Public Data Branch

Department of the Prime Minister and Cabinet

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Dear Public Data Branch,

I provide the below submission as feedback on the draft Open Government National Action Plan.

I authorise its publication online.

Whether my submission has sufficient resonance to effect the final report is problematic. Nonetheless, the “Submission from the Steering Committee of the Australian Open Government Partnership Network” runs parallel to my submission and therefore I strongly commend that highly credible and worthy submission.

The final report must reflect and address the issues raised by the Steering Committee or be condemned as unworthy.

Regards

Peter Bennett

Whistleblowing Information Network – Member

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Whistleblowing Information Network

Member Contribution.

INTRODUCTION: I am a member of the Whistleblowing Information Network (WIN). I was the President of Whistleblowers Australia for 9 years but left when some ethical and trust standards were used which did not meet my expectations.

WIN is an informal group of former whistleblowers. Group members include university professors, businessmen, ex bank officials, pilots, senior ex public servants and solicitors.

Due to time constraints this feedback critique will not be reviewed by fellow network members. However I believe the general sentiments contained herein are shared by group members.

Unfortunately our network members have only recently become aware of the Open Government project. Hence our failure to make submissions at an earlier stage. Therefore it is a tad unfair to be strongly critical given that we have not contributed to the debate to date. Nonetheless, there are serious matters that are not even considered in this plan and therefore this critique is focussed on those serious matters on which the plan is clearly silent.

Lastly this submission is based on personal direct whistleblowing experience and close association with many others who have had the same experiences. We know how the system actually works (or doesn't work) in real terms – at the coal face. The current system of Open Government is flawed and is failing in many respects and observers are trying to find out how to plug them. Whistleblowers already know where holes are, what caused them and what it will take to plug them.

SUMMARY: This Plan proclaims lofty, worthy and practical intentions to deal with corruption. What it lacks, is an account of how corruption is able to flourish when there are rules and legislation to prevent it. Simply put – rules and legislation are not enough. Corruption is an opportunistic attitudinal attribute. It flourishes where organisational standards of conduct are hypocritically or deceptively applied or are given lip service and where the control and regulation of corruption or other wrongdoing is poorly maintained.

The plan simply accepts that corruption and wrongdoing exists and provides no measures to prevent it in the first instance. Corruption and other wrongdoing exists in organisations with problematic or selective integrity standards and/or where regulation, control and penalties are badly managed. Corruption, illegality and other wrongdoing exists in organisations at a rate directly proportionate to the amount of gain to be achieved against the risk of being caught. The control of that situation rests squarely on the shoulders of those who lead the respective organisations.

From a whistleblowers perspective the solution to corruption is clear. Facilitate and promote safe ways to disclose corruption. That will lead to a greater risk to those engaged in corruption of being caught. That will at least effectively reduce corruption and maybe even eliminate it.

Public right to corruption information: Legislation at present is aimed as a first priority at protecting organisations from disclosures about internal corruption. As such, the protection, safety and well-being of the whistleblower is subordinate to the interests of the organisations. All legislation is biased to achieve that end. However if corruption exists in any organisation it is a public right and it is in the public interest that that corruption be publicly disclosed. This serves two purposes. Firstly it forces the organisation to publicly correct their failed management system. Secondly it provides the public with an opportunity to decide whether the organisation has satisfactorily rectified the matter and therefore deserve their custom/support.

The particular focus of this critique is specifically directed towards matters that are not properly addressed in the plan;

- failure to establish high cultural standards and regulation thereof within organisations.
- failure to expose the hypocrisy between the stated cultural objectives and the practice of those objectives.
- failure to appreciate the value of whistleblowing at a cultural and organisational level.
- restricting whistleblowing down to tax and corporate wrongdoing.
- bias towards protecting organisations at the expense of protecting whistleblowers and the public interest.
- the backhand denigration of whistleblowers by legislatively labelling them "disclosers".
- the clear governmental opposition to integrity/investigative bodies.
- the public right to information about fraud, corruption or wrongdoing that harms or may harm the public interest.
- lack of support, legislative protection and restitution that must be provided to whistleblowers.
- lack of effective legislation to deter, detect and penalise fraud, corruption or wrongdoing that harms the public interest.

Plan balks at first hurdle

In the Australian context, this Open Government project balks at the first hurdle - though that situation is likely to be the same in all countries. The project requires "concrete commitments from governments to promote transparency, empower citizens, fight corruption …. to strengthen governance while embracing principles of transparency and accountability". Yet these principles are sadly lacking in the highest offices of the land. Politicians and political parties are not held to the same standards of conduct and accountability that they impose on the community. There is factual deception, misrepresentation either by intention or omission and unachievable inducements offered by politicians to get elected or by political parties to hold power. The very standards of ethics and integrity sought to be achieved under an Open Government project are dropped by politicians and political parties at every election. Moreover throughout the parliamentary cycle, there are ongoing abuses of office by political parties and politicians who use information or misinformation without regard for ethical standards in an attempt to defeat transparency and accountability.

The situation is exacerbated by the same parliamentarians who then obstruct the establishment of any oversight mechanisms which might bring them to account. The Australian Parliament, and specifically governments of all persuasions, strongly oppose the establishment of any independent commission which might expose political corruption, misconduct, deception, obfuscation, abuse of office, wilful misrepresentation, unethical conduct and other forms of corruption. In particular, political parties uniformly will not abide the prospect of any commission being established which could impose penalties for such misconduct. The hypocrisy of this situation is well recognised.

Empowering citizens by making politicians and political parties accountable to the highest standards of public office is simply not on the political agenda – Strike one. Our governments are not committed (concretely or otherwise) to genuine transparency – strike two. And our governments are not committed to accountability – Strike three – and OUT..

To remediate the credibility of this Australian Open Government project, there must be a clear statement at the outset about the mechanisms the parliament/government has established or intends to establish to ensure integrity, transparency and accountability of the political process at all political levels. In the absence of such a statement, it is clear that the prospect of any Government maintaining and abiding by the stated objectives of this project is not politically supported and therefore the goals of the plan are unachievable.

It is noted that a section of the plan addresses Integrity in the public sector and refers to "Confidence in the electoral system and political parties" – however the scope of that section clearly does not address the issues raised about the accountability of politicians and political parties.

Defining corruption

A threshold issue in relation to this plan is the definition of corruption and the scope of wrongdoing. It seems this plan is generally directed towards unethical conduct, regulatory or compliance issues and perhaps even civil offences or misdemeanours. But corruption and wrongdoing can extend beyond minor indictable offences and could include serious felony offences. Therefore it is imperative that the plan must clearly identify what is meant by corruption and wrongdoing.

Risks to whistleblowers

There are two tiers in the risks to whistleblowers.

Tier 1. The problem with any whistleblowing is that the corruption being observed/suspected may not be limited to unethical conduct, civil offences or misdemeanours. What the whistleblower observes may only be a small part of organisational misconduct. Therefore the level of protection that must be provided to any whistleblower must assume that the disclosure may be about a serious criminal offence.

Whistleblowers are being encouraged/induced to disclose information about suspected wrongdoing but the protection mechanisms provided are invariably set to manage or resolve simple administrative and regulatory offences. The potential risk of the matter extending to serious felony offences is persistently overlooked in the structure of protection mechanisms.

It is a complete abrogation in the duty of care requirements of those who set up protection mechanisms that they fail to take into account that any disclosure may be placing the whistleblower at immediate and serious risk to their well-being.

For a whistleblower to make a safe disclosure it must be made to a body that is independent and at arm's length from the organisation concerned. And to ensure that if the whistleblower is subsequently victimised, that independent body must have powers to; i) stop the victimisation, ii) restore the whistleblower to a safe and thriving state, iii) punish those who carried out the victimisation and iv) force the rectification of the protection mechanisms of the relevant organisation.

Tier 2. The protection mechanisms (including legislation) established by most organisations have serious embedded failures. Firstly the disclosure procedures usually require the disclosure to be made within the organisation where suspected corruption is occurring. The whistleblower has no way of knowing the scope of any suspected corruption within an organisation. Therefore disclosing within an organisation may mean the disclosure may be made to a person who was involved in the corruption.

Even if the disclosure does expose wrongdoing in the organisation, the whistleblower invariably suffers some form of organisational stigma. In many organisations whistleblowers are virtually labelled and treated as pariahs. Despite the best efforts of good organisations to protect a whistleblower there is still a stigma attached to making a disclosure. This adverse reaction arises because the culture of most organisations does not elevate whistleblowing to an admirable and praiseworthy endeavour. Whistleblowers are seldom thanked, commended publicly (or rewarded) within organisations for disclosing wrongdoing.

The scope of whistleblowing

The role of whistleblowers is understated in the context of this plan about Open Government and anti corruption measures. Whistleblowing by people who have observed any wrongdoing is the most effective, efficient and least disruptive means to stop wrongdoing. Anyone who directly sights suspected corruption is crucial to stopping such conduct**.** However whistleblowing legislation is invariably applicable only to employees/contractors. Whereas there are a range of other people who observe wrongdoing who are not covered by whistleblower protection provisions.

It is wrongly assumed that organisations can only impose reprisals against employees/contractors and therefore anybody who is not an employee or a contractor needs no protection. This is patently wrong. Clients/customers of organisations, related businesses, suppliers, partners, shareholders, accountants, public officials, regulators and others all have the opportunity to observing wrongdoing by organisations or people within organisations. All of these people could be adversely affected through retaliation by offending organisations or particular employees. Therefore it is essential that whistleblowing provisions and protections must extend to any person who discloses information about corruption or other wrongdoing.

The weaknesses of this current plan are very obvious to those of us who have been involved directly in disclosing wrongdoing, malpractice, maladministration or corruption in the public or private sector. The plan sorely lacks the appreciation of how wrongdoing permeates organisations and how it is often perpetuated by systemic negligence, indifferent or protective organisational cultures.

Our society consists of institutions or organisations – such as governments, religions, public services, businesses, institutions, clubs or groups and the like. Every institution has its cultures and mores which tend to be imposed by those who control institutions.

It is a fundamental principle that people tend to behave in accord with cultural moralities and norms of the organisations to which they belong. It is those leaders in control who set the ethical, integrity and just standards of organisations. Those leaders must also set the means to apply, monitor and regulate those standards. Therefore leaders have a dual obligation; to establish the ethical and integrity standards and to monitor and control those standards to eliminate corruption and other wrongdoing.

It is imperative those with the controlling power must take the lead to set those standards and to regulate those standards – in short the standards and regulation must come from the top of the organisation.

This plan does not emphasise the role of organisational leaders setting unambitious integrity standards, promotion of whistleblowing, monitoring systems, disclosure measures, control mechanisms and remedial processes.

How/why cultures fail

Unfortunately this project pursues the ill-advised assumption that corruption and other wrongdoing is best curbed from the bottom up. This is the cultural myth perpetuated and promoted by leaders in most organisations – usually in good faith but often through an opinion that they know what is best or in ignorance and in other cases through negligence or

indifference. Generally leaders don't want to acknowledge wrongdoing in their organisations as it may adversely reflect on their competence –this is particularly evident in the Public Service. So the process is that those who control organisations uniformly proclaim a set of cultural standards and expect everyone to comply. If they set up any means to monitor or regulate those standards, it is inevitable that such measures are minimal to avoid costs and are consequentially ineffective. And if corruption or wrongdoing is exposed, then the aim is to resolve the situation with as little damage as possible to the organisation. More importantly to those leaders is the desire to resolve the corruption as secretly as possible – regardless of the undoubted harm that may be collaterally and respectively caused to the general public, the employees, the clients, the shareholders, associates or members. But more importantly with little or no regard to any harm that may befall the whistleblower who disclosed the wrongdoing in the first place.

In fact and practice, whistleblowers tend to be blamed for any ructions caused by the disclosure of corruption or wrongdoing. The disclosure tends to be treated as an unworthy and undesirable impediment to the smooth working of the organisation. And the whistleblower tends to be held responsible for that impediment.

So the typical organisational practice is to set standards and place responsibly on whistleblowers to disclose any wrongdoing. Then when the whistleblower does what is expected and discloses wrongdoing, the organisation invariably "shoots the messenger". From the vast amount of public information available it seems that in most cases the whistleblower is consistently harmed in their employment. Hence we have many battered and bruised whistleblowers who have tried to stop corruption and other wrongdoing only to suffer reprisals in employment. Such reprisals are often completely at odds to the proclaimed values of the organisation.

More importantly is the persistent cultural response of organisations to simply fix the identified instance of wrongdoing. Seldom if ever, do organisations actually go back to determined how the wrongdoing was able to flourish. The typical organisational response is to weed out those engaged in corruption, minimise any exposure of the identified wrongdoing, move the whistleblower to a place of so-called 'safety' (which is invariably a dead-end job) and go back to business as usual.

Example of organisational responses

Recently Australian banks were formally brought to task for systemic corruption in certain banking practices. Each bank acknowledged that there had been 'misconduct' by some of their staff in dealing with customers. Those who had engaged in wrongdoing had profited from bonuses that had accumulated because of the unfair and unethical conduct of those employees.

The bank's solution was to sack those so-called offending employees only after their conduct was exposed by clients. Importantly the Banks had clearly failed to identify that their employees were acting corruptly – or perhaps that is because those employees were actually working to the standards set by the bank. And they would have continued to do so forever if that conduct had not been disclosed by a client whistleblower. At any rate, the "corrupt offences" were not it seems, statute offences. None of the offenders were charged with any criminal or other offences. It appears that none of the bonuses corruptly obtained were repaid – though compensation is being paid to the rorted clients.

The Banks did not explain why none of their employees "blew the whistle" or disclose the obvious corrupt conduct being carried out by other employees. They did not explain how their integrity standards were able to be perverted by large numbers of employees yet nobody reported/disclosed that wrongdoing to management. Clearly their employees do not believe in the integrity, safety, and protections available to whistleblowers in those Banks.

Moreover the banks did not acknowledge that the culture of the organisation had allowed the corruption to occur. Nor was there any advice from the banks that they were undertaking a

cultural, integrity and practice review to ensure that such conduct could not redevelop in future. There was no disclosed review of how the offending employees were recruited, selected and trained or whether changes to that system were being instituted. There was no advice on the cultural and practice standards that were set when those employees were recruited or who set them. There was no review of the senior officers who set up that group of corrupt employees and why they did not impose on those employees, proper ethical and integrity standards (presuming they existed in the relevant banks). No senior bank officer was held to account by any means.

Given the significant role that the major banks play in Australian society, it bodes very poorly that these pillars of integrity, ethical conduct and fair play set such a low standard for cultural integrity. Moreover it clearly shows that senior Australian institutions are not enthusiastic about control and monitoring of corruption opportunities and even less enthusiastic about promoting corruption disclosures through whistleblowing.

ASIC is Australia's watchdog on banking and financial institutional conduct. Its role is to "contribute to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair and transparent, supported by confident and informed investors and consumers". Clearly ASIC does not ensure that customers receive fair and transparent service.

There has been no push by Parliament for ASIC to prosecute the banks or the offending employees. Nor has there been any parliamentary push to introduce legislation which would prevent the same sort of banking misconduct being repeated.

The Australian Parliament and government cannot claim in this Open Government Plan that they are actively pressing for anti-corruption matters in primary national organisations – to do so would be a total misrepresentation of the truth and the facts.

Cultural values ignored.

What is lacking from this Open Government project is a recognition that leaders must set cultural standards, implement, promote and regulate those standards and abide by them. So what this project has determined is an acknowledgement by all parties that there is corruption, fraud, abuse of office, malfeasance, misfeasance and a plethora of other wrongdoing but no discussion or plans on how to publicly set and enforce ethical, integrity and just standards of good Open Government.

And from a whistleblowers perspective, the project lacks an understanding that organisational standards which are not effectively regulated are not truly standards – they are a façade.

There is sufficient proof that the Governments of this country are not genuinely committed to Open Government.

- A most critical example of this is the demolition of the Office of Australian Information Commission – a goal successfully achieved to the satisfaction of most senior public servants

- Australian Parliaments have repeatedly rejected establishing an Independent Commission against Corruption –but where they exist they are being pared back to an insignificant state. .

- Each Parliament in Australia has introduced Whistleblower Protection legislation. However in every case whistleblowers are not mentioned in the legislation. The legislative provisions do NOT refer to “whistleblowers” – the provisions refer to “disclosers”. Whereas Whistleblowing is commendable because it is disclosing something that is wrong and should be stopped – disclosing on a person is an abomination in Australian culture – it is “dobbing”. “Disclosing” was intended to put whistleblowers in their pejorative place – as nothing more than a dobbing discloser. **Observation**: When the Public Interest Disclosure Act was finalised in Canberra, it was observed that many senior public servants crowed at the success they had in ensuring that whistleblowers would be pejoratively identified as “dislcosers” under the Act.

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- Protection under most whistleblowing legislation is restricted to employees. Other observers of wrongdoing are not covered by the protection provisions of whistleblowing legislation. For example, clients of (banking) organisations, shareholders, parents, patients, bystanders, volunteers, state or local government workers, politicians, judges and so on are not protected from retaliation if they observe and disclose wrongdoing.

- Deliberations about Government decisions are NOT made public and are exempt from FOI disclosure. Even after those decision are acted upon, the public may not gain access to the grounds on which the decision were made.

- The FOI legislation is being wound back and members of Government and the public service are seeking to extend restrictions to various classes of information.

- Shield Laws for journalists remain pathetically inadequate.

- There is no provision under the Fair Work Act for whistleblowers who are damaged in their employment to seek remedies and compensation.

- Peter Shergold (a senior advisor to Government) has implied that whistleblowers should be hunted down and prosecuted.

The Whistleblowing While They Work 2 advises:

- More than a fifth of all organisations indicated that despite encouraging reporting, they did not currently have any strategy, program or process for supporting and protecting the staff who raised concerns.

- Half of business and not-for-profits (49% and 51% respectively) also said they did not assess the risks of the detrimental impacts staff might experience from raising wrongdoing concerns.

- While most organisations provide a range of standard supports to staff who report, less than half of organisations take any extra steps. Only 39% of businesses and 32% of not-for-profit organisations (46% of all organisations) in the survey provided whistleblowers with access to a management designated support person as part of their response.

- Perhaps most alarmingly, only 17% of businesses, 17% of public agencies and 13% of not-for-profits (16% of all organisations) in the study have a mechanism for ensuring adequate compensation or restitution. This is if staff do experience reprisals or other detriment after whistleblowing.

- Instead - even in the public sector, where compensation mechanisms have been broader and longer-standing - organisations are instead more likely to promise disciplinary action against anyone responsible for reprisals.

- Where laws do protect whistleblowers, they tend to criminalise reprisals. This creates a very high legal bar before anyone is prepared to accept that the employee deserves apologies, compensation or restitution for problems they suffer.

- For example, under the Life Insurance Act 1995, any whistleblowers like the Commonwealth Bank's Bengamin Koh, can only access compensation, if a criminal reprisal against them is first proven.

- But this is incredibly hard. In NSW, the Independent Commission Against Corruption found that State Emergency Services Commissioner, Murray Kear, had engaged in a reprisal by sacking his deputy commissioner - at least in part due to her public interest disclosures. But the criminal prosecution failed.

- Compensation avenues that do not rely on this kind of bar clearly need a much higher priority both in law, and procedures.

- At the moment the narrow protections for whistleblowers in Australia's Corporations Act do not even apply to anonymous reporters, if identified later.

- So far, the few protections enacted or proposed for the private and not-for-profit sectors are piecemeal and potentially inconsistent. There are a few protections in the Corporations Act for breaches of corporations law and some in the banking, tax and life insurance Acts.

I commend the following submissions:

Other submissions are commendable but are not directly aligned to the theme I present.

- Submission from the Steering Committee of the Australian Open Government Partnership Network
- the Accountability Round Table submission (14/15 November)
- Neil Freestone
- Derek Screen
- Nigel Waters
- OPG Anti Corruption
- Justin Warren

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My view is that this plan has too many platitudes which gloss over the real state of institutional corruption and wrongdoing in Australia. Therefore it is not useful in the fight against corruption. The competitive nature of society means that some will subsume the public interest for an unjust/unfair benefit. This forces those who usually act honourably to compromise their standards just to stay in the game. Consequently the mind set of too many in Parliament, Government and other high ranked social organisations are not concretely committed to conducting affairs with the public interest as a priority.

Rather, in too many cases, the public interest runs last place behind organisational and personal self interest, arrogance, patch protection, benefit or profit or the avoidance of accountability. The public interest is only dealt with when those other concerns have been dealt with to the satisfaction of the leaders in those organisations.

I suggest that this Open Government Plan project has only taken a first tentative step towards producing a realistic and pragmatic outcome. Advancement will not come from claiming that we (Australian institutions/organisations) have almost got it right. Or that all we need is a little tinkering round the edges and all will be well. More self-criticism and less platitudes and self-aggrandisement is more likely to produce a real means to bring our organisations up to an honourable and commendable standard.

Therefore I respectively urge this Plan be modified where possible to include some observations made herein. But more importantly I suggest that the Plan be submitted as tentative and remains work in serious progress. It would be good to acknowledge that the project has opened realisations about the scope of corruption which needs more comprehensive consideration before making a formal submission to the project.

Peter Bennett