Dr Anna Dacre
Committee Secretary
Social Policy and Legal Affairs Committee
House of Representatives
PO Box 6021
Parliament House
Canberra, ACT 2600
E-mail: spla.reps@aph.gov.au

Submission to Inquiry into the *Public Interest Disclosure Bill 2013*

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The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make a submission to the inquiry by the House Standing Committee on Social Policy and Legal Affairs into the *Public Interest Disclosure Bill 2013.*

Often tax evasion, especially in developing countries, is linked to bribery, especially the bribery of government officials. Whistleblowers are often an important mechanism by which bribery is detected, as recently demonstrated by the Securency/NPA case.

The TJN-Aus supports meaningful protection for those who legitimately act as whistleblowers, where the person has attempted to raise matters such as illegal activity, tax evasion or tax avoidance, other forms of corruption, official misconduct involving a matter of significant public interest, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety and dangers to the environment through the official internal channels of redress and has received an obviously inadequate response within a reasonable timeframe. However, the TJN-Aus acknowledges that this must be balanced by measures to discourage those who would make of reckless or false allegations.

The TJN-Aus notes that the Australian Standard on *Whistleblowing Protection Programs for Entities* (AS8004-2003) recommends protection for whistleblowing of conduct including any conduct that was dishonest, fraudulent, unethical or related to an unsafe work practice.

While the TJN-Aus welcomes the *Public Interest Disclosure Bill 2013* it is concerned about some of the limitations within the Bill. It believes the Bill should be amended before being passed in the Parliament.

Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN). TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

(a) promote sustainable finance for development;
(b) promote international co-operation on tax regulation and tax related crimes;
(c) oppose tax havens;
(d) promote progressive and equitable taxation;
(e) promote corporate responsibility and accountability; and
(f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- ACTU
- Australian Education Union
- Anglican Overseas Aid
- Baptist World Aid
- Caritas Australia
- Columban Mission Institute, Centre for Peace Ecology and Justice
- Friends of the Earth
- Global Poverty Project
- Greenpeace Australia Pacific
- Jubilee Australia
- National Tertiary Education Union
- Oaktree Foundation
- SJ Around the Bay
- Social Policy Connections
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia
- Union Aid Abroad – APHEDA
- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia

The Need for Australia to Improve its Protection of Whistleblowing

The study by Professor AJ Brown and his colleagues into whistleblowing by public sector employees found on a conservative estimate, 12 per cent of employee survey respondents had acted as public interest whistleblowers in their organisation over two years. Even if often problematic, whistleblowing is a natural feature of public sector life. However, at least as many public officials who observe wrongdoing also continue to choose not to report, citing lack of confidence in the management response and in management support.[1]

The authors of the study concluded, whistleblowing is, for the most part, a positive force for the good management of public sector organisations. Even if employee disclosures often involve other personal and workplace issues, the information they hold has been proven to be vital in the detection and remediation of wrongdoing, ranging from the minor to the most serious cases. A large proportion of whistleblower reports are substantiated and lead to necessary management action, a larger proportion than is often the case in respect of allegations or complaints from all sources. Whistleblowing therefore has proven organisational value. The likelihood is also increased that, when it is not heeded, or it is mismanaged, the same accurate information will eventually surface among external integrity agencies or the wider public. It is in the interests of those in authority to shift from seeing whistleblowing and whistleblowers as a problem—should they hold that view—to instead

[1] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 289.

invest in systems to enable employees to report perceived wrongdoing more easily, and earlier.[2]

The study found, at present, whistleblowers who survived the experience were most likely to have done so thanks to their own personal skills and support networks, the fact that their disclosure was able to be substantiated and because they happened by chance to have a manager who was willing and able to support them. The formal management systems of the majority of organisations currently do little to ensure or increase the likelihood of such outcomes.[3]

The current protection for whistleblowers in the *Public Service Act 1999* is inadequate. It does not ensure proper investigation of public interest disclosures or provide adequate protection to those individuals that make disclosures.

The OECD Directorate for Financial and Enterprise Affairs assessment *Australia: Phase 2. Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions,* 4 January 2006 found that on issues of foreign bribery:

> *Other than awareness-raising measures undertaken by DFAT to encourage officials to report suspected breaches of the foreign bribery offence, in the form of a DFAT cable and DFAT news article, there does not appear to have been any awareness raising measures to encourage public officials outside of DFAT to report foreign bribery instances encountered in the course of their work. This could constitute a weakness of the Australian detection system, given that a number of public officials serving in Commonwealth public bodies or agencies are in contact with Australian companies operating abroad and are well-situated to discover instances of bribery of foreign public officials in the course of their work.*

The OECD assessment then went on to state in specific reference to the need to improve whistleblower protection for those in the public sector that:

> *98. This apparent weakness of the Australian public service detection system raises further concern given the low level of whistleblower protection in the public sector. Section 16 of the Public Services Act 1999 protects Commonwealth public servants from victimisation and discrimination where they report breaches of the Code by an employee or employees to an authorised person within an Australian Public Service agency. The Australian authorities specify, in their Phase 2 responses, that such breaches would include failure to comply with Australian law when acting in the course of Australian public service employment. However, section 16 only provides protection where reporting is made to the Australian Public Service (APS) Commissioner, the Merit Protection Commissioner, or the Agency Head of the person making the disclosure (or to persons authorised by the fore-mentioned authorities). There are no specific provisions protecting whistleblowers where disclosures are made to law enforcement authorities.*
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> *99. The Australian authorities explain that victimisation of, or discrimination against, an APS employee by another APS employee for having reported suspected illegal activity to a law enforcement authority would be a breach of the APS Code of Conduct, and could result in disciplinary action under the APS Act. They also point out that although a recent evaluation conducted by the APS Commission into agency management of suspected breaches of the Code of Conduct found some confusion*

[2] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 296.
[3] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 299.

> *among employees about how the APS whistleblower scheme operates, a recent survey disclosed general satisfaction with the protections. Between 69 and 77 per cent of APS employees had a high or moderate level of confidence that they would not be victimised or harassed as a consequence of making a report that they suspected that another employee had seriously breached the Code of Conduct. In any case, there has been some criticism of the Commonwealth public sector whistle-blowing protections. For instance, they were considered weak in a Transparency International Report of 2004. In addition, the Parliamentary Committee on Finance and Public Administration observed that the whistleblower scheme was deficient, notably in that: (a) it applies only to half of the federal public sector; (b) it does not cover disclosures by members of the public; and (c) reports can only be received by a limited number of authorities, the APS Commissioner having no power to take remedial action. Although the Australian authorities have indicated that whistleblower protection provisions applicable to private sector employees would also protect Australian officials, it appears that this legislation is rather weak as well….*

The OECD urged the Australian Government "*to ensure effective whistleblower protection measures for Commonwealth officials and staff employed by Commonwealth agencies who report suspicions of foreign bribery, in order to encourage them to report such instances without fear of retaliatory action."*

Unfortunately, there has been little, if any, improvement in the protections offered to whistleblowers six years on, as assessed in the OECD Working Group on Bribery *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* released in October 2012. It found:

> *143. A patchwork of laws of the Commonwealth level provides some whistleblower protection in foreign bribery cases. Section 16 of the Public Service Act 1999 prohibits victimisation or discrimination against a civil servant as a consequence of having "reported breaches (or alleged breaches) of the Code of Conduct". To qualify for protection, the disclosure must be made to a senior official; external disclosures (e.g. to media or law enforcement) are not protected. The Section also does not protect disclosures of misconduct committed by non-Australia civil servants. This raises concerns because employees of agencies such as AusAID are Austrade regularly work in high-risk situations with individuals who are not civil servants. These employees are encouraged or required to report foreign bribery but are not protected under Section 16….*

With regards to the failure of the Commonwealth Government to provide meaningful whistleblower protection to private sector employees, the OECD Working Group on Bribery was even more scathing:

> *144. Regarding private sector whistleblowers, laws cited by the Australian authorities are insufficient or irrelevant to foreign bribery. Section 317A of the Corporations Act protects officers, employees and contractors of Australian companies who disclose violations of the Corporations Act to ASIC. This covers disclosure of foreign bribery-related false accounting, but not foreign bribery per se. Whistleblower laws that apply only to financial institutions are not so restricted and cover disclosures about any misconduct, including foreign bribery. None of these laws, however, protects disclosures to law enforcement of the media….*

The Working Group highlighted the value of whistleblower protection in combating foreign bribery:

> *145. Despite inadequate protection, some whistleblowing does occur. Some participants at the on-site visit believed that whistleblowing in the private sector has been useful in detecting misconduct such as foreign bribery. In the Securency/NPA case, one whistleblower reported wrongdoing to the company and the AFP, while a*

> *second disclosed allegations to the media. The case, however, may also highlight the need to better protect whistleblowers, as two Securency employees claim to have been dismissed after raising bribery concerns. Commentators believe that better whistleblower protection could lead to a higher level of foreign bribery enforcement.*

The OECD Working Group on Bribery recommended:

> *… Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable ground from discriminatory or disciplinary action.*

The TJN-Aus urges the Australian Government to introduce protections for whistleblowers in the public sector in line with the OECD assessment and recommendations. Specifically, that:

- the whistleblowing protection apply to disclosures to law enforcement authorities;
- they cover all members of the public service; and
- there is comprehensive protection against victimisation, discrimination, discipline, and employment sanctions for legitimate whistleblowing actions.

The TJN-Aus is aware that the Australian Government submitted a response to the *Australia: Phase 2. Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* to the OECD in Paris in June 2008.

The TJN-Aus also notes the findings of the Griffith University report into whistleblowing in 2008 which stated that major legislative constraints in most jurisdictions when it came to whistleblowing included:

- A failure to provide legislative guidance on the circumstances when legal protection of whistleblowers might reasonably extend to public disclosures, in circumstances where it is impossible or has proved unsuccessful for officials to disclose to authorities; and
- A failure to provide agencies with an effective human resource management incentive to minimise harm experienced by whistleblowers, through realistic compensation mechanisms for those who report and whose career then suffers as a result.

The report argued that there was a need for the recognition of the vital role that supervisors at all management levels play as recipients of disclosure to be built into the legislative frameworks, as well as being recognised in the procedures of agencies.

In 2010 G20 countries committed to implement laws to protect whistleblowers, with 13 of the G20 countries having laws protecting whistleblowers in the private sector and 14 for whistleblowers in the government sector.

The US signed into law the *Whistleblower Protection Enhancement Act* on 27 November 2012*,* designed to protect employees who expose government wrongdoing from retaliation by supervisers. In a media release on 13 November 2012, the US Office of Special Counsel stated the legislation would:[4]

- Overturn legal precedents that narrowed protections for government whistleblowers;
- Give whistleblower protections to employees who are not currently covered, including Transportation Security Administration officers;
- Restore the Office of Special Counsel's ability to seek disciplinary actions against supervisors who retaliate;
- Hold agencies accountable for retaliatory investigations, among other improvements.

[4] http://www.osc.gov/documents/press/2012/pr12_21.pdf

After Congress did not include whistleblower protections for national security and intelligence employees, President Obama issued a Presidential Policy Directive prohibiting retaliation against them for exposing waste, fraud and abuse.[5]

The TJN-Aus notes it has been over a decade since whistleblower compensation provisions were added to Britain's workplace laws, applying across most public and private sector employment.[6]

In February 2009 the Federal House of Representatives Standing Committee on Legal and Constitutional Affairs released a report entitled *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*. The report made 26 recommendations for the implementation of a public sector whistleblower scheme, which the Government largely stated it agreed with. The Government provided its response on 17 March 2010, promising to introduce legislation.

Comments on the *Public Interest Disclosure Bill 2013*

The TJN-Aus welcome Section 5 of the Bill extending its reach to acts, omissions, matters and things outside of Australia.

The TJN-Aus supports the definition of disclosable conduct as outlined in Section 29.

The TJN-Aus believes that under Section 26 the ability to disclose to a professional association or union should be included for the purpose of seeking advice or assistance as put forward in recommendation 25 of the report by the House of Representatives Standing Committee on Legal and Constitutional Affairs report *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*.

The TJN-Aus is concerned that under Section 26(3)(a) a public interest disclosure may be restricted from protection on the grounds it may damage international relations of the Commonwealth or it may damage relations between a State or Territory and the Commonwealth. These do not seem good reasons to restrict the reporting of illegal activity, corruption, official misconduct involving a matter of significant public interest, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety and dangers to the environment. The TJN-Aus is also concerned at the inclusion of the broad "any other relevant matters" in Section 26(3)(f).

The TJN-Aus supports the definition of public official outlined in Section 69, which it believes extends to non-Australian Commonwealth employees working for agencies such as AusAID and Austrade. This would address the concern raised by the OECD Working Group on Bribery about such employees currently not being provided with whistleblower protection. However, TJN-Aus believes the legislation should also cover the staff of Members of Parliament and Senators.

The TJN-Aus notes it is essential that whistleblowers be protected from detrimental action or victimisation as a result of their whistleblowing action and therefore welcomes Sections 13 and 16 and Sections 20 and 21 relating to protecting the confidentiality of the whistleblower. It also welcomes Section 15 that allows the Federal Court to grant an injunction against any reprisal action against the whistleblower and allows for the court to order an apology for taking, or threatening to take, reprisal action. We particularly welcome the inclusion of an offence for victimising a whistleblower, as outlined in Section 19 of the Bill.

[5] Joe Davidson, "Congress approves stronger whistleblower protections", The Washington Post, 13 November 2012.

[6] A.J. Brown, "Everyone backs whistleblowing laws. So why are we still waiting for them?", Sydney Morning Herald, 2 October 2012.

The TJN-Aus supports Section 14 of the Bill as it is important that whistleblower protection legislation include the ability of whistleblowers to access compensation for any detrimental action or victimisation suffered. This was an important point made in the study by Professor Brown, who noted despite the evidence of the importance of whistleblowing, and the knowledge that whistleblowers have suffered, no public official is believed to have yet been able to secure formal compensation for damage to their career under current whistleblower protection legislation.[7] In 2008, for all jurisdictions other than the Commonwealth and New South Wales, a person who suffers detriment is also entitled to sue a person or body responsible for detriment in the Supreme or District Court. This can be by way of a tort action under personal injuries law or (in South Australia and Western Australia) as an action for victimisation under equal opportunity legislation.[8] A general problem with seeking to obtain compensation for detrimental action or victimisation suffered as a result of whistleblowing is that these statutory mechanisms do not locate the avenue for enforceable legal compensation within the employment relationship, where the duty of care is most obvious. Rather, the statutory mechanisms equate the damage suffered by a whistleblower to a personal injury suffered by the individual as the result of negligence by another individual (for example, as if in a car accident). The burden of establishing the nature of the duties involved, combined with the costs of taking legal action in an intermediate or superior court, combined with the risk of a costs order should the action fail, are all enough to explain why whistleblowers to date would seek to live with adverse outcomes rather than seek compensation.[9]

The TJN-Aus is disappointed at the high threshold for public disclosures in the Bill. The TJN-Aus notes this is inconsistent with the US *Civil Service Reform Act 1978* and the UK *Public Interest Disclosure Act 1998* in allowing public disclosures. The UK *Public Interest Disclosure Act 1998* protects disclosures to the media, providing that the disclosure meets the test for internal disclosures, is not made for personal gain and is reasonable under the circumstances. In addition, the whistleblower must meet one of three preconditions for such disclosures:

- Reasonable fear of reprisal for the disclosure to the employer or to a prescribed person;
- Reasonable belief of the concealment or destruction of evidence relating to the misconduct; or
- Previous disclosure of the misconduct to the employer or a designated person who is supposed to deal with such disclosures.

The TJN-Aus notes the research by Professor Brown found the natural tendency for most employees is to report wrong-doing internally[10], so aligning the Bill with UK legislation is unlikely to generate more than a small trickle of public disclosures.

The TJN-Aus believes Sections 38(2) and 39(2) should be removed as it means the response to an investigation into a public interest disclosure is never inadequate no matter how inadequate or ineffective the response has been from a Minister, the Speaker of the House of Representatives or the President of the Senate. It is inappropriate to be able stifle exposure of illegal activity, corruption, official misconduct involving a matter of significant public interest, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety and dangers to the environment through a

[7] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 303.
[8] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 272.
[9] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 274.
[10] A.J. Brown, "Whistleblowing in the Australian Public Sector. Enhancing the theory and practice of internal witness management in public sector organisations", ANU E-Press, 2008, p. 269.

Minister being unwilling to take effective action against such serious matters. Sections 38(1) and 39(1) provide an appropriate definition of when the response to an investigation has been inadequate even if a Minister, Speaker of the House of Representatives of President of the Senate is involved in the response.

The TJN-Aus welcomes the requirement that the authorised officer must inform the discloser of the allocation if the discloser is readily contactable under Section 44(2) of the Bill. The TJN-Aus also welcomes the requirement of the principal officer of the agency to inform the discloser of the decision to investigate or not to investigate the disclosure in section 50 and to provide the discloser with a copy of the completed report into the disclosure under Section 51.

The TJN-Aus is concerned by Section 52(6) stating that the failure to complete an investigation within the time limit under the section does not affect the validity of the investigation, which calls into the question the purpose of having a time limit for the investigation.

The TJN-Aus supports the inclusion of Section 56 in the Bill, which ensures that serious criminal conduct must be reported to a member of an Australian police force and that any criminal conduct may be reported to a member of an Australian police force. However, the TJN-Aus is concerned that Section 56(2) will require the person conducting an investigation to have extensive knowledge of all Australian criminal law to know if an offence is punishable by imprisonment for a period of at least two years and therefore know they have an obligation to report the alleged conduct to a member of an Australian police force. It would seem much simpler to simply require that any suspicion of criminal conduct must be reported to a member of an Australian police force.

The TJN-Aus welcomes the requirements for the reporting on the Act under Section 76. However, under Section 76(1) it should specify a timeframe in which the Minister must table the report in the Parliament after receiving it.

Dr Mark Zirnsak
Secretariat
Tax Justice Network Australia