

Dr Warren Mundy
Independent Reviewer
NLAP Review

27 October 2023

By email: submissions@nlapreview.com.au

Independent Review of the National Legal Assistance Partnership 2020-2025 (NLAP)

Dear Dr Mundy,

Thank you for the invitation to make a submission to the Independent Review of the National Legal Assistance Partnership 2020 – 2025 (**NLAP**).

This letter comprises the submission of Transparency International Australia to the Review.

Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system. Transparency International Australia has not to date received Commonwealth funding under the NLAP.

This submission adopts a particular focus on the need to facilitate improvements to whistleblower protections through adequate funding for legal support to accompany ongoing law reform in this area. Our recommendations appear in full on page 6 of this submission. In summary, we submit that serious consideration be given to NLAP funding of initiatives and projects undertaken by community legal centres (**CLCs**) concerning whistleblowers, with a unified and coordinated approach across the CLC sector, to provide such services in response to identified need and to afford – in a scaled and consistent manner – greater protections to employees who blow the whistle on corruption or misconduct, in circumstances that invariably involve power imbalances, which is particularly pronounced in circumstances where certain employees are already vulnerable or disadvantaged. We also recommend that consideration be given to Commonwealth funding for legal support (up to an appropriate cap) for the cost of whistleblowers seeking advice and representation, plus a smaller cap for other costs such as career transition and welfare costs, similar to a scheme previously proposed by the Victorian state government.

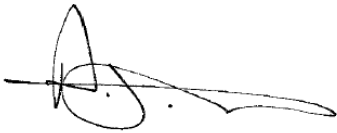
We consent to:

- the publication of this submission on the Review website and for the submission to be quoted with attribution in the report of the Review; and
- Transparency International Australia being identified in the report of the Review as having made a submission.

We would also be pleased to provide further information as necessary, if this would assist with the Review.

We can be contacted at the following email addresses: a.j.brown@griffith.edu.au and clancy.moore@transparency.org.au.

Kind regards,



Professor A J Brown, Griffith University
Board member
Transparency International Australia

Legal need and Commonwealth legal assistance funding

There is clear unmet legal need in the area of whistleblower protections and accordingly, we submit that there is an associated requirement for adequate funding at a Commonwealth level to improve the protection and legal support afforded to whistleblowers across Australia. Any realistic forecasting for legal assistance funding should accommodate the ongoing reform in the area of whistleblower protections.

Transparency International Australia's experience of working with people that blow the whistle on wrong doing and corruption, including with the recent establishment of a National Whistleblowing Advisory Group, demonstrates the urgent need for legal support including funding for legal assistance. Our National Whistleblowing Advisory Group members have consistently pointed to the high legal costs associated with blowing the whistle, participating in investigations and playing their role in official follow-up actions including court processes (as witnesses or otherwise). They have also pointed to the costs of defending their own employment and civil rights against detrimental actions or omissions, reprisals and the like as a result of blowing the whistle.

Additionally, we anticipate there will be consistent growth in the demand for legal services in this area over at least the next decade –and likely beyond – as whistleblower protection laws undergo significant reform. Some reforms are already underway and many potential reforms in this area have been foreshadowed by the Federal Government.

As to the current whistleblower protection legislation in force at a Commonwealth level, the relevant legislation is comprised of the following:

1. *Public Interest Disclosure Act 2013* (Cth);
2. *Corporations Act 2001* (Cth);
3. *Fair Work (Registered Organisations) Act 2009* (Cth);
4. *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
5. *Aged Care Act 1997* (Cth);
6. *National Disability Insurance Scheme Act 2013* (Cth); and
7. *Taxation Administration Act 1953* (Cth).

Presently, there are separate reviews underway concerning a new Aged Care Act which includes proposed revised disclosure protections for whistleblowers and the *Taxation Administration Act 1953* (Cth) (**TAA**) and the Taxation Administration Regulations 2017, as part of the government's response to the PwC 'tax leaks scandal'. There is also a statutory review required under section 1317AK of the *Corporations Act 2001* (Cth) into the operation of the whistleblower protection provisions in the *Corporations Act* and Part IVD of the TAA which provides for whistleblower protections in relation to tax. In addition to this, stakeholders await the Federal Government's foreshadowed consultation with respect to a whistleblower protection authority, being an initiative which the Federal Labor Party has now committed to 'considering'. Such an authority should, in our view, be tasked with supporting whistleblowers in addition to data capture, monitoring, and transparent reporting to ensure objectives are met.

The Human Rights Law Centre (a partner of Transparency International Australia in this area) recently published a report concerning the increased level of legal support required for whistleblowers, '*The Cost of Courage: Fixing Australia's Whistleblower Protections*'

(September 2023) (**Appendix 1 (Cost of Courage report)**). The Cost of Courage report reviewed case law from 23 different whistleblowing laws (current and repealed) and analysed 78 judgments across 70 cases over three decades. The outcome of this analysis revealed that there was only one judgment in which the whistleblower was awarded compensation for facing detriment after making a disclosure.¹ In the vast majority of cases the subject of the report, whistleblowers were found to be unsuccessful. The report also stated:

*In 21 of the unsuccessful cases, the whistleblower was self-represented, suggesting access to justice is an acute issue.*²

The data set considered by the Human Rights Law Centre therefore demonstrated the ongoing need for improved support for whistleblowers through funding assistance for advice and representation, to improve access to justice. Further, the report found that there was no successful judgment (in which a favourable outcome was determined in favour of a whistleblower) under several key, in-force whistleblowing regimes, including under federal laws protecting public sector and private sector whistleblowers, union whistleblowers, or under public sector whistleblowing legal regimes in Victoria, South Australia, Western Australia, and the Northern Territory.³ Such concerning results underscore the need for substantive reform to support and protect whistleblowers at state and federal levels, and adequate funding to ensure they are able to obtain the legal assistance – in the form of advice and representation – that they clearly require in this area of law, which is riddled with complexity and typically involves disproportionate power dynamics as between employees and their employers.

The inevitable result of this forthcoming suite of reforms (and foreshadowed further potential reform) is the need for increased levels of funding for legal support to be provided to whistleblowers, particularly in circumstances where they experience disadvantage (i.e. many whistleblowers and prospective whistleblowers fit within the NLAP National Priority Client groups and emerging groups⁴). Comprehensive and consistent funding at a Commonwealth (and state) level, with adequate provision in funding forecasts that reflect future reforms, is therefore essential to ensure whistleblowers are legally supported, irrespective of what type of wrongdoing they are seeking to expose and address. This need is amplified in circumstances where the whistleblower experiences disadvantage such that they would not otherwise be in a position to obtain legal advice or representation.

Sustainable and adequately-funded service delivery

As the Cost of Courage report argues, the support ecosystem for whistleblowers must be sustainable. The current high prevalence of unrepresented litigants in whistleblower-related litigation demonstrates the significant challenge for whistleblowers given the inadequate support they experience under the present regime. This does not sufficiently reflect the significant public interest in whistleblowers making protected disclosures with the benefit of advice and representation. In the Issues Paper to the present Review, Dr Munday states:

Effective advocacy by legal assistance providers either through participation in policy processes or by funding litigation with a public interest element can, in the long run, reduce disputes, litigation and the demand for legal services. It goes without saying

¹ Human Rights Law Centre, 'The Cost of Courage: Fixing Australia's Whistleblower Protections', (September 2023), 9.

² Human Rights Law Centre, 'The Cost of Courage: Fixing Australia's Whistleblower Protections', (September 2023), 7.

³ Ibid.

⁴ National Legal Assistance Partnership Review Issues Paper, 18 – 19.

*these activities must be funded. This issue has recently been highlighted by the Royal Commission into the Robodebt Scheme...*⁵

Notably, whistleblowers played a pivotal role in the course of events leading to the Robodebt Royal Commission and assisted with the Commission's investigations. Nevertheless, the current legal protections and the level of support for whistleblowers remain inadequate and many whistleblowers stay silent for fear of reprisals and other consequences. Effective whistleblower protections coupled with adequate funding to afford whistleblowers legal representation is therefore not only necessary, it is entirely consistent with the aims of the present Review and the objective of the National Strategic Framework for Legal Assistance. The objective is as follows:

“To further a national, integrated system of legal assistance that is focused on keeping the justice system within reach, maintaining the rule of law, and maximising service delivery within available resources. Within this system, legal assistance services should be delivered in a high quality and culturally appropriate manner.”

It is in the public interest that consideration be given to increased government funding to empower whistleblowers and to keep the justice system within reach for them, including by facilitating access to adequately-funded advice and representation. Significantly, this is not a new notion and a blueprint already exists at the state level for a pilot for the provision of similar funding for advice in this area. The Victorian Government in 2018 proposed a pilot program named the Discloser Support Scheme and released an Issues Paper (**Appendix 2**). The objective of the Disclosure Support Scheme was to “ensure that, so far as possible, a person is no worse off for making a protected disclosure complaint”⁶. It was designed, with requisite eligibility criteria, to provide subsidised legal assistance; reimbursement of reasonable legal costs incurred in making a protected disclosure complaint (with total legal costs limited, up to a cap of \$24,000); and/or financial assistance towards welfare costs and career-transition costs (also limited up to a cap of \$2,000 in total)⁷. Transparency International Australia strongly supports a similar model being considered at a federal as part of the present Review. We submit that such a model is consistent with the adoption of a client-centric approach, tailored and timely legal services, and appropriate preventative action, which are among the key outcomes which the NLAP aims to achieve.

⁵ National Legal Assistance Partnership Review Issues Paper, ii.

⁶ Victorian Government Department of Premier and Cabinet Discussion Paper: ‘Designing a pilot for the Discloser Support Scheme’ (October 2018), 3.

⁷ Victorian Government Department of Premier and Cabinet Discussion Paper: ‘Designing a pilot for the Discloser Support Scheme’ (October 2018), 5.

Recommendations

In light of the matters discussed above, Transparency International Australia recommends the following, with a view to facilitating the objective and the outcomes of the NLAP, in the area of whistleblower protection:

- **Recommendation 1:** there be an increase to the level of Commonwealth funding for whistleblower protections to enable CLCs to deliver whistleblower legal support services, including advice and representation, as appropriate.
- **Recommendation 2:** Commonwealth funding be considered for legal support (up to an appropriate cap) for the cost of whistleblowers seeking advice from a solicitor in relation to making a protected disclosure, participating in an investigation, and/or any detrimental action proceedings, plus a smaller cap for other costs such as career transition and welfare costs (which may include appropriate costs for advice, assistance and coaching from a recruitment or human resources firm; re-skilling costs; counselling from a counsellor, psychologist or psychiatrist).