THE LAW SOCIETY
OF NEW SOUTH WALES

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16 February 2017

Tax and Corporate Whistleblower Protection Project
C/- Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market Street
Sydney NSW 2000

By email: whistleblowers@treasury.gov.au

Dear Ms Keall,

Review of Tax and Corporate Whistleblower Protections in Australia

The Law Society of NSW appreciates the opportunity to make comments on the Treasury's *Review of Tax and Corporate Whilstleblower Protections in Australia* ("Consultation Paper"). The Law Society's Business Law Committee contributed to this submission and the Public Law Committee supports it.

Overview

The Government is seeking public comment to assist it with the introduction of appropriate protections for tax whistleblowers and in assessing the adequacy of existing whistleblower protections in the corporate sector. In particular, it seeks comments on whether corporate sector protections and similar provisions under financial system legislation should be harmonised with whistleblower protections in the public sector.

The Law Society supports significant reform of whistleblowing laws in Australia. Whistleblowing plays a key role on uncovering corporate and tax misconduct. It can be a means of combating poor compliance cultures. It can only fulfil these roles, however, if individuals can come forward without incurring significant personal risk or financial cost. This requires reforms to the existing laws relating to corporate whistleblowers and the implementation of adequate safeguards for tax whistleblowers.

The Law Society supports harmonised reforms to existing whistleblower protections. This can be effected by amendment to all the relevant acts or by the introduction of primary, centralised legislation, which applies across all contexts and sectors.

We support the enactment of overarching, uniform whistleblower legislation as the most accessible and efficient way to ensure that all whistleblowers are afforded the same protections and, where relevant, the same opportunities for compensation. The Law Society would support the establishment of an independent oversight agency, in the nature of an office of the whistleblower, under a unified regime dealing with claims of retaliation or compensation.

If possible, the Council of Australian Governments should be asked to review this approach and request the Commonwealth to support action by all States and Territories to adopt a similar, or parallel approach.

Law Council of Australia submission

We have had the benefit of reviewing the submission made to this consultation by the Law Council of Australia. We endorse that submission, a copy of which is attached.

Unified regime

The Law Society supports an overarching whistleblowing regime rather than the fragmented one that is developing in Australia. This could be implemented by a new piece of legislation or by expanding the application of the *Public Interest Disclosure Act 2013* (Cth)("PIDA") as the basis for such a unified whistleblowing regime.

The statutory review of the PIDA in 2016 ("Review") found that the mechanisms in the Act which facilitate investigation of wrongdoing are overly complex and that the categories of disclosable content are too broad. The Review made a number of recommendations, which are summarised on page 15 of the Consultation Paper. These include concentrating the categories of disclosable conduct to "the most serious integrity risks, such as fraud, serious misconduct or corrupt conduct". If these recommendations were implemented, the PIDA would contain both the mechanism and framework for disclosure and for the appropriate protections. The other relevant legislation in each sector, governing corporations, taxation, competition, consumer protection, public service, etc. could set out the categories of disclosable conduct.

It would be necessary to provide for the availability of parallel internal and external avenues for making disclosures in the private sector. The Law Society does not however support mandating the internal reporting system to cover all corporations. The efficacy of the internal reporting system would, instead, be a factor that could be taken into account in considering the penalty being imposed as a result of the conduct that gave rise to the protected disclosure.

This suggested framework bears some similarity to that under the *Privacy Act 1988* (Cth). We envisage that the external body would have power to take legal action against wrongdoers under the expanded PIDA, or other overarching legislation, with success in such legal action giving the whistleblower an automatic entitlement to compensation. Prosecution of the disclosable conduct should be in the hands of the relevant government authority.

Instituting a unified regime enables all areas of activity to be encompassed and provides a more transparent process for potential disclosers. One of the major shortcomings of the current fragmented regime identified in the Consultation Paper is the difficulties faced by a potential whistleblower in identifying the correct legislation protecting disclosures that may be made. This difficulty increases as the regime becomes more fragmented. There is enough pressure on a potential whistleblower without this additional burden.

Whistleblowers (Questions 1-3)

Whistleblower protection under the *Corporations Act 2001* (Cth) applies to current officers or employees of the company in question (that is, an insider), or contractors (including an employee of the contractor) to the company (that is, an outsider) (section 1317AA). Under the PIDA, the eligibility for protection is similarly restricted. We support broadening the categories of discloser protected under the regime, including to former officers and employees. Any person, particularly a customer/client of the government department, statutory authority, corporation, business, etc., could become aware of wrongdoing which should be disclosed.[1] A person who refuses to pay a bribe and so is not awarded a contract, cannot claim protection as a whistleblower as he/she is neither an insider nor outsider. Broadening whistleblower protection in this way is an additional reason for providing an external parallel avenue for disclosure.

Disclosable conduct (Questions 4-5)

We agree with the recommendation by the Review that the categories of disclosable conduct are currently too restricted, but do need to remain concentrated. However, a balance needs to be struck, so that wrongdoing, whether in the public or private sector, is disclosed and actioned so that all persons can conduct their business and government relationships with confidence. Clearly, while the Review recommended this concentration, it was in the context of the PIDA applying only to the public sector space. If expanded to cover the private sector as suggested, we propose that it will need to cover a broader range of disclosable conduct, but still at the "serious integrity risk" level.

As to the good faith obligation currently contained in the *Corporations Act 2001* (Cth), we are of the view that a more effective requirement would focus on the belief held by the disclosing party rather than their subjective motive for disclosing. We suggest the use of an "honest belief" or "belief on reasonable grounds" that the information indicates a serious wrongdoing.

Financial rewards (Questions 26-27)

We are of the view that a rewards system should not be established as part of a unified system at this point in time, but that consideration of such a regime should form part of a later review.

Conclusion

We suggest that a unified regime is consistent with the various reports and reviews mentioned in the Consultation Paper, including the evaluations made in the G20 Evaluation of Public and Private Sector Protections. A "Public Interest Disclosure Act" that is expanded beyond its current, relatively narrow application to public sector employment, would have many advantages. If expanded to apply to all business relationships and dealings, including employment and independent contractors, it can give protection to all involved in those relationships and dealings if they have information on disclosable conduct.

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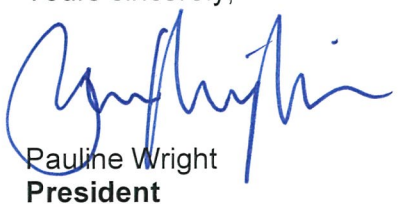
[1] As a first step, definitions could be included in the *Corporations Act 2001* (Cth) to make this clear.

Thank you for the opportunity to provide comments to this review. I would be grateful if questions can be directed at first instance to Liza Booth, Principal Policy Lawyer, by email at liza.booth@lawsociety.com.au or phone (02) 9926 0202.

Yours sincerely,



Pauline Wright
President

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Law Council
OF AUSTRALIA

Review of Tax and Corporate Whistleblower Protections in Australia

The Treasury

Whistleblower Protections in the corporate, public and not-for-profit sectors

Parliamentary Joint Committee on Corporations and Financial Services

9 February 2017

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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.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

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

About the Business Law Section

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws passed pursuant to the Constitution of the Law Council of Australia and is constituted as a Section of Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section has a current membership of more than 1,100 members. The Section has 15 specialist Committees, all of which are active across Australia.

Current Office Holders on the Business Law Section's Executive Committee are:

- Ms Teresa Dyson, Chair;
- Ms Rebecca Maslen-Stannage, Deputy Chair; and
- Mr Greg Rodgers, Treasurer.

Acknowledgement

The Law Council is grateful for the assistance of the Taxation Law Committee, the Foreign Corrupt Practices Committee and the Corporations Committee of the Business Law Section of the Law Council and the Queensland Law Society in the preparation of this submission.

Overview

1. The Law Council welcomes the Australian Government's initiative in reviewing current legislative and other arrangements with respect to reforming the regulation of whistleblowing impacting on the activities of companies and major institutions.

2. The Law Council acknowledges that there is a public interest in ensuring appropriate protections are afforded to whistleblowers in the corporate, public and not-for-profit sector.

3. The Law Council strongly supports significant reform of whistleblowing laws in Australia. It congratulates the Treasury on its Consultation Paper Review of tax and corporate whistleblower protections in Australia and the comprehensive and well targeted list of questions that have been posed.

4. The Law Council believes this reform is now urgent and supports its inclusion in the Department of Prime Minister and Cabinet's reform agenda.

5. In recent years, the Australian Government has taken steps to address shortcomings of existing whistleblower protections. In 2014, the Senate Standing Committee on Economics found that 'a strong case exists for a comprehensive review of Australia's corporate whistleblower framework, and ASIC's role therein'.[1] This inquiry highlighted whistleblowing as a major issue that impacted the way in which the Australian Securities & Investments Commission (**ASIC**) was able to deal with questions in exercising its obligations.

6. In the 2016-17 Federal Budget, the Government announced that new arrangements would be introduced to better protect tax whistleblowers and to ensure that appropriate protections are in place for whistleblowers who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.

7. This topic has become even more relevant, as was illustrated in recent amendments to industrial relations legislation, and in particular, amendments to the *Fair Work (Registered Organisations) Act 2009* **(FWRO Act)** by the *Fair Work (Registered Organisations) Amendment Act 2016* in November 2016 (Part 4A). The added protection for whistleblowers that were negotiated by Senator Xenophon, amongst others, have been instrumental in prompting the release by Minister O'Dwyer of the Treasury Consultation Paper on 20 December 2016. Corresponding with that particular initiative, the Australian Senate has also commenced an Inquiry into the same topic.

8. However, too often in the past regulation has been piecemeal and rushed without careful policy analysis being undertaken of how the regulation can lead to genuine behavioural and structural change. Adequate time must be taken to ensure that the structure of appropriate regulation is right. Any whistleblowing regime that the Government eventually produces should be the subject of careful consideration, draft legislation exposed for commentary and appropriate discussion. The Law Council also supports the use of workshops or roundtables of interested experts to facilitate the development of the legislation. The Law Council thanks Treasury for

[1] Senate Standing Committee on Economics, *Performance of the Australian Securities and Investments Commission* (June 2014), 207.

inviting representatives to the roundtables scheduled on this topic in February 2017. There are a range of activities being pursued in this area (for example, the '*Whistling While they Work*' initiative[2]) that could be harnessed as part of policy development. The Law Council would be pleased to be an active participant in any other such workshops or roundtables. These measures will better ensure that Australia sets in place a regime that will provide adequate guidelines for regulators throughout the country in dealing with a very important aspect of corporate compliance and the way it can be monitored and pursued.

9. Statutory protections for corporate whistleblowers were enacted in 2004 and are contained in Part 9.4AAA of the *Corporations Act 2001* (Cth) (**Corporations Act**). Broadly, the provisions provide whistleblowers with statutory immunity from civil or criminal liability, a right to seek compensation if damage is suffered as result of victimisation (which is specifically prohibited), and prohibit the revelation of the whistleblower's identity or the information disclosed subject to certain exceptions.

10. There are certain criteria that must be met to qualify under the Corporations Act whistleblower protections. The whistleblower must be a *current* officer or employee of the relevant company, or a contractor to the company. The whistleblower must make the disclosure to ASIC, the company's auditor or certain nominated persons within the company in *good faith* and have *reasonable grounds* to suspect the company has breached the Corporations Act. These protections are not available to anonymous whistleblowers.

11. Further, the protections under the Corporations Act only cover disclosures made in respect of contraventions of corporate law, rather than tax or other law. Whistleblowers who disclose information to ASIC in respect of tax evasion or avoidance are not protected by the Corporations Act.

12. The tax law does not currently have satisfactory safeguards to ensure the identity of a tax whistleblower is protected. The protections afforded under the privacy laws and Division 355 of the *Taxation Administration Act 1953* (Cth) are limited and are subject to numerous exceptions. Further, neither regime prohibits victimisation or provides for compensation where it occurs. The Australian Taxation Office (**ATO**) does not have an express power to protect whistleblowers from victimisation. The Law Council notes that whistleblower protections in comparable international jurisdictions provide both specific protections from victimisation and compensatory remedies.

13. The purpose of whistleblower protections is to encourage people with credible information about corruption, fraud, misconduct within the corporate sector, or tax evasion or avoidance, to come forward to the relevant regulator, (e.g. ASIC or the ATO), without fear of reprisal.

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[2] Griffith University, *Whistling While They Work 2: Improving Managerial Responses to Whistleblowing in Public & Private Sector Organisations* , Whistling While They Work <http://www.whistlingwhiletheywork.edu.au/>. The Whistling While They Work project is led by Griffith University's Centre for Governance & Public Policy and supported by researchers from Griffith University, University of Sydney, Australian National University, Victoria University Wellington, Australia's Commonwealth Ombudsman, New South Wales Ombudsman, Australian Securities and Investments Commission, CPA Australia and the New Zealand State Services Commission. The Project is supported by the Australian Research Council and 23 partner and supporter organisations across Australia and New Zealand.
The Project involves two major surveys, for organisations wanting to establish whether their whistleblowing policies meet current best practice; whether they are actually working; and if not, why not.

14. This purpose cannot be achieved to its full extent without reforms to the existing rules for corporate whistleblowers and the implementation of adequate protection for tax whistleblowers.

15. In that respect, the Law Council supports harmonised reforms to other existing whistleblower protections (such as improved protections for public sector whistleblowers) as well as those contained in the Corporations Act either by amendment to each relevant act or by introduction of overarching whistleblower legislation.

16. However, any reform to whistleblower laws needs to balance the protection of confidentiality, privilege and evidentiary laws.

17. The Law Council recommends that new whistleblowing laws should have the following key design features:

    - The laws should be uniform in structure and operation, applying across all contexts and sectors;

    - The laws should apply to any whistleblower, without regard to narrow specifications of relationship to the entity in question;

    - In the corporate context, the laws should encourage internal whistleblowing and resolution as the preferred route, but with an explicit acknowledgment that a disclosure to a regulator can occur at any time;

    - There should be broad rights of restitution and compensation for victimisation; and

    - There should be broad community consultation on the merits and demerits associated with a possible rewards scheme for whistleblowers. If introduced, such a scheme should be subject to appropriate scrutiny and overview.

18. It is vital that any regime that is introduced be uniform across the board (unless there are strong justifications for a separate approach to be taken in specific legislation). It is also important, if at all possible, for the Council of Australian Governments (**COAG**) to be asked to review the approach taken by the Commonwealth in dealing with these matters, with a view to the States and Territories of Australia adopting a similar or parallel approach. One of the major problems that face Australian corporations and other business enterprises, as well as government instrumentalities, is that they may be subject to different laws in the same area of activity from State to Territory without adequate justification for the legal rules applying differently. The cost to Australia of this fractured approach to the Federal system was highlighted by the Business Council of Australia in its report in 2006, entitled *Reshaping Australia's Federation. A New Contract for Federal-State Relations*,[3] and has been the subject of ongoing attempts by the Commonwealth, the States and Territories to bring a more coordinated and uniform approach to legislation.

[3] Business Council of Australia, *Reshaping Australia's Federation. A New Contract for Federal-State Relations* (2006).

19. All governments in Australia must work more effectively towards bringing a sensible uniform approach to the regulation of commercial activities where needed. The artificial State boundaries do not merit a different legislative approach in dealing with such matters as whistleblowing and other aspects of the regulation of business.

A compliance culture

20. Whistleblowing and its protection is a vital aspect of corporate compliance. However, the Law Council considers that suggestions in some quarters that there is a serious problem in Australian corporations concerning corporate culture are misplaced. In our experience Australian boards do seek to ensure that there is a culture of compliance.

21. Since 2001, a legislative obligation has been imposed on companies and other organisations by the *Criminal Code Act 1995* (Cth) (**Criminal Code**). The Criminal Code was enacted in 1995 but did not come into operation until 2001. This legislation, which the Commonwealth had hoped would be replicated by the States and Territories makes it clear that every organisation subject to the operation of the laws of the Commonwealth, that deal with various aspects of conducting business by reference to criminal sanctions that may be imposed, must have in place a culture of compliance as set out by the Criminal Code.

22. The importance of the Criminal Code in this context cannot be over-emphasised. Indeed, the decision, although largely in the form of *obiter dicta* of Justice French of the Federal Court (as he then was) in the case of *ASIC v Chemeq Limited,*[4] emphasised the very significant impact that the Criminal Code now had on the behaviour and obligations of corporations and other organisations governed by Commonwealth law. This is especially where criminal sanctions might apply. Under these obligations, the bodies were required to put in place risk compliance programs and make sure that those programs were kept up-to-date, refreshed and continually revised.

23. In the Law Council's view, any whistleblowing regime that is introduced into Australia should be built on the sound foundation of the culture of compliance, emphasised by the Criminal Code. This culture of compliance is central in evaluating how the whistleblowing provisions will be administered and regulated.

24. A solid corporate compliance culture must also be supported by a robust regulatory system where regulators take appropriate action in cases where the alleged breach of the culture has resulted in a breach of the law. ASIC, for example, has a clear and plain regime to follow in targeting directors and officers of businesses, corporations or otherwise that do not comply with the law. It is then the role of the courts to review the relevant conduct, and set down certain standards and guidelines. This is essential before considering introducing further criminal sanctions.[5]

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[4] *ASIC v Chemeq Limited* [2006] FCA 936.

[5] The Law Council notes that in 2015, ASIC suggested, for example, that new criminal sanctions should be introduced into certain parts of the *Corporations Act 2001* (Cth) where the alleged absence of culture was stated to be leading to ASIC encountering difficulties in discharging its obligations: see John H C Colvin and James Argent, 'Corporate and personal liability for 'culture' in corporations?' (2016) 34 *Company and Securities Law Journal* 30. That article points out the legal ambiguity that would be associated with legislating to require a good culture.

Specific commentary on Treasury questions

1. **Do you believe that the Corporations Act categories of whistleblowers should be expanded to former officers, staff and contractors?**
2. **Should it be made clear that the categories include other people associated with the company such as a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners?**
3. **Are there any other types of whistleblowers that should be included, and if so, why?**

25. The Law Council supports a broad definition of whistleblower and does not see a policy basis as a general matter for suggesting that any person who has relevant information concerning wrongdoing should not be protected in general terms if they bring that information to the attention of a relevant regulator. The Law Council agrees that not all consequences of whistleblowing will be relevant to every category of whistleblower but the categories should not be restricted in a way that makes the overall scope of the laws ineffective.

26. The existing Corporations Act categories of whistleblower are deficient. The Law Council agrees with the comments concerning the current limitations made in the Treasury Consultation Paper.

27. The Law Council recognises that there will be some categories of person who may need to be treated differently under the whistleblowing laws for certain purposes. In that regard, the circumstances specified in Regulation 21F-4(4) of the US Securities and Exchange Commission (**SEC**) whistleblowing regulations are examples of relationships that may require special consideration in particular contexts.[6] Depending on the way the legislation is drafted and the scope of categories of whistleblower it may be useful to consider some of the categories of person identified in this regulation. If broad categories of whistleblower are adopted we would support consideration being given to the categories of person identified in the US regulation (as well as any other categories that can be identified) to assess how they should be treated. For example we would not support protection for a professional advisor who discloses in violation of their professional obligations.

28. Existing legislation may not explicitly recognise that whistleblowing can occur (and frequently will occur) within large corporate groups. If an employment relationship is relevant to any aspect of the whistleblowing laws, it should be sufficient that the person is an employee of any entity within a corporate group.

29. The categories of corporate whistleblower to which protection is afforded should be consistent with the categories of tax whistleblower. The Law Council generally

[6] This provision provides that information will not be considered to be original information for purposes of the making of rewards if the information is privileged (unless disclosure is permitted by legal practitioner rules) or the information was obtained through legal representation. Further, information will not be considered original if the information was disclosed through a whistleblowing program to the recipient, the person is a compliance officer, the person was retained to conduct an investigation, the person is an external auditor and the information was obtained through the audit or the information was obtained in a manner that violates law (in these cases there is an exception if disclosure is necessary to prevent conduct that is likely to cause substantial injury).

agrees with the proposed categorises of tax whistleblower listed in the Consultation Paper, with the exception that professional advisors (such as legal advisors and tax advisors), who breach professional obligations owed to their clients (whether under legal professional privilege or otherwise, such as under the *Tax Agent Services Act 2009* (Cth) (**TASA**)), should not be protected, since there is a public interest in clients being able to seek legal and tax advice without fear of being reported to authorities by their legal and tax advisers.

30. The tax definition should be expanded to include former officers, staff and contractors. The Law Council considers that the definition should include unpaid workers, auditors and business partners or joint venturers, and clients of the company. With respect to professional advisors, there needs to be confirmation of their duties of confidentiality to clients, contractual obligations and any obligations imposed by professional bodies, statutory and otherwise (for example, the Tax Practitioners Board).

31. The Law Council acknowledges that many of the above categories of whistleblowers could arguably fall into the *contractor* category. However, expanding the definition explicitly would remove ambiguity and would give individuals who fall into those categories assurance that they would be protected.

32. Each of the above proposed categories of whistleblowers may be in possession of valuable information which may expose corporate, tax or other misconduct. Whistleblower laws should go beyond merely protecting the individual whistleblower and encourage individuals to come forward with information whether or not they could be subjected to reprisals from their employer. Whistleblowers that may not fear victimisation should still be afforded the same statutory immunities. Expanding the definition of qualifying whistleblowers will encourage a wider range of individuals to come forward with information.

4. Should the scope of information disclosed be extended? If so please indicate whether you agree with any of the options discussed above, and why. If you do not believe any of the above options should be considered please explain why not and whether there are any other options that should be considered instead.

33. The Law Council agrees that the current restrictions of the Corporations Act regime are too narrow and should be extended to a breach of any law of the Commonwealth. The laws should also facilitate the sharing of whistleblower information with other regulatory bodies so that the right information reaches the right regulatory body and can be pursued by that regulatory body if that is more appropriate.

34. The existing subject matter qualification only relates to the Corporations Act. It does not support the range of investigative work that ASIC may undertake, nor does it support investigations by other regulatory bodies such as the ATO or the Australian Prudential Regulatory Authority (**APRA**). The adoption of a single general regime, which includes a far broader subject matter qualification, would simplify the law and would remove ambiguities and uncertainties for whistleblowers who otherwise may not necessarily be protected.

35. A good example of how this regime should operate is in the context of foreign corrupt practices. If a whistleblower were to have relevant information, there should be no restriction on the provision of that information to ASIC, even if the most

relevant offence might be violation of Part 70 of the Criminal Code and the most relevant regulatory investigation body may be the AFP. The legislation should facilitate that process.

36. Other regulators should also have these whistleblowing laws in uniform terms and be able to operate in a similar way (e.g. Australian Competition and Consumer Commission and APRA).

37. The Law Council supports the establishment of an office of the whistleblower within Government or primary regulators so that a potential whistleblower does not need technical legal advice to ascertain who they should turn to in the first instance.

5. Should the 'good faith' requirement be replaced by an objective test requiring the disclosure be made on 'reasonable grounds'?

38. The Law Council is of the view that the 'good faith' requirement should be jettisoned. To qualify for the protections, a whistleblower should have reasonable grounds to suspect actual or potential unlawful behaviour. This should be determined by reference to an objective test based on an honest belief, held on reasonable grounds, that the information disclosed shows or tends to show that wrongdoing has or will occur. The only question should be whether the information is credible. Questions of motive may be relevant to restitution, compensation or reward, but not the right to approach a regulator with relevant information under whistleblowing laws.

6. Should anonymous disclosures be protected?

39. The Law Council submits that whistleblowers should disclose their identity to the regulatory authority and be contactable at a later stage if required, provided that confidentiality arrangements are put in place to protect the whistleblower's identity from the company.

40. If adequate confidentiality protections are in place, in fact whistleblowers may feel more comfortable disclosing their personal identity and may be less inclined to remain anonymous.

41. Without disclosure of the whistleblower's identity to the regulatory authority, it invariably restricts the ability of the regulatory authority to assess the whistleblower's claims, to determine whether the whistleblower claim is based on reasonable grounds.

42. The Foreign Corrupt Practices Committee, in contrast, supports the facilitation of anonymous disclosure. That Committee has noted that there may be very good reasons why a whistleblower wishes to report anonymously, at least, initially and that should not derogate from the usefulness of that information to a regulator. To ensure integrity in anonymous disclosure to regulators, the Foreign Corrupt Practices Committee suggests that the information must be submitted through a legal advisor and that a mechanism similar to SEC Regulation 21F-9(c) apply to that process.[7]

[7] Provision of a confirmation by the whistleblower to the legal advisor that the information is true and correct with a confirmation by the legal advisor to the regulator that they have verified the whistleblower's identity

7. **Should the information provided by anonymous whistleblowers also be subject to rules limiting further dissemination of the information if the information might reveal that person's identity?**
8. **Should regulators be able to resist production of this information under warrants, subpoenas or Freedom of Information processes?**

43. If anonymous disclosures are to be protected, the Law Council sees no issue with further dissemination of anonymous whistleblower information among regulators.

44. Anonymous whistleblowers should be protected by the regulator being entitled to resist the disclosure of their identity under warrants, subpoenas or freedom of information processes.

9. **Should the specified entities or people to whom a disclosure can be made be broadened? If so which entities and people should be included?**
10. **Should whistleblowers be allowed to make a disclosure to a third party (such as the media, members of parliament, union representatives, and so on) regardless of the circumstances? In the alternative, should such wider disclosure be allowed but only if the company has failed to act decisively on the information provided? Are there alternative limitations that should be considered? Please give reasons for your answers.**
11. **What are the risks of extending corporate whistleblower protections to cover disclosures to third parties? How might these risks be managed?**
12. **Do you believe there is value in a 'tiered' disclosure system being adopted similar to that in the UK?**
13. **Should there be any exceptions in this context for small private companies?**
14. **Should disclosure be allowed for the purpose of seeking professional advice about using whistleblower protections, obligations and disclosure risks (as suggested by the review of AUS-PIDA)?**

45. On balance, the Law Council does not consider that disclosures to third parties should be protected under the proposed reforms. Entities to which disclosures may be made should only include those which will treat the information confidentially. For this reason, the Law Council does not support protecting disclosures made to third parties such as the media or special interest groups. As a matter of principle, apart from first taking action through an organisation's internal whistleblowing program, whistleblower laws should be restricted to the protection of information provided to relevant regulators charged with the enforcement of applicable law. As noted above, that principle should extend to the sharing of information among regulators.

46. For example, tax whistleblowers should only disclose information to the ATO. However, tax whistleblowers should still be protected if they disclose information to

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and that they have reviewed the whistleblower's confirmation and that the information in it is to the best of the legal advisor's knowledge true and correct.

the Inspector General of Tax (**IGOT**), or an oversight agency that may be established. Disclosures by corporate whistleblowers should be able to be made to ASIC or any other relevant regulator (e.g. APRA).

47. It is difficult to assess whether a company has failed to act decisively on information provided, and the Law Council questions who would be required to make such an assessment (e.g. the whistleblower or a regulator). The Law Council also notes that a determination that a company has failed to act decisively on information provided would itself take time to conclude. If disclosures to third parties are to be allowed, they should only be protected where it can be concluded with certainty that a company has failed to act decisively on information provided.

48. In any case, it is preferable that, where feasible, the whistleblower raises his or her concerns internally in the first instance, prior to disclosing information externally unless there are compelling circumstances that justify bypassing any internal process.

49. The proposed reforms deal with federal legislation and would not protect disclosures to state revenue authorities or other state-based government agencies. It may be that harmonised state-based whistleblower protections would need to be introduced consistent with a federal regime (see the general comments on state harmonisation in the Overview).

50. The Law Council believes it is implicit that whistleblowers can have access to professional advisors in assessing their rights, but would have no objection to that being made explicit for the avoidance of doubt.

51. As noted above, the Law Council is of the view that only information disclosed to an entity, which is under an obligation to treat that information confidentially, should be protected.

52. The Law Council also considers that in the case of allowing disclosures to the media it would be difficult to assess whether information had been acted on quickly enough in a state of emergency. The Law Council is of the view that information disclosed by whistleblowers in an emergency should be to the relevant regulator or an oversight agency. Accordingly, the Law Council would not encourage a tiered system as in the UK.

53. Where whistleblowers seek advice from legal advisors on the operation of the provisions, that advice should be protected by legal professional privilege. Accordingly, the Law Council does not consider disclosures for the purpose of seeking professional advice about the protections, obligations and disclosure risks should be protected under the reforms.

15. Is there a need to strengthen protections of a whistleblower's identity, and if so, what specific amendments should be considered?

16. To whom should the provisions apply to government agencies who receive the information or all recipients of the information or both?

17. Should courts and tribunals be allowed access to information provided the confidential character of the information and the whistleblower's identity is maintained through the use of bespoke judicial orders?

18. **How should any additional protections of a whistleblower's identity be balanced by the need for a company or agency to investigate the wrongdoing and also to ensure that procedural fairness is afforded to those alleged to have engaged, or been involved in, wrongdoing?**

19. **Should consent by a whistleblower be required prior to disclosing the information to people or entities for purposes of investigating a matter? If so, in what circumstances?**

54. The Law Council supports the imposition of statutory obligations of confidentiality on regulatory agencies in the investigation phase of any enforcement activities, unless the whistleblower has agreed to the disclosure of their identity to third parties or unless the identity of the whistleblower has become public through other means.

55. The reforms should clearly state that regulators and enforcement agencies may disseminate information disclosed by a whistleblower for investigative or prosecutorial purposes provided that the person or entity to whom the information is disseminated has the same duties of confidentiality as the initial recipient of the information.

56. Provided that the whistleblower's confidentiality is protected, the whistleblower's consent should not be required. There may be circumstances in which information will need to be provided to other entities for reasons which the whistleblower will not necessarily understand. The regulator should not be required to have to pause investigations until consent is given by a whistleblower or have to justify to the whistleblower the reasons for disseminating the information as this can cause undue delay.

57. Disclosure of the identity of a whistleblower's identity during court proceedings should be a matter of judicial discretion based on existing procedures. The courts and tribunals have satisfactory processes for dealing with confidential information during proceedings. The Law Council supports the inclusion of an explicit requirement for procedural fairness for those who are accused of wrongdoing.

20. **Is there a need to strengthen the current prohibition against the victimisation of whistleblowers in the Corporations Act? If so, should these be similar to those which exist under the AUS-PIDA and RO Act?**

21. **Do the existing compensation arrangements in the Corporations Act need to be enhanced? If so, what changes should be made to ensure whistleblowers are not disadvantaged?**

22. **Does the existing legislation provide an adequate process for whistleblowers to seek compensation? Should these be aligned with the AUS-PIDA and the RO Act? Please include an explanation for your answer and identify what changes, if any, are needed and why.**

23. **What would the most appropriate mechanism for administering the compensation process? Should it rely on whistleblowers having to make a claim or someone else as advocate on their behalf?**

58. Prohibitions against the victimisation of whistleblowers should be consistent for whistleblowers in all industries and should mirror those that exist under the AUS-PIDA and the RO Act. Specifically, concepts of *reprisal* and *victimisation* should be non-exhaustively defined. The Law Council would also support protections similar to those afforded under the *Public Interest Disclosure Act 1998* (UK) (**UK-PIDA**) which protect employees from retaliation by their employer.

59. Compensation for victimisation following disclosure of information by a whistleblower can be difficult to access and the Law Council considers that the claim process for both tax and corporate whistleblowers should be administered by an independent oversight agency (discussed further below). The potential kinds of remedies available should be clarified in the legislation and information on the claims process should be published by the oversight agency.

60. Many commentators have pointed to Australia having a poor record concerning the protection of whistleblowers and noted the negative impact experienced by many whistleblowers in terms of reputation and future career prospects, as well as many other detrimental impacts. Australian whistleblowers may face large corporate entities that take active steps to protect their reputation in response to whistleblowing, including through vilification of the whistleblower, reprisals, termination of employment, internal policies prohibiting certain disclosures or other professional consequences. To the extent that retaliation remedies are available they have not been used because they are inaccessible to a whistleblower who has no access to justice from a practical perspective (for example, due to accessibility and cost).

61. The whistleblower regime needs to recognise this potential imbalance in power and provide both:

    a. an accessible and low cost mechanism for whistleblowers to access compensation and remedies; and

    b. a regime which strongly encourages corporate entities to respond to credible whistleblowing through careful review and appropriate responses rather than retaliation.

62. The best way of achieving that outcome is to charge regulators with a responsibility to pursue sanctions for retaliatory conduct, rather than leaving the matter to an under-resourced whistleblower.

63. In terms of remedies for retaliation, the Law Council supports a broad judicial discretion to make orders, including loss of past and future earnings and damages that are very broadly defined.

64. The Law Council supports a review as to whether a court is the right tribunal to consider a claim for compensation. As noted above, the relevant forum that considers compensation should be accessible and low cost from the whistleblowers perspective. If a court is the appropriate forum, a mechanism should be considered to permit access to the court if the whistleblower is or has become impecunious.

65. The Law Council supports the inclusion of an offence in the legislation prohibiting any person from engaging in retaliatory conduct against a whistleblower, enforceable by the relevant regulatory body. The Law Council notes that in the United States it is a separate offence for an employer to retaliate against a whistleblower in the terms

and conditions of employment because of any lawful act done by a whistleblower providing information.[8] The Law Council considers such a penalty would significantly increase the *in terrorum* effect against corporations so as to discourage retaliation.[9] Under the existing Australian regime it is too easy for a corporation to deal with a whistleblower through retaliation, knowing the likelihood is that a compensation suit is unlikely to be brought and, even if it were, that compensation would be the outcome rather than the opprobrium associated with a prosecution for failure to comply with a substantive legal obligation.

24. How should compensation be funded?

66. Compensation should be funded by a compensation order made against the party who has engaged in retaliation. Where compensation is provided by means of a payment, it should be payable by the company or taxpayer which committed the acts giving rise to the compensation claim. This should impose limited additional cost to the Government to implement the system and should act as a further deterrent to engaging in reprisal or retribution.

25. Should whistleblowers be required to bear their own and their opponent's legal costs when seeking compensation or have the risk of adverse costs order removed as per recent amendments to the RO Act?

67. The Law Council does not consider that a whistleblower should be exposed to an order of legal costs if an application for compensation is made by a whistleblower, provided the application is made in good faith.

68. Provided that a whistleblower qualifies for the proposed protections (i.e. falls within a specified category, has reasonable grounds to suspect actual or potential misconduct, and discloses the information only to the relevant regulatory entity), he or she should not be subjected to the risk of an adverse costs order. To do so would likely discourage potential whistleblowers from coming forward.

26. Should financial rewards or other types of rewards be considered for whistleblowers? Why or why not?

27. If so, what options should be considered in establishing a rewards system?

69. The most contentious issue associated with the current debate concerning whistleblowing is whether a rewards system should be introduced.

70. The Law Council's preliminary view is that a reward system should not be supported. However, it is important that the merits and demerits associated with a rewards system should be comprehensively identified and debated as part of the current consultation and inquiry process and a final decision made on the introduction of a rewards system through the proposed legislation.

[8] Section 21F(h), *Securities Exchange Act 1934* Pub L. 73-291, 48 Stat. 881.
[9] In its 2016 Annual Report the US Office of the Whistleblower reported that it had successfully brought its first stand-alone whistleblower retaliation action against an employer under these provisions. See U.S. Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2016) 2, 21.

71. By way of illustration of the wide range of views that exist on this issue, the Law Council's Business Law Section's Foreign Corrupt Practices Committee and Corporations Committee include individuals who hold strong opinions for and against the adoption of a rewards system. The majority view was that a rewards system is problematic from a policy perspective as it may distort incentives to report and should not be necessary if the other elements of the regime (including retaliation protections) are strong and effective. The minority view was that a rewards system is needed to create the same 'game changing' environment that arose in the United States this decade.

72. What seems clear is that the United States bounty system, after 5 years of operation, is now proving to be a game changer and has led to a significant increase in credible information provided by whistleblowers to United States regulatory bodies. In that regard the Law Council notes that, for the year ended 2016, the United States Office of the Whistleblower reported that Australia was the third highest source of offshore tips under the United States system.[10]

73. In the Law Council's view, the advantages and disadvantages of a US style whistleblower regime can be summarised as per the table below.

74. The Law Council's response to a specific tax reward system is addressed under Consultation Paper question 49 below.

Advantages and disadvantages of US style whistleblower bounties

Advantage	Disadvantage
1. **Proven increase in high quality tips to regulators** – The evidence supporting the quality of tips received by the SEC under the s21F regime now seems quite clear. In 2012 Thomas Sporkin, director of the market surveillance unit of the SEC stated that on average the SEC receives two or three 'high quality' tips per day. 'These often come from high-level industry executives or managers that are knowledgeable about how security markets work' and have included tips from former board members.[11] This is an exponential increase on the 'two dozen' high quality tips the SEC received each year prior to the introduction of the monetary sanctions.[12] In 2016 the US SEC	1. **May change whistleblower motivations** - A rewards based system may change the motivations of a whistleblower so that the action is no longer in 'good faith'. This type of system may encourage speculative, unreliable and potentially vexatious claims by people motivated by potential monetary gain, rather than altruism.[13]

[10] Ibid., 26.
[11] Tom Steinert-Threlkeld, *SEC Whistleblower Tip Rate: 7 A Day, On Wall Street* (May 23, 2012) <http://www.onwallstreet.com/news/sec-whistleblower-tip-rate-7-a-day>.
[12] David Clarke, *SEC gets more whistleblower tips* (Reuters, Washington, 4 February 2011) <http://www.reuters.com/article/us-sec-whistleblower-idUSTRE7135UA20110204>.
[13] Nicholas Mavrakis and Michael Legg, 'The Dodd-Frank Act whistleblower reforms put bounty on corporate non-compliance: Ramifications and lessons for Australia' (2012) 40 *Australian Business Law Review* 1, 30-31.

Advantage	Disadvantage
received 4,218 tips from whistleblowers. In FY2015-16, Australia's Office of the Whistleblower only received 146 tips.	
2. **Encourages people motivated by monetary gain (rather than altruism) to report** -'[B]ounties allow for the harnessing of existing internal cultural preferences to achieve more effective information flows from whistleblowers to external regulators. In private enterprise corporate environments it might be expected organisational values would emphasise profits and financial rewards ahead of public duty, limiting the effectiveness of whistleblower programs. Bounties offer the opportunity to turn this dissonance neatly on its head, by relying on existing internal cultural emphasis on profits and monetary rewards to work to the advantage of external regulators.'[14]	2. **Government cost** - Bounties must be paid from a government fund. In the US, the bounty amount is ten to thirty percent of the monetary sanction collected as a result of the tip. Bounties have been as large as $30 million.[15] This money ultimately comes out of government funds. It should however be noted that Australia's corporate penalties are substantially lower than those in the US. Therefore if the amount awarded to a whistleblower were a percentage of the sanction collected by the regulator, the Australian bounties would be much lower (perhaps ASIC should consider contributions to a whistleblower fund similar to its current approaches to extracting community benefit payments under EUs)
3. **Provides compensation for the intangible** - Most compensation schemes aim to place the victim in the same position they would have been in had the event not occurred. There are a number of intangible costs suffered by whistleblowers which are not accounted for in the current Australian framework, such as loss of future job opportunities, the financial cost of stigmatisation and the emotional cost of blowing the whistle. A bounty system would provide additional funds to compensate for these detriments.	3. **Potentially reduced quality of tips** - There is the potential for the regulator to become burdened with low quality tips which consume the regulator's resources but do not lead to successful outcomes, as individuals hastily provide useless information in the hope of receiving a bounty.
	4. **System open to abuse from 'serial submitters'** - In the US two 'whistleblowers' have unsuccessfully attempted to claim awards in

[14] Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty hunters, whistleblower and a new regulatory paradigm' (2013) 41(5) *Australian Business Law Review* 298, 302.
[15] U.S. Securities and Exchange Commission , *SEC Announces Largest-Ever Whistleblower Award* (22 September 2014) <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290>.

Advantage	Disadvantage
	connection with 153, and 25 different actions respectively.[16]
	5. **System open to abuse from litigation funders** - There is the potential that bounties will lead to the opening of the proverbial floodgates and the development of a litigation culture (potentially supported by litigation funders) which would create inefficiencies as these claims put a strain on court resources and the resources of businesses defending them.
	6. **May discourage altruistic whistleblowers** - Altruistic whistleblowers may be discouraged from making disclosures as they may be stigmatised as acting for monetary gain. However bounties could be made optional to negate this.
	7. **May undermine internal compliance or reporting systems as it gives employees an incentive to bypass them** - In the US they have alleviated this issue by reducing bounties where the whistleblower has interfered with internal compliance or reporting systems.[17] Furthermore, the whistleblower's 'place in the queue' in the US is determined according to the date on which the internal report was made.[18] Interestingly, in 2016, 80% of employee whistleblowers in the US still reported internally before reporting to the regulator suggesting that this is not a widespread issue.[19]

[16] U.S. Securities and Exchange Commission, *2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2015), 14.
[17] Section 21F(6), *Securities Exchange Act 1934* Pub L. 73-291, 48 Stat. 881.
[18] U.S. Securities and Exchange Commission, *Implementation of the Whistleblower Provisions of s 21F of the United States Securities and Exchange Act of 1934*, 17 CFR Parts 240 and 249 [Release No 34-64545; File No S7-33-10] RIN 3235-AK78 page 6 <http://www.sec.gov/rules/final/2011/34-64545.pdf> 6. See also V Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, 'Bounty hunters, whistleblower and a new regulatory paradigm' (2013) 41(5) *Australian Business Law Review* 298.
[19] U.S. Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2016), 16-17.

75. If a reward system were to be adopted, the Law Council would not support a rigid adherence to the United States bounty system.

76. First, the Law Council believes that the quantum of any reward should be more nuanced than the US fixed 10-30% reward structure. Instead, the Law Council would support the ability of the decision-making body to make a reward order on the application of a whistleblower or the relevant regulatory body based on consideration of a range of specified relevant factors such as the seriousness of the wrongdoing uncovered, the contribution to the successful prosecution the whistleblower has made, the risk the whistleblower faced in coming forward, the public savings resulting from the whistleblowing, the way the whistleblower conducted themselves (including internal whistleblowing as the first action), any detriment the whistleblower has suffered that is not susceptible of accurate measurement through compensation and the penalty imposed on the wrongdoer.

77. Second, the Law Council would not support the decision being made by the administrative body that has undertaken the enforcement proceedings. The process should be independent and objective. Instead, the Law Council would support the decision being made by a court or other tribunal. In structuring a decision making process it is important that a whistleblower be able to access the process without significant cost or risk of adverse order if the application is made in good faith. See comments above in response to questions 20-25.

28. If a reward system is established how should it be funded?

78. If a reward system was to be adopted, the system should be funded by the Government using funds contributed from consolidated revenue, the fund into which penalties would be paid by a wrongdoer.

29. Do you believe there is merit in requiring companies to put in place systems for internal disclosures? If so, what form should this take?

30. Mandating internal disclosure systems for companies should impose a higher regulatory burden but the benefits may outweigh the costs. Would you support a move to a mandatory system? Please give reasons for your answer.

31. Should systems be for internal disclosure be considered or all companies, irrespective of size or should there be an exception for small proprietary companies, as defined in the Corporations Act? Please explain why or why not.

79. The Law Council considers that the need for, and nature of, internal arrangement should be a matter left for companies themselves. One size will not fit all in this area. Instead, the absence of effective internal processes should go to penalty issues in the same way as enunciated by Justice French of the Federal Court (as he then was) in the case of *ASIC v Chemeq Limited.*[20] A solution may be to provide that the Court should take into account the effectiveness or otherwise of whistleblowing reporting systems and the way in which whistleblowing has been handled internally in imposing penalties for the breach of any law.

[20] *ASIC v Chemeq Limited* [2006] FCA 936.

80. Based on the Foreign Corrupt Practices Committee's experience in advising companies, the Law Council understands that as an adjunct to improved whistleblowing laws companies will see the overwhelming logic in enhanced internal mechanisms. This trend appears to be occurring in any event.

81. One important aspect of the design of the system is to, firstly, recognise that it is an ameliorating consideration in terms of the penalty imposed on a company found to have engaged in wrongdoing that it has acted on internal whistleblower information and self-corrected its conduct. Secondly, structuring the arrangements should be considered so that a whistleblower is strongly incentivised to internally report as their first action (but with an explicit acknowledgment that a disclosure to a regulator can occur at any time).

82. On the second of these issues, a similar position is adopted in SEC Rule 21F-6(a)(3) which provides that the amount of any bounty shall be positively impacted if the whistleblower reported the information through internal processes and assisted any internal investigation and SEC Rule 21F-6(b)(3) which provides the amount of any bounty will be negatively impacted by any interference with internal processes or false statements that hindered internal attempts to investigate.[21] The SEC has noted that it adopted this principle late in its commentary process as a result of submissions made to it and that it considers this provision important from a policy perspective to encourage appropriate corporate behaviour.[22]

83. In the context of listed entities, one area that might assist in encouraging compliance is to require the listed entity to disclose in its annual report the internal systems it has in place to facilitate whistleblowing, how whistleblowing disclosures are assessed and escalated within the entity, whether whistleblowing reporting has occurred in the financial period and how the entity dealt with and responded to the disclosures (disclosure to be made generically to preserve confidentiality). This type of disclosure requirement would be best dealt with in relevant listing rules rather than in whistleblowing legislation itself.

32. If internal procedures are required should any breach of these be the subject of internal disciplinary action or should responsibility for enforcement be undertaken by ASIC or another external regulator? What would be a potential mechanism for oversight and monitoring of internal company procedures by a regulator? Could it be modelled on the UK FCA's approach?

84. Assuming internal procedures are required, breaches should be subject to internal disciplinary action (as guided by published material by ASIC or the oversight agency) in the first instance, before referral to ASIC or another external regulator, as appropriate.

85. Every business and its internal systems will be unique. The Law Council supports a principles based approach like the UK Financial Conduct Authority approach which

[21] SEC Rule 21F-4(c)(3) also provides that internal reporting is also relevant to the assessment of whether the whistleblower has contributed original information.
[22] See U.S. Securities and Exchange Commission, "Implementation of the Whistleblower Provisions of the Securities Exchange Act of 1934", Release No. 34-64545 at 6-7, 101-07, 228-237 available at www.sec.gov/rules/final/2011/34-64545.pdf.

will ensure internal systems and checks can be flexible and tailored to the circumstances of each business.

86. The Foreign Corrupt Practices Committee does not support such provisions. However, it has noted that the absence of effective internal procedures should bear upon considerations of penalty.

33. Should the Corporations Act establish a role for ASIC or another body to protect the interests of and generally act as an 'advocate' for whistleblowers?

87. The Law Council does not believe ASIC, or any other regulator, should act as an advocate for whistleblowers, nor should private enforcement options be entertained. However, the Law Council notes that an independent oversight agency should be established which, while not an *advocate* for whistleblowers, should provide an avenue for whistleblowers to disclose information, seek *general* advice about the protections to which they are entitled and to commence the process for compensation, where appropriate.

88. The Law Council does not support the enactment of a law similar to the *False Claims Act* (US) which allows *qui tam* actions, as this would effectively allow whistleblowers to step into the role of the regulator in prosecuting misconduct.

34. Should alternative private enforcement options be considered instead?

89. If the above, measures are adopted the Law Council does not believe there is a need for additional alternative enforcement actions. The Law Council would expect that there would be a role for litigation funders and plaintiff law firms within the existing legal structure if a rewards regime was introduced.

35. Should reforms be extended to the industries regulator under the other legislation identified above, including the credit legislation? If so, should the reforms be uniform across all similar legislative whistleblowing regimes, even those not named in this paper?

36. Please provide your views on how the proposed reforms should be best structured and rationale.

90. The Law Council considers the enactment of an overarching, uniform whistleblower protections act would be the most efficient way to ensure all whistleblowers are afforded the same protections and where appropriate, avenues for compensation. The reforms should be extended equally to industries regulated under other legislation. The Law Council envisages that an independent oversight agency would be established under this Act and would have a clearly defined role (discussed further below).

91. Alternatively, the Law Council would support harmonised reforms to the Corporations Act, equivalent whistleblower legislation (e.g. for the banking, insurance, and superannuation industries), and to the tax law to implement the proposed protections.

37. Please comment on any other matters you believe the Government should consider in strengthening the protections available for corporate whistleblowers.

92. The Law Council submits that the whistleblowing laws should explicitly override any contractual confidentiality requirements and render ineffective any contractual agreement that would prohibit whistleblowing to any regulatory body (other than confidentiality in the context of a tax adviser or legal adviser relationship). In that regard, the Law Council notes the provisions of paragraph 21F(e) of the United States *Securities Exchange Act*..[23]

93. As noted in the Overview above, the legislation should contemplate reviews of the way in which the regulators have been and will exercise the powers that are vested in them to ensure that any new whistleblowing rules that are introduced are properly applied and pursued by them. As noted, such a review mechanism will assist in ensuring regulators are able to properly and effectively enforce the law.

38. Are the proposed categories of persons who can be a tax whistleblower appropriate?

39. Are there any other categories of individuals that should be included or excluded?

94. The Law Council considers the proposed categories of persons are appropriate, as noted above. That is, the Law Council would support an expansion of the definition of a qualifying whistleblower for the purposes of the Corporations Act to include former officers, staff and contractors. The definition should include unpaid workers, auditors and business partners or joint venturers, and clients of the company. With respect to professional advisors, there needs to be confirmation of their duties of confidentiality to clients, contractual obligations and any obligations imposed by professional bodies, statutory and otherwise (for example, the Tax Practitioners Board) and that legal professional privilege remains paramount.

40. Do you consider the proposed protections for a tax whistleblower's identity to be appropriate?

41. Do you consider the proposed protections against retaliation for tax whistleblowers to be appropriate?

95. As noted above, the courts and tribunals have satisfactory processes for dealing with confidential information. Accordingly, the Law Council does not consider that the requirement of confidentiality should apply to disclosures to a court or tribunal.

96. The proposed protections for a tax whistleblower's identity and against retaliation in line with the AUS-PIDA and the RO Act are appropriate. These protections should apply equally to corporate whistleblowers.

[23] *Securities Exchange Act 1934* Pub L. 73-291, 48 Stat. 881.

42. Should the scope of disclosures protected be determined by an objective test requiring the disclosure to be made on 'reasonable grounds'?

97. Please refer to the Law Council's response to Consultation Paper question 4 for the Law Council's view on the determination of the general scope of disclosures.

98. The Law Council considers that the scope of disclosures could be limited by an objective test requiring the disclosure to be made in circumstances where there were *reasonable grounds* for the disclosure to be made.

99. Questions concerning the whistleblower's subjective intentions / motives for making the disclosure should not be relevant to this test.

100. Given the complexity of the legislative provisions in question, there may be some difficulties in determining whether a disclosure of tax avoidance is being made on reasonable grounds, however that should not preclude such disclosures from being protected.

101. The regulator (the ATO in this case) should implement a clear series of checks and balances, which are publicly known, to show how they would deal with these tests.

43. Do you agree that tax whistleblowers should be able to disclose information anonymously?

102. Please refer to the Law Council's response to Consultation Paper question 6 for the Law Council's view on anonymous whistleblowers.

44. How should the claim process for tax whistleblower compensation work?

45. Are the proposed remedies for tax whistleblowers that are disadvantaged as a result of making a disclosure sufficient?

103. Please refer to the Law Council's response to Consultation Paper question 21 for the Law Council's view on the compensation process.

46. Do you agree with tax whistleblowers only being protected when disclosing information to the ATO to preserve the confidentiality of tax protected information?

104. As noted above, other than internal disclosure through the relevant corporate whistleblower program, tax whistleblowers should disclose information to the ATO in the first instance and should be protected when doing so. Tax whistleblowers should also be protected if they disclose information to the IGOT, any oversight agency that may be established, or any other government agency. Those entities, and any other entities to which the information is subsequently provided should be under the same obligation to maintain confidentiality.

47. Should tax whistleblowers be able to receive the proposed protections when disclosing to internal or external individuals?

105. Both corporate and tax whistleblowers should be afforded the proposed protections when disclosing to internal individuals provided that those individuals to whom the information is disclosed are appropriate recipients of the information (e.g. senior management or persons responsible for the internal whistleblower arrangements, if any).

106. As noted above, the Law Council does not consider that the whistleblower protections should be available to whistleblowers who disclose information to third parties such as the media or members of parliament. There are few controls imposed or enforced in relation to the ways in which the media use information provided by the public. As noted above, there is no obligation on the part of the media to maintain confidentiality and protect the whistleblower's identity. Nor can the media protect the whistleblower from any retaliation which may arise as a result of the media's portrayal of the information disclosed. Further, the media does not have a duty to remain impartial or ensure the information is credible and substantiated before publicising it.

107. The whistleblower protections should encourage whistleblowers to work with the regulators who have the authority to investigate and address the misconduct disclosed by the whistleblower. Legislative protections for disclosures to the media do not support this purpose.

48. To what extent should the Commissioner be able to use information disclosed under the proposed tax whistleblower system to make income tax assessments?

108. The Commissioner should only be able to use information disclosed by a whistleblower to make income tax assessments once the information has been verified and the matter has been properly investigated. The information should then be used in accordance with the normal processes undertaken by the Commissioner for raising amended assessments.

109. The Commissioner should not be able to issue assessments based on whistleblower information until the investigation has been concluded. The existing requirements currently imposed on the Commissioner to be satisfied that the relevant tax liability exists in order to make a determination must still apply and should not be watered down by the proposed reforms. The taxpayer should have the usual objection and appeal avenues available to dispute any such assessment.

49. Do you consider a reward system should be introduced for tax whistleblowers?

110. A reward system should not be introduced for tax whistleblowers.

111. While the Law Council acknowledges that a reward system may serve as an incentive to certain whistleblowers to come forward and that businesses may be more motivated to not only avoid unlawful behaviour in the first place but also to ensure that they have appropriate internal measures in place to allow whistleblowers to raise concerns internally and to address such concerns before they are escalated to a regulator, it is not appropriate that whistleblowers should be rewarded with a share

of or any form of payment that relates to taxes which are required to fund public expenditures.

112. Concerns have been raised in international jurisdictions for many years about the dangers of a reward system for whistleblowers.

113. Specific difficulties with the US system for tax whistleblowers are illustrated by the examples below and should be considered in the design of any tax reward system. In 1999 the 4th Circuit Court of Appeals warned that excessive rewards drew in whistleblowers *like moths to the flame*, when it dismissed a case against Roche Biomedical by two employees who had already received US$833,000.

114. Further, public disclosure of rewards may open the doors to claims against the decision maker by whistleblowers who expect to receive a particular amount based on other cases.

115. However, if a reward system is introduced, any reward offered to a whistleblower should be discretionary and should not be excessive. Rewards should only be offered following completion of an investigation, once all avenues of appeal are exhausted, and should not be publicly disclosed. The Law Council acknowledges that this can mean a significant time passes before a whistleblower receives an award (if any), but considers this will provide a balance and ensure procedural fairness is afforded to the company or taxpayer.

116. This will also ensure cases such as Douglas Durand and TAP Pharmaceutical Products (**TAP**) are less likely to occur. In that case, Mr Durand spent many years gathering evidence of purported fraud by TAP and assisted the US government with investigations for which he was paid US$126 million. However, throughout the process, it became apparent that many of the claims Mr Durand had made were untrue and ultimately the employees indicted throughout the process were exonerated. On balance it is preferable for a whistleblower to be required to wait out the process to receive any reward, than to be paid a reward which may later be required to be recovered where it becomes apparent that the whistleblower's information was unsubstantiated.

117. There should also be limited, if any, scope for a whistleblower to dispute the provision or amount of an award. As noted, the regulator should not be obliged to keep a whistleblower informed throughout the process. If a whistleblower has a right to dispute an award, in circumstances where the regulator does not pursue an investigation, the whistleblower may seek justification from the regulator as to why the investigation was discontinued under the relevant freedom of information or administrative review laws. This would cause undue burden on the regulator as well as the courts and tribunals which would hear such matters.

118. A recent example of this occurred in the US in August 2016 where the Tax Court considered the character of proceeds which should be included when calculating the reward to which a whistleblower is entitled. The Tax Court held that the value of criminal fines and civil forfeitures count towards the *collected proceeds* used to calculate a whistleblower's award. The IRS had taken the position that only money collected under legal obligations in the Internal Revenue Code should count towards the whistleblower's reward. The Tax Court however, held that the expression *collected proceeds* requires a broader interpretation than that which has been applied by the IRS, noting that Congress could have specifically defined the expression if it were intended to be limited. The Tax Court considered the ordinary

meaning of the expression and described it as a *sweeping term* which includes *all proceeds collected by the Government from the taxpayer*.

119. One of the most high profile whistleblower cases, and one which demonstrates why Australia should not seek to mirror the US whistleblower system, is that of Brad Birkenfeld, a former banker for UBS AG. The information provided by Mr Birkenfeld assisted the IRS to collect over US$5 billion in revenue. However, Mr Birkenfeld was a party to the activities in respect of which he blew the whistle and served time in prison for abetting tax evasion. Despite his involvement in the misconduct, Mr Birkenfeld was awarded US$104 million for the information he provided to the IRS.

120. The reforms should not encourage whistleblowers who are motivated by self-interest. Reward systems in international jurisdictions have created a niche market in which lawyers routinely package up claims for whistleblowers and a range of how to guides have been published (eg The Whistleblower's Handbook by Stephen Kohn, a leading whistleblower attorney in the US).

121. The Law Council does not support a system which allows people to profit from their involvement in crime or misconduct. Accordingly, a whistleblower who participated in the unlawful behaviour should not be entitled to a financial reward under any circumstances.

122. Where there is evidence of contrition and remorse, the regulator may in its discretion take such remorse and cooperation of the whistleblower into consideration when determining the consequences of the whistleblower's involvement.

123. Further, for the reasons set out above in response to Consultation Paper question 42, careful consideration needs to be given towards the scope of the tax disclosures that are to be protected.

50. If Australia were to introduce a reward systems for tax whistleblowers what structure should the Government consider implementing?

124. The Law Council's response to this question is provided under Consultation Paper question 49 above.

51. Should a whistleblower be entitled to a reward if they participated in the tax avoidance behaviour?

125. The Law Council's response to this question is provided under Consultation Paper question 49 above.

52. If a reward system were to be adopted should a threshold (i.e. the amount recovered by the ATO) be established to determine when whistleblowers are rewarded?

126. A reward system should not be introduced. However, without limiting this submission, if there were a reward system, there should be a minimum threshold (e.g. in terms of the revenue that is collected by the ATO or penalties that are imposed by ASIC) such as under Canada's 2012 Economic Action Plan, and a moderate cap on the maximum reward payable.

127. The Law Council would not recommend the provision of *a proportion of* the revenue collected to whistleblower as a result of the information provided as this does not support the general policy of the revenue system. The purpose of imposing tax is to raise revenue for government expenditure on matters of public benefit such as hospitals, infrastructure, roads and transport, and education. Payment of rewards to whistleblowers does not serve the policy of the revenue system. The amount of the reward itself should not be referrable to or a proportion of the revenue collected or penalties imposed.

53. Do you agree that the proposed tax whistleblower protections should include provisions preventing the disclosure of taxpayer information to the informant?

54. Do you agree that the ATO should be prevented from providing whistleblowers with information relating to progress of investigations?

128. The three main circumstances in which a whistleblower would be inclined to request taxpayer information or updates from a regulator on the status of an investigation:

    a. where the whistleblower's complaint has a personal element;

    b. where the whistleblower expects a reward; and

    c. where the whistleblower fears retribution.

129. As a general comment, whistleblowers should not be provided with information relating to the progress of investigations. Once a whistleblower has provided the information they wish to disclose, it becomes a matter for the relevant regulator to investigate. A requirement to provide a whistleblower with information relating to the progress of an investigation may give the whistleblower a misguided impression that the investigation is on behalf of that whistleblower personally.

130. From a policy perspective, whistleblower protections are not intended to encourage individuals to come forward with personal grievances against companies, taxpayers or otherwise. Accordingly, there should be no obligation on the regulatory authority and no expectation on the part of the whistleblower that they should be kept informed throughout the process or provided with reasoning as to the action or inaction taken.

131. There will be circumstances in which the regulator chooses not to pursue an investigation. The regulator should not necessarily be obliged to provide the whistleblower with a reason why it did not proceed with the investigation.

132. However, it may be best practice to provide a form of notice to the whistleblower outlining that the matter has been closed without further investigation, why the investigation did not proceed, and next steps for the whistleblower if they are unhappy with the decision (e.g. referral to the oversight agency, discussed below).

133. A whistleblower who, from the outset, expects a reward pending the outcome of an investigation is likely to have a personal interest and wish to be informed throughout the process. As noted above, any reward should be at the absolute discretion of the relevant body.

55. As part of the new protections for tax whistleblowers should an existing body be empowered (or a new body be established) to protect the interests of tax whistleblowers? Should it be empowered to take legal action on behalf of the whistleblowers?

134. The IGOT would be best placed to protect the interests of tax whistleblowers where the reforms are introduced by way of amendments to existing legislation. Alternatively, if the reforms are enacted under a uniform whistleblower protections Act, the Committee would support the establishment of a new, independent oversight organisation or agency which would oversee the operation of harmonised whistleblower legislation or a new uniform whistleblower protections Act. Depending on the path chosen to give effect to the reforms, the IGOT or the new organisation should be able to provide general advice on the protections available to whistleblowers and should be able to oversee investigations undertaken by government agencies as a result of whistleblower information.

56. If an oversight body was to be established should it solely focus on tax whistleblowers or act as a wider whistleblower oversight agency?

135. Consistent with its view on the proposed expansion of the definition of qualifying whistleblower under the Corporations Act, the Committee considers that whistleblower protections, and any oversight body established, should be for both tax and corporate whistleblowers equally where the reforms are introduced through a uniform whistleblower protections Act. Where the reforms are given effect by amendments to existing legislation, the Committee considered that the IGOT would be best placed to oversee protections for tax whistleblowers.

57. Are there any other protections that should be offered to tax whistleblowers?

136. As noted above, the proposed protections outlined in this submission should be adequate for tax and corporate whistleblowers alike.

137. Separately, we submit that consideration could be given to whether the tax whistleblower regime should be made retrospective. This may better align with the corporate whistleblower protections in Australia.

58. What are the interactions, if any, between these proposed protections and professional advisors' fiduciary including legal professional privilege or ethical obligations?

138. Client legal privilege is a right for a client of a lawyer not to have their communications associated with legal advice or impending litigation disclosed without their consent. The benefit is for the client, not the lawyer. The Law Council regards client legal privilege as a fundamental civil right and a pillar of the Australian legal system. It ensures full and frank discussions between legal advisers and their clients, which promotes the administration of justice and encourages compliance with the law.

139. Legal professional privilege should not be eroded as a result of the implementation of any effective whistleblower regime.

140. Legal professional privilege protects the disclosure of certain communications between a lawyer and a client when such communications are for the dominant purpose of seeking or providing legal advice, or for use in existing or anticipated legal proceedings.

141. The purpose of legal professional privilege is to encourage full and frank disclosure by clients to their legal advisors without fear that information disclosed will be used against them. Legal advisors and other professional advisors (for example, tax agents) who have a duty of confidentiality to their clients should not be protected under the proposed reforms where they disclose information provided to them by their clients in confidence. Legal professional privilege, obligations under Legal Profession Uniform Law, under the *Tax Agent Services* Act 2009 (Cth) and any professional ethical obligations should not be watered down or adversely affected by the proposed whistleblower protections.

142. Advisors who are subject to a duty of confidentiality should not be required to breach that duty to assist an investigation by a regulator initiated as a result of whistleblower information.

143. The potential interaction between legal professional privilege and whistleblower protection may arise when in-house counsel or external legal practitioners advise corporations or government agencies. A key aspect of this interaction is that privilege does not attach to communications in furtherance of an illegal or improper purpose.[24]

Charities and not-for-profit organisations

144. There is no specific protection for whistleblowers under the *Australian Charities and Not-for-profits Commission Act 2012* **(ACNC Act).** However, if a person wishes to raise a concern, the Australian Charities and Not-for-profits Commission (**ACNC**) advises that a person is entitled to do so anonymously or using a pseudonym, where reasonable. The ACNC directs the person to its privacy policy. In the 2015-16 ACNC *Annual Report*, ACNC reported that 930 concerns were raised. However, two thirds of these concerns were from members of the general public who would therefore not be covered by any whistleblower protections in the FWRO Act. Thirty-four per cent of concerns related to compliance issues.

145. The FWRO Act has been extended to expand the identity of whistleblowers to former employees, contractors as well as employees ((337A (a)). This will not protect those insiders in charities and other not-for-profits who are volunteers and not employees. This can be particularly important for patrons, advisory board and board members as almost all of these are volunteers in the charity and not-for-profit sector. The Senate Economics References Committee, in its "Final Report - Performance of the Australian Securities and Investments Commission (26 June 2014)" recommended changes which include extension of the definition of whistleblower to 'unpaid workers', but this has not been taken up. The ACNC Annual Report 2015-16 indicates that an equal number of concerns regarding charities were raised by volunteers as were raised by employees. This percentage supports an extension of whistleblower protection to volunteers.

[24] *Evidence Act 1995* (Cth), s 125. See also *Baker v Campbell* (1983) 153 CLR 52 at 409-410; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 147, 156, 159, 161; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 514-515; *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 at 514.

146. The FWRO Act defines *disclosable conduct* as an act or omission that:

    a. contravenes, or may contravene, a provision of the FWRO Act, the Fair Work Act; or

    b. the Competition and Consumer Act 2010 (Cth) (**CAC Act**); or

    c. constitutes, or may constitute, an offence against a law of the Commonwealth.

147. This will have limited application to charities and not-for-profits, subject to the extent to which they are governed by the CAC Act. The extent to which there is corresponding State legislation affecting state governing laws will be important.

148. It is noted that section 1317AA of the *Corporations Act 2001* (Cth) applies to protect certain disclosures but only in relation to a contravention of the *Corporations Act 2001* (Cth). This protection can only assist in relation to those charities and not-for-profits which are corporations formed - under that legislation or falling within its purview - which most charities and not-for-profits do not. In addition, section 1317AA only protects employees and not volunteers, such as unpaid directors.

149. The key overseas legislation in UK and US is either based on corporations law (Sarbanes-Oxley Act 2002 (US)) or employment law (PIDA (UK)), similar to the approach in Australia. Breaking the strict nexus to either corporations legislation or employment law would have the widest application in the charity and not-for-profit context.

150. The extensive protection, anti-reprisal and investigations provisions are very formal in nature and while on the one hand might offer comfort to whistleblowers, they may also, in the case of organisations of the typical size and nature of not-for-profits, give the impression that it is 'all too hard'. Consideration of the "fit for nature" as well as the purpose of the process is required - either in legislative drafting (e.g. incorporating internal resolution steps) or communication and education. This underscores the need for some appreciation of the not-for-profit sector by the regulator if the protections are to extend to that sector as is the preferable position.

151. The choice of the 'whistleblower' regulator, apart from the ABCC, will be important. In line with the point made in the preceding paragraph the regulator should have an appreciation of the voluntary nature and nuances underpinning most charity and not-for-profits. It will be important to ensure that any additional regulatory supervision is not further or unnecessarily fragmented nor burdensome so as to discourage voluntary participation in society.

152. As noted above, the Law Council considers that it is generally not appropriate to extend whistleblower protection for public interest disclosures to third parties or the media. It is critical that any whistleblower protection framework encourages disclosure to the appropriate regulator, so as to ensure the integrity of the protection framework generally and also to ensure that disclosures are properly investigated.

153. In summary it would be preferable for whistleblower protections to be extended to the not-for-profit sector - but not at any cost. The burden of any additional responsibilities must be weighed against the benefits with supporting and encouraging volunteering and philanthropy as the yardstick against which proposed changes are to be measured. This requires some appreciation of the uniqueness of

the not-for-profit sector in both formulation and implementation of proposed changes.

Conclusion

154. The Law Council believes the proposed changes to existing corporate whistleblower protections and the introduction of tax whistleblower protections would be very positive steps and that the benefits of such reforms will be well received. The proposed reforms will encourage greater transparency and accountability in business and will provide assurance to whistleblowers that they will be protected.

155. The Law Council would be happy to provide further assistance, or discuss any of the above submissions, if it would assist.