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Maria Xernou
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OECD
By email: maria.xernou@oecd.org

cc Marion Barraclough
Assistant Director, Criminal Law Reform, Integrity and Security
Attorney-General's Department
marion.barraclough@ag.gov.au

Dear Ms Xernou,

Re: Public Consultation: Review of the 2009 OECD Revised Anti-Bribery Recommendation

Transparency International Australia welcomes the public consultation and review of the 2009 OECD Revised Anti-Bribery Recommendation.

We support the position and recommendations outlined in the submission by Transparency International, on behalf of the TI movement.

Transparency International's 2018 Exporting Corruption report shows that out of 44 parties to the OECD Anti-Bribery Convention only seven countries are in the top active enforcement category and four are in the next moderate enforcement category.[1] This report finds that while there appears to have been some improvement in enforcement, overall there has been little improvement since 2015.

The Transparency International submission to this review includes both recommendations from the Exporting Corruption report, and a number of new recommendations.

In particular, Transparency International Australia (TIA) supports the following recommendations, given they are particularly relevant to Australia:

1. **Transparency of beneficial ownership of companies and trusts**

Secret ownership is an obstacle to detection and investigation of corrupt transactions, including laundering of proceeds of crime in foreign bribery cases. The 2009 Anti-Bribery Recommendation does not address the issue of beneficial ownership transparency.

A new recommendation should be added encouraging States to introduce central registers containing beneficial ownership information and make that information public. This should be systematically reviewed by the OECD.

In the Australian context, Transparency International Australia updated its position on beneficial ownership in April 2019.

Transparency International Australia has long called for transparency of beneficial ownership of companies and trusts though submissions to government, and through our active participation in the Open Government Partnership.

[1] Exporting Corruption – Progress Report 2018: Assessing enforcement of the OECD Anti-Bribery Convention (Transparency International) https://www.transparency.org/whatwedo/publication/exporting_corruption_2018

2. Access to remedies for victims

There is now wide consensus that corruption has adverse human rights impacts. However, neither the OECD Anti-Bribery Convention nor the 2009 Revised Recommendation reference the victims of foreign bribery. This fosters the false notion that corruption is a victimless crime.

The nexus between bribery, corruption and human rights violations is clear. Too often communities, citizens and particularly women and girls, bear the brunt of bribery and corruption. Bribery and corruption is not gender neutral, for example, paying bribes through sexual favours – a practice known as sextortion – exists.

Bribery and corruption can rob states of much needed revenues to ensure the provision of essential services, and to alleviate poverty.

Access to remedy is recognised in the context of the international human rights frameworks, including the UN Guiding Principles on Business and Human Rights[2].

Further, The OECD Guidelines for Multinational Enterprises includes a human rights chapter consistent with the UN Guiding Principles on Business and Human Rights. This includes the provision that multinational enterprises should provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.[3]

In addition, the OECD Guidelines require due diligence with respect to human rights and bribery and include a requirement to address actual impacts through remediation.

Recommendations in the anti-bribery review should be included to provide for enforcement authorities in affected states to be given timely notice about, and an opportunity to conduct joint investigations (where this is feasible) and an opportunity to participate in foreign bribery cases at different stages. Further, authorities in victim states to be able to submit claims for reparations or compensation, including social and collective damages, and to present victim impact statements.

The recommendation should also call for the OECD Working Group on Bribery to review the status of country arrangements for inclusion, representation and standing of victims in foreign bribery cases.

Annex II (Good Practice Guidance on Internal Controls, Ethics, and Compliance) should be revised in accordance with the OECD Due Diligence Guidance, in as far as it concerns adverse impacts that are caused or contributed to by the enterprise, i.e. the enterprise's own activities, in relation to foreign bribery. The six steps outlined in the MNE Due Diligence Guidelines should be referenced.

3. Non-trial dispositions, including settlements

There is an increasing trend towards companies and governments settling foreign bribery cases out-of-court. Such settlements can take various forms depending on the country, including plea bargains, non-prosecution agreements (NPAs), deferred-prosecution agreements (DPAs), leniency agreements and conduct-adjustment agreements.

While settlements are cost-saving and incentivise companies to self-report, they should not be used in a way that undermines the justice system or public confidence in it.

Settlement agreements should be made public, including their terms and justification, the facts of the case, the offences and other relevant information. They should provide for effective, proportionate and dissuasive sanctions and be subject to meaningful judicial review, including an opportunity for affected stakeholders to be heard.

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[2] There is growing international recognition of the interlinkages between corruption and human rights violations and of the need for states and multinational companies to remedy adverse impacts on human rights. In 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. This implemented the UN's 2008 "Protect, Respect and Remedy Framework".

[3] http://mneguidelines.oecd.org/guidelines/

A new recommendation should be included to ensure parties to the Convention ensure that settlements and other non-trial resolutions are justified and transparent. It should include detailed provisions as outlined in the CSO letter in to OECD Secretary General Angel Gurria (December 2018).[4]

Transparency International Australia holds the view that companies should be required to admit liability as a condition of entering into a DPA. This was made clear in our submission to the Australian Attorney General's Department Consultation into Deferred Prosecution Agreement Scheme, July 2018.

4. **Facilitation payments**

The UN Convention against Corruption (UNCAC) requires criminalisation of foreign bribery. It makes no exception for facilitation payments. All parties to the OECD Convention are also parties to the UNCAC. Therefore, the Recommendation should include a new instruction to countries to remove any exemption for facilitation payments.

Transparency International Australia has long called for the removal of facilitation payments as a defence in the Australian Foreign Bribery legislation.

5. **Enhance detection and reporting of foreign bribery by financial and non-financial professions subject to AML requirements**

Recent anti-foreign bribery enforcement actions exposed new forms of foreign bribery related to money-laundering and accounting offences. External auditors play an important role in the detection of suspicious transactions and are an important element in implementation of money laundering and terrorist financing prevention measures.

The Financial Action Task Force recommends that not only accountants and external auditors, but also designated non-financial businesses and professions (DNFBPs), including lawyers, real estate agents, notaries, as well as trust and company service providers, be covered by anti-money laundering and counter terrorism finance legislation.

The existing AML recommendations should be extended to all DNFBPs in their functions of providing services for all business transactions.

Transparency International Australia updated its position on AML/CTF in Australia in April 2019.

6. **Transparency in public procurement**

Corruption and bribery risks in procurement are well known. Enhanced transparency and opportunities for participation from civil society and the general public will assist in mitigating risks. Further, debarment by national authorities, for those organisations held liable for bribery and corruption, would act as a deterrent and improve public confidence, trust and integrity in procurement.

Recommendations should be amended to reflect the 2015 G20 principles, which state: "…member countries should support efforts to provide opportunities for input from civil society and the general public on the public procurement processes and participation, during the pre-tendering phase, of relevant stakeholders, including representatives of suppliers, users and civil society consistent with law."

7. **Strengthen whistleblower protection**

Ensuring whistleblowers are supported, protected and compensated for the personal risks and hardship they can encounter when exposing bribery and corruption is fundamental in the detection, investigation, and prevention of bribery and corruption. 'Blowing the whistle' often comes at extreme personal and professional cost and detrimental impacts to the individuals and their families..

[4] https://uncaccoalition.org/en_US/cso-letter-to-oecd-on-principles-for-the-use-of-non-trial-resolutions-in-foreign-bribery-cases/

The OECD Recommendation on whistleblowers should be revised and expanded, to encourage countries to adopt effective and comprehensive whistleblower protection legislation in line with international standards and best practice such as outlined in the TI International Principles for Whistleblowing Legislation.

Transparency International Australia and the Griffith University draft report Governing for Integrity: A blueprint for Reform (April 2019), recommends that:

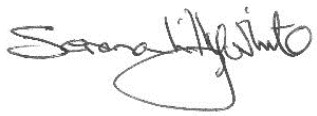
The (Australian) Commonwealth and each State government reform its public interest disclosure (whistleblower protection) legislation to:

- Bring legal protections at least to the standard of Part 9.4AAA of the Corporations Act, as amended,
- granting access to compensation where agencies fail to support and protect public interest whistleblowers
- Recognise collateral or 'no fault' damage as a basis for whistleblowers to be compensated for impacts of reporting, not simply direct reprisals
- Establish reward and legal support schemes to ensure the financial benefits to government of whistleblowing disclosures are reflected in support to whistleblowers themselves, individually and collectively; and
- Establish a properly resourced whistleblower protection authority, providing not only advice, support and referrals, but expert monitoring and oversight of responses to disclosures, and active protection including investigations into detriment, compensation and civil penalty actions. This recommendation relates to: all Australian governments, especially the Commonwealth in respect of the Public Interest Disclosure Act 2013 and other proposed whistleblowing reforms.

In conclusion, this submission supports the recommendations and submission made by our colleagues at Transparency International.

We would welcome the opportunity to discuss this further.

Yours sincerely



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