The Senate

Economics Legislation Committee

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

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Senate Economics Legislation Committee

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Chapter 1

Introduction

1.1 On 8 February 2018 the Senate referred the provisions of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (the bill) to the Economics Legislation Committee for inquiry and report by 16 March 2018.[1] On 16 March 2018 the Senate agreed to extend the reporting date to 22 March 2018.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting submissions by 23 February 2018. The committee received 33 submissions, which are listed at Appendix 1.

1.3 The committee held a public hearing in Melbourne on 6 March 2018. The names of witnesses who appeared at the hearing are at Appendix 2.

1.4 The committee thanks all individuals and organisations that contributed to the inquiry.

1.5 Hansard references throughout this document relate to the Proof Hansard. Please note that page numbering may differ between the proof and the final Hansard.

Overview of the bill

1.1 Part 1 of Schedule 1 of the bill amends the *Corporations Act 2001*. It widens the definition of eligible whistleblowers to include, for example, former employees of a company; it strengthens protections for whistleblowers and provides for compensation for retaliation against them; and it provides for disclosure to a third party if the original recipient of information has not responded adequately and circumstances require urgent action.

1.2 Part 2 of Schedule 1 amends the *Taxation Administration Act 1953* along similar lines, noting that the identity of taxpayers is protected. Part 3 amends the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, and the *Superannuation Industry (Supervision) Act 1993* so that there is a single whistleblower protection regime to cover the corporate, financial and credit sectors.

Background and consultation

1.6 The reason for government interest in protecting whistleblowers is that:

> …the prevention of corruption, waste, tax evasion or avoidance and fraud relies upon appropriate protections for people who report these wrongdoings.[2]

1.7 Similarly, the Australian Institute of Company Directors' position is that:

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1 *Journals of the Senate No. 83*, 8 February 2018, p. 2634.

2 Department of the Prime Minister and Cabinet, *Australia's first Open Government National Action Plan 2016–18*, p. 12.

> We believe that strong protections for whistleblowers support good governance outcomes and are therefore in the interests of business, whistleblowers and the broader public.[3]

1.8 Protections for whistleblowers were included in the *Public Interest Disclosure Act 2013*. They were intended to encourage public officials to report suspected wrongdoing in the Australian public sector. The Act gave public sector whistleblowers protection against reprisal action. The government began work on provisions along the same lines for the private sector in mid-2016.[4]

1.9 Similar protections were legislated in the *Fair Work (Registered Organisations) Amendment Act 2014*, which was passed in November 2016. They were added as an amendment by Senator Nick Xenophon. In his second reading speech, Senator Xenophon noted an undertaking by the government to support a parliamentary inquiry into implementing the same level of protection across the corporate and public sectors, and to introduce legislation by December 2017 to bring this about.[5]

1.10 The current bill is part of the Government's Open Government National Action Plan, which was announced in December 2016.[6] In the Open Government National Action Plan, the government undertook to improve protections for whistleblowers in the corporate sector, and for whistleblowers on tax matters.

1.11 Since then, in September 2017, the Parliamentary Joint Committee on Corporations and Financial Services (the PJC) has published its unanimous report on *Whistleblower protections in the corporate, public and not-for-profit sectors*. The drafting of this bill and consultation on it were already under way when that report was published. The government has not yet responded to that report, and the bill does not purport to address all the recommendations of the PJC. However in effect the bill does address the vast majority of the PJC's 35 recommendations. The recommendations which are not addressed, as they pertain to the private sector, are summarised in the Explanatory Memorandum (pp. 10–11).

1.12 The measures in this bill reflect those in the Registered Organisations legislation. Because the Government's action to prepare this bill commenced prior to the PJC's reporting date, there are three substantive recommendations of the PJC that are not addressed in the bill. These include a single private sector Act, the introduction of a rewards scheme for whistleblowers, and the establishment of an independent

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

4 Ms Kate Mills, Principal Adviser, Financial System Division, Department of the Treasury, *Committee Hansard*, 6 March 2018, p. 55.

5 Senator Nick Xenophon, Second Reading Speech, Fair Work (Registered Organisations) Amendment Bill 2014, *Senate Hansard*, 21 November 2016, p. 2744.

6 Department of the Prime Minister and Cabinet, *Australia's first Open Government National Action Plan 2016–18* https://ogpau.pmc.gov.au/sites/default/files/posts/2017/07/first-open-government-national-action-plan-final.pdf (accessed 15 February 2018).

Whistleblower Protection Authority. The government is considering all the recommendations of the PJC.[7]

1.13 Current protections for whistleblowers in the private sector are included in the *Corporations Act 2001*, and in legislation applying to the entities regulated by the Australian Prudential Regulation Authority (APRA), namely the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, and the *Superannuation Industry (Supervision) Act 1993*.[8] There is currently no specific regime for tax whistleblowers.[9]

1.14 The Department of the Treasury released an exposure draft of the bill for comment in October 2017. Submissions on the draft have been published.[10]

Financial implications

1.15 According to the Explanatory Memorandum, the Budget impact is minimal. The estimated overall average compliance cost is $25.4 million per year over ten years.[11]

1.16 However, consulting firm KPMG believes that the compliance costs have been underestimated. In particular, the cost of training all managers and supervisors in all firms—because they will be eligible recipients of disclosures under the bill—and the cost of maintaining and communicating a whistleblower policy in big firms, could be huge.[12]

Date of effect

1.17 The bill is to take effect on 1 July 2018. It provides that whistleblower policies must be in place by 1 January 2019.

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7 Explanatory Memorandum, p. 10.

8 Explanatory Memorandum, p. 14.

9 Explanatory Memorandum, p. 65.

10 Department of the Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017—Exposure Draft, Published Responses, https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/ (accessed 21 February 2018).

11 Explanatory Memorandum, p. 3.

12 KPMG, *Submission 15*, p. 3.

Chapter 2

Content of the bill

Harmonising whistleblower regimes

2.1 The current protections in the *Corporations Act 2001* (the Corporations Act) cover a current officer, employee, or contractor of the company in question who makes a disclosure in good faith (and not, say, with a personal grievance) about a breach of corporations law. The whistleblower must provide his or her name.[1]

2.2 The protections include limited protection from civil or criminal liability or contractual remedies for making the disclosure, prohibitions on victimisation and the right to seek compensation for damage from victimisation, and prohibitions on the revelation of the whistleblower's identity or the information disclosed (with some exceptions).

2.3 The financial sector whistleblower provisions are generally similar, and apply to disclosure concerning misconduct or impropriety in APRA-regulated entities.

2.4 This bill brings the corporations and financial sector whistleblower regimes into alignment (Schedule 3). The new arrangements in the Corporations Act will cover whistleblowers in the corporate and financial sectors.

2.5 The bill also extends protection to entities regulated by the *National Consumer Credit Protection Act 2005* and the *Financial Sector (Collection of Data) Act 2001* (Schedule 1, item 2, s. 1317AA(5)(c)), which at present do not include whistleblower protections.

Scope of disclosures that qualify for protection

2.6 At present the disclosures that are protected have to do with breaches of the particular Act that governs the entity. This bill expands the scope of disclosable matters.

2.7 Disclosable matters now include misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity, or to a related body corporate (Schedule 1, item 2, s. 1317AA(4)). It applies to conduct that is an offence against the Corporations Act, the Australian Securities and Investments Commission (ASIC) Act, or the financial legislation that has been brought into scope; and it also includes an offence against any other law of the Commonwealth that is punishable by 12 months' imprisonment, or represents a danger to the public or the financial system. The Explanatory Memorandum notes that some of the conduct covered here may not in fact be a breach of a law.[2] The bill also allows for regulation to prescribe other conduct (Schedule 1, item 2, s. 1317AA(5)).

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1 Explanatory Memorandum, p. 14.

2 Explanatory Memorandum, p. 22.

Defining 'eligible whistleblower'

2.8 To be an eligible whistleblower, a person must have some relationship with the entity about which they are making a disclosure. The definition is intended to cover people who are likely to have information about matters which should be disclosed.[3]

2.9 An eligible whistleblower is an employee, supplier (or employee of a supplier) or associate of the entity; or a relative or dependant or spouse of such a person. Importantly, the definition is widened to cover individuals who are or have been in one of these relationships: thus, former employees and associates are now also protected (Schedule 1, item 2, s. 1317AAA). The bill allows for other categories of person to be prescribed by regulation.

2.10 In the case of superannuation entities, the bill also applies to trustees, custodians and investment managers of the entity.

Recipients of disclosures

2.11 Disclosures may be made to ASIC or APRA, or another prescribed Commonwealth authority, or to a lawyer for the purpose of obtaining advice (Schedule 1, item 2, s. 1317AA(1) and (3)). The Explanatory Memorandum notes that where legal advice is being sought, the individual may not be an eligible whistleblower and the matter may not be a disclosable matter. This is so that people can seek advice about whether they would be protected.[4]

2.12 Disclosures are also protected if they are made to an officer of the entity, or an auditor or actuary of the entity, or another person the entity has authorised to receive disclosures. They may also be made by an individual employee to their supervisor (Schedule 1, item 2, s. 1317AAC). The bill allows for other persons or bodies to be prescribed by regulation.

Emergency disclosure

2.13 The bill also provides for 'emergency disclosure' to a journalist or a member of Parliament. Such disclosure will be protected only if the disclosure has already been made to ASIC, APRA or a prescribed body and qualifies for protection, a reasonable period has passed since it was made, and there is now an imminent risk to public health or safety or to the financial system if the disclosure is not acted on immediately. The discloser must give the original recipient written notification of their intention to make an emergency disclosure (Schedule 1, item 2, s. 1317AAD).

2.14 The bill defines a journalist to be one who is working for a newspaper or magazine, a radio or television broadcasting service, or a similar service operated commercially through the internet. This is intended to rule out disclosures on social media or to 'self-defined' journalists.[5]

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3 Explanatory Memorandum, p. 23.

4 Explanatory Memorandum, pp. 20–21.

5 Explanatory Memorandum, p. 28.

'Reasonableness'

2.15 At present, whistleblowers are required to make disclosures 'in good faith'..

2.16 This requirement has been replaced by a reasonableness test which requires that the whistleblower have reasonable grounds to suspect misconduct or an improper state of affairs (Schedule 1, item 2, s. 1317AA(4) and (5)).

2.17 The requirement to act in good faith has been removed on the basis that the Government wishes to encourage whistleblowers to come forward with information that will assist law enforcement efforts, regardless of the motivation of the whistleblower.

Confidentiality

2.18 The bill makes it an offence to reveal the identity of a whistleblower without the whistleblower's consent, except to regulatory or law enforcement authorities or in the course of investigation. The prohibition covers revealing information which would identify the whistleblower, but this is qualified by an exception where revealing the information is necessary for the investigation (Schedule 1, item 2, s. 1317AAE). It is not an offence in general to disclose information about the wrongdoing which has been disclosed by the whistleblower.

2.19 A note to this section in the bill states that in a prosecution for an offence the defendant 'bears an evidential burden'—that is, the burden of proof is on the person accused of revealing a whistleblower's identity.

2.20 There is no longer any requirement that a whistleblower provide his or her name in order to qualify for protection. Anonymous disclosures will now be protected.[6]

What protection is offered to whistleblowers?

Immunity in criminal and other proceedings

2.21 A whistleblower is not subject to any civil, criminal or administrative liability for making a disclosure, and no action can be taken against him or her under a contract, for example an employment contract or a supply contract with the company the disclosure relates to. Information that is protected by this act will not be able to be used against the whistleblower in criminal proceedings or proceedings where a penalty is imposed (Schedule 1, item 2, s. 1317AB(1)). This clarifies and extends existing protections.

2.22 However, a note in the bill makes it clear that a person can still be subject to civil, criminal or administrative liability for conduct that is revealed by the disclosure.

Protection from victimisation

2.23 The bill makes it easier for a whistleblower to seek redress for victimisation.

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6 Explanatory Memorandum, p. 28.

2.24 The bill allows for civil or criminal prosecutions for victimisation. This occurs where the victimiser causes detriment to another person in the belief or suspicion that the person, has made, or may make a disclosure. Thus there is no requirement that the disclosure has actually taken place, nor that the victimiser actually knows about a disclosure; nor is there a requirement to prove that the victimiser intended to cause the detriment, nor that the disclosure is the only reason for the detriment (Schedule 1, items 5–7, s. 1317AC).

2.25 The detriment can be to another person: it does not have to be to the whistleblower, but can also be to a colleague, supporter, friend or relative. This is already the case in existing law.[7]

2.26 The bill provides that detriment includes dismissal, disadvantage or discrimination in employment, harassment or intimidation, harm or injury (physical or psychological), and any damage to a person including their property, reputation or financial position. Detriment is not limited to these categories of harm.

Compensation

2.27 By making it easier to prove victimisation, the bill makes it easier for a whistleblower (or their associate) to seek compensation for loss, damage or injury. In addition, a claim for compensation can be made without the offence of victimisation having been proved. The claim can be against an individual or a body corporate, and the body corporate can also be liable for conduct that assisted or was involved in the victimising conduct (Schedule 1, item 9, s. 1317AD).

2.28 As well as orders for compensation, a court can grant an injunction to stop the victimising conduct, or an order requiring an apology or reinstatement or exemplary damages, or any other order the court thinks appropriate.

2.29 The bill reverses the burden of proof in compensation claims. The claimant for compensation simply has to point to evidence that suggests a 'reasonable possibility' that the victimisation has taken place. Once that is done, the defendant entity which will bear the evidential and the ultimate legal burden of disproving the claim—that is, that the defendant entity did not believe or suspect that the whistleblower may have made a disclosure that qualifies for protection, and that the belief or suspicion was not the reason, or part of the reason, for the victimising conduct (Schedule 1, item 9, s. 1317AE (2)). This will no doubt be a difficult onus for a defendant entity to discharge, as it will have to prove a negative proposition concerning its own state of mind. If the claim is made against a person and their employer, there will be no order against the employer if it took reasonable steps to avoid the victimising conduct (s. 1317AE (3)).

2.30 The whistleblower's identity is to be protected in court proceedings (s. 1317 AG).

2.31 The bill also removes the risk to whistleblowers of an adverse costs order being made against them. The claimant cannot be ordered to pay the costs of the

7 Explanatory Memorandum, p. 33.

defendant entity on a party-party basis, unless the claimant has vexatiously initiated the proceedings or where the claimant's behaviour has otherwise unreasonably caused the other party to incur costs (s. 1317 AH).

Whistleblower policy

2.32 The bill requires public companies, large proprietary companies and companies that are trustees of superannuation entities to have a whistleblower policy, and to make that policy available to officers and employees of the company.

2.33 The policy has to set out information about the protections available to whistleblowers and what disclosures are protected, how the company will support whistleblowers and investigate disclosures, and how the company will ensure fair treatment of employees who are mentioned in disclosures (Schedule 1, item 9, s. 1317AI).

Penalties

2.34 At present victimisation and disclosing a whistleblower's identity are offences and a contravention has to be proved to the criminal standard, beyond reasonable doubt. The bill maintains criminal liability for these offenses. It reverses the onus of proof for the former in favour of the whistleblower, and also makes both offences civil penalty provisions, with contraventions attracting a maximum penalty of $200,000 for an individual and $1 million for a corporation (Schedule 1, items 10 and 11, s. 1317E(1) and s. 1317 (G)).

Amendment of the Taxation Administration Act 1953

Overview

2.35 Part 2 of Schedule 1 of the bill amends the *Taxation Administration Act 1953* in ways that are broadly similar to the amendments to the Corporations Act. It creates a regime to protect individuals who report non-compliance with tax laws or misconduct in relation to an entity's tax affairs.[8]

2.36 A disclosure may be made by an eligible whistleblower to the Commissioner of Taxation or to an eligible recipient. Eligible recipients explicitly include internal auditors and registered tax agents and BAS agents. The bill does not specify that a person who supervises or manages a whistleblower is an eligible recipient.

2.37 There is no provision for emergency disclosure, largely because tax affairs are confidential and the Commissioner of Taxation has indicated that public disclosures would very likely compromise its investigation of a whistleblower’s disclosure, but also because the time lags involved in tax collection mean that the occasions when they might be justified do not arise.

2.38 While whistleblowers are not subject to liability or contractual action for making a disclosure, there is no immunity from an assessment of the whistleblower's own taxation if it is revealed by the disclosure. There can also be an administrative

8 Explanatory Memorandum, pp. 65–6.

penalty. However, the Commissioner may treat it as a voluntary disclosure when assessing an administrative penalty.

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

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?
>
> 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?
>
> 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.

Additional Comments by the Australian Greens

Reward for risk: recognising the toll on the individual

1.1 The Australian Greens believe this Bill is a missed opportunity. While the Bill does improve protections provided for whistleblowers—off a very low base—it has failed to do so adequately or in a way that recognises the enormous toll that whistleblowing can have on an individual.

The Parliamentary Joint Committee report

1.2 As is noted in the committee report, the Bill fails to address a number of recommendations from the Parliamentary Joint Committee on Corporations and Financial Services' report on Whistleblower Protections. The report provides a contemporary and comprehensive list of reforms required to protect and compensate whistleblowers. These recommendations were unanimously agreed to by members of both houses, from multiple parties, only six months ago. The Parliamentary Joint Committee served up the solutions on a plate, but the government have ignored them.

1.3 Professor A. J. Brown, Griffith University has listed the major areas of reform set out by the Parliamentary Joint Committee, but not provided for in the Bill:

i. Providing business with a single, simple Whistleblower Protection Act covering all relevant Commonwealth regulation, rather than multiple legislative requirements (NB: while the Bill consolidates financial services provisions in the Corporations Act, it simultaneously creates a duplicate regime for tax whistleblowing in the Taxation Administration Act, contrary to the Committee's recommendation 3.1);

ii. Clear coverage of wrongdoing, and clear roles and responsibilities for other Commonwealth regulatory and law enforcement agencies, beyond the Treasury portfolio;

iii. Comprehensive coverage for all private and not-for-profit sector employees who reveal wrongdoing by or within the control of their employer, under Commonwealth regulation, i.e. beyond the present range of corporate, financial service and tax entities;

iv. Access to remedial and compensation avenues beyond the courts (e.g. via the Fair Work Commission, as provided for in the Public Interest Disclosure Act 2013);

v. An agency with full obligations and powers to implement the regime, including to take action to ensure protection and compensation (e.g. a whistleblowing protection authority or unit); and

vi. Effective resourcing for this implementation (including, potentially, the Parliamentary Joint Committee's option of a reward-based scheme).[1]

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1 Professor A J Brown, *Submission 21*.

1.4 Given the extent of these shortcomings, and the fundamental nature of some of them, it will be very difficult to address all of these issues through amendments to the Bill. Nevertheless, the Greens will seek to amend the Bill in the Senate to better reflect the findings of the Parliamentary Joint Committee report.

Whistleblower rewards

1.5 Offering legal protections is often not enough for someone who has knowledge of fraudulent activities to come forwards with information and risk their financial security, job security and mental health. One of the most important and progressive recommendations of the Parliamentary Joint Committee was to introduce a reward scheme for whistleblowers (Recommendations 11.1 & 11.2) to encourage people to expose misconduct and enable tax authorities to reclaim money.

1.6 This is not a radical idea. The US False Claims Act was passed in 1863. It now allows whistleblowers to receive up to 30 per cent of reclaimed money that has been stolen or avoided from government authorities. In 2015, 80 per cent of the around $3.5 billion recovered by US Justice Department was a result of actions taken by whistleblowers.

1.7 Rewards work. They encourage disclosure. They recover ill-gotten gains. And they help compensate whistleblowers. The Australia Greens support the implementation of the recommendations of the Parliamentary Joint Committee in relation to rewards.

Recommendation 1

That, following the imposition of a penalty against a wrongdoer by a Court (or other body that may impose such a penalty), a whistleblower protection body or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.

That such a reward should be determined within such body's absolute discretion within a legislated range of percentages of the penalty imposed by the Court (or other body imposing the penalty) against the whistleblower's employer (or principal) in relation to the matters raised by the whistleblower or uncovered as a result of an investigation instigated from the whistleblowing and where the specific percentage allocated will be determined by the body taking into account stated relevant factors, such as:

a) **the degree to which the whistleblower's information led to the imposition of the penalty;**
b) **the timeliness with which the disclosure was made;**
c) **whether there was an appropriate and accessible internal whistleblowing procedure within the company that the whistleblower felt comfortable to access without reprisal;**
d) **whether the whistleblower disclosed the protected matter to the media without disclosing the matter to an Australian law enforcement agency or did, but did not provide the agency with adequate time to investigate the issue before disclosing to the media;**

e) whether adverse action was taken against the whistleblower by their employer;

f) whether the whistleblower received any penalty or exemplary damages (but not compensation) in connection to any adverse action connected with the disclosure; and

g) any involvement by the whistleblower in the conduct for which the penalty was imposed, noting that immunity from prosecution, seeking a reduced penalty against the whistleblower etc. is dealt with by separate processes and that a reward would be regarded as a proceed of crime, if the whistleblower had been involved in criminal conduct (i.e. immunity or reduced penalty, not the reward is the benefit and incentive).

Senator Peter Whish-Wilson
Senator for Tasmania

Senator Rex Patrick's Dissenting Report

Perfect if the enemy of the good, but this ain't even good

Introduction

1.1 The committee recognises in its report that:

> …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, while some like the Law Council seemed to suggest that it would be better to withdraw the bill altogether and 'get it right'. 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.

I understand that perfect can be the enemy of the good, but this Bill ain't even good (yet). It is ambiguous and confusing and the provisions as they currently stand do not effectively protect whistleblowers, nor are they sufficiently workable for companies that will be subject to them.

1.2 The Bill fails both the public and the whistleblower. If it is to deal effectively with protecting those who have or who are revealing corporate misconduct, such as in the Commonwealth Bank of Australia 's (CBA's) financial planning arm in 2008 (Jeff Morris), Securency (James Shelton), CBA's Intelligent Deposit Machines and the recent and ongoing revelations from the Banking Royal Commission, the Bill must be amended.

1.3 I thank the Secretariat for its hard work in capturing and aggregating the views of those people and entities that provided input to the inquiry and I also thank the Committee for their time. Unfortunately the Committee, after undertaking an extensive amount of work, recommends the passage of a Bill which it knows, and acknowledges, is not what it should be

1.4 In particular, it is disappointing that the Committee does not see that proceeding with this Bill, as is, is in unnecessary but direct conflict with recommendations of the unanimous 2017 inquiry on this topic by the Parliamentary Joint Committee on Corporations and Financial Services. To do so is also inconsistent with the Government's commitments in this area made to the Senate, the NXT and Senator Hinch by Minister Cash in November 2016 (See Appendix 5 to the PJC Report). This Bill can be made much more consistent with those recommendations and those commitments, and it should be.

For the Avoidance of Doubt

1.5 Whistleblowers aren't always good people; but more often than not they are the best people. They do what they do with integrity and courage and at great risk to themselves.

1.6 As Jeff Morris, a whistleblower and hero, stated to the Committee:

> The first thing I'd like to convey is that whistleblowers are human beings. They're human beings taking on massive corporate machines, and it's a very unequal contest. It's the classic case of flesh against steel, and it almost always ends badly. Whistleblowers' health suffers; their finances and their family suffer.

1.7 The Parliament should recognise this and protect them with strong and unambiguous laws. These proposed laws lack these characteristics. The Parliament needs to send a signal to 'bad apple' individuals and/or corporations that there is every likelihood that they are being watched by a colleague or worker, respectively, empowered by legislation that is comprehensive and won't tolerate challenges to any embedded nuances.

1.8 There must be minimum doubt in the statute's language and application. Without this we will end up seeing poorly resourced whistleblowers battling it out in the courts against highly resourced companies over the meaning and intent. If lawyers and judges are needed to sort out the interpretation on each and every occasion, we haven't done our job properly.

1.9 This Bill has to be amended so that there is no doubt as to a corporation's responsibility to encourage and facilitate whistleblowers, to protect them, and in the event they fail in this duty then they will have to properly compensate them.

Necessary Improvements

1.10 To avoid overburdening organisations with a whistleblower training requirement for a broad range of low level managers, the Bill should be amended to make clear that a disclosure can be made to any person in a position of responsibility but then limit 'eligible recipients' to senior managers.

Recommendation 1

1.11 A whistleblower should be able to make a disclosure to any person of responsibility within an organisation but limit 'eligible recipients' to senior managers.

Recommendation 2

1.12 A whistleblower should be able to make a disclosure to an internal auditor.

1.13 Whistleblowing is not about individual personal, employment or workplace grievances. To not explicitly exclude these grievances risks making implementation of the laws unworkable.

Recommendation 3

1.14 Disclosures that are *only* individual personal, employment or workplace grievances should not protected under this Act (unless they are a grievance raised under the civil remedy or victimisation provisions at s1317AC, AD) and this should be stated explicitly.

1.15 The ‘emergency disclosure’ threshold in 1317AAD(c) is so high as to not capture any historical Australian whistleblower cases. It is a ‘Clayton’s’ provision.

1.16 The Bill must be modified to allow for external disclosures that, as a minimum, meet the ‘Jeff Morris’ and/or ‘James Shelton’ test – as recommended by the Parliamentary Joint Committee.

Recommendation 4

1.17 If a disclosure of disclosable conduct has been made to a prescribed authority and after a reasonable time, no steps have been taken by that or any other agency (excluding where the whistleblower has elected to make an anonymous disclosure) whistleblowing protections shall apply if the same disclosure is subsequently made to a journalist if they have complied with the disclosure requirements of the Act.

Recommendation 5

1.18 A ‘reasonable time’ for emergency disclosures should then be defined.

Recommendation 6

1.19 The emergency disclosure protections should extend to only as much information as is necessary to have the emergency disclosure acted upon.

1.20 There was general agreement amongst contributors to the Inquiry that the bill involved state of mind issues for civil remedies, but disagreement as to whether this issue was negated by reverse onus of proof in respect of this state of mind. There is no good reason to leave confusion and ambiguity in the legislation.

Recommendation 7

1.21 Belief or suspicion requirement in s1317AD(1)(b)&(c)must be removed and replaced with a more general test that does not hinge on state of mind.

Recommendation 8

1.22 ‘Victimising conduct’ in s1317AD(1)(a) must be removed and replaced with ‘detrimental conduct’.

1.23 The bases for civil relief must include a failure by the organisation to fulfil a duty to support or protect the whistleblower, as already supported by the Government in 2016 in respect of the *Fair Work (Registered Organisations) Act 2009* and its commitments to the Senate and the public.

Recommendation 9

1.24 Conduct giving rise to remedies in s 1317AD(1) must explicitly include a failure to fulfil ‘a duty to support or protect the second person in relation to a disclosure they made and detriment was caused to the second person as a result of the failure of the first person in part or whole to fulfil that duty.’ Section 1317AD(2)(c) must be modified in similar duty related terms.

Recommendation 10

1.25 Guidance must be provided to a court that 'duty to support or protect' includes responsibility to fulfil organisation's commitments under a s1317AI(5)(c) policy or any similar policy, and any applicable guidance or standards. This guidance can be added as a new subsection to s1317AD

Recommendation 11

1.26 The 'due diligence defence' in s1317AE(3) must be made consistent with the duty to support or protect and reduced to a mandatory or relevant consideration when deciding orders, so that the issue of whether or the extent to which the duty was fulfilled is considered, but is no longer a total defence.

1.27 A more robust onus of proof, consistent with international best practice as recognised by the OECD, Transparency International, and the submissions of Professors Brown (Australia), Devine (USA) and Lewis (UK), must be laid out for compensation and other remedies:

Recommendation 12

1.28 A claimant should be required to show:

a) they made a disclosure to which the Act applies;

b) they suffered detriment within the meaning of the Act (not simply a 'suggestion' of a 'reasonable possibility' that they have suffered detriment, as proposed); and

c) prima facie, either that the fact of their disclosure could have been a contributing factor in the detrimental act or omission (meaning any factor, which alone or in connection with other factors, tended to affect in any way the outcome); or, as above, the respondent was under a duty to provide support or take action in order to prevent, limit, avoid, or restrain others in respect of such detrimental outcomes resulting from the whistleblowing;

If the claimant burden is met, then the respondent is required to demonstrate by clear and convincing evidence (meaning, it must be highly probable or reasonably certain) that:

a) The respondent would have taken the same action in relation to the claimant, in the absence of the disclosure issue, for independent and legitimate reasons;

b) A significant step had already been taken toward implementing that course of action prior to the disclosure issue arising; and

c) All duties to support and protect the claimant in respect of their whistleblowing were discharged, or that none of the detriment suffered could possibly have been prevented by the proper and reasonable fulfilment of those duties.

Committee Recommendations

1.29 I support Recommendations 1 and 2 of the Committee's recommendations.

Senator Rex Patrick
Senator for South Australia

Appendix 1
Submissions and additional documents

Submissions

1 Institute of Internal Auditors
2 Media, Entertainment & Arts Alliance
3 Name Withheld
4 Dr Vivienne Brand
5 Financial Planning Association of Australia
6 Queensland Nurses and Midwives' Union (QNMU)
7 Professor David Lewis
8 Financial Services Council
9 Confidential
10 International Bar Association Anti-Corruption Committee
11 Governance Institute of Australia Limited
12 Maurice Blackburn Lawyers
13 Australian Council for Superannuation Investors
14 Herbert Smith Freehills
15 KPMG
16 Australian Lawyers Alliance
17 Commonwealth Director of Public Prosecutions (CDPP)
18 Deloitte
19 Australian Council of Trade Unions (ACTU)
20 Australian Banking Association (ABA)
21 Professor A J Brown
22 Synod of Victoria and Tasmania, Uniting Church in Australia
23 Government Accountability Project
24 Mr James Shelton
25 DLA Piper Australia
26 Whistleblowing Information Network (WIN)
27 Dr David Chaikin
28 Transparency International Australia (TIA)
29 Whistleblowers Australia Inc.
30 Australian Competition & Consumer Commission (ACCC)
31 Australian Institute of Company Directors (AICD)
32 Law Council of Australia
33 NSW Ombudsman

Answers to questions on notice

1 Answers to questions on notice from a public hearing held in Melbourne on 6 March 2018, received from Dr David Chaikin on 5 March 2018.

2 Answers to questions on notice from a public hearing held in Melbourne on 6 March 2018, received from Herbert Smith Freehills on 8 March 2018.

3 Answers to questions on notice from a public hearing held in Melbourne on 6 March 2018, received from Professor A J Brown on 8 March 2018.

4 Answers to written questions on notice, received from the Australian Human Rights Commission on 15 March 2018.

5 Answers to questions on notice from a public hearing held in Melbourne on 6 March 2018, received from Treasury on 21 March 2018.

Appendix 2
Public hearings

Melbourne, 6 March 2018

Members in attendance: Senators Bushby, Hume, Ketter, Patrick.

BAILES, Mr Morry, President, Law Council of Australia

BROWN, Professor AJ, Centre for Governance and Public Policy, Griffith University

CARRUTHERS, Mr Ben, Senior Manager Litigation, Australian Prudential Regulation Authority

CHAIKIN, Dr David, Private capacity

CLARKE, Mr Trevor, Director, Industrial and Legal, Australian Council of Trade Unions

DAY, Mr Warren, Senior Executive Leader, Australian Securities and Investments Commission

DE WIND, Mr Les, Assistant Commissioner, Lodgement Strategy and Delivery, Intermediaries and Lodgement, Australian Taxation Office

GOLDING, Mr Greg, Chair, National Integrity Working Group and Foreign Corrupt Practices Committee, Law Council of Australia

MILLS, Ms Kate, Principal Adviser, Financial System Division, Markets Group, Department of the Treasury

MORRIS, Mr Jeffrey, Private capacity

MOULT, Dr Natasha, Deputy Director of Policy, Law Council of Australia

PETSCHLER, Ms Louise, General Manager, Advocacy, Australian Institute of Company Directors

PRICE, Mr John, Commissioner, Australian Securities and Investments Commission

RYAN, Mr Lucas, Senior Policy Adviser, Advocacy, Australian Institute of Company Directors

WOOD, Mr Gregory, Manager, Base Erosion and Profit Shifting Unit, Department of the Treasury

ZIRNSAK, Dr Mark, Senior Social Justice Advocate, Synod of Victoria and Tasmania, Uniting Church in Australia