TRANSPARENCY INTERNATIONAL AUSTRALIA

TRANSPARENCY INTERNATIONAL AUSTRALIA
ABN 23 068 075 525
E: info@transparency.org.au
P: +613 9877 0369
PO Box 2041
Blackburn South VIC 3130
Australia

26 February 2018

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Economics.Sen@aph.gov.au

Re: Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

Dear Mr Fitt

On behalf of Transparency International Australia (TIA) I am pleased to make this submission to the Senate Economics Legislation Committee on the above Bill. Our organisation is Australia's leading civil society body devoted to combatting corruption. It has for many years supported a compelling need for change and improvement in the whistleblower area. Allegations of serious corruption and wrongdoing, more often than not, come from within an organisation or from sources closely associated with an organisation. The need for adequate protection is an urgent priority.

Griffith University Submission

Professor A.J. Brown, Australia's foremost academic expert on whistleblower protection law and policy, has provided the committee with a detailed and comprehensive submission dated 25 February 2018. As it happens, Professor Brown is a Director of Transparency International Australia and is also on the Board of our global organisation Transparency International.

TIA wholly supports and adopts Professor Brown's submissions and does not seek to repeat them in this submission. However, for emphasis we would wish to make the following points.

TIA Points of Emphasis

- The positive aspect of the Bill is that it transforms a currently inadequate scheme into the beginning of an effective scheme.
- As noted in other submissions, however, it fails to import a significant number of the recommendations of the Report from the Parliamentary Joint Committee (PJC) on Corporations and Financial Services. In a number of areas, the Bill proposes measures which are inconsistent with the Committee's recommendations.

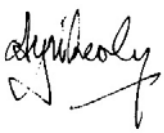
TRANSPARENCY INTERNATIONAL AUSTRALIA
ABN 23 068 075 525
E: info@transparency.org.au
P: +613 9877 0369
PO Box 2041
Blackburn South VIC 3130
Australia

The Government's stated aim in introducing the Bill is 'to enable whistleblowers to come forward with the confidence they will be protected under a comprehensive and robust legal framework'. These areas of reform were identified by the PJC and a number have not been included in the Bill. They should be, or at least addressed in subsequent legislation. TIA draws your attention especially to the following:

- The need to provide comprehensive coverage and protection for all private and not-for-profit sector employees who reveal wrongdoing by or within the control of their employer, beyond the present range of corporate, financial service and tax entities;
- The need to establish a separate whistleblowing protection authority or unit, properly resourced, to ensure that protection is provided to whistleblowers, and where necessary provide the direct support that no other agency currently provides.

- I also attach our submission to Commonwealth Treasury of 6 November 2017, on the Exposure Draft of the Bill. We raised concerns there which remain valid with respect to the present Bill, including those above, as well as other specifics below. From the Explanatory Memorandum and Second Reading Speech we can see no evidence or reasoning for why our previous submissions were rejected in the formation of this Bill, especially given they had been accepted by the PJC. This suggests some deficiencies in the Government's processes for arriving at a quality Bill, which we hope might be rectified, moving forward.
- In terms of the Bill as it stands, we particularly emphasise:
  - The need to properly separate criminal liability and civil remedies;
  - The need to include a best practice version of the onus of proof (see Professor Brown's submission, Section C3);
  - The need to provide appropriate protection for third parties (e.g. media/public interest) disclosures. The Bill extend protection to emergency disclosures to the media where there is imminent risk of serious harm or danger to public health or safety or to the financial system, if the information is not acted on immediately. Such a provision would not have conferred protection on Jeff Morris (CBA scandal) and James Shelton (Securency scandal). Our previous submission (attached) goes into this in some detail, all of which still applies. There should be a much simpler and more reasonable test which meets community expectations and reflects PJC recommendations.

We hope that this submission will prove to be of benefit to the important work of your committee.



The Hon. Anthony Whealy QC

Chair – Transparency International Australia

TRANSPARENCY INTERNATIONAL AUSTRALIA
ABN 23 068 075 525
E: info@transparency.org.au
P: +613 9877 0369
PO Box 2041
Blackburn South VIC 3130
Australia

6 November 2017

Treasury Laws Amendment (Whistleblowing) Bill 2017 – Exposure Draft

TI Australia values the opportunity to comment on the exposure draft legislation released on 23 October 2017.

Transparency International Australia (TIA) welcomes the Government's commitments to address these issues. However, we note that while many of the amendments represent positive steps towards implementation of TI Australia's previous submissions as well as the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services (which we broadly support), many amendments are inconsistent with those recommendations. Moreover, there are vital issues contained in the Parliamentary Joint Committee's report which are not addressed without which, evidence suggests, any scheme is unlikely to be effective.

1. Domestic and international experience shows that whistleblower protections can be strong 'on paper' but meaningless in practice, unless the right support is provided to enable whistleblowers to activate their rights. It is also imperative that the scheme is sufficiently comprehensive, with appropriate support of administering agencies and regulated entities, including an agency with the power and resources to properly refer and coordinate the responses to disclosures where multiple agencies may become involved. Both these elements are entirely missing from the Government's proposed amendments in the Draft. These facts reinforce our view that the Government should respond with a more comprehensive package before introducing any specific amendments to Parliament based on this draft Bill.

As a result, TI Australia would rather see the Government place priority on implementation of a comprehensive reform package as outlined by the Parliamentary Joint Committee, including by making use of the work that has been done to develop these amendments but not limited to them. We believe it may be a wasted step for the Government to proceed with piecemeal legislative improvements at this time. Given the extent of inconsistencies between the draft Bill and the Parliamentary Committee report and international best practice, and the very short timeframe proposed for introduction of the Bill, we believe that any bill based on this, even with improvements, will indeed represent a piecemeal response which would need to be revisited in the

very near future to be effective. TI Australia does not believe this is the correct approach, and that it would be better to take a little more time, now, to get this right.

2. TI Australia also supports the Parliamentary Committee recommendation that all private sector whistleblower protections should be placed in one set of rules (including those relating to tax, even if the identity of a tax entity for the rules is slightly broader than just corporate entities). Anything less risks the proliferation of multiple rules which will only complicate matters both for whistleblowers, and for companies; and impede the practical effectiveness of protections. Even if the Government decides to continue to proceed with amendments to the Corporations Act as an interim measure before proceeding to a fully comprehensive approach, the tax whistleblowing provisions should be incorporated into that Act (including protections for financial services, credit, insurance, superannuation of whistleblowers) rather than left sitting in parallel. In the absence of compelling reasons, we consider that having parallel schemes is both unnecessary and unwise. We believe the Government should heed the Parliamentary Committee report on this as well as other matters, before proceeding with any legislation.
3. The absence of any significant new implementation roles and responsibilities being given to any agency (e.g. a whistleblowing agency, whether stand-alone or part of another agency) is, in TI Australia's view, also a likely fatal gap in the proposed arrangements. As TI Australia submitted previously, 'independent advice, support and legal services should be expanded as part of improved oversight and compliance under new laws, to assist organisations and employees in detecting and dealing with wrongdoing, help organisations with best practice whistleblowing procedures, and ensure access to remedies and justice for public interest whistleblowers'. Recently a US guidance on the need to assist potential whistleblowers has been published which bears out graphically part of this point. See: http://www.fcpablog.com/blog/2017/10/27/dangerous-times-advising-whistleblowers-before-they-act.html. Unless or until attention is given to our position on this aspect we see limited utility in the amendments. For example a "one-stop shop Whistleblower Protection Authority" to cover both public and private sectors, as recommended, could deal with these important issues.

4. On many specific areas where the amendments are not – but could well be – consistent with known or prospective best practice in this area, we are pleased that our board member, Professor A J Brown, is a member of the expert panel advising on these reforms. We rely on him to provide you with specific guidance on these issues and very much hope that the Government will heed his advice on specific issues. However, even if there is time to correct specific defects in the Bill in the near future as a step towards quality legislation, in TI Australia's view the above major gaps remain. Such gaps still mitigate in favour of a fully developed response to the Parliamentary Committee report as the necessary first step in developing the most effective and appropriate legislation.

5. TI Australia urges that particular attention should be given to one proposed provision which at present falls very far short of international best practice. This is proposed

section 1317AAC dealing with 'Whistleblower third party disclosees' and the principles for when a corporate whistleblower retains protections, if they need to take a disclosure to the media or other 'third parties' (e.g. civil society organisations). The draft bill proposes that this be:

> (1) … if:
>
> (a) a person (the ***discloser***) has previously disclosed information to a whistleblower disclosee referred to in subsection 1317AAB(1) [i.e. ASIC, APRA, AFP or another prescribed body]; and
>
> (b) a reasonable period has passed since that disclosure was made; and
>
> (c) the discloser has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not acted on immediately.

The draft Bill then proposes that a further disclosure may be made to a member of the Parliament of the Commonwealth, a State or a Territory; or a journalist ('a person who is working in a professional capacity as a journalist').

TI Australia has a particular interest in this issue, as a vital element of transparency which will make any such regime effective.

While we support an approach where public disclosures should generally only attract the protections if an effort has first been made to bring it to the attention of a relevant regulatory or law enforcement agency, the provision as currently drafted does not adequately cover circumstances where these protections can and will sometimes be needed.

TI Australia's position remains, as previously submitted, that:

> All Australian whistleblower protection laws should extend to whistleblowers who reasonably make their concerns public -- for example because there is no safe mechanism for internal or regulatory reporting, their employer fails to respond reasonably to their disclosure, or other reasonable circumstances -- including availability of a statutory public interest defence to civil or criminal proceedings in those situations.

We also note that the Parliamentary Committee recommended a test based on a simplified or more 'objective' version of the federal Public Interest Disclosure Act tests – which include:

- provision for emergency disclosures *without* first going to a regulatory agency, in dire circumstances such as described in s.1317AAC(1)(c),
- provision for further public disclosure where <u>any</u> public interest disclosure has not been responded to within a reasonable time (not just 'emergency' ones)
- provision for further public disclosure where a public interest disclosure <u>has</u> been responded to, but the response is 'inadequate'.

TI Australia agrees with the Parliamentary Committee that these types of circumstances should be included in what is "reasonable", and notes that the amendments are currently a long way from that standard.

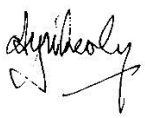
For example, the amendments as currently proposed would not cover some of the major whistleblowing incidents in recent Australian history, where it is widely agreed and indeed applauded that whistleblowers did go public, after inadequate action by regulators. This includes the Securency / Note Printing Australia foreign bribery matters, and the related to Commonwealth Bank Financial Planning services and similar matters. These are exactly the types of situations which must be covered by these rules, if we genuinely wish that both companies and regulators improve their practices to ensure that such public disclosure is not required.

There are existing precedents for more effective tests not only in the federal Public Interest Disclosure Act, but in the Public Interest Disclosure (Whistleblower Protection) Bill 2012 (the 'Wilkie' Bill), and in ACT, Queensland and WA legislation. We are not aware of specific problems having arisen in relation to these better tests.

Finally, we note that the better legislation to date on this issue – such as the Public Interest Disclosure Act or the UK PID Act 1998 – does not seek to artificially restrict the categories of persons to whom such a further disclosure can be made, to such narrow definitions of 'journalist' or even 'media'. Disclosure might also be validly or better made to civil society organisations (including ourselves) so that we may help advise whistleblowers on a responsible and effective path. A more open category of 'further' disclosure would be easier to administer, less prone to litigation over technical issues regarding the status of the recipient, and better aligned with principles of free speech and of a 'public interest' defence to breaches of employer confidentiality and similar threats.

We would be happy to comment further on a redrafted provision which meets these reasonable tests, or to make more specific suggestions.

Yours faithfully



The Hon. Anthony Whealy QC
Chairman, TI Australia