A Ten-Point Integrity Plan for the Australian Government

Submission by Transparency International Australia on the Proposed National Anti-Corruption Plan

May 2012

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1. Summary

Transparency International is the global coalition against corruption. Transparency International Australia (TIA) welcomes the commitment of the Australian Government of $700,000 to the 'development and implementation' of a National Anti-Corruption Plan, and is pleased to make this response to the Discussion Paper released by the Commonwealth Attorney-General's Department in March 2012.

Transparency International Australia considers that the draft Plan, when published, will need to satisfy five basic criteria if it is to make a significant contribution to the nation's anti-corruption efforts:

- Precise definition of the Australian Government's anti-corruption **policy responsibilities**
- Clear understanding of the relationship between an **anti-corruption plan** and an **integrity plan**
- Detailed attention to gaps and inconsistencies in the framing and coverage of **legal definitions of corruption-related conduct** (criminal and non-criminal; federal, State and local; government and non-government) as a necessary prerequisite of enhanced anti-corruption strategies
- Measurable commitments to the strengthening of **operational capacity** in corruption resistance-building, detection and enforcement (not simply improved policy coordination and leadership)
- A clear **action plan** including timeframes, resources required, resources committed, lead agency responsibilities, and processes for evaluation and review.

Transparency International Australia is concerned that the Discussion Paper did not disclose sufficient detail to provide confidence as to whether or not, as yet, the proposed plan will meet such criteria. For example, TIA is concerned by the implication that $700,000 may be sufficient to support the 'implementation' of any meaningful coordinated national anti-corruption plan. TIA is also concerned about the absence of any specified mechanisms (eg, COAG) for more effective collaboration across jurisdictions and between the Commonwealth and the States. In these circumstances the plan should perhaps be designated a 'Commonwealth' rather than a 'national' plan.

Based on its own research and appreciation of the above issues, TIA nevertheless considers that a strong, credible, forward-looking national anti-corruption plan is necessary and achievable.

In TIA's view, such a plan would address these criteria with respect to, as a minimum, the following 10 priority issues:

A. A strengthened Commonwealth **parliamentary integrity** regime

B. Strengthened oversight of **non-criminal misconduct** matters across all Commonwealth agencies

C. Standing capacity for review and report on **alleged failures in corruption prevention**

D. Comprehensive **whistleblower protection** across the public and private sectors

E. Best practice **anti-bribery laws** and enforcement

F. Reformed **electoral integrity** regime

G. Reformed **disclosure and political finance** regimes

H. More coherent **parliamentary oversight** of Commonwealth integrity agencies

I. More effective international engagement (**Open Government Partnership**)

J. A robust and transparent anti-corruption plan **monitoring regime**

2. Background

Transparency International is the global coalition against corruption.

Transparency International Australia (TIA) welcomes the commitment of the Australian Government of $700,000 to the 'development and implementation' of a National Anti-Corruption Plan, and is pleased to make this response to the Discussion Paper released by the Commonwealth Attorney-General's Department in March 2012 (AGD 2012).

TIA considers the single largest corruption risk in Australia to be that of complacency – the frequent assumption that because things do not 'appear' to be as bad in Australia as elsewhere, or as bad in some Australian jurisdictions as others, that specific corruption risks are either lower, or being effectively managed, or simply that no significant corruption-related conduct is occurring. As publishers of the annual global Corruption Perception Index (CPI), Transparency International is conscious that transnational *perceptions* of corruption do not provide an objective, let alone relative measure of corruption or anti-corruption efforts in any given nation in *actuality*.

Contrary to international perceptions that Australian public and corporate life is relatively 'corruption-free', Australian public affairs since the 1980s have continued to feature major corruption scandals, on an annual or more frequent basis, affecting all levels of government as well as Australian-controlled businesses. These include:

- reminders of the risks of official corruption on the scale of pre-Fitzgerald Queensland, with the conviction of former Queensland Minister Gordon Nuttall for corruption-related offences;
- the uncovering of systemic corruption in the NSW Police Service in the 1990s, followed by more recent corruption in NSW local government and other circles;
- the discovery of serious criminal conduct at senior levels of the NSW Crime Commission;
- major and unresolved concerns regarding organized crime-related corruption in Victoria;
- abuses of power and position, including by former Commonwealth parliamentarians, in the nation's immigration and taxation systems;
- systemic rorting of Commonwealth-controlled programs such as the 2008-2010 home insulation scheme;
- recurring questions regarding adequacy of oversight of parliamentarians' personal interests and official entitlements, including at Commonwealth level; and
- the involvement of former or current Commonwealth-owned or controlled entities in alleged or proven international bribery – most notably the Australian Wheat Board Limited, Securency and Note Printing Australia – along with enduring questions regarding the failures in governance, oversight, regulation and risk management that have allowed such events to occur.

This history combines with apparent consensus that corruption risks are only likely to intensify for the foreseeable future in the modern globalized economy, given ever-increasing competitive pressures on business, the sophistication of modern organized criminal and security threats, and the intensity of politics and public administration in the age of the new media, public expectations and financial volatility.

TIA supports the Australian Government's approach of using the National Anti-Corruption Plan to examine the adequacy of current anti-corruption arrangements, in light of 'a risk analysis of current and emerging corruption risks' (AGD 2012, p.4). This risk identification and risk management focus implies a focus on prevention and mitigation, which is the fundamental goal of anti-corruption policies and operations.

TIA also notes separate advice from the Commonwealth government that it intends to consult TIA on its draft risk assessment and management framework – at which time more detailed comment on its approach will be possible.

While looking forward to that opportunity, TIA notes that it is unfortunate that some of the considerable work already undertaken by the Australian government which bears on these questions, such as Australia's Self-Assessment Report for the purposes of review for compliance with the UN Convention Against Corruption, could already have been released for public assessment and comment, yet has not been. Such circumstances make it difficult to contribute to a meaningful discussion about the scope of risks which the Australian government intends to analyse.

While the Discussion Paper sets out a large number of Commonwealth agencies with greater or lesser involvement in pro-integrity and anti-corruption programs, there are also further factors bearing on the complexity of assessing whether this institutional framework is sufficient to address current and emerging corruption risks. This includes the absence of systematic research and intelligence needed to understand the full extent of corruption in Australia. The Discussion Paper cited no such research.

This reinforces why actions to address corruption tend to be reactive rather than proactive, and highlights the extent of the information vacuum in which the Commonwealth's risk analysis must necessarily occur. This in turn increases the likelihood of continuing gaps in the response, if 'objective' risk analysis alone is used to determine the response – as opposed to other more overarching and subjective criteria, such as requirements of public confidence. This problem is well recognized internationally, through decisions of governments to frame assessments of anti-corruption strategies around their apparent effectiveness in bolstering *integrity* in institutions and governance, rather than simply trying to respond to evidence of current or likely *corruption* (however defined) (OECD 2005, p.13).

TIA's own assessment of major areas of risk, of direct relevance to the Commonwealth Parliament and Australian Government in light of discussion in the next section, is reflected in Part 4 of this submission.

While welcoming and supporting this initiative, however, the above factors combined with the lack of detail in the Discussion Paper give TIA cause for concern regarding how the Commonwealth intends to arrive at a robust, meaningful and implementable plan. Unless the assessment of the existing situation involves both comprehensive and critical analysis, descriptions of anti-corruption efforts involving many agencies and much activity may contribute to, rather than alleviate, existing problems of complacency.

For a strong plan to be achieved, which escapes these pitfalls, TIA considers that the draft Plan will need to meet a number of criteria, in addition to addressing the substantive issues listed in Part 4. These criteria are discussed in the following section.

3. Criteria and Concerns

Transparency International Australia considers that the draft Plan will need to satisfy the following five basic criteria if it is to make a significant contribution to the nation's anti-corruption efforts.

Precise definition of the Australian Government's anti-corruption policy responsibilities

Corruption, as broadly defined by TIA and in the Discussion Paper, is a ubiquitous phenomenon and risk. To be effective, an anti-corruption plan must systematically address the many institutional contexts in which corruption occurs: in the government sector, the non-government sectors, and at the interface between sectors; within government, at Commonwealth, State and local government levels; and at international and transnational levels. As a signatory to the UNCAC and OECD Conventions (and the APEC Code of Conduct for Business) Australia has obligations to the private sector, civil society and all levels of government.

While describing many anti-corruption related elements of Australia's system of government at a high level of generality, the Discussion Paper provides no systematic framework for identifying, with any precision, how corruption risks and response needs are to be assessed and addressed with reference to each of these contexts, for purposes of planning and action.

Nor is TIA aware that development of the plan is engaging the political or policy interest of State or local government; or for which there is any clear framework of engagement. The Discussion Paper includes some welcome recognition of operational mechanisms for intergovernmental consultation and coordination between law enforcement and integrity agencies. However, at a political and policy level, there are more complex issues regarding:

- the adequacy of anti-corruption efforts in different jurisdictions (for example, continuing controversy over minimum standards of institutional design for an anti-corruption commission in Victoria); and
- the accountability and integrity of intergovernmental programs (including, for example, the reach of integrity agencies such as Auditors-General from one jurisdiction into the operations of others: see COAG Reform Council 2012).

TIA considers it vital that national anti-corruption efforts include stronger support for more effective collaboration across jurisdictions and between the Commonwealth and the States. To this end, TIA would support the identification of integrity and accountability as a priority issue for collaborative investigation and action through the Council of Australian Governments (COAG).

However, the fact that this has not occurred within the timeframe of this Plan makes the suggestion of a genuinely 'national' plan somewhat illusory. It may be more appropriate for the Australian Government to designate the plan to be a 'Commonwealth Anti-Corruption Plan' rather than a national one. For even that to occur, however, the Plan must delineate with greater specificity, the Australian Government's different interests or policy responsibilities with respect to anti-corruption – for example, with respect to:

1. Prevention, detection and enforcement of corruption offences by Australian private individuals and businesses, in their private and business conduct, at home and overseas;
2. Prevention, detection and enforcement of corruption-related actions within Australia by foreign individuals, governments or businesses (e.g. international organized crime, money laundering and proceeds of corruption);
3. Commonwealth responsibility for the integrity and accountability of Commonwealth public officials, agencies and programs; and

4. The Commonwealth's interests in the integrity and accountability of government as a whole across Australia, including State and local officials, agencies and programs.

Unless these interests are defined with greater precision, and the adequacy of current institutions and strategies mapped against the risks affecting each function or interest, it is difficult to envisage how concrete plans and commitments for the future will be identified.

Given the likelihood that the Plan can only truly claim to be a Commonwealth plan, the 10 priority issues emphasised in Part 4 have been chosen with a view to actions within the direct control of the Commonwealth Parliament and Australian Government.

Clear understanding of the relationship between an anti-corruption plan and an integrity plan

As noted earlier, it is widely accepted that the adequacy of anti-corruption efforts may be best assessed by evaluating integrity efforts, rather than simply corruption itself. This is especially the case because corrupt behaviours are often categorized in terms of specific criminal offences (such as bribery), which may differ between jurisdictions and sectors, only represent the worst types of abuse of power, and are proved far more rarely than they are either prosecuted or suspected – providing a narrow, fragmentary and piecemeal focus on what is actually a more systemic set of risks and problems.

For these and other reasons, Transparency International has proposed since the late 1990s that the most effective way to combat corruption is to evaluate and strengthen the 'national integrity system' (Pope 1996; 2000). The first major 'national integrity system assessment' (NISA) was undertaken in Australia (Griffith University & Transparency International Australia 2005).

This approach seeks to consider **all** the major elements which make up a national integrity system (i.e. the national anti-corruption system), recognizing that effective anti-corruption measures cannot be found in a single institution or single law, but in the totality of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power, and how they operate together. An effective integrity system functions to ensure that power is exercised in a way that is true to the values, purposes and duties for which that power is entrusted to, or held by, institutions and individual office-holders – the reverse of corruption.

The majority of priority issues identified as relevant today by TIA, in Part 4, were issues among the recommendations of the 2005 NISA report.

The Discussion Paper recognizes corrupt conduct as lying at one end of a spectrum or 'continuum' of behavior (AGD 2012, p.7) – in other words, it seeks to present corruption in context. However, it appears to remain predicated on assumptions that an anti-corruption plan can or should be addressed simply to risks of corrupt conduct, rather than to the promotion of integrity.

This may be a recipe for a piecemeal or fragmented approach, especially when the Commonwealth has a unique and unusual history of primarily defining corruption in terms of fraud and theft, to the exclusion of other forms of corrupt behaviour (rather than defining fraud and theft as possible examples of corruption: see Griffith University & Transparency International Australia 2005, pp.35-36). TIA considers that unless the plan takes a holistic view of risks to integrity, and institutional strategies for ensuring integrity, the Commonwealth's anti-corruption strategies may remain overly limited.

Detailed attention to gaps and inconsistencies in the framing and coverage of legal definitions of corruption-related conduct

In diagnosing risks and identifying areas for action, TIA considers that the plan must give detailed attention to gaps and inconsistencies in the framing and coverage of legal definitions of corruption-related conduct (criminal and non-criminal; federal, State and local; government and non-government).

This requires specific engagement with the differing legal triggers which define the interest and jurisdiction of regulatory and integrity agencies for the purpose of monitoring, detection, investigation and action against corruption-related behavior. It is a necessary prerequisite of enhanced anti-corruption strategies, because it forces government to confront the detail of how detection and enforcement efforts are currently organized and resourced.

At present, the Discussion Paper presents a broad definition of corruption (as does Transparency International) but neither presents nor flags an intent to review, in more detail, the specific legal definitions required to operationalize that broad definition. This is despite the diversity of approaches currently used in Australia, and the fact that they are a matter of public controversy.

At federal level, there is unresolved divergence between:

- a traditional reliance on 'narrow' offences (such as bribery and secret commissions) in criminal law, supplemented by offences of theft and fraud, to provide operational definitions (some of which are referred to on p.17 of the Discussion Paper); and
- the introduction of a broader criminal offence of 'abuse of public office' by a Commonwealth public official who (*Criminal Code Act 1995 (Cth),* s.142.2(1)) (referred to on p.17):

  (i) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or

  (ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or

  (iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official;

  with the intention of:

  (i) dishonestly obtaining a benefit for himself or herself or for another person; or

  (ii) dishonestly causing a detriment to another person; and
- the introduction of even broader definitions of 'corrupt conduct' for integrity oversight, investigation and reporting purposes in limited circumstances, such as the *Law Enforcement Integrity Commissioner Act 2006* (Cth), s.6(1) (*not* mentioned on p.17):

  (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
  (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
  (c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

At State level, different approaches are being taken again, with their adequacy a matter of controversy (e.g. currently in the creation of Victoria's Independent Broad-based Anti-Corruption Commission). Integrity agencies in at least four States have now worked for varying periods with definitions of 'corrupt conduct', 'improper conduct', and 'official misconduct' of varying degrees of inconsistency. Neither the Commonwealth's broad legal definitions, nor its methods of operationalizing them (e.g. via criminal versus administrative methods) are consistent with any of these.

In particular, there is a serious mismatch between the type of definition in *Criminal Code* s.142.2 (which at State level would be found in administrative or integrity legislation) and the means used to ultimately

carry out its enforcement (i.e. criminal investigation, with all its limitations, versus the types of administrative or integrity investigation used by ACLEI and at State level). As discussed further in part 4, this mismatch cannot be overcome by the Australian Public Service Code of Conduct regime as long as that regime involves such weak central oversight and independent investigation capacity, and lacks comprehensiveness by only applying to Australian Public Service (APS) agencies, rather than all Commonwealth agencies and entities.

TIA considers that even in respect of public sector corruption (above), the statement that 'Australia has a strong legislative regime criminalising corrupt behaviour' (AGD 2012, p.17) is an overstatement of dubious accuracy, at the present time. This is without attempting to review the consistency and comprehensiveness of relevant definitions governing private sector behaviour.

TIA is particularly concerned that the Discussion Paper makes no reference to the recent recommendation of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity that relevant Commonwealth agencies (including the Attorney-General's Department) review the current ACLEI corruption definition (PJC 2011, rec. 6).

As recently as February 2012, the Australian Government's response to this recommendation was to agree in principle to such a review, including public consultation on the issue, noting that 'the definition has relevance beyond' ACLEI. That the same government would release an anti-corruption plan discussion paper the following month, making no mention of this recommendation or response, gives cause for concern.

In TIA's view, the Anti-Corruption Plan is the logical vehicle through which to take stock of the adequacy or inadequacy of these fundamental definitions, as a necessary precursor to assessment of the adequacy of the administrative and enforcement mechanisms used to carry them out.

TIA supports the principle that the Commonwealth needs to develop the most effective possible statutory definition(s) for Commonwealth purposes. However, TIA considers that unless the proposed Plan deals in adequate detail with the question of how corruption-related conduct is defined and framed in Australia, it may give a potentially false impression of the extent to which comprehensive and effective anti-corruption strategies are in place, and gloss over the real gaps and challenges in detection, monitoring and enforcement.

Measurable commitments to the strengthening of operational capacity in corruption resistance-building, detection and enforcement (not simply improved policy coordination and leadership)

TIA is concerned that the Australian Government only appears to be asking the Australian people, through the Discussion Paper, 'whether and how *policy co-ordination and leadership* could be improved' in the nation's anti-corruption arrangements (emphasis added).

TIA does consider that policy coordination and leadership can and should be improved, both at a Commonwealth level and more broadly. TIA has previously recommended (GU&TIA 2005, p.93) that each Australian government requires a designated body or agency, with membership from all 'core' integrity agencies in the jurisdiction, with responsibility and resources to:

(i) Promote policy coherence and operational coordination in the work of core integrity institutions;

(ii) Coordinate research, evaluation and monitoring of the implementation of ethics, accountability and administrative review legislation, including the balance between different aspects of integrity systems (e.g. education, prevention and enforcement);

(iii) Report to the public on the 'state of integrity' in the *entire* jurisdiction;

(iv) Ensure operational cooperation and consistency in public awareness, outreach, complaint-handling, workplace education, prevention, advice and investigation activities, including greater sharing of information between integrity bodies;

(v) Foster cooperation between public sector integrity bodies, sector-specific or industry-specific integrity bodies and like integrity bodies in the private sector;

(vi) Provide ongoing advice to government and the public on institutional and law reforms needed to maintain and develop the jurisdiction's integrity regime; and

(vii) Sponsor comparative research, evaluation and policy discussion regarding integrity mechanisms in other jurisdictions, nationally and internationally.

Indeed, TIA is concerned that the Australian Government is understating the need for greater coordination, by having recently described its anti-corruption approach as constituting a 'multi-agency model' (AGD 2012, p.12). The recent adoption of the term 'model' suggests that current Commonwealth arrangements reflect a degree of pre-existing planning or coherence which, in TIA's assessment, is factually and historically inaccurate. The Commonwealth's present arrangements would be better understood as the result of decades of largely uncoordinated developments in administrative law, criminal law and public sector management, together with political accident.

TIA is even more concerned, however, at the implication that improved policy coordination and leadership may be sufficient to address whatever deficiencies might be identified in Commonwealth arrangements. It is well established that any credible review and plan should address not simply coordination or *coherence* in the arrangements, but *capacity,* including (GU&TIA 2005, p.62):

- Legal capacity (are integrity institutions properly constituted, and do integrity institutions and practitioners have the formal powers or jurisdiction they need to fulfil their tasks?)
- Financial capacity (are the budgets of integrity institutions right for their tasks, and is the right share of financial resources across society and within organisations being devoted?)
- Human resource capacity (are sufficient numbers of employees dedicated to integrity functions either in core institutions or distributed among organisations?)
- Skills, education and training (do integrity practitioners or staff in general have the right professional training and background to discharge their important roles?)
- Political/community will (do senior political and business officeholders possess, or are they sufficiently empowered by the community to find, the will to provide genuine leadership?)
- Community capacity (is there sufficient broader social or community understanding and support for integrity processes?)
- Balance (are financial, human, legal and management resources being adequately shared between the different positive and negative strategies in the integrity system, such as effective leadership training as against criminal investigations?).

TIA is concerned that the language of a multi-agency 'model' may be being incorrectly used as justification for overlooking fundamental questions of capacity, and distribution of capacity.

In its February 2012 response to the Parliamentary Joint Committee on ACLEI, above, the Australian Government cited its so-called multi-agency approach as a basis for *not* accepting the PJC's recommendation for 'a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity commission with anti-corruption oversight of all Commonwealth public sector agencies' (PJC 2011, rec 10). In its response, the Government's position was that its multi-agency response is based 'on the premise that **no single body** should be responsible', and that there is 'no convincing case for the establishment of **a single over-arching** integrity commission'.

TIA is concerned that by confusing issues of coherence and capacity, the Australian Government is at risk of failing to properly address either of these issues in the development of its Plan.

Transparency International is the most prominent originator of the idea that anti-corruption efforts should be framed through a comprehensive 'integrity system', rather than single anti-corruption laws and institutions.

This is especially the case when as recently as July 2010 and May 2012, the Australian Government has substantially expanded the jurisdiction of ACLEI to fill *some* of exactly these types of gaps in anti-corruption capacity. TIA welcomes these extensions of jurisdiction, and associated expansions of resources.

However, given the longstanding concerns of successive Senate Legislation Committees and the Parliamentary Joint Committee about the fragmented nature of the Government's approach, TIA is concerned that the government would exclude any particular institutional option – such as extension of ACLEI-type oversight of corruption-related conduct across all Commonwealth operations – on the incorrect assumption that this would somehow necessarily conflict with retaining a 'system' or 'multi-agency' approach.

TIA therefore supports the Commonwealth's 'multi-agency model' (to the limited extent that one actually exists), but is concerned at the risk of this approach being used to mask an uncoordinated, incoherent and weak anti-corruption effort, if, in fact, the multiple agencies are not functioning as a coherent system, and if gaps in capacity between them are not addressed.

Irrespective of the institutional models chosen, the Australian Government's Plan needs to convince the Australian public that effective capacity exists, and is being deployed, to achieve the prevention, detection and investigation of corruption, to a common and coherent standard, across **all** areas of Commonwealth employment and responsibility, including APS agencies, non-APS agencies, parliamentarians, Ministers and the judiciary. At present this is not the case.

A clear action plan including timeframes, resources required, resources committed, lead agency responsibilities, and processes for evaluation and review

TIA welcomes the assurance that the Plan will include "an 'action plan' with proposals to ensure the Commonwealth can effectively tackle corruption risks in the future" (AGD 2012, p.5).

TIA looks forward to an action plan which includes all the mechanisms necessary for ensuring public confidence that the Plan will make a real difference to bolstering the nation's corruption resistance, including detail as to the timeframes, resources, tasking, and evaluation and monitoring processes needed to guarantee effective implementation.

TIA notes that the implementation task, alone, mitigates in favour of the creation of new dedicated, guaranteed resources and institutional support beyond that which currently exists. At present there is no readily identifiable co-ordination mechanism for core integrity agencies or for distributed integrity efforts, nor a readily understood mechanism for managing the relationships between them.

TIA looks forward to playing whatever roles may assist in this process, as reflected in Part 4. However, some of the Government's public statements include advice that the $700,000 committed to the Plan was for both 'development and implementation'. TIA is concerned by the implication that $700,000 may be sufficient to support the 'implementation' of any meaningful coordinated national anti-corruption plan, and looks forward to learning of the commitment of new resources commensurate with the actions to be undertaken under the Plan.

4. Priority Issues – A Ten Point Integrity Plan

A. A strengthened Commonwealth parliamentary integrity regime

Most public jurisdictions and much of the corporate sector now function under statutory schemes requiring development of enforceable codes of conduct or statements of official responsibilities, but the development of legislative and ministerial ethics regimes has been a saga of avoidance, delay, resistance and doubt. The Commonwealth parliament's system, in which "neither house has a code of ethics or conduct, and there is no move towards an ethics or integrity commissioner" is one of "puzzling self-regulation" (Uhr 2005: 147). This lack of enforceable parliamentary and ministerial standards contrasts strongly with the systems in place for other public officials and most private sector officeholders.

In its negotiations with the independents following the 2010 election the Government committed to pursue the principles of more 'transparent and accountable government [and to] improved process and integrity of parliament' (ALP-Greens & Wilkie Agreements, 1 & 2 September 2010, cl. 4.3; ALP–Windsor-Oakeshott Agreement, 7 September 2010, cl.2, cl. 4, Annex A (Agreement for a Better Parliament: Parliamentary Reform, cll. 16, 18, 19. 20)). Specifically, the Government committed to 'establishing within 12 months a **Parliamentary Integrity Commissioner**, supervised by the Privileges Committees from both houses to:

- provide advice, administration and reporting on parliamentary entitlements to report to the Parliament
- investigate and make recommendations to the Privileges Committees on individual investigations, to provide advice to parliamentarians on ethical issues; and
- uphold the Parliamentary Code of Conduct and to control and maintain the Government's lobbyists register.'

Very limited progress has occurred on the code of conduct, and no progress on a Parliamentary Integrity Commissioner.

On 18 May 2012 Senator Milne announced that the Greens will re-introduce the National Integrity Commissioner Bill, first introduced into Parliament in 2010. This Bill provides for ACLEI to continue, establishes an 'Independent Parliamentary Advisor' (a lesser role that the proposed Parliamentary Integrity Commissioner) and creates a chief National Integrity Commissioner to investigate and deal with corruption issues involving any Commonwealth public official or agency.

The recent Slipper and the Thomson events have brought the issue of Commonwealth Parliamentary integrity front and centre. The Government and the Parliament risk irreversible public scepticism about their integrity if they do nothing. The development of a National Anti-Corruption Plan is also at risk if there is a perception that the executive and legislature – the core pillars of our democratic system - are not prepared to take sustained, coherent and robust action to address corruption within their own institutions. In such circumstances, how can any action they propose to take elsewhere not seem hypocritical?

Action required:

- the establishment of a Parliamentary Integrity Commissioner (as per government commitments) and/or Parliamentary Advisor embedded within a National Integrity Commission framework (as per Greens Bill);
- the Commonwealth integrity regime needs to include more robust and independent investigation and reporting capacities, not just advice;
- an independent panel should be established to advise on and preferably draft a code of conduct for ministers and members of parliament; this panel could include a representative of Transparency International Australia and the Queensland Parliamentary Integrity Commissioner.

B. Strengthened oversight of non-criminal misconduct matters across all Commonwealth agencies

One of the most robust elements of Australia's anti-corruption systems is the growing presence, at State level, of coordinated capacity for the independent investigation, oversight and review of serious non-criminal misconduct risks across the entire public sector. All Australian States have now either introduced or are introducing regimes of this kind, including 'mandatory reporting' obligations whereby agencies must centrally report all suspected corrupt or high risk official misconduct, including non-criminal matters, to an agency with power to investigate such misconduct – even though in practice, the investigative load continues to be shared between agencies.

The Commonwealth Government lacks such a system, although since 2006, it has possessed one with respect to officials exercising law enforcement functions in designated law enforcement agencies. TIA welcomes the significant expansions of this system in July 2010 and May 2012.

Instead, in other respects, the Commonwealth Government relies on:

- the interest of all agencies and the Australian Federal Police in prosecuting corrupt conduct for themselves (where it reaches a criminal standard of seriousness), and
- the interest of *some* (Australian Public Service) agencies in identifying and remedying other non-criminal misconduct – from minor to serious – through the APS Code of Conduct regime, supported by a valuable but limited regime of standard-setting, capacity-building and *ex post facto* monitoring by the Australian Public Service Commission.

This system is inadequate because:

- It leaves in place significant jurisdictional gaps depending on whether a Commonwealth agency is or is not an APS agency;
- It continues to rely too heavily on assumptions that corrupt conduct is criminal, when in relation to much high risk misconduct, that is not the case; and when even if it is arguably criminal, many matters are not likely to excite the investigative or prosecutorial priorities of the AFP or DPP; and when even fewer matters are likely to be found to meet the high evidentiary standards required for proof of criminal activity;
- In APS agencies, the system relies too heavily on the interest of APS agency managers in determining appropriate responses to different forms of misconduct for themselves, with insufficient operational oversight or alternatives -- especially, when, in relation to corruption-related misconduct such as abuse of office and conflict of interest, how agencies perceive their institutional self-interest may become especially complex; and
- It encourages inconsistency and compromises transparency in the identification of 'real' levels of high risk misconduct, reducing the ability for corruption resistance building efforts to be targeted where they may be most needed.

The Australian Government routinely cites evidence of the low apparent incidence of misconduct in APS agencies as a reason for preserving this system. For example, the Discussion Paper (p.8) cites 'less than four in every 1,000 employees' as having been found in breach of the APS Code of Conduct.

However, such a statistic is meaningless unless placed in comparative, relative or analytic context. This includes a system which is inadequately conducive to reliable reporting of Code breaches, and to distinguishing between high risk and lower risk forms of breach, even when reported. It is complicated by the Commonwealth's tradition of identifying corrupt conduct purely or primarily in terms of fraud and theft, as noted in Part 3.

Where it exists, comparative data tends to show no reason for believing that misconduct risks, even if different and differently distributed, are lower overall than in State administration (see e.g. Brown 2008, p.180). Moreover, even using the existing system, the 2011 APS data shows a dramatic increase in suspected and/or substantiated high risk misconduct over the previous year (Figure 1 below). Such variations – even on a year to year basis – could equally suggest that the incidence of such misconduct is not as low as previously argued, or that its incidence or seriousness is on the rise (which suggests the system may not be working), or in either case, that there is a volatility in integrity standards, or detection, or reporting, or all three, which warrants closer scrutiny.

Figure 1: Types of misconduct in finalised APS Code of Conduct investigations, 2009–10 and 2010–11
Source: APSC (2011)

Type of misconduct	Employees investigated for this type of misconduct (no.)			Cases where a breach was found (%)		
	2009–10	2010–11	% change	2009–10	2010–11	% change
Conflict of interest	59	72	**+22%**	61	86	**+41%**
Fraud other than theft (e.g. identity fraud)	54	64	**+19%**	61	83	**+36%**
Theft	17	11	-45%	47	64	**+36%**
Improper use of position status (e.g. abuse of power, exceeding delegations)	69	58	-16%	30	50	**+67%**
Unauthorised disclosure of information (e.g. leaks)	19	24	**+26%**	42	71	**+69%**

It is also noteworthy that the statistics do not provide more detailed information about specific activities highly vulnerable to corruption, collusion, fraud and manipulation, such as procurement. It would also appear that training in procurement lacks a specific focus on improving skills in preventing corruption in procurement processes.

Action required:

- A statutory misconduct framework for the Commonwealth public sector covering all agencies and entities;
- Clearer statutory guidance on forms of misconduct best dealt with by Commonwealth agencies and entities without recourse to central agencies, and higher risk official misconduct (especially higher corruption risk) subject to immediate mandatory reporting to an appropriate, and common, central agency;
- A common, independent central agency with power to oversight the investigation of, and where necessary itself investigate, higher risk criminal and non-criminal official misconduct; set more rigorous standards for investigative responses; and monitor compliance with those standards; acting in cooperation with existing agencies;
- A common central agency with strengthened resources and coordination capability in respect of corruption-related misconduct intelligence, risk analysis, education and prevention, corruption resistance building, and public reporting.

C. Standing capacity for review and report on alleged failures in corruption prevention

The Discussion Paper (p.11) suggests that Royal Commissions can be established to inquire into and report on matters of public concern, including allegations of systemic corruption. However, the effectiveness of these inquiries depends very much on the terms of reference.

Systemic issues such as why existing oversight arrangements did not work, whether existing governance arrangements are adequate, whether institutional responses were timely or sufficient may not be addressed. The narrow terms of reference of the Royal Commission into the Australian Wheat Board kickback allegations is an example of a lost opportunity for greater and more effective transparency and accountability.

The Commonwealth also appears to have not responded to the set of weighty recommendations of the ALRC in its 2009 report (ALRC 2009a) designed to modernize the framework for Royal Commissions and statutory inquiries and in this context calling for action as part of a national plan to counter corruption.

There remain enduring public questions about what senior Reserve Bank executives and the Board knew or didn't know, or should or shouldn't have done to prevent Securency and Note Printing Australia from continuing their corrupt activities. Within the public service proper, we have seen the Palmer and Comrie investigations into how DIMIA/DIAC officers got themselves into a position where they were detaining and deporting Australian citizens. It appears at present that forensic responses into what went wrong and how it can be prevented in the future get triggered only in response to the most major and intractable public scandals. Even in these situations, there is no assurance that the terms of reference drafted by the government will not be too limited to allow proper scrutiny of agencies, individuals or issues. A capacity for independent forensic investigation and reporting is required.

Many ICACs and similar agencies established at state level have an education and prevention mandate, as well as their investigation role. They can take a systemic approach as well as investigating specific allegations of corruption. These functions appear more fragmented at the Commonwealth level, either because of a narrow jurisdictional focus (eg, ACLEI, although we note the recent announcement of additional agencies to come within ACLEI's purview) or because they are spread across a number of different agencies. This means at the least an increased risk that identification and handling of systemic issues will be more difficult, or that it will not happen at all. A broadly based independent anti-corruption agency to lead the prevention, detection and investigation of corruption across **all** areas of Commonwealth employment and responsibility would mitigate this risk. It would also address the risk of gaps in the coverage of the national integrity agencies.

Action required:

- The development of an independent standing capacity for education and prevention as well as systemic forensic investigation, review and reporting of prima facie failures in corruption prevention across **all** areas of Commonwealth employment and responsibility, including Ministers, judiciary and Members of Parliament;
- Early Government response to the ALRC recommendations in its 2009 report *Making Inquiries: A New Statutory Framework.*

D. Comprehensive whistleblower protection across the public and private sectors

TIA considers it crucial that the Australian Government moves promptly to plug the gaps in whistleblower protection, wherever public interest disclosures of wrongdoing are made by Commonwealth public officials or employees or organization members in institutions subject to regulation by the Commonwealth. This includes but, for the sake of comprehensiveness, should not be limited to corrupt and corruption-related conduct.

In respect of the Commonwealth public sector, the Discussion Paper (pp. 18-19) notes the Government's commitment to introduce a comprehensive Public Interest Disclosure Act. While welcoming this continuing commitment, TIA notes that it is 18 years since a Senate Select Committee first recommended such legislation; it will soon be five years since this particular administration committed itself to the objective; it is more than three years since the House of Representatives Legal and Constitutional Affairs Committee made its bipartisan recommendations for a comprehensive scheme; and within the last two years, the Government has failed to meet its own deadline for introduction of the Bill more than three times.

TIA also notes with concern the statement in the Discussion Paper that 'whistleblower protection in the Commonwealth public sector is provided by law, including under section 16 of the *Public Service Act 1999* and section 16 of the *Parliamentary Service Act 1999*.' Given the widely established limitations and partial coverage of these provisions, giving rise to the necessity of the more comprehensive approach to which the Government is committed above, this statement is both confusing and inaccurate.

TIA also notes with concern the statement in the Discussion Paper (p.19) that the proposed legislation will 'facilitate reporting and provide for investigation of alleged wrongdoing in the public sector'. TIA is concerned that no mention is made of an intention to offer effective legal protections, compensation rights and employment remedies to officials who suffer detriment as a result of having made a public interest disclosure.

TIA also notes 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.

In respect of whistleblower protection in the non-government sectors, regulated by the Commonwealth, the Discussion Paper notes that limited protection is included in some 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 recent advice of 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.

Action required:

- Prompt introduction and passage of a comprehensive Public Interest Disclosure Act governing all Commonwealth officials, including (i) effective central oversight and coordination, (ii) provision for disclosure to the media as a last resort or in exceptional circumstances, and (iii) accessible, enforceable and realistic employment remedies for officials who suffer detriment as a result of having made a public interest disclosure;
- Implementation of the Australian Law Reform Commission's recommendations on secrecy laws and open government (ALRC 2009b), including reform of s.70 of the *Criminal Code Act 1995*;
- 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.

E. Best practice anti-bribery laws and enforcement

The provisions of the UK Bribery Act, particularly those creating a corporate offence of passive bribery, effectively require companies to show that they have put in place adequate measures to prevent bribery by themselves or their employees agents or associates. These provisions are already having a real influence amongst Australian companies doing business in Australia and abroad, and are rapidly becoming the standard for corporate behaviour. To remove uncertainty, stimulate prevention measures and support effective enforcement in the corporate sphere, TIA recommends that the Australian Government adopt a similar approach. At the least this would provide much more certainty as to corporate obligations. The Government should also publish a guide for corporations similar to the UK Guidance Statement with its 6 principles.

The government could also usefully open a discussion about the provision of clear incentives for companies to self-report and, as defendants, to make an early plea where their own investigations uncover likely bribery of this type. At present the relevant executives responsible for acting or causing the bribery continue to face their own prosecution risk. TIA suggests that it is time to publicly consider what incentives authorities can give to companies to encourage early and full co-operation and disclosure.

TIA also recommends that the government also address the issue of company responsibility for bribery committed by their subsidiaries and other intermediaries. In reviewing and clarifying the foreign bribery provisions of the Criminal Code, doubts as to their application to all subsidiaries and intermediaries in the supply chain of Australian companies should be resolved. In relation to facilitation payments, TIA recommends that the Government act to remove existing regulatory ambiguity by banning such payments outright, as they are bribes and should be eliminated. We do acknowledge that this is a sizeable challenge for most companies and that zero tolerance of facilitation payments can only be achieved over time; however this should not deter the Government from taking action in this area to clarify and strengthen the law and provide incentives for companies to self report.

Finally, the Government should consider the establishment of an independent government agency similar to the UK's Serious Fraud Office, which can investigate and prosecute serious fraud and corruption. The UK Serious Fraud Office has special compulsory powers to require any person or corporation to provide any relevant documents and to answer any relevant questions. Such an office could also be responsible for enforcement and guidance in relation to bribery.

Action required:

- Provide clear incentives for companies to encourage early and full co-operation and disclosure of suspected bribery;
- Review and clarify the foreign bribery provisions of the Criminal Code with a view to resolving doubts as to their application to all subsidiaries and intermediaries in the supply chain of Australian companies;
- Publish a guide for corporations similar to the UK Guidance Statement with its 6 principles
- Review the extent of technical hurdles in achieving a successful prosecution in foreign bribery cases;
- Initiate a discussion about the benefits of establishing a specialist government agency similar to the UK Serious Fraud Office.

F. Reformed electoral integrity regime

Australia enjoys a generally high reputation for electoral integrity, founded on a long history of independent, professional electoral administration. It does not suffer from what might be called retail-level malpractice or institutional failures, of the kinds that bedevil some systems (Birch and Carlson 2012). A central feature of Australian electoral democracy has been compulsory voter registration and turnout. This ensures high turnout by international standards. But in recent years the compulsory registration system has been under strain. In 2009, the Australian Electoral Commission estimated that 1.2 m eligible citizens were not enrolled (over 8% of the eligible population). The traditional paper based registration system is not well serving newer, younger or re-enrolling electors; yet sophisticated continuous data-matching by electoral authorities has been purging rolls of electors who move homes. Further, until a 2010 court case, registration closed within hours of a national election being called (there is now a grace period of a week after the election is called – see Orr 2010 and Hughes and Costar 2006).

Integrity is served as much by the comprehensiveness of the electoral roll as by erecting barriers to deter fraudulent enrolment. Overhaul of legal and administrative systems is essential to address the problem of a significantly under-inclusive roll. Several state systems have responded by (a) effectively permitting people to enrol up until state election day, putting Australia on a par with Canada and New Zealand, and (b) allowing electoral authorities to 'automatically enrol' a potential voter based on reliable government data as to their place of living, and subject to giving that person a chance to correct the data. Such measures should be implemented nationwide, to ensure simplicity and uniformity.

Action required:

Nationwide implementation of reforms to allow people to enroll up to election day and to allow electoral authorities to automatically enroll a potential voter based on reliable government data as to their place of living, giving the person the chance to correct the data if necessary.

G. Reformed disclosure and political finance regimes

There has been a plethora of political party funding reform at state level in recent years, both in relation to the mechanisms for the public funding of election campaigns and the monitoring and public disclosure of parties' receipts and expenditures and donations by individuals and companies. A welcome recent initiative in NSW has been to restrict donations to individuals.

The public and private funding of political parties, whether within or beyond election campaigns, is a highly contested issue. There is considerable disquiet about the extent to which money buys access and influence.

One immediate and simple step the Government can take is to pass the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010* (which passed the House of Representatives and was introduced into the Senate in November 2010). Among other things this Bill reduces the disclosure threshold to $1000; requires certain persons making gifts at or above the threshold to furnish returns within specified time periods; ensures that for the purposes of the disclosure threshold related political parties are treated as one entity; prohibits the receipt of a gift of foreign property and certain anonymous gifts by registered political parties, candidates and members of a Senate group; and introduces new offences and penalties and increase penalties for existing offences.

Action required:

Passage of the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010*

H. More coherent parliamentary oversight of Commonwealth integrity agencies

Special-purpose parliamentary committees have an increasingly important role in Australia's integrity and anti-corruption systems. They function as both a performance assessment mechanism in relation to integrity agencies of many kinds, and an accountability mechanism for ensuring that the often strong powers and functions of independent integrity agencies continue to be exercised in the public interest. They also function to:

- support integrity agencies by helping ensure that their activities are properly resourced, and remain insulated from changing government priorities;
- bolster public confidence by positioning appropriate agencies as properly accountable to the people through the Parliament, rather than simply to the government of the day, whose operations are often likely to be those which integrity agencies are scrutinizing; and
- increase the policy and operational coherence of the integrity system, by providing a central point or points for coordinating the flow of information between Parliament, government and integrity agencies.

At the Commonwealth level, there is little coherence to this important element of the integrity system. At present the Parliamentary Joint Committee for Law Enforcement Integrity is a statutory committee which oversights ACLEI, as noted by the Discussion Paper (p.11). However little reference is made to the wider importance of these structures, and their potential. For example, the Parliamentary Joint Committee for Law Enforcement oversights the ACC and the AFP. The Parliamentary Joint Committee on Corporations and Financial Services oversights ASIC's operations. The Auditor-General works closely with the Joint Committee of Public Accounts and Audit.

TIA considers that there may be important opportunities for rationalization and greater coherence among these committees as a means of strengthening the Commonwealth's anti-corruption approach, especially with respect to its own integrity system.

By contrast, the Parliament currently provides no oversight committee for either the Commonwealth Ombudsman or the Australian Information Commissioner, despite these being important independent integrity agencies within the Commonwealth's current 'multi-agency' approach.

Action required:

- Review and rationalization of the Commonwealth Parliament's Joint Parliamentary Committee structures to provide a lesser number of more integrated, and better resourced, statutory committees with integrity, accountability and anti-corruption oversight functions;
- Specific inclusion of the Commonwealth Ombudsman and the Australian Information Commissioner within statutory Parliamentary Committee oversight arrangements.

I. More effective international engagement (Open Government Partnership)

The Discussion Paper (pp. 23-25) sets out a range of international anti-corruption activities in which Australia is engaged. TIA notes the Government's engagement with G20, and its support for international efforts against corruption, including EITI, UNCAC, Stolen Assets Recovery, the International Anti-Corruption Academy, and Transparency international itself. We urge that it is in Australia's interests that this support and engagement continue and increase. (In this context we note the Government's recent budget decision to delay its commitment to increase aid spending to 0.5% of gross national income.)

Australia should aim to lead by example in this arena by the quality of its National Anti-Corruption Plan and the commitment to its implementation. It should take all opportunities to affirm its commitment to fighting corruption both domestically and internationally. It is therefore puzzling that Australia has declined to join the Open Government Partnership, launched in September 2011 by 8 governments including the US and the UK. The Government says it is continuing to consider and to consult. To become a member of OGP, participating countries embrace a high-level Open Government Declaration; deliver a country action plan developed with public consultation; and commit to independent reporting on their progress going forward. An additional 47 countries have committed to the OGP.

The statements of principle and intent set out in the NACP Discussion Paper align closely with the OGP Declaration. It is hard to see what is holding Australia back from joining the OGP.

Action required:

Early Government decision and announcement of its commitment to join the OGP.

J. A robust and transparent anti-corruption plan monitoring regime

At the least the NACP will provide a valuable overview of perceived gaps, emerging risks and national priorities of current and proposed Commonwealth Government anti-corruption agencies. There is also an opportunity for the NACP to set out how and when the government proposes to implement and monitor progress in addressing emerging risks and anti-corruption priorities. In doing this it will be helpful if the NACP sets out in detail some robust performance measures, and how the Government proposes to engage key stakeholders in monitoring progress. The Plan should also include a commitment to an annual reporting process.

Part of the objective of the Plan is to achieve greater civil society and stakeholder engagement in the issues raised in the Plan. It would be an indication of the seriousness of this commitment if the Plan were to include an opportunity for civil society representatives to monitor and to report on progress of implementation. Certainly TIA would be interested in contributing to an assessment of progress in implementation.

The work that TIA has undertaken in developing this submission has highlighted again the paucity of reliable information about the nature and extent of corruption in key sectors. It would also be worthwhile commissioning an update of the 2005 NISA study, focusing on the coherence and robustness of current anti-corruption institutional arrangements and policy responses, especially at the Commonwealth level. The NIS methodology has evolved since the 2005 study. A system analysis undertaken with a clearer understanding of the context within which the integrity systems operate would also enable greater citizen understanding of and engagement with integrity and anti-corruption plans.

Action required:

- Invite civil society representatives to monitor and report on progress of implementation of the National Anti-Corruption Plan.
- Undertake an independent assessment of the nature, extent and impact of corruption in Australia.
- Commission an update of the 2005 NISA study, focusing on the coherence and robustness of current anti-corruption institutional arrangements and policy responses, especially at the Commonwealth level

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