Submission by Transparency international Australia to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* and the *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012.*

Transparency International is the pre-eminent global coalition against corruption. Transparency International Australia (TIA) is one of over 100 national chapters fighting corruption across the world.

TIA is pleased to have the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (the Wilkie Bill) and the *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012.*

Summary

In summary, TIA considers that the Australian Government has a responsibility to move promptly to plug the existing gaps in APS whistleblower protection, wherever public interest disclosures of wrongdoing are made by Commonwealth public officials, employees, contractors, or members of organizations subject to Commonwealth regulation. These disclosures include but, for the sake of comprehensiveness, should not be limited to corrupt and corruption-related conduct. TIA believes that the Wilkie Bill comprehensively achieves this goal. TIA's preferred course of action is for the Government to adopt the Wilkie Bill and to prioritise this legislation for passage in the first Parliamentary session in 2013.

Background

There is a long and sorry history of federal government inaction on whistleblower protection spanning nearly 20 years. Whistleblower protection for federal public servants was first recommended by a Senate Select Committee in 1994. In 2007, the Rudd government committed itself to best practice whistleblowing legislation. In early 2009, a House of Representatives committee inquiry chaired by Mark Dreyfus QC set out a blueprint for comprehensive federal legislation. Those recommendations received bipartisan support.

In March 2010, the government committed to implement the scheme. But since then, despite the federal government's agreements in September 2010 with independent MPs Andrew Wilkie, Rob Oakeshott and Tony Windsor to move on this, nothing has actually happened. In fact within the last two years the Government has failed to meet its own deadline for introduction of whistleblower protection legislation more than three times.

The urgent need for effective public interest disclosure legislation

Every day it becomes more apparent why comprehensive whistleblower protection legislation is needed. Just a few weeks ago, the OECD strongly criticized Australia's very limited enforcement of foreign bribery laws. The OECD report noted that the initial allegations of foreign bribery against Securency/Note Printing Australia were initially rejected without investigation when a whistleblower first approached the Australian Federal Police in 2008. Recent evidence in the subsequent court case suggests that an employee who tried to raise the issue within the Reserve Bank was 'sat on' by his superiors.

Public interest disclosure legislation is a critical part of the various ways in which governments and their administrations are held accountable for their actions. It helps people to raise concern about significant wrongdoing in the public sector without fear of reprisal, and to go to the media if blowing the whistle within the organisation is futile.

Comprehensive legislation is urgently needed to protect public interest disclosures of wrongdoing made by Commonwealth public officials, employees, contractors or members of organisations regulated by the Commonwealth. This legislation needs also to offer effective legal protections, compensation rights and employment remedies to officials, employees, contractors etc., who suffer detriment as a result of having made a public interest disclosure.

In this context TIA notes with concern that that the Government's last known policy position on this issue, in February 2010, was to *decline* the Legal and Constitutional Affairs Committee's recommendation that federal whistleblowers be entitled to seek compensation under the *Fair Work Act.* Since that time, however, the Government has been unable to offer any indication of what alternative remedial avenues it proposes.

The Wilkie Bill establishes a comprehensive public interest disclosure framework governing all Commonwealth officials and employees of Commonwealth-regulated organisations. It includes effective central oversight and coordination, provides for disclosure to the media as a last resort or in exceptional circumstances, and specifies accessible, enforceable and realistic employment remedies for officials who suffer detriment as a result of having made a public interest disclosure.

The inadequacy of the Government's response to the Wilkie Bill

The Special Minister of State, in a Media release responding to the Wilkie Bill, suggested that it falls short of necessary safeguards and balances and that a more prescriptive outline of rights and responsibilities of public servants and whistleblowers is necessary. In TIA's view, the Wilkie Bill more than adequately specifies these rights and responsibilities. It sets out clearly those who may make a public interest disclosure, the officials to whom a public interest disclosure may be made, how it should be made, what action must be taken on receipt of a disclosure, which other agencies should be informed, how investigations should be conducted, the circumstances in which disclosures may be made to journalists and others, limitations on these disclosures, and legal protections for disclosers. It also provides a comprehensive system of checks and balances to discourage frivolous or vexatious disclosures, specifies particular ways of investigating disclosures which may contain sensitive defence, intelligence or law enforcement information, and sets clear constraints on when and how whistleblowers should go public.

The Minister's Media Release referred to the need to foster and promote a culture in the APS which supports calling out wrongdoing and maladministration and protecting those who stand up, and noted that the Dreyfus report found that the existing workplace culture is a major disincentive for people to speak out about suspected wrongdoing.

The Government's procrastination in introducing effective public interest disclosure legislation does little to suggest that it is serious about changing APS culture in relation to whistleblowing and to whistleblower protection. Timely legislation is an important first step in promoting cultural change. It is a statement of principles and accepted practice. It provides an essential hook on which to hang the training and institutional reforms which must underpin serious and sustained cultural change in the APS.

Recommendation

The Special Minister of State has committed to the Government finalizing its position by the end of 2012 and to introducing legislation early in 2013. However, TIA's assessment of the Wilkie Bill is that it sets the standard for public interest disclosure legislation, not just in Australia but worldwide. TIA suggests that he Government should support the Wilkie Bill. If the Government thinks it has prepared better legislation, it should release its draft legislation before the end of 2012, which would allow for open and transparent comparison with the Wilkie Bill.

Postscript – whistleblower protection in the non-government sectors

TIA believes the Commonwealth Government should also act to improve the existing legislative provisions in relation to whistleblower protection in the non-government sectors regulated by the Commonwealth. Limited protection is included in provisions such as Part 9.4AAA of the *Corporations Act 2001*. However, TIA notes that in 2008 the Government commenced a public review of these provisions – whose inadequacy is widely known – with that review having never been completed or released. Compared with the public sector, there is also a clear lack of independent research into whistleblower protection needs and options in the private sector.

TIA welcomes the advice of the then Minister Brendan O'Connor (6 December 2011) that the work to reform these provisions 'will be progressed following the finalisation of the Public Interest Disclosure Bill'. However, TIA also notes that even when that occurs, the *Corporations Act* governs only one, albeit major area of private sector regulation in which stronger whistleblower protection is justified, with other areas including competition and consumer regulation being at least equally important, including with respect to the prevention and remediation of the effects of corrupt conduct.

TIA recommends that the Commonwealth take prompt action to comprehensively review, including on the basis of new research, options for comprehensive reform of whistleblower protection in non-government and business organisations which are subject to Commonwealth regulation.