Law Council
OF AUSTRALIA

Treasury Laws Amendment (Whistleblowers) Bill 2017 - Exposure Draft

The Treasury

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Corporations Committee, Foreign Corrupt Practices Committee and Taxation Law Committee (**Tax Committee**) of the Business Law Section of the Law Council of Australia, the Law Council's National Criminal Law Committee, Law Society of New South Wales and the Law Institute of Victoria in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Treasury on the Exposure Draft Treasury Laws Amendment (Whistleblowers) Bill 2017 (**the Bill**).

2. The Bill seeks to create a single whistleblower protection regime in the *Corporations Act 2001* (Cth) (**Corporations Act**) to cover the corporate, financial and credit sectors, and create a new whistleblower protection regime in the taxation law, including the *Taxation Administration Act 1953* (Cth) (**TAA**), to protect those who expose tax misconduct. The reforms to the Corporations Act include:

   - expanding the protections to a broader class of people;
   - expanding the types of disclosures that will be protected under the framework;
   - allowing disclosures to parliamentarians and the media in certain circumstances, if preconditions are satisfied;
   - imposing new stringent obligations to maintain the confidentiality of a whistleblower's identity;
   - making it significantly easier for a whistleblower to bring a claim for compensation where he or she has been victimised;
   - creating a new civil penalty offence so that law enforcement agencies will be able to take action against companies where the civil standard of proof can be met; and
   - requiring all large companies to have a whistleblower policy in place, with penalties for failing to do so.

3. The new whistleblower protections in the taxation law are broadly consistent with the enhanced protections under the Corporations Act, and will facilitate disclosures about tax misconduct being made directly to the Australian Taxation Office (**ATO**).[1]

4. The Law Council strongly supports significant reform of whistleblowing laws in Australia and the broad thrust and intent of the Bill.

5. However, the Law Council considers that the Bill does not currently address several requirements for a comprehensive whistleblower regime, as identified by the Parliamentary Joint Committee on Corporations and Financial Services (**the Committee**) *Whistleblower Protections Report* (September 2017) (**the Report**).

6. The Law Council's primary recommendation is that the Expert Advisory Panel and the Treasury assess the Bill against the Report to ensure a comprehensive whistleblower regime is achieved. This should occur prior to the introduction of the Bill into Parliament to ensure appropriate alignment of whistleblower laws.

[1] The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, *Consultation on Whistleblowers Media Release*, 23 October 2017 at http://kmo.ministers.treasury.gov.au/media-release/103-2017/.

Self-contained, uniform legislation would be preferable

7. As set out in our prior submission to the Treasury and the Committee, the Law Council favours whistleblowing laws to be uniform in structure and operation, applying across all contexts and sectors and administered by a single regulatory body that could then pass disclosures to the relevant regulatory body responsible for investigations into the misconduct disclosed.[2] The Law Council considers that there may be value for whistleblowing provisions to be located in the one piece of legislation to ensure that uniformity is established and maintained. Replicating provisions across various pieces of legislation may increase the possibility for amendments across a suite of legislation with the potential to hinder the objective of uniformity. The Law Council hopes such an objective will be the subject of further consideration by the Expert Advisory Panel (**the Panel**) and the Treasury.

Assessment against the Report needed

8. The Law Council understands that the Bill is intended to deliver on Australian Government commitments made in 2016 as part of the Open Government National Action Plan and is not a response to the Report. However, the Panel will assess the draft legislation against the Report, and will provide advice to Government on how the Bill measures up against the Report's recommendations.[3] The Report identifies a range of issues beyond the context of the Bill which need to be considered in a complete evaluation of a comprehensive whistleblower regime.

9. For example, some of the Report's recommendations that do not appear to be addressed by the Bill include that:

   - Commonwealth private sector whistleblowing legislation (including tax) be brought together into a single Act; and

   - a Whistleblower Protection Authority be established as an investigative agency with the powers and resources to provide improved protections.[4]

10. The Law Council recommends that the Expert Advisory Panel and the Treasury assess the Bill against the Report to ensure a comprehensive whistleblower regime is achieved. This should occur prior to the introduction of the Bill into Parliament to ensure appropriate alignment of whistleblower laws.

The appropriateness of expanding the protections to a broader class of people

11. The Law Council supports expanding the protections to the much wider category of persons specified including former officers, employees and suppliers, whose relationship with the relevant organisation may place them in a position to identify wrongdoing by that entity. This is because, even with the proposed protections, it may not be feasible for a person to disclose information while remaining an officer,

[2] Law Council of Australia, *Submission to the Treasury and Parliamentary Joint Committee on Corporations and Financial Services Whistleblower Protections in the corporate, public and not-for-profit sectors*, (February 2017).
[3] The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, *Consultation on Whistleblowers Media Release*, 23 October 2017 at http://kmo.ministers.treasury.gov.au/media-release/103-2017/.
[4] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (September 2017).

employee or supplier of a regulated entity.[5] However, the Law Council reiterates its view that the Bill should be assessed against the Report to ensure that it adequately implements the Report's recommendations.

The appropriateness of expanding the types of protected disclosures

12. The Law Council considers that the expansion of the types of disclosures that will be protected under the framework is appropriate. More specific types of conduct are identified, but these are not intended to limit the wider application of the concept of 'misconduct or an improper state of affairs or circumstances' in relation to the entity or its related bodies.[6]

13. The proposed types of disclosures set out in the exposure draft include:

    - an offence against, or a contravention of, a provision of several statutes (including the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth));
    - an offence against any other law of the Commonwealth punishable by imprisonment for a period of 12 months or more;
    - any conduct that represents a danger to the public or the financial system; or
    - any conduct that is prescribed by regulations.[7]

14. The Law Council considers that these categories cover most of the disclosures that should be protected. The ability to prescribe additional conduct as 'disclosable conduct' in regulations enables further matters to be added should it be appropriate.[8]

Elimination of 'good faith' requirement

15. The Bill replaces the subjective 'good faith' requirement with an objective test requiring the discloser to have 'reasonable grounds to suspect'.[9] This is appropriate as it does not rely on the whistleblower's interpretation of a set of facts.[10]

16. However, the Tax Committee notes that it is concerned with the reasonable grounds condition referred to above being adopted in the tax whistleblower regime (specifically included in proposed subsections 14ZZT(2) and (3)).

17. As outlined, a disclosure is covered where the discloser 'has reasonable grounds to suspect that the information indicates' non-compliance with a taxation law or the avoidance of tax imposed by a Commonwealth law.

18. While there is no detail on the use of a reasonableness test in the Explanatory Memorandum related to the tax whistleblower regime, the Explanatory Memorandum

[5] The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Bill.
[6] Exposure Draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017, sch 1 item 2 cl 1317AA(2).
[7] Ibid sch 1 item 2 cl 1317AA(3).
[8] The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Bill.
[9] Ibid sch 1 item 2 cl 1317AA(2), (3) and see also sch 1 item 13 cl 14ZZT(2), (3).
[10] The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Bill.

at paragraphs 1.69 to 1.72 explains the decision to adopt the objective reasonableness test in place of a good faith requirement.

19. While it will not be problematic in the context of a clear case of wrongdoing, the Tax Committee submits that in the context of taxation matters, it can be a very difficult issue.

20. Particularly where the tax whistleblower laws have been deliberately drafted to ensure that general anti-avoidance provisions are captured (refer paragraph 2.13 of the Explanatory Memorandum), the Tax Committee notes that it will be a very difficult matter to determine whether a whistleblower has reasonable grounds in an allegation of Part IVA / tax avoidance. This could only ever be determined after a full tax audit has been conducted by the Australian Taxation Office, at which point working out whether the original application was reasonable or not seems otiose.

The appropriateness of allowing disclosures to parliamentarians and the media

21. The Law Council understands that section 1317AAC of the exposure draft only permits the disclosure of information to a third party disclosee, being a member of the Parliament of the Commonwealth, a State or a Territory, or a journalist, in cases where the following conditions are met:

    (a) the discloser has previously disclosed information to a whistleblower disclosee referred to in section 1317AAB(1);

    (b) a reasonable period has passed since the disclosure was made; and

    (c) the discloser has reasonable grounds to believe that there is 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.

22. 'Whistleblower disclosee' is defined in section 1317AAB as:

    (a) Australian Securities and Investments Commission (**ASIC**);

    (b) Australian Prudential Regulatory Authority;

    (c) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); and

    (d) a person or body prescribed for the purposes of this paragraph in relation to the whistleblower related entity.

23. The Law Council considers that it is appropriate that a disclosure should first be made to a regulator or the Australian Federal Police before any disclosure can be made to a member of parliament or a journalist, for the reasons set out at paragraphs 2.30 to 2.32 of the Explanatory Memorandum to the Bill.

Inadmissibility of information disclosed does not work

24. The Law Council believes that the inadmissibility provision of paragraph 1317AB(1)(c) is too broad and might not work to achieve the outcome intended.

25. To use an extreme example: A company officer becomes aware they are under investigation by the ASIC for a breach of the Corporations Act. The officer responds by making full disclosure to ASIC under Part 9.4AAA of all information relating to the breach. It cannot be intended that the information is then inadmissible as against the officer.

26. The Law Council recommends that paragraph 1317AB(1)(c) be removed from the Bill.

Victimisation, compensation and corporate attribution

27. The Bill provides that compensation will be available where a person engages in conduct that causes damage to any other person in the belief or suspicion that the other person has or may make a protected disclosure and this belief or suspicion is a reason for their conduct.[11]

28. In order to be eligible for the compensation, the claimant only has to provide that they suffered damage because of the conduct of the defendant. Once this is proved, the defendant must prove either that they did not have the requisite belief or suspicion or that it was not a reason for their conduct to avoid liability. The Law Council supports this approach.[12]

29. Each of the prohibitions on victimisation (section 1317AC) and the right to compensation (section 1317AD) refer to a person who "engages in conduct" (see paragraphs 1317AC(1)(a) and 1317AD(1)(a)). Corporate culpability for the acts of employees should be considered in this context, as the primary entity who should have responsibility under these provisions is the corporation, not employees and officers.

30. Under the *Criminal Code Act 1995* (Cth) (**Criminal Code**) the physical element of the victimisation offence would be attributed to a corporation through section 12.2 and the fault element would be attributed to a corporation through section 12.3 of the Criminal Code. As the compensation remedy is not an offence, the Criminal Code corporate attribution provisions would not apply and corporate attribution would be based on principles of general law (based on directing mind and will).

31. The Law Council believes it would be preferable for corporate attribution to be explicitly dealt with in these sections. From a policy perspective, the Law Council believes there should be vicarious liability for acts of employees and agents to reinforce the need for a corporate culture that supports the need for whistleblowing complaints to be properly investigated and responded to. Subsection 769B(1) of the Corporations Act would be a good model for imposing corporate culpability under these provisions.

[11] Ibid sch 1 item 13 cl 14ZZY.
[12] The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Bill.

Making compensation easier

32. Where a finding of violation of the victimisation offence has been made under section 1317AC, the Law Council considers that a court should also explicitly have the ancillary power to make compensation orders. The power could be modelled on sections 1317HA and 1317HB of the Corporations Act (civil penalty provisions).

33. This would allow a simpler and more cost-effective mechanism for whistleblowers who have suffered victimisation to obtain compensation than the possible need for the whistleblower to bring a separate action based on section 1317AD.

34. Consistent with the questions raised in the "*ASIC Enforcement Review Position Paper 7*" an alternative would be to make the victimisation offence a civil penalty provision.

The effectiveness of the new civil penalty offence

35. The inclusion of the new civil penalties is appropriate.

Whistleblower policy requirement needs review

36. The Law Council submits that it is appropriate for large companies as well as all 'whistleblower regulated entitles' to have a whistleblower policy. This is because the entity's rights and obligations under the proposed legislation will be included in their compliance and risk frameworks and will need to be documented, understood and complied with by all their internal stakeholders.[13]

37. However, the Law Council believes some aspects of the requirement for corporate whistleblowing policies (section 1317AF) needs reconsideration.

    a) The application to all public companies (subsection 1317AF(1)) is too broad. Many public companies will have no employees. Many public companies may be small businesses. The Law Council suggests that the policy requirement apply to any public company (or group of related bodies corporate that includes a public company) that has, say, more than 100 employees.

    b) The requirement to make a policy available to all people who may be eligible whistleblowers (paragraphs 1317AF(1)(b) and 1317AF(2)(b)) requires reconsideration. Eligible whistleblowers include, for example, family members, suppliers and prior employees (section 1317AAD). The requirement should be satisfied by making a policy publicly available (including by posting to a website).

    c) The requirement for the policy to address protections available and how to ensure fair treatment should not be the primary focus of what is required by a policy (subsection 1317AF(4)). The requirements of the legislation are self-evident and need not be repeated in the policy. Instead the requirement should be to specify how a whistleblowing disclosure can be made, how the disclosure will then be dealt with by the corporation and what protections and support will be provided to a whistleblower.

[13] The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Bill.

Confidentiality and corporate investigations

38. The Law Council considers that the confidentiality provisions for protecting a whistleblower's identity are appropriate and are likely to be effective.

39. However, the offence of disclosing confidential information (section 1317AE) should not stifle *bona fide* internal investigations by corporations of information disclosed through internal whistleblowing. The legislation should encourage internal whistleblowing and resolution as the preferred route of resolution of whistleblower claims.

40. This section should make it clear that *bona fide* internal investigation of whistleblowing disclosures by the provision of confidential information matters to authorised employees with responsibility for investigating whistleblowing and officers who are decision-makers within a corporation is permitted on a need-to-know basis and is not restricted by the section.

41. The Bill aims to make amendments to section 1317AB of the Corporations Act and create a new protection under the TAA to provide that:

    (a) the person is not subject to any civil or criminal liability for making the disclosure;

    (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure; and

    (c) if the disclosure was a disclosure of information to the Commissioner—the information is not admissible in evidence against the person in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information.

42. The Law Council notes that this is not a complete immunity as the immunity provided for by paragraphs 1317AB(1)(c) and 14ZZW(1)(c) does not prevent the person being subject to any civil or criminal liability for conduct that is revealed by the disclosure.[14]

Professional conduct rules

43. In the Law Council's view, obligations owed by lawyers to their clients to maintain confidentiality under the professional conduct rules should continue to override the obligations for disclosure under the new laws.

Other observations

44. The Law Council has the following less-significant concerns relating to the Bill:

    a) The desirability of explicitly permitting information sharing among whistleblower disclosee regulatory bodies should be considered (subsection 1317AAB(1)).

    b) The issue of whether a serious breach of state or foreign law should also be disclosable conduct (subsection 1317AA(3)) and whether information sharing with state and foreign regulatory bodies should then be permitted requires further consideration. For example, the Law Council suspects a frequently disclosed type

[14] The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council on the Bill.

of conduct would be an alleged breach of state based occupational health and safety laws.

c) While the term "misconduct" is defined in the Corporations Act, the phrase "improper state of affairs" (subsection 1317AA(2)) is inherently ambiguous. The Law Council suggests this latter phrase be removed from the Bill (particularly having regard to the further specificity of subsection 1317AA(3)).

d) The Law Council finds the reference to "associate" in the eligible whistleblowers definition odd (paragraph 1317AAD(e)). In this context as an associate would be someone acting in concert with the whistleblower regulated entity in connection with the relevant conduct (i.e. disclosure of whistleblowing information), the use of the term may be devoid of meaning.

e) References to an officer or employee of a whistleblower regulated entity for purposes of the definition of eligible whistleblower (paragraphs 1317AAD(a) and (b)) should be extended to officers and employees of a related body corporate of a whistleblower regulated entity to deal with corporate groups and to reflect that corporate groups frequently conduct business through an employing subsidiary.

Taxation amendments

45. The Law Council makes the additional comments specifically in relation to the taxation amendments.

46. The Law Council queries whether the definition of eligible whistleblowers is too broad. The Law Council understands that the intention was that these laws would not extend to a situation where, for example, competitors could blow the whistle on one another thereby impacting on the business of the competitor. With the current definition, it appears that the following could arise:

    (i) Person A runs a website development business. Person A is a dependant. His mother is in a de facto relationship with Person B. Person B runs a cleaning business and provides cleaning services to a company that runs a web design and development business that competes with Person A's business (Business 2).

    (ii) Person A can blow the whistle on Business 2 with the benefit of protections provided that they satisfy the reasonable grounds condition.

    (iii) In this circumstance, assuming that the claim can satisfy the reasonable grounds condition and still be vexatious, the only detrimental consequence for Person A would be the possibility that the courts make an award of costs against them.

Disclosure of whistleblowers in tax review proceedings

47. Consideration should be given to the issue of whether or not in the case of a tax whistleblower, the affected taxpayer should have some right to see the disclosures made and/or identity of the whistleblower in the event of any contest to a tax assessment that may arise from the report by the whistleblower. On one view, this is not particularly relevant in tax review proceedings (at least in the Administrative Appeals Tribunal which reviews tax matters de novo). However, in some cases, it could be important, for example if the whistleblower is a person that the taxpayer otherwise intended to call as a witness in the review proceedings.