Mr Alan Raine
Committee Secretary
Senate Economics Legislation Committee

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

9 February 2024

Inquiry into Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

Dear Committee Secretary

Thank you for the Committee's invitation to provide a submission to the inquiry into Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (**the Bill**).

This letter comprises a joint submission from the Human Rights Law Centre, Griffith University's Centre for Governance & Public Policy, and Transparency International Australia. This submission pays particular attention to the relevant proposals in respect of proposed improvements to whistleblower protections in Schedule 2 to the Bill.

The Committee's present inquiry concerning the Bill follows the consultation by Treasury arising from the PricewaterhouseCoopers (**PwC**) scandal, in which confidential information acquired from Treasury by certain PwC partners was shared across the firm, among other matters. We also made a submission to Treasury in relation to its consultation, a copy of which has been published by Treasury.[1]

As noted in our submission to Treasury, the PwC scandal highlighted the gaps in Australia's whistleblowing framework with the result that it is currently failing those who seek to speak up about wrongdoing, including tax whistleblowers. Such gaps and the present shortcomings of existing provisions damage the integrity of the public sector and Australia's regulatory frameworks concerning tax practitioners, and beyond.

Accordingly, we welcome the proposed reforms in Schedule 2 to the Bill to extend tax whistleblower protections, namely to:

1. Enable whistleblowers to make protected disclosures to the Tax Practitioners Board (**TPB**) where the discloser considers the information may assist the TPB

[1] Human Rights Law Centre, Griffith University and Transparency International Australia, 'Response to PwC – Whistleblower Protections' (4 October 2023): Consultation hub | Response to PwC – whistleblower protections - Response to PwC - Consult hub (treasury.gov.au) (last accessed 16 January 2024).

to perform its functions and duties (including when the information is provided via the Commissioner); and

2. Protect whistleblowers when they make eligible disclosures to additional entities.

The Bill provides for limited additional categories of disclosure recipients, including a medical practitioner, a psychologist, or an entity prescribed in the regulations. There is therefore only a possibility that any further additional entities may be prescribed in the regulations in the future. We would instead support including further additional recipients in the Bill itself, including professional associations, bodies that represent the professional interests of disclosers, and registered trade or industry unions, with further potential entities to be prescribed in the regulations. These additional categories were included in the exposure draft published by Treasury for consultation, but are now not in this Bill.

Necessary amendments to provide for the appropriate protection of sensitive tax information (including, for example, to provide that a contravention of such requirements constitutes an offence) should also be considered to accommodate such an expansion to the categories of recipients of disclosures.[2] Given the hardships faced by whistleblowers, extending the categories of recipients would provide them with much-needed support and would reduce the confusion and complexity for whistleblowers who seek a clear pathway to disclose wrongdoing, alongside accompanying protections for sensitive tax information. Sufficient flexibility should also be retained to allow for further eligible recipients to be prescribed in the accompanying regulations. However, we believe – contrary to the change between the exposure draft and the Bill – that further core categories of disclosure recipients should be 'baked into' the Bill rather than left for regulatory discretion.

For the avoidance of doubt, we also support the prescription in future accompanying regulations to expressly list the TPB and the Commissioner of the Australian Charities and Not-for-profits Commission (**ACNC**) as authorised recipients of confidential information to effectively facilitate the sharing of such information more effectively between the Commissioner of Taxation, the TPB, and the ACNC, and such provisions allow a person to disclose confidential information to the TPB or the ACNC about a discloser who has made a qualifying disclosure, without committing an offence under the legislation. In light of our recommendations to expand the scope of eligible recipients, further consideration should also be given as to any appropriate additional entities that may be prescribed in the accompanying regulations for the purpose of section 14ZZW(2)(d) of the *Taxation Administration Act 1953* (**TAA**).

We are supportive of the reversal of the burden of proof requirements where a whistleblower makes a claim for protection under Part IVD of the TAA but only to the extent articulated in the Bill i.e. in accordance with the proposed amendment to insert section 14ZZXA to require the individual claimant to bear the onus of adducing (or pointing to) evidence that suggests a 'reasonable possibility' that the claim is made out, on the basis that this brings the TAA in line with the burden of proof requirements in section 10 and section 23 of the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***). However, the nature of the jurisdiction in the contemplated separate proceedings in s 14ZZXA of the *TAA* should be clarified in the Bill given there may otherwise be uncertainty in this regard at present. In *Boyle v Commonwealth Director of Public*

[2] See Explanatory Memorandum to the Bill [2.11] – [2.12].

Prosecutions [2023] SADC 27 (***Boyle***), Judge Kudelka considered, in relation to the pleading of the immunity in defence of a criminal prosecution, that the separate proceedings took the nature of civil proceedings,[3] and hence a balance of probabilities standard applied. This finding has been appealed to the Court of Appeal of South Australia and judgment is presently reserved.

Comprehensive Reform Essential

Despite our broad support for the proposed reforms in Schedule 2 to the Bill as outlined above, in order to ensure any reform for improved whistleblower protections is as effective and enduring as possible, a comprehensive, consistent, and holistic reform of Commonwealth whistleblower protection legislation should occur. This includes ensuring the present inquiry in relation to the Bill is informed by other highly relevant reform processes which are presently underway (or will be underway shortly), including but not limited to the present Stage 2 *PID Act* consultation and the statutory review of the *Corporations Act 2001* (Cth) (***Corporations Act***) which is required this year pursuant to section 1317AK of the *Corporations Act*. A whole of government approach necessitates consideration of these relevant processes to ensure that the present inquiry is not isolated or swiftly rendered redundant once these public and private sector reform processes have progressed.

Consistent with our previous submission to Treasury, we strongly recommend that the best way to protect tax whistleblowers is to include the proposed amendments in a reformed, state-of-the-art whistleblower protection law which covers all employers and entities under Commonwealth legislation or subject to Commonwealth regulation, rather than separate legislation solely designed to address misconduct in respect of tax practitioners. It is clearly intended that the proposed reforms in Schedule 2 to the Bill seek alignment with at least the *PID Act* procedures regarding claims for protection,[4] with the *National Anti-Corruption Commission Act 2022* regime for disclosures for improved whistleblower support[5], where possible. It would be a missed opportunity if such alignment were to occur with current versions of such legislation which are likely to be the subject of substantive reform in the near future. We therefore endorse the recommendation made by the Parliamentary Joint Committee (**PJC**) in 2017 that Commonwealth private sector whistleblowing legislation *(including tax)* be brought together into a single and consistent Act.[6] Anything short of this approach would continue to codify the disparity in the Commonwealth whistleblower protection framework, which would be compounded each time amendments are made to each act.

The current whistleblower protection framework – which includes the TAA – is inconsistent, features overlapping regimes, and is suffering from the absence of an oversight body such as a whistleblower protection authority. Effective whistleblower protections – including for tax whistleblowers – require a consistent, harmonised, and holistic regulatory approach in order to:

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[3] *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [10]-[12].
[4] Explanatory Memorandum, [2.17].
[5] Explanatory Memorandum, [2.13].
[6] Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors. September 2017 (Steve Irons MP, Chair). Recommendation 3.1.

- Reduce the impact of the current inconsistencies across the current Commonwealth whistleblower framework and minimise future inconsistencies;
- Ensure whistleblowers receive consistent and effective protection and support, irrespective of the nature of wrongdoing they seek to disclose; and
- Simplify the complexity of the current legislative framework which acts as a barrier to potential whistleblowers and places a significant regulatory burden on entities, particularly in circumstances involving multiple and/or overlapping regimes.

Protection for Receipt of Disclosures

As above, we support expanding the categories of eligible individuals and organisations who can receive disclosures from whistleblowers including medical practitioners, psychologists, professional associations, bodies that represent the professional interests of disclosers, and registered trade or industry unions, subject to appropriate protections for sensitive information. An additional required safeguard, though, is the need for sufficient protections for recipients.

The present immunity under existing legislation only protects the *discloser* from liability for making a protected disclosure. In light of our experience in practice, we remain concerned that recipients, particularly those recipients who are not legal practitioners (where the disclosure is already protected by legal professional privilege), may be subjected to allegations of inducement to breach confidentiality obligations and similar claims, even in circumstances where such claims have no foundation. This may act to further hamper the whistleblower in their attempts to seek assistance and support to do the right thing. Accordingly, we consider it desirable to remove this possibility by amending the legislation (by amending section 14ZZX of the *TAA*) to provide that a recipient is also immune from liability for *receipt* of a protected disclosure. This is pertinent in circumstances where the categories of recipients is expanded under the legislation. In the absence of such an amendment to afford sufficient protections to eligible recipients, the utility of expanding the category of potential eligible recipients may have a limited impact in practice due to perceived risks on the part of would-be eligible recipients of heightened potential exposure to claims in the absence of express protections.

Effect of *Boyle*: express clarification required as to scope of immunity

On the current state of the law, whistleblowers are **not currently protected** for processes that are reasonably necessary to the making of the disclosure such as making photocopies or capturing any document or similar acts that are otherwise anterior to the making of a disclosure. There is ongoing uncertainty as to the scope of the scope of the immunity in section 10 of the *PID Act* (section 14ZZX in the Bill provides an equivalent immunity in the *TAA*) following the determination of Judge Kudelka in *Boyle* that the immunity in section 10 of the *PID Act* protects the *making* of the disclosure alone, and does not extend to any anterior conduct – even conduct reasonably necessary to making a disclosure.[7] The issue is currently before the Court of Appeal of South Australia, and the Human Rights Law Centre has made submissions as *amicus curiae* in favour of a broader construction of the immunity that protected anterior conduct that was reasonably necessary to the making of the disclosure. We consider this broader construction is consistent with the beneficial intent of the

[7] *Boyle* at 7 [195] – [237].

legislation and that it would otherwise also avoid perverse consequences. The Court of Appeal is presently reserved.

In the absence of any determination at the appellate level on this issue, it would be prudent for the scope of the immunity to be expressly clarified by an amendment to s 14ZZX of the TAA via the Bill, to clarify that the immunity protects the making of the disclosure and prior acts that are reasonably necessary to the making of the disclosure. Otherwise, in light of the *Boyle* decision, in the absence of such an amendment, the immunity in the *TAA* would be defeated by the whistleblower's employer taking administrative or civil action – not in relation to the disclosure itself, but the photocopying of the documents or similar.

For these reasons, we make the below recommendations in relation to the Bill for the purposes of the present inquiry.

Recommendations

Recommendation 1: That the regulation and protection of whistleblowing in relation to tax practitioners (and others) be enhanced by the adoption of the comprehensive, uniform approach as previously recommended by the landmark report of the Parliamentary Joint Committee on Corporations and Financial Services (2017), namely by establishing **a single Whistleblower Protection Act** covering all non-government entities and employers and entities under Commonwealth legislation or subject to Commonwealth regulation.

Recommendation 2: That the Government pursue a comprehensive, consistent approach to whistleblower protections, including by establishing a standalone and independent whistleblower protection authority with jurisdiction, ultimately, to oversee and enforce both public sector and private sector protections (including in relation to tax whistleblowers).

Recommendation 3: That, in the absence of the introduction of a single Whistleblower Protection Act in accordance with Recommendation 1, the present inquiry supports the following amendments:

- all elements of the proposed reforms in Schedule 2 to the Bill to extend whistleblower protections for tax whistleblowers, in addition to the inclusion in the Bill of further additional eligible recipients, including professional associations, bodies that represent the professional interests of disclosers, and registered trade or industry unions, with further potential entities to be prescribed in the regulations, with due consideration given to provisions for the appropriate protection of sensitive tax information in light of the expansion of the categories of eligible recipients and any appropriate additional entities that may be prescribed in the accompanying regulations for the purpose of section 14ZZW(2)(d) of the *TAA*;

- an additional amendment to s 14ZZX of the *TAA* to expand the scope of the protection from any civil, criminal or administrative liability (including disciplinary action) to the recipient entities who assist disclosers in their professional capacity, eligible recipients, and legal practitioners in receipt of a protected disclosure for the purpose of providing legal advice or legal

representation, for *receiving* the relevant disclosure pursuant to the terms of the *TAA* and *Taxation Administration Regulations 2017* (***TAR***);

- a further amendment to s 14ZZX of the *TAA* to clarify and expand the scope of the immunity to ensure whistleblower protections extend to conduct reasonably necessary for the making of a disclosure;

- clarification to proposed section s 14ZZXA of the *TAA* in the Bill to specify the nature of the jurisdiction in the contemplated separate proceedings arising as a consequence of an immunity claim; and

- each of the overdue reform priorities also needed to make all *other* Commonwealth whistleblowing laws fit-for-purpose, as laid out in *Protecting Australia's Whistleblowers: The Federal Roadmap* (see **Appendix 1**) – particularly items 5-12 in that report to ensure our legal framework contains best practice protections and is otherwise streamlined and workable for all stakeholders.

We are content for this submission to be published. We would be pleased to provide more information if this would assist.

We can be contacted at kieran.pender@hrlc.org.au and a.j.brown@griffith.edu.au.

Kind regards,

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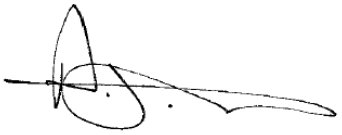

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