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18 May 2017

Dr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
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Dear Secretary

**Whistleblower protections in the corporate, public and not-for-profit sectors -- Responses to Questions on Notice**

Thank you for the opportunity to give evidence before the Committee on 27 April 2017.

It is my pleasure to provide the following answers to questions on notice from the Committee – both the Committee's written questions of 11 April 2017, and specific questions from the hearing on 27 April.

**Questions of 11 April 2017**

**1. Corporate sector**

a. What are your views on which of the best practice criteria [from the G20 whistleblowing laws review included in Professor A J Brown's submission no.23] should be considered in any reforms for **corporate sector** whistle blowing legislation in Australia?

**All the criteria should be considered. Transparency International Australia was pleased to be a joint publisher of this review, when first conducted in 2014. We support the application of all the selected criteria, to all sectors.**

b. Are there aspects of the recent Fair Work Registered Organisation amendments (ROC amendments) to legislation for whistleblowing that would be appropriate to include in **corporate** sector reforms?

**Yes, as indicated in our submission, we consider all the key advances in the *Fair Work (Registered Organisations) Amendment Act 2016* to be applicable at least in principle, and in many instances in detail, to the wider corporate sector. These include:**

- **a broadening of the definition of 'disclosable conduct' (although this will need to be broader still for the entire corporate sector)**
- **the replacement of 'good faith' requirements with requirements for an honest and reasonable belief**
- **protection of anonymous disclosures**
- **a broad definition of 'detrimental action' capable of triggering reprisal prosecutions or civil remedies**
- **recognition that civil remedies for detrimental outcomes should be available wherever such outcomes occur and an organisation or its managers have failed in part or whole to fulfil their duty to prevent reprisals or to provide support and protection to a whistleblower (irrespective of whether there was any intent to cause or allow detrimental outcomes to occur)**
- **provision for exemplary damages for detrimental actions/outcomes**
- **the 'public interest' costs principle whereby a whistleblower taking civil action for detrimental treatment is protected from any risk of paying the respondent's legal costs (even if unsuccessful), other than in the event of the claim being deemed vexatious or an abuse of process.**

**Transparency International Australia nevertheless notes that further issues beyond those dealt with by the *Fair Work (Registered Organisations) Amendment Act 2016* will also need to be dealt with in broader reform for the corporate and not-for-profit sectors (such as requirements for organisational whistleblowing procedures; oversight and enforcement arrangements; and the extension of protection to whistleblowers who make disclosures to the media or third parties in reasonable circumstances).**

c. Are any additional provisions necessary to ensure that whistleblowing laws are effective for multinational corporations, with significant management structures outside Australia?

**Not to our knowledge. The legislation should be designed according to international best practice, and include provision for extra-territorial application (in particular with respect to the liability of persons for taking or failing to prevent reprisals or detrimental action).**

**2. Public sector**

a. What are your views on which of the best practice criteria should be considered in any reforms for **public sector** whistle blowing in Australia?

**All of the criteria should be considered.**

b. Are there aspects of the recent ROC amendments for whistleblowing that would be appropriate to include in **public** sector reforms?

**Yes, all the same advances should apply, if they do not already, for the public sector.**

c. Do you have any comments on the findings made by the Moss review of the Public Interest Disclosure Act 2009?
https://www.dpmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf

**TI Australia broadly supports the findings and recommendations of the Moss Review, especially the overall need for simplification of the Act, but with two exceptions:**

**(1) the importance of separating the criminal offence of reprisal from the breadth of circumstances that should give rise to employment or civil remedies for detrimental outcomes, in order to ensure that employment and civil remedies are available where anyone fails in their duty to support and protect a whistleblower, or to prevent or restrain a reprisal – not only where a reprisal can be shown to have been taken (with its accompanying implications of direct intent or knowledge that an act or omission would result in detrimental impacts);**

**(2) the importance of narrowing the current over-broad definition of 'intelligence information' so that Commonwealth public sector whistleblowers in intelligence or related agencies receive the same level of protection as other public sector whistleblowers, in all circumstances (currently, any information whatsoever originating from or held by an intelligence agency is defined as 'intelligence information' irrespective of its actual content, which then precludes an otherwise identical disclosure from attracting protections in some circumstances).**

3. **Not-for-profit sector**

   a. What are your views on which of the best practice criteria should be considered in any reforms for **not-for-profit** whistle blowing in Australia?

      **All of the criteria should be considered.**

   b. Are there aspects of the recent ROC amendments for whistleblowing that would be appropriate to include in **not-for-profit** sector reforms?

      **Yes, all of them.**

**PIDA Agency, harmonisation and consistency**

4. Some submitters and witnesses have commented on the idea of establishing a Public Interest Disclosure Agency (PIDA) agency as an independent body to receive disclosures, provide advice to whistleblowers and a clearing-house for initial investigations (e.g. Submissions 32, 22). What do you consider to be the potential advantages and disadvantages of such an approach?

   **TI Australia considers there is merit to suggestions that a new, independent agency is needed to oversight and support the protection of whistleblowers in the corporate and not-for-profit sectors, because no single, existing agency is able to fulfil this function. However, the focus of the agency should be on supporting and protecting whistleblowers, including providing advice to whistleblowers and agencies, promoting best practice processes and procedures, ensuring that protection is afforded, ensuring that whistleblowers can access their legal rights, and acting on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes in appropriate cases.**

   **To avoid duplication and confusion, and ensure that resources are not stretched beyond what is realistic, primary responsibility for investigating the actual disclosure should continue lie with existing investigative and regulatory agencies. Any new support and protection agency should nevertheless be empowered to request information, and give advice and, if necessary, direction to investigating authorities regarding measures needed to ensure the proper support, protection and management of the whistleblower.**

5. What do you consider to be the advantages and disadvantages of putting all whistleblower protection laws in a single Act versus the current situation where the laws are spread over at least four Acts?

   **TI Australia supports a comprehensive approach in which all employers and organisations are covered by the same basic whistleblower protection obligations, and all employees and organisation members (contractors, volunteers etc.) have the same protections and obligations, irrespective of the type of wrongdoing disclosed or the particular industry in which the disclosure is made. While particular, additional requirements or strategies may be necessary in particular industries, we believe that whistleblower protection obligations are more likely to be successfully implemented if the basic rights and obligations are common across, and understood by, all employers and industries.**

6. To what extent should there be harmonisation (not replication, but consistency and difference where appropriate) of whistleblower provisions across the public, corporate and not-for-profit sectors?

   **TI Australia considers that basic protections (e.g. duties to protect and support whistleblowers, access to employment and civil remedies, thresholds for protection, and principles for the protection of third party/ media disclosures) should be consistent across sectors; but that many procedural requirements for how disclosures should be managed, investigated, responded to and reported on will need to remain subject to substantial variation depending on the type and size of organisation, type of wrongdoing, and specific requirements pertaining to different industry sectors, etc.**

   a. What arrangements should be in place for companies or not-for-profit organisations that undertake contracts or work for the public sector to ensure that they or their staff or whistleblowers are not subject to conflicting arrangements?

      **See our answer above. Once sufficiently comprehensive and consistent basic protections are in place for all companies and not-for-profit organisations, then the Commonwealth Public Interest Disclosure Act should be amended as necessary to ensure that any additional specific inclusion of Commonwealth contractors under that Act is tailored to need (e.g. reporting and investigation channels) and does not impose inconsistent protection obligations.**

I trust these answers will further assist the Committee.

Yours sincerely

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