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The Secretary
Standing Committee on Legal and Constitutional Affairs
House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

Attention: Andrea.Cullen.Reps@aph.gov.au

Dear Secretary

Re: Inquiry into whistleblowing protections within the Australian Government public sector

Transparency International's Australian Chapter (TIA) welcomes this Inquiry which we regard as timely and essential. We have confidence that it will lead to greater openness of government and a real contribution to curbing fraud and corruption in the public sector in this country. We share the view that the framework of protections under the Commonwealth government is weaker than in most states when in fact we should be expecting that government to show leadership.

It is commendable that the Inquiry has not been sparked, as is so often the case, by a major scandal. For example it was disturbing that it required a report from an external agency, the United Nations, to trigger any interest from the Australian Government in the AWB *Iraq Oil for Food* scandal which has significantly damaged Australia's international integrity reputation.

The Inquiry's outcomes should have profound impact on the future directions of governance in Australia both directly within the Australian Government public sector and by osmosis in other Australian jurisdictions and the private sector. TIA submits that whistleblowing protections must be considered within the contexts of:

(a) Encouraging as much openness and full and timely reporting as legitimate circumstances allow. We would expect that the Inquiry's recommendations will extend to include the Australian Defence Forces (ADF) and the Australian Federal Police (AFP).

(b) Being a fundamental part of the risk management process and the fraud and corruption detection strategy for all entities.

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National Integrity Systems Assessment

In December 2005, TIA and its partner, Griffith University's Key Centre for Ethics, Law, Justice and Governance, in the Australian Research Council Linkage Project (ARC) published the final report into Australia's National Integrity Systems (NISA) entitled *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*. The report can be viewed on TIA's website www.transparency.org.au. We would be happy to provide printed copies for Committee members.

Recommendation 11 of the report states:

That the legislated basis for all integrity systems for any sector in any jurisdiction, include a scheme to facilitate 'whistleblowing' by current and former employees about integrity concerns that is at least consistent with Australian Standard 8004-2003, plus the following principles:

(i) A statutory requirement, either directly or through organisational codes of conduct, for employees to report suspected corruption, fraud, defective administration or other integrity lapses to a person able to effect action;

(ii) The criminalisation of reprisals against public interest whistleblowers or other internal integrity witnesses wherever this role is a factor of any significance in detrimental action taken against them (whether official or unauthorised);

(iii) Provision of statutory defences to any legal action for breach of confidence, official secrets or defamation where the whistle is blown to an authority empowered to take action; or to the media, in circumstances where this is objectively reasonable;

(iv) Training for managers in the avoidance, detection, investigation and prosecution of reprisal actions (whether giving rise to criminal, disciplinary or civil liability);

(v) Statutory requirements for all organisations to develop and promulgate internal disclosure procedures (IDPs) (including, in the private and civil society sectors, all organisations over an appropriate size); and

(vi) A statutory whistleblowing coordination role for a core integrity agency in each of sector, to which all significant employee disclosures must be notified, and whose duties include (a) guidance on effective investigation, resolution and management and (b) a discretion to directly and fully investigate alleged reprisals.

As a direct consequence of the above research, TIA along with a consortium of thirteen public integrity agencies, embarked upon further ARC supported research into the development of more effective operational approaches to whistleblower protection. The final report of this research project will be launched by Senator John Faulkner – Special Minister of State and Cabinet Secretary at Parliament House Canberra on 9 September 2008. The aptly titled *Whistling While They Work* project's recommendations focus not only on the need for legislative reform but the need for effective operational systems for managing whistleblowing as and when it occurs. This extends to practical remedies for public officials (including ADF and AFP personnel) whose lives and careers can suffer as a result of having made a public interest disclosure.

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Corporate and Financial Services Sector

We submit that the inquiry should cover the corresponding need for reform of the law for protection of corporate whistleblowers and within the financial services sector. Presently this is flawed and quite inadequate.
For example, as we pointed out in our letter of 14 March 2007 to ASIC on the subject of whistleblower protection under the Corporations Act:

> From our viewpoint there is an urgent need to amend the Act and extend the protection offered under Part 9.4AAA. Because it was enacted in terms which disregarded the recommendations of the Senate Committee it has flaws which can and should be rectified.
>
> This matter has been discussed at a number of seminars and the general view is that no lawyer would advise a client to contact ASIC and hope to rely on the provision. We see no reason why the protection offered under the Act should not be redrafted and extended so as to encourage more potential whistleblowers to contact ASIC or the auditors.
>
> For example, we do not believe that such persons would, even if they were able to prove they were acting in good faith and had reasonable grounds for their allegations, be sufficiently protected against becoming incriminated in any improper conduct.

A corresponding issue is the lack of protection for whistleblowers under the laws administered by APRA. There we also have drawn the relevant Minister's attention to the lack of requirement for 'hot lines' in entities administrating superannuation funds which is a serious lack considering the huge amounts held and administered for such funds and the significant potential for fraud and maladministration. An after-the-event exposure by auditors may often not be sufficient to prevent scandal and loss. Hence, anything that can be done to encourage whistleblowing along the lines of legislative reform recommendations of the WWYW report should be covered by the Committee in both the ASIC and APRA contexts.

In both these contexts we consider it is imperative that no requirement of 'good faith' should be placed on the informant and at the same time there is a need to positively facilitate or even require that externally administered 'hot lines' be in operation. That is for good reason best practice already in many large corporate enterprises. The advantage of anonymity and ease of access of a 'hot line', as the submission of Stopline Pty Ltd to your Committee demonstrates, goes hand-in-glove with the legal protections reform we do believe your Committee should recommend.

Penalties and Sanctions

We note the Inquiry's terms of reference include whether penalties and sanctions should apply to whistleblowers who knowingly or recklessly make false allegations. Anecdotal evidence suggest the incidence of whistleblowers making reckless of false allegations is low. We recognise the risks but would submit that any thresholds for penalties and sanctions should recognise that whistleblowers must be encouraged and should not have to prove "good faith" before the issue they want to ventilate and have investigated is addressed.

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Open Government and Public Interest

Finally I would like to revert to one of the two major themes in the opening paragraph, that of the need for openness. In his paper of July 2005 TIA's Chairman Mr. Frank Costigan QC posed the question *Would we need Whistleblowers if we had open Government?* and concluded the short answer is "yes" and the long answer is "yes, but not as much". In that paper he makes lengthy references to the highly significant decision of the Federal Court (Finn J) in Bennett v Human Rights and Equal Opportunity Commission (2003) 34 FRC 334. The judgment traces the history from colonial days to legislative attempts to shackle public servants' use of information. Mr. Costigan goes on to summarise the case as follows:

> Bennett was both a public servant employed by Australian Customs Service and the Federal President of the Customs Officers Association (COA). He made various media statements relating to the operation of Customs. The CEO of Customs directed him in either of his capacities not to make statements which involved disclosure of information about public business or of anything about which he had official knowledge. Bennett did not comply with the direction and was disciplined. He complained to the Human Rights Commission that the CEO had (i) infringed his right to freedom of expression under the International Covenant on Civil and Political rights (ICCPR) and (ii) discriminated against him on the basis of grade union activity and political opinion. The Human Rights Commission declined to deal with his complaint. Mr. Bennett sought review of this decision in the Federal Court.

Part of the long and detailed judgment was concerned with the interpretation of Regulation 17(3) of the Public Service Regulations. The Regulations read:

> An APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

Justice Finn held that the Regulation was invalid because it infringed the implied constitutional freedom of political communication and could not be read down to avoid that consequence. On pages 355 and 356 of the judgment he cites statements of Chief Justice Mason and Justice McHugh of the High Court in which the tensions between confidentiality and the public interest are reviewed.

TIA looks forward to appearing before the Committee and assisting in every possible way with the Inquiry.

Yours faithfully

Grahame J Leonard AM
Director