

18 November 2016

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Dear Dr Kennedy and colleagues

Open Government Partnership – Australia’s Draft National Action Plan

I write to congratulate the Australian Government on publication of the draft of its first National Action Plan, and for its renewed commitment to the Open Government Partnership.

I hope the following submissions assist you with finalising a robust and worthwhile first action plan.

While I will restrict my submissions to two items in the draft plan, on other issues I wish to indicate my support for the submission lodged by the Steering Committee of the Australian Open Government Partnership Network, with respect to the plan in general.

1.1. Improve whistle-blower protections in the tax and corporate sectors

It is welcome and indeed historic to see concrete commitments to deal with this large gap in current Australian corporate governance and regulation.

As Project Leader of the *Whistling While They Work 2* Project, referenced in the draft, I thank the Committee for this acknowledgement of the importance of our research. Our project represents a significant investment of taxpayer funds, not only through the Australian Research Council but the direct and in-kind contributions of many Commonwealth and State agencies, among our 23 partner and supporter organisations, as you would be aware (www.whistlingwhiletheywork.edu). Accordingly we are committed to ensuring it assists the development of policy and law reform of the kind now flagged by the draft plan.

The project released preliminary results of our first survey on 8th November, and these can be found on our website above. They already support some key principles for the direction of reform in the next year, and I hope will also assist you in finalising the plan.

My specific submissions are that this item of the plan should:

1. Include more specific commitments for the process and timing that will lead to legislative reform within the life of the present Parliament (i.e. milestones for the development, public release and introduction of legislation).

2. Reference the work of the Senate Economics Committee – in particular its June 2014 report on the Performance of ASIC – and indicate the Government’s acceptance of the Committee’s recommendations for proceeding on this issue (previously only ‘Noted’).
3. Outline a concrete consultation process which reflects, and includes, strong participation from the full range of stakeholders on this issue – including the corporate and not-for-profit sectors, unions and civil society organisations, along with independent and academic experts. A far broader range of stakeholders needs to be strongly engaged in this process than currently suggested by the draft plan.
4. Include milestones for that consultation which recognise the advantages of taking account of further, main results from the WWTW2 Project, prior to options being finalised and decisions made. These results will only begin to become publicly available in the second half of calendar year 2017.
5. Cease to adopt the goal and language of ‘harmonisation’ of private and not-for-profit whistleblowing regulation with the *Public Interest Disclosure Act 2013 (Cth)*. While this may prove beneficial on some issues, all research and experience to date indicates that it is not a sound overall strategy for best-practice regulation, especially when the recent Moss Review of the *Public Interest Disclosure Act 2013 (Cth)* confirms the Commonwealth’s own whistleblowing regimes – while historic and important – are also in vital need of clarification, updating and reform.
6. Recognise that while incentives for whistleblowing in relation to tax matters are a specific issue (ideally, with incentives and protections that will apply to a range of persons broader than simply whistleblowers i.e. employees), public interest whistleblower protection in Australian business life more broadly will not be efficiently achieved simply by amending the Corporations Act 2001 or replicating enhanced protections in that Act, in other Commonwealth laws, in the ‘topsy turvy’ manner achieved by the United States. A comprehensive approach is needed which recognises the intersections between regulation, compliance and workplace relations law across different areas of business life, in particular if compliance burdens on business are not to be increased by piecemeal and ad hoc approaches.

The consultation and policy development process should be structured, and resourced, to recognise and manage this complexity if the commitment is to be realistically met.

7. The goal of reform should be a world’s best practice regulatory regime for incentivising and protecting the role of whistleblowing in corporate governance and good government.

4.2. National Integrity Framework

The draft plan’s recognition of the importance of a holistic approach to anti-corruption and accountability in Australian institutions, through inclusion of this item, is to be applauded. Open government cannot be achieved without strong policy and institutional frameworks for integrity and anti-corruption, and vice versa.

There is nevertheless some confusion and inadequate specificity in the diverse items in this element of the plan, which currently undermines confidence in the likelihood that real progress will be delivered under all the various commitments.

Many of the commitments (e.g. continuing to work on foreign bribery reform, and strengthening anti-money-laundering systems) are vitally important, but relate primarily to the business sector and to higher quality criminal laws and their enforcement. These elements should be retained but separated from the need to fully evaluate and strengthen the Commonwealth’s *public* integrity regime, which is the cornerstone of the national integrity system at the federal level.

In this most important respect, the only commitments in the current plan are to respond to the Parliamentary Joint Committee's report on the jurisdiction of the Australian Commission for Law Enforcement Integrity, and 'ongoing' review of the jurisdictions and capabilities of the AFP Fraud & Anti-Corruption Centre and the Australian Commission for Law Enforcement Integrity.

Neither of these represent new or significant commitments. In particular, no specific activities or processes are proposed for this 'ongoing' review, let alone any which engage any external stakeholders. This makes the current draft plan effectively meaningless.

As the public submissions and evidence to this year's Senate Select Committee on a National Integrity Commission, confirms, if this element of the plan remains without any specificity, it will also have no public credibility, and stand as a potential embarrassment for the Government.

Griffith University is also currently privileged to lead another Australian Research Council Linkage Project (2016-2019), partnering with Transparency International Australia and Australian integrity agencies, entitled 'Strengthening Australia's National Integrity Systems: Priorities for Reform'. More details on Transparency International's approach to evaluating strengths and weaknesses in the national integrity framework can be found at www.transparency.org/whatwedo/nis.

The researchers involved would be pleased to support a concrete process for realising the above commitment, as an important and tangible component of the plan. For example, we would welcome the participation of the AFP Fraud & Anti-Corruption Centre, Australian Commission for Law Enforcement Integrity, and other relevant Commonwealth agencies in a structured program of research, review and deliberation – both public and in-house – on questions of jurisdiction and capability in the field of federal public sector anti-corruption. This is already a foremost concern for the project, as most relevant agencies are already aware.

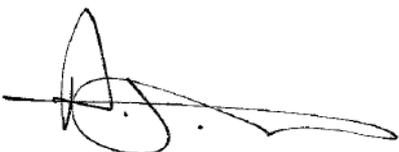
Alternatively the Government could commission its own expert comparative review of the current roles, powers and resources of the key Australian anti-corruption agencies, in order to identify clearer and more transparent benchmarks for the 'ongoing' review of the Commonwealth's particular arrangements. These could then be applied, with stakeholder participation, under the second action plan, in a manner that may help build better public understanding of and confidence in the Commonwealth's arrangements.

Whatever you decide, I recommend you put something concrete in this element of the plan, for all the above reasons.

I hope that these suggestions may be useful, and am ready to assist in any other way.

You are welcome to publish this submission.

Yours sincerely



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(Non-executive director, Transparency International Australia)