

Justice and International Mission Unit

130 Little Collins Street

Melbourne Victoria 3000

Telephone: (03) 9251 5271

Facsimile: (03) 9251 5241

jim@victas.uca.org.au

The Treasury

Langton Crescent  
Parkes ACT 2600  
E-mail: whistleblowers@treasury.gov.au

**Submission to Review of tax and corporate whistleblower protections in Australia**

**10 February 2017**

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia (the Unit) welcomes this opportunity to make a submission to the ‘Review of tax and corporate whistleblower protections in Australia’.

The Unit believes the Federal Government should introduce legislation to protect and reward whistleblowers that provide information to expose serious criminal activities in the private sector, including, but not limited to, tax evasion, bribery, fraud, human trafficking, forced labour, extortion, insider trading and money laundering, as well serious cases of tax avoidance. The experience of other jurisdictions is that whistleblowers are often a value source of information. For example, a 2007 study of corporate fraud in the US between 1996 and 2004 by Alexander Dyck, Adair Morse and Luigi Zingales found only 6% of frauds were uncovered by the US Securities and Exchange Commission (SEC) and 14% by auditors. By comparison 19% were exposed by employees and 14% by the media.[[1]](#footnote-1)

The Panama Paper, and the Luxembourg Leaks before them, highlight the important role whistleblowers play in combating tax evasion and tax avoidance..

The Senate Economics Committee report on ASIC previously recommended (Recommendation 15):

*…protections for corporate whistleblowers be updated so that they are general consistent with and complement the protections afforded to public sector whistleblowers under the Public Interest Disclosure Act 2013. Specifically, the corporate whistleblower framework should be updated so that:*

* *Anonymous disclosures are protected;*
* *The requirement that a whistleblower must be acting in ‘good faith’ in disclosing information is removed, and replaced with a requirement that a disclosure:*
  + *Is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or*
  + *Shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes;*
* *Remedies available to whistleblowers if they are disadvantaged as a result of making a disclosure are clearly set out in legislation, as are the processes through which a whistleblower might seek such remedy;*
* *It is a criminal offence to take or threaten to take a reprisal against a person (such as discriminatory treatment, termination of employment or injury) because they have made or propose to make a disclosure; and*
* *In limited circumstances, protections are extended to cover external disclosures to third parties, such as the media.*

Protection of whistleblowers in both the public and private sector was a commitment made by G20 countries in 2010 and 2012. See for example:

<https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/G20AntiCorruptionActionPlan.pdf>

1. **Do you believe that the Corporations Act categories of whistleblower should be expanded to former officers, staff and contractors?**

The Unit supports that whistleblower protections and rewards should extend to former officers, staff and contractors. The Australian Government should be seeking to encourage detection of serious corporate criminal activity such as tax evasion, fraud, bid ridding and bribery as well as tax avoidance schemes. The Unit has had experience of employees who allege they refused to assist in criminal activity ordered by their employer and had their employment terminated as a result. Part of the allegations made were that the business was involved in tax evasion. The ATO advised that before the now former employee made any disclosure of the alleged criminal activity they should seek formal legal advice as it was possible the employer engaged in the criminal activity may be able to take legal action against the former employee if they exposed the criminal activity. It is important that such people be able to report to the appropriate authorities evidence of criminal activity without the risk of legal action against them.

1. **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?**

The Unit supports that it should be made clear that whistleblower protections and rewards apply to categories including other people associated with the company such as a company’s former employees, financial services providers, accountants and auditors, unpaid workers and business partners.

1. **Are there any other types of whistleblowers that should be included, and if so, why?**
2. **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 could be considered instead.**

The scope of information protected and rewarded should include serious criminal offences including tax evasion, bribery, fraud, human trafficking, forced labour, extortion, insider trading and money laundering, as well serious cases of tax avoidance.

1. **Should the ‘good faith’ requirement be replaced by an objective test requiring the disclosure be made on ‘reasonable grounds’?**

The Unit supports an objective test replacing a ‘good faith’ requirement. The importance of encouraging whistleblowers to come forward is to foster greater detection of serious criminal activity by private corporations. The motivation of the whistleblower is irrelevant to the desirability to have the serious criminal activity detected. Thus the test for whistleblower protection should be that the whistleblower has an honest belief, based on reasonable grounds, that the information disclosed relates to serious criminal activity by the company involved.

1. **Should anonymous disclosures be protected?**

The Unit supports whistleblowers making anonymous disclosures being protected, consistent with *Public Interest Disclosure Act 2013* that applies to public sector employees. The Unit is aware of allegations of retaliation by employers on the Seasonal Worker Program against whole groups of employees from the Pacific on the suspicion that one of the employees has anonymously tipped off the Department of Employment or the Fair Work Ombudsman about exploitation on the Program or breaches the *Fair Work Act.* Private sector employees should be able to seek protection against such retaliation (even if they are not the source of the information but are subject to the retaliation as the employer is seeking to inflict collective retaliation) as well as compensation.

1. **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?**

Information provided by anonymous whistleblowers should be subject to rules limiting actions that might reveal the whistlblowers identity, except where serious harm to others might result. For example, in a case where anonymous information from a whistleblower reveals a company is involved in human trafficking should not stop those subject to the human trafficking being rescued from their situation even if it would expose the identity of the whistleblower. In such cases it is important the whistleblower, once exposed, is given the opportunity for protection, compensation or reward as appropriate.

1. **Should regulators be able to resist production of this information under warrants, subpoenas or Freedom of Information processes?**

In order to encourage whistleblowers to come forward and reveal information related to serious criminal activity being committed by private sector companies, it is important to provide incentives for people to come forward. If an anonymous whistleblower knows the information they have provided, which could allow their identity to be deduced, can be obtained through a warrant, subpoena or Freedom of Information process it will deter many whistleblowers. Therefore it is undesirable to allow these processes to allow the identity of the whistleblower to be deduced or revealed directly.

1. **Should the specified entities or people to whom a disclosure can be made be broadened? If so, which entities and people should be included?**

Whistleblowers should be able to make disclosures to relevant law enforcement agencies and regulators including, but not limited to, APRA, ASIC, the ATO, the Australian Federal Police, AUSTRAC, state police forces, the Fair Work Ombudsman, the Department of Immigration and Border Protection, the Department of Employment, the ACMA and the Registered Organisations Commission. In addition disclosure should be permitted to the company’s auditor.

1. **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 disclosures 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.**

As the Unit has suggested that protection and reward for whistleblowers should apply only in cases involving suspicion of serious criminal activity by the company or its employees, the whistleblower should be able to make disclosure directly to a relevant regulator or law enforcement agency, so that the information can be investigated. Where a the management of a company has authorised, sanctioned or ordered the serious criminal activity it is completely inappropriate that the whistleblower would need to report the information internally first. Further, in many cases the whistleblower may not know who in the company may be involved in authorising the criminal activity, so they should be able to make a disclosure directly to the relevant regulator or law enforcement agency.

The whistleblower should also be permitted to make disclosure to bodies, including lawyers and unions, in the process of seeking legal advice.

1. **What are the risks of extending corporate whistleblower protections to cover disclosures to third parties? How might these risks be managed?**

There is a risk that allowing corporate whistleblowers to disclose to third parties other than law enforcement and regulators could result in the information being disseminated more widely. This could unfairly tarnish a corporation where the information is untrue or misconceived and there is no criminal activity or serious tax avoidance taking place. Such a risk is negligible where the disclosure is to a legal professional acting in a client relationship.

1. **Do you believe there is value in a 'tiered' disclosure system being adopted similar to that in the UK?**

A UK styled tiered system would have less value in a regime where protection only extends to information related to serious criminal activity, as it is desirable such information is provided directly to law enforcement authorities or regulators to be dealt with rather than an internal disclosure that may tip off the perpetrators and allow them to take action to conceal the criminal activity from proper investigation. A tiered system would make more sense if whistleblowing protection is extended to a wider range of corporate wrong-doing where some forms of wrong-doing are best dealt with internal to the corporation rather than through consuming the limited resources of law enforcement and regulatory agencies.

1. **Should there be any exceptions in this context for small private companies?**

Small private companies should not be shielded from having serious criminal activity they are involved in exposed by a whistleblower. The size of the company should not provide any protection from being exposed to law enforcement agencies and regulators and held to account for serious criminal conduct.

1. **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)?**

The Unit believes that disclosure should be allowed for the purpose of seeking professional advice about whistleblowing protections, obligations, disclosure risks, compensation in the case of retaliation and reward (if available). This may also serve as a safeguard in stopping misconceived or trivial disclosures.

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

The Unit believes that while regulators and law enforcement agencies should be able to share information from whistleblowers for investigative and prosecutorial purposes, there is a need to require the regulators and law enforcement agencies to protect the identity of the whistleblower, where that identity is not already known to the corporation accused of criminal activity and where the whistleblower has not given their informed consent to have their identity revealed. As in the US, the exception should be where there is imminent danger to public health or safety or imminent violation of a criminal law involving a serious offence, that makes it necessary to reveal the whistleblower’s identity.

1. **To whom should the provisions apply to – Government agencies who receive the information or all recipients of the information or both?**

The provision to protect the identity of the whistleblower should apply to all recipients of the information, as fear of exposure without such protection will deter many whistleblowers from providing information about serious criminal activity that may be known to them.

1. **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?**

It would seem reasonable that courts and tribunals be allowed to access information provided the confidential character of the information and the whistleblower’s identity is maintained.

1. **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?**

In terms of procedural fairness, in the Unit’s proposed regime it is information relating to serious criminal activity where the whistleblower would gain protection and the right to compensation. The process envisaged is that the whistleblower provides the information to the law enforcement agency or regulator who then assesses the information and determines if an investigation is warranted. If the investigation finds sufficient evidence of serious criminal activity, enforcement action will follow in which the company or the individuals involved will be afforded procedural fairness during the enforcement action.

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

Provided there are adequate and thorough safeguards against law enforcement agencies and regulators revealing the identity of the whistleblower, or allowing the identity to be deduced, then it should not be necessary for law enforcement agencies and regulators to have to gain consent from the whistleblower in order to share the information for the purposes of an investigation. However, the law enforcement agency or regulator should be required to consult with the whistleblower before sharing the information with another agency or regulator to identify any risks the sharing of the information may expose the identity of the whistleblower and to take all reasonable steps to ensure that does not happen, unless the whistleblower has consented to having their identity revealed.

1. **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?**

The Unit believes that the current prohibition against victimisation of whistleblowers in the *Corporations Act* should be strengthened and brought in line with *Registered Organisations Act.*

1. **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?**

The Unit believes the existing compensation arrangements in the *Corporations Act* do need to be enhanced and a clearly defined path for compensation needs to be in the legislation. The Unit favours a stand-alone piece of legislation covering protection, compensation and reward for whistleblowers in the private sector, rather than amendment of the *Corporations Act.* In the stand-alone Act the provisions for compensation should largely mirror those that exist in the *Registered Organisations Act* in which the Court can award compensation, injunctions and other remedies to whistleblowers for detriment caused from a failure to prevent reprisals relying on actual or constructive knowledge. Exposure to adverse costs for the whistleblower is also mitigated when making compensation claims provided they have not been made vexatiously and do not constitute an abuse of process.

1. **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.**

As noted in the answer above, the Unit believes that the ability of whistleblowers to seek compensation should be aligned with the *Registered Organisations Act.* In order to encourage whistleblowers to provide information on serious criminal activity in the private sector, whistleblowers need the reassurance that if they are subjected to reprisal (often the loss of their job) they will be able to be properly compensated.

1. **What would be 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?**

In addition to whistleblowers being able to take court action, the Unit also supports the establishment of a Whistleblower Ombudsman that can provide compensation to whistleblowers on a confidential basis, where the whistleblower is unwilling or unable to run a court action.

1. **How should compensation be funded?**

The Ombudsman should be funded from a portion of the funds recovered by the Government from cases that result from whistleblower information. That is, for example, a whistleblower exposes a tax evasion scheme in which the Government recovers $100 million in unpaid taxes. Of the recovered $100 million then a portion, say 10% or $10 million would be placed in the Whistleblower Ombudsman compensation fund (and the Unit would support $10 million being offered to the whistleblower who exposed the case under a reward system).

1. **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?**

The Unit supports whistleblowers having the risk of adverse costs orders removed as per the *Registered Organsiations Act.*

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

Ideally whistleblowers would be able to expose corporate wrong-doing and be protected from retaliation. Where attempts at protection fail, then the next best outcome is that the whistleblower would be fully compensated for the retaliation and victimisation inflicted on them. However, despite the well-regarded UK *Public Interest Disclosure Act 1998* offering regimes for both protection of whistleblowers and compensation, in practice whistleblowers in the UK have still be subjected to retaliatory action and the compensation mechanisms have not always worked as well as intended. Many cases of compensation for retaliatory action are settled before proceeding to the employment tribunal. Hence a third line of effective encourage for whistleblowers is reward.

The US *False Claims Act* has been able to recover over US$44 billion since 1986 through lawsuits filed under the Act. In 2014 alone, recoveries from *qui tam* cases totalled nearly US$3 billion, with whistleblowers receiving US$435 million.

The provision of financial reward for whistleblowing has allowed the US to expose major cases of illegal activity against the US Government. Fraud has been detected at 50 times the rate before the amendments to the *False Claims Act* were made in 1986.[[2]](#footnote-2)

US laws that reward whistleblowers have both safeguards against making false claims and thresholds of action before a reward will apply. The fact that a reward will only be provided when the US Government recovers funds is a safeguard against people making false claims. The whistleblower will only get a reward if a court finds that the corporation in question has broken the law and is required to make financial payment to the government. If the court finds the whistleblower’s claims are false, then no reward follows.

In terms of thresholds, under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* the Securities Exchange Commission will only provide a reward where the information leads to an enforcement action yielding monetary sanctions of over US$1 million. This helps ensure that information brought to regulatory authorities is more likely to be of a serious nature pre-sorts whistleblower cases for the law enforcement or regulatory agency in question.

Against the idea of setting thresholds needs to be weighed the desire to address serious criminal activity in the private sector even where the sums of money involved may not be large, for example a labour hire business involved in human trafficking or forced labour.

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

As outlined in the previous question.

1. **If a reward system is established, how should it be funded?**

Further, the Unit would support a scheme where up to 10% of the funds recovered by government are offered to the whistleblower (in some cases the whistleblower may not wish to take a reward as they provided the information out of a sense of civic duty or moral concern) and 10% is paid into the Whistleblower Ombudsman to fund compensation and also to fund rewards in cases where the government does not recover money or impose a financial penalty on the corporation or individuals involved.

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

There are benefits to corporations having internal whistleblower systems that allow them to detect wrong-doing within their corporation, such as an internal fraud that is costing them lost money.

Corporations should be required to inform employees of any whistleblower protection, compensation and reward systems the Commonwealth Government establishes for whistleblowers in the private sector out of this consultation.

A requirement to have an internal whistleblower system would make sense for larger corporation (small to medium businesses may lack the size to be able to accommodate such a requirement), but for cases of wrong doing that fall below the threshold of serious criminal activity. The Unit remains of the view that serious criminal activity should be reported to law enforcement agencies and regulators in the first instance, rather than through an internal company system to avoid tipping off those involved in the serious criminal activity or the corporation dealing with the matter internally and avoiding justice being carried out. For example, a corporation learning of serious criminal activity by its employees may seek to avoid reputational damage and possible sanctions on the corporation by dismissing the employees involved and then not reporting the criminal activity to law enforcement authorities or regulators.

1. **Mandating internal disclosure systems for companies would 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.**
2. **Should systems for internal disclosure be considered for 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.**

Any mandated internal disclosure system will need to be catered to acknowledge the different resource capabilities of different sized companies. However, the Unit believes regardless of the size of a business companies should be required to inform employees of any whistleblower protection, compensation and reward systems the Commonwealth Government establishes for whistleblowers in the private sector out of this consultation.

1. **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?**
2. **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?**

The Unit supports the establishment of a stand-alone Whistleblower Ombudsman to ensure that disclosures are managed in a fair and consistent manner and to increase both the quality and quantity of whistleblowing. The Unit agrees with the discussion paper proposition that it would be better to have a comprehensive whole of private sector whistleblowing approach to ensure a more consistent and coordinated approach across industries and regulators, remove gaps and promote greater certainty.

The Whistleblower Ombudsman should be tasked with seeking to protect the interests of whistleblowers and act as an advocate for them.

1. **Should alternate private enforcement options be considered instead?**
2. **Should reforms be extended to the industries regulated 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?**

The Unit supports a comprehensive approach to provide whistleblower protection, compensation and rewards for the exposure of serious criminal activity in the private sector across credit legislation and other relevant legislation.

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

The Unit favours the establishment of a comprehensive law providing protection, compensation and rewards to whistleblowers in the private sector as a counter-part to the *Public Interest Disclosure Act* and including features from the *Registered Organisations Act*. The new Act is preferable as it should include features not in the *Public Interest Disclosure Act* such as a system of rewards. It should also include the establishment of a Whistleblower Ombudsman.

1. **Please comment on any other matters you believe the Government should consider in strengthening the protections available for corporate whistleblowers.**
2. **Are the proposed categories of persons who can be a tax whistleblower appropriate?**

The Unit supports the proposed categories of persons who can be a tax whistleblower.

1. **Are there any other categories of individuals that should be included or excluded?**
2. **Do you consider the proposed protections for a tax whistleblower’s identity to be appropriate?**

The Unit supports the proposal that the identity of a tax whistleblower and the disclosure of any information which is capable of revealing their identity be subject to an absolute requirement of confidentiality (that is, prohibiting the release of any information by anyone to anyone, including to a court or tribunal), unless:

* the whistleblower gives informed consent to the release of their identity; or
* the revelation is necessary to avert imminent danger to public health or safety, to prevent imminent violation of any criminal law, or to enable whistleblowers to secure compensation for reprisals.

The exception to the above should be that the ATO can share information about the disclosure with other law enforcement bodies such as the Australian Federal Police, the DPP and ASIC where it is necessary for the purposes of investigation and prosecution, provided the strict confidentiality is then also extended to those agencies. To not allow this to happen may otherwise unduly hamper an investigation or prosecution and render the disclosure worthless as it may not be able to be acted upon.

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

The Unit supports the proposed protections against retaliation for tax whistleblowers in the discussion paper, that they be granted immunity from criminal, civil and administrative liability for the commission of or involvement in any contravention of the tax law, provided they were not the architect or controller of the tax evasion or tax avoidance. The Unit also supports that it be a criminal offence to take or to threaten to take a reprisal and compensation be granted if detriment is suffered due to reprisal.

1. **Should the scope of disclosures protected be determined by an objective test requiring the disclosure to be made on ‘reasonable grounds’?**

The Unit strongly supports that the scope of disclosures protected be determined by an objective test that the disclosure was made on reasonable grounds, that the whistleblower had an honest belief, on reasonable grounds, that the information disclosed related to tax evasion or tax avoidance or another serious breach of tax law. This will encourage more whistleblowers to come forward than if a ‘good faith’ test is applied. It is desirable to detect tax evasion and tax avoidance regardless of the motivation of the whistleblower.

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

The Unit supports the ability of tax whistleblowers to be able to disclose information anonymously, as is currently the case with the ATO online form that allows information about tax evasion and tax avoidance to be provided anonymously. Most information provided to the ATO by this mechanism is provided anonymously.

However, the law should grant protection and compensation to a whistleblower if they are able to show they suffered reprisal because subsequently their identity was deduced by the corporation involved in tax evasion or tax avoidance.

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

The provisions for compensation should largely mirror those that exist in the *Registered Organisations Act* in which the Court can award compensation, injunctions and other remedies to whistleblowers for detriment caused from a failure to prevent reprisals relying on actual or constructive knowledge. Exposure to adverse costs for the whistleblower is also mitigated when making compensation claims provided they have not been made vexatiously and do not constitute an abuse of process.

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

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

The Unit supports whistleblower protection only being granted when disclosing information to the ATO so as to maximise the possibility that the ATO will be investigate thoroughly and recover any tax owed as well as imposing sanctions for violation of tax law. Disclosure of suspected tax evasion and tax avoidance should be made to the ATO in the first instance, to avoid a corporation being tipped off and being able to take action to conceal tax evasion or tax avoidance and destroy evidence before the ATO can investigate.

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

Whistleblowers should be able to maintain protection if they have made disclosures for the purpose of seeking legal advice prior to making the disclosure to the ATO.

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

The ATO should be able to use any evidence provided by the whistleblower in making an income tax assessment in the same way as the ATO would use any other evidence it uncovers.

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

The Unit supports a reward system for tax whistleblowers, modelled on the system used by the US Internal Revenue Service.

Such rewards have can a significant benefit in recovery of funds from tax evasion and tax avoidance. The US IRS reported since 2007, information received from whistleblowers has assisted the IRS in collecting over US$3 billion in tax revenue, and the IRS has awarded US$403 million to whistleblowers.[[3]](#footnote-3)

A high profile case is that of former banker Bradley Birkenfeld who was paid a US$104 million reward for his role in exposing the role Swiss bank UBS had played in US citizens engaging in tax evasion. According to the IRS, Birkenfeld had “provided information on taxpayer behaviour that the IRS had been unable to detect, provided exceptional cooperation, identified connections between parties to transactions, and the information led to substantial changes in UBS business practices and commitment to future compliance.” They went on to say “While the IRS was aware of tax compliance issues related to secret bank accounts in Switzerland and elsewhere, the information provided by the whistleblower formed the basis for unprecedented actions against UBS.” His information directly resulted in UBS having to pay a US$780 million fine to the US Government and over 35,000 taxpayers voluntarily repatriated their illegal offshore accounts. His disclosure also indirectly lead to revised tax treaty negotiations between the US and Swiss governments, and to UBS subsequently releasing the names of over 4,900 US taxpayers with offshore accounts, who were then investigated.[[4]](#footnote-4)

In the US specialist lawyers can assist whistleblowers prepare their information for the IRS, assisting the tax authority with initial processing of the information, see for example the Tax Whistleblower Law Firm.[[5]](#footnote-5) This can have benefits in reducing the investigative resources the tax authority needs to commit to the preliminary investigation of a case.

Under the Stop International Tax Evasion Program by the Canadian Revenue Agency, whistleblowers can be rewarded between 5% and 15% of federal tax collected for information leading to tax recoveries exceeding $100,000.[[6]](#footnote-6) In their 2014-2015 annual report to Parliament the Canadian Revenue Authority reported that:[[7]](#footnote-7)

*As of March 31, 2015, the program had received 1,920 calls. The Agency identified 522 as coming from potential informants. Of those, 201 followed up with written submissions and 110 cases are actively under review.*

Thus it would appear the Canadian system is obtaining a higher proportion of valuable disclosures compared to the discussion paper citing of only 34 of the 14,000 whistleblowers who lodged complaints under the US *Dodd-Frank Act* being rewarded. Further, it needs to be recalled that under the US system the reward is only granted on successful recovery of a fine on the corporation. A whistleblower might be able to provide information on criminal activity by a corporation that unfortunately may not lead to a successful prosecution.

In the UK, media reports suggest that offering a reward for exposing tax evasion is assisting Her Majesty’s Revenue and Customs in collecting more tax, paying out £605,000 to informants in the 2014-2015 financial year.[[8]](#footnote-8)

Germany also provides rewards for whistleblowing on tax evasion.[[9]](#footnote-9)

Whistleblowers may find that they are unable to work in a particular industry again as a result of exposing tax evasion or tax avoidance. A reward system can help motivate a whistleblower concerned about a substantial loss in their future income as they retrain to seek employment in a new sector.

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

The reward system for tax whistleblowers would be best modelled on the US system, but informed by an assessment of the best features of reward systems in other jurisdictions.

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

The Unit supports a whistleblower being entitled to a reward if they participated in the tax avoidance behaviour provided they were not the controller, instigator or architect of the tax evasion or tax avoidance in question. There is a potential significant deterrent effect to those who would initiate and design tax evasion and tax avoidance schemes if they are faced with the threat that anyone who knows about the scheme may report it and be rewarded for reporting it.

Review of criminological literature on what works to deter crime finds that perceived certainty of punishment due to detection is associated with reduced intended offending.[[10]](#footnote-10) The conclusion is that certainty of detection and apprehension and not the severity of the legal consequences ensuing from apprehension is the more effective deterrent.[[11]](#footnote-11) Thus anything that assists in improving detection of tax evasion and tax avoidance will assist in deterring such behaviour.

1. **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?**

The establishment of a threshold before a reward is provided can help the ATO allocate its resources to whistleblower information in more serious cases and ensure the disclosures provided by whistleblowers are of a more serous nature.

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

The Unit supports preventing disclosure of taxpayer information to the whistleblower.

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

The Unit supports the whistleblower being told the status and disposition of their case as under Canadian and US law, to avoid whistleblowers feeling the disclosues they have made are not being taken seriously by the ATO. This is a complaint that has been made repeatedly by tax whistleblowers the Unit has had contact with and may be reduced by the ATO informing the whistleblower of changes in the status of the case they have provided information on without revealing any taxpayer information.

1. **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?**

As noted above, the Unit supports the establishment of a Whistleblower Ombudsman to support and advocate for all whistleblowers in the private sector, including tax whistleblowers. The Whistleblower Ombudsman should be able to take legal action on behalf of the whistleblower in cases of reprisal against the whistleblower.

1. **If an oversight body was to be established should it solely focus on tax whistleblowers or act as a wider whistleblower oversight agency?**
2. **Are there any other protections that should be offered to tax whistleblowers?**
3. **What are the interactions, if any, between these proposed protections and professional advisors’ fiduciary including legal professional privilege or ethical obligations?**

Dr Mark Zirnsak

Director

Justice and International Mission Unit

Synod of Victoria and Tasmania

Uniting Church in Australia

130 Little Collins Street

Melbourne, Victoria, 3000

Phone: (03) 9251 5265

E-mail: [mark.zirnsak@victas.uca.org.au](mailto:mark.zirnsak@victas.uca.org.au)

1. Kim Sawyer, “Rewarding whistleblowers for risk brings results”, *The Australian Financial Review,* 23 December 2008. [↑](#footnote-ref-1)
2. Kim Sawyer, “Rewarding whistleblowers for risk brings results”, *The Australian Financial Review,* 23 December 2008. [↑](#footnote-ref-2)
3. <http://static1.squarespace.com/static/54b02e1de4b075f5535088d5/t/56bb98914c2f856b13c08a5c/1455134865917/WB_Annual_Report_FY_15_Final+Ready+for+Commissioner+Feb+8.pdf>, p. 4. [↑](#footnote-ref-3)
4. Lowtax Library Newswire, “IRS Pays UBS Whistleblower USD104 m’, 14 September 2012. [↑](#footnote-ref-4)
5. http://twlfusa.com/ [↑](#footnote-ref-5)
6. http://www.cra-arc.gc.ca/gncy/cmplnc/otip-pdife/menu-eng.html [↑](#footnote-ref-6)
7. <http://www.cra-arc.gc.ca/gncy/nnnl/2014-2015/ar-2014-15-eng.pdf>, p. 50. [↑](#footnote-ref-7)
8. http://www.theguardian.com/politics/2015/jun/15/uk-tax-authorities-hmrc-record-informants [↑](#footnote-ref-8)
9. Jason Fekete, “Whistleblowers will get cash rewards for helping nab tax cheats”, *Montreal Gazette,* <http://www.montrealgazette.com>, 21 March 2013. [↑](#footnote-ref-9)
10. Daniel S Nagin, ‘Deterrence in the Twenty-First Century’, *Crime and Justice* Vol. 42, No. 1, (August 2013), 201. [↑](#footnote-ref-10)
11. Daniel S Nagin, ‘Deterrence in the Twenty-First Century’, *Crime and Justice* Vol. 42, No. 1, (August 2013), 202. [↑](#footnote-ref-11)