Sent: Sunday, 25 November 2012 11:00 PM
To: Committee, SPLA (REPS)
Cc: Cullen, Pauline (REPS)
Subject: Publc Interest Disclosure Bills - Submission of Accountabiltiy Round Table.

Mr. Graham Perrett, MP

Chair, Standing Committee on Social Policy and Legal Affairs

Parliament House

Canberra

Dear Mr. Perrett

I enclose the submission of the Accountability Round Table (ART) on the Public Interest Disclosure Bills for
the Committee's consideration. Its attachment is included.

I also enclose material concerning the ART"s Executive members and its aims and activities.

We look forward to the opportunity to participate in the Committee's hearing on 30 November 2012.

Yours Sincerely

Tim Smith

Chair, Accountability Round Table

25 November 2012

Submission of the Accountability Round Table to the Social Policy and Legal Affairs Committee on proposed Public Interest Disclosure Bills

Introduction

The Accountability Round Table (ART) welcomes the opportunity to make submissions and give evidence to the Committee on this very important legislation – the Public Interest Disclosure (Whistleblower Protection) Bill 2012 and the Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012 .

Time constraints and the absence as yet of material critical of the draft Bills have necessarily narrowed the scope of this submission.

Minister Gray in his response to the FIRST Bill on 29 October 2012 stated that

> "It falls short on practical grounds to offer a workable system of Whistleblower protection that requires a more prescriptive outline of rights and responsibilities of public servants and whistleblowers".

The issues to which the Minister refers are not readily apparent. Bearing in mind that the Bill builds on what is generally accepted to be best practice, one is left to wonder what are the Minister's concerns. The work of this Committee would be greatly assisted if the Minister's concerns were detailed and made available for its consideration and for comment by those appearing before it.

The Accountability Round Table's Position

It has been accepted for some time that the present Commonwealth laws do not provide a satisfactory Public Interest Disclosure system. That was the unanimous conclusion of the Legal and Constitutional Affairs Committee in 2009 and was acknowledged by the Government in its response. The need for action by Australia has been raised by the UNCAC International Review Committee and by the OECD Foreign Bribery Convention Working party. The introduction of best practice whistleblower protection by 2012 was a commitment made by the members of the G20, including Australia, in its Anti-Corruption Action Plan.

We submit that the fundamental purpose of such legislation is to appropriately encourage people in the public sector to disclose public sector wrongdoing so that it can be addressed within and by the public sector. To achieve that objective it must provide protection for persons who disclose information in good faith within the public sector. There must also be a right to take concerns elsewhere where the whistleblower is not satisfied that the relevant authorities have addressed the reported wrongdoing adequately. We submit that the legislation achieves these objectives.

Any whistleblower protection legislation should also help develop a pro-disclosure culture in the sectors in which it operates. We submit that, properly resourced and administered, implementation of the proposed scheme should achieve that objective. Specifically in relation to the Australian public sector, we also note that this objective will be significantly assisted by the fact that legislation expressly recognises the public trust nature of employment in the public sector, and thereby supplies the necessary ethical basis to reinforce the specific provisions. (The attached paper of French CJ from 2011 sets out a strong rationale for basing legislative requirements such as those proposed in the Bill on the ethical obligations which, in our society, are implicit in public office and public employment.)

It is generally accepted that considerable courage may be required to disclose information about wrongdoing even when there is little apparent risk of adverse consequences. Unfortunately, experience has shown that whistleblowers in both public sector and private sector employment who disclose serious wrongdoing, in the public interest, can be victimised or punished in a wide variety of ways. To encourage people to do what can be seen as their public duty and disclose wrongdoing,

- effective protection must be provided for all such 'public interest' disclosures;
- appropriate compensation must be provided in cases where that protection fails; and
- appropriate sanctions must be available to be used against individuals and employers who seek to punish or deter protected disclosure of wrongdoing.

The proposed Bills may fairly be described as representing best practice in these important respects. Their provisions are reasonably clear and should work well in practice. They should be able to be relied upon with reasonable confidence, particularly by people considering whether to make a public interest disclosure or not. They also address the other critical issues in a manner that should enable an appropriate balance to be found in their administration and operation in particular situations. The proposed legislation should also prove effective in protecting innocent individuals and organisations from reputational damage arising either from genuine disclosures which on investigation are not proved, or from malicious false 'disclosures'.

Conclusion

The ART strongly supports the proposed Bills and submits that they should be passed into law as soon as possible.

We also submit that provision should be made in the legislation for a public review of its operation after a reasonable period of operation. For however careful the consideration and preparation of the Bills

may have been, experience is needed to test the provisions. For example, there are the provisions under which the Ombudsman, the overarching oversight and investigation body, and the Inspector-General of Intelligence and Security are given oversight and investigation functions in relation to "disclosures relating to intelligence agencies". We support this approach which was recommended by the Legal and Constitutional Affairs Committee and publicly accepted by the Government. Section 49 (3) empowers the two agencies to "enter into shared arrangements or mutual assistance in relation to the performance of functions conferred on either of them" under the Act. With that statutory authority, we suggest that it is reasonable to proceed on the basis that the two independent agencies will develop the necessary protocols for the handling of matters relating to intelligence agencies. The lack of detailed legal formality gives the agencies the flexibility needed to develop protocols in the light of experience. It would, however, be prudent for this Committee to review its operation, and that of the legislation generally, after a reasonable period of operation. We suggest 2 years.

Hon. Tim Smith QC
Chair, Accountability Round Table
25 November 2012