



Law Council
OF AUSTRALIA

Office of the President

1 March 2018

Senator Jane Hume
Chair
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Senator

Inquiry into Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

I refer to your invitation to make a submission on the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (**the Bill**).

The Law Council is grateful for the assistance of the Queensland Law Society, its National Integrity Working Group, National Criminal Law Committee, the Foreign Corrupt Practices Committee, Corporations Committee, Taxation Committee and Privacy Law Committee of its Business Law Section in the preparation of this submission.

The Law Council repeats its submission to Treasury on the earlier Exposure Draft of the Bill lodged on 6 November 2017 (attached).

The comments made in the Law Council's submission remains relevant to the Bill (noting the changed section references), with the exception of paragraphs 34 and 37(b) and (c) of the Law Council's submission which have now been addressed.

Preliminary comments

The Law Council strongly supports significant reform of whistleblowing laws in Australia and the broad thrust and intent of the Bill. It also supports several aspects of the Bill as an important first step in whistleblower reform.

However, the Bill does not currently address several of the issues 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**).¹ These include for example the Committee's recommendations relating to:

- (a) the creation of a single Whistleblower Protection Act covering all areas of Commonwealth regulation beyond the Bill's corporate financial service and tax entities;
- (b) access to non-judicial remedies (e.g. through the Fair Work Commission under the *Public Interest Disclosure Act 2013* (Cth));
- (c) an agency empowered to implement the regime such as a whistleblower protection authority; and
- (d) appropriate resourcing for effective implementation.

The Law Council therefore encourages the Australian Government and the Treasury to continue to work towards a comprehensive whistleblower regime and to provide a prompt response to the Committee's Report.

Further, there have been changes between the Exposure Draft and the Bill which are of concern including:

- 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.
- The change in the onus of proof in regard to orders for compensation and other remedies (the claimant only needs to adduce **or point to** evidence that suggests a **reasonable possibility** of the matters in proposed paragraph 1317AD(1)(a) – i.e. it is not necessary for the claimant to prove the matters on the balance of probabilities). In this context, the Law Council notes for example that KPMG in its submission on the Exposure Draft suggested that there should be mandatory conciliation (similar to that contained in the *Fair Work Act 2009* (Cth) general protections regime) before a victimisation claim can be filed.
- The manner in which the emergency disclosure provisions will work (i.e. the notification process in proposed paragraph 1317AAD(1)(d) appears to serve no purpose as it does not require the discloser to notify the regulated entity or to give the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority or the prescribed bodies, an opportunity to respond).
- The matters which must be dealt with in whistleblower policies have been further expanded by the Bill, rather than confined.

In light of the proposed expansion to whistleblower recipients, and in any event, the Law Council re-asserts its call for the phrase 'improper state of affairs' to be removed from the Bill (as set out in proposed paragraph 44(c) of our submission regarding the Exposure Draft). 'Improper state of affairs' is too broad as it may capture every possible grievance including those of a personal or employment nature.

¹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (13 September 2017).
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report>.

Volunteers charities and not-for-profit organisations²

The Law Council reiterates its view that consideration should be given in respect to extending the whistleblower protections to volunteers.³

The Law Council notes that the amendments to the Bill require public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy including certain information prescribed in the new section 1317AI. Many not-for-profits are companies limited by guarantee or otherwise not proprietary companies, and are by definition public companies.

The Law Council queries whether this obligation is intended to apply so widely. Given that not-for-profits do not seem to be the intended subjects of this regime as the Australian Charities and Not-for-profits Commission is not one of eligible recipients for disclosures, it would be appropriate to carve them out of the requirement to have a whistleblower policy. The Law Council therefore repeats its earlier view that it would be preferable for whistleblower protections to be extended to the not for profit sector, but not at any cost.⁴

Tax amendments

On a tax specific note, the Taxation Committee requests that the drafting of proposed subsection 14ZZT(1) of the *Taxation Administration Act 1953* (Cth) be reconsidered. In particular, the proposal to omit a reasonable grounds test, as appears in paragraph 14ZZT(2)(c).

The Taxation Committee sees no policy basis for providing a whistleblower with the protections that this proposed legislation affords where they have no reasonable grounds to suspect that the information they provide to the Commissioner indicates misconduct or an improper state of affairs in relation to tax.

A party is currently able to provide any details to the Commissioner through existing whistleblower arrangements in place with the Australian Taxation Office and does not need to have reasonable grounds as outlined above to do so. In those circumstances, if the whistleblower were to breach laws (e.g. defamation) in doing so, there are no (nor should there be) legislative protections against the breach of those laws.

To provide legislative protection in the form outlined in proposed section 14ZZX where a whistleblower has no 'reasonable grounds' is not, in the Taxation Committee's view, appropriate. It appears that this view is shared where the information is provided by the whistleblower to an eligible recipient (in proposed subsection 14ZZT(2)), but that a different position should apply where that information is shared with the Commissioner.

The Taxation Committee does not consider the policy for this to be reasonable. While we accept that the intention might be to provide the Commissioner with as much information as possible to enable the performance of his or her duties and functions, offering legislative

² The Law Council adopts this input from the Queensland Law Society.

³ Law Council of Australia, submission to the Treasury and the Parliamentary Joint Committee on Corporations and Financial Services, *Review of Tax and Corporate Whistleblower Protections in Australia and Whistleblower Protections in the corporate, public and not-for-profit sectors*, 9 February 2017, <https://www.lawcouncil.asn.au/resources/submissions/review-of-tax-and-corporate-whistleblower-protections-in-australia>, 31-32.

⁴ Ibid.

protections from a variety of laws is a significant and serious matter which justifies including a reasonable grounds test.

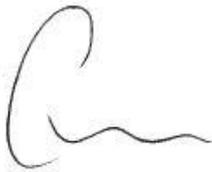
Reporting obligations under the Privacy Act

The Law Council notes that where the protected information containing *personal information* is the subject of an *eligible data breach* as defined by the *Privacy Act 1988 (the Privacy Act)* it would be helpful to clarify expressly that reporting obligations under Part III C of the Privacy Act, do not apply. The Law Council appreciates that factually such scenarios would be rare, and arguments can be made to dispense with the requirement to notify or qualify for an exemption under Part III C of the Privacy Act on a case by case basis. However, given the objectives of the Bill, the framework would benefit from the certainty as suggested.

Thank you for the opportunity to provide this submission.

Please contact Dr Natasha Molt, Deputy Director of Policy (02 6246 3754 or Natasha.molt@lawcouncil.asn.au), in the first instance should you have any queries.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a stylized flourish at the end.

Morry Bailes
President