Review of the Public Interest Disclosures Act 1994

Answers to questions taken on notice at the public hearing on 27 September 2016

Professor AJ Brown

received on 30 September 2016

1. The Committee has heard evidence that the Public Interest Disclosures Act can be difficult to interpret and would benefit from redrafting.

a. In your view, is there a need for the Act to be redrafted?

Yes, the Act would benefit from a fresh redraft.

b. If so, which parts of the Act are most in need of redrafting?

A fresh redraft would take in the whole Act. However, in particular, I stress my evidence to the committee that the remediation and compensation mechanisms in the Act require wholescale redevelopment, to separate out the criminal remedies (prosecution of deliberate reprisals) from civil, employment and administrative remedies (which should be available on a no-fault basis).

In this regard I'm happy to attach my submission to the Review of the Commonwealth Public Interest Disclosure Act 2013, which sets out detailed recommendations in this regard as would apply to the Commonwealth Act (items 4-6 and Appendix). A similar approach could be taken to the NSW Act.

2. Would it be preferable to redraft the NSW Act to mirror the Commonwealth Act?

While there are various positive aspects of the Cth Act that could be adopted, on the whole the Cth Act is very cumbersome and complex as a piece of legislation. The simplest and best drafted Act of this kind in Australia is the *Public Interest Disclosure Act 2012* (ACT). Despite being Territory legislation, it would be easily adapted for any State jurisdiction. It has specific aspects that would not be replicated (e.g. it allows 'any person' to seek protection for making a public interest disclosure, rather than simply public officials and contractors, etc), but otherwise is superior legislation with a clearer and better structure than the Cth Act. It too would benefit from improvements, including those stressed above, relating to effective and accessible remediation and compensation remedies, but would be a better place to start.

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Dear Philip

Submission -- Public Interest Disclosure Act 2013 (Cth)

Thank you for the opportunity to make a late submission to your very important review.

The following represent the main areas in which I believe the Act can and should be improved, by way of amendment.

Separately to these issues, it is also important to recognise, and advise Government, that after a limited period of operation there is still only limited information about the performance of Act and the regime it seeks to establish. I therefore encourage you to recommend to Government that it undertakes a further review in another three years, or such earlier time as would enable it to consider the results of the Whistling While They Work 2 project, and the outcomes (or lack of outcomes) in respect of applications for compensation under the Act.

In my view, the key areas for improvement are:

1. Possible preferable title of the Act

While for many years I have advocated for *Public Interest Disclosure Act* as a preferable title to *Whistleblower Protection Act*, there are good reasons for thinking that the best title for this kind of legislation is a combination, e.g. *Public Interest Disclosure (Whistleblower Protection) Act.* This was the title of the private member's bill introduced by Andrew Wilkie MP in 2012.

The reasons for reconsidering this, are that while the primary focus should be kept on the value of disclosures, the 'PID' title means that the legislation is relatively easily confused with other legislation such as that relating to Freedom of Information and security/confidentiality classifications. The title 'Protected Disclosures Act' is obviously even worse in this regard. Also, whereas the term 'whistleblower' carried overwhelmingly negative or damaging stereoptypes 20 or 10 years ago, this is much less true today. It is therefore now more appropriate to consider whether formally incorporating it in the legislation has some improved value, as a means of more clearly communicating what the legislation is about.

2. Clarity and workability of the Act

Recommendations for improvement to the Act should continue to be tested against the principle that the Act should promote an '**if in doubt, can report'** attitude on the part of all public officials – or in other words, promote confidence that if public interest-related wrongdoing (defined broadly) is reported, the report will be appropriately actioned and officials supported and managed appropriately.

The challenge of this legislation is that its cumbersome drafting and complexity already work against its utility for promoting this principle. All proposals for simplifying the Act should be viewed favourably. However, the only way this will work, and still support this key principle, if simplifications involve *removing* unnecessary steps, classifications, tests or requirements (and certainly not adding any), while also ensuring that the steps removed are not simply for the administrative convenience of agencies in ways that reduce their obligations to ensure the highest degree of consideration for the welfare and interests of disclosers. Each proposed amendment or improvement needs to be considered in this light.

3. Simplification of wrongdoing / disclosable conduct

The definition of disclosable conduct under the Act can and should be simplified, by removing the automatic classification of any/all reports of breaches of the Australian Public Service Code of Conduct as public interest disclosures. This definitional approach was always out of step with equivalent legislation at State level and internationally, and incredibly ill-advised. Given that this was clear at the time, it is difficult to fathom why the Government proceeded with this approach, but it should now be rectified.

I stand by my submissions at the time to the House of Representatives Legal Affairs and Social Policy Committee on the 2013 Bill:

> "Consideration should be given to refining the scheme so that it only captures those breaches of the APS Code of Conduct that would amount to a substantive category of specified wrongdoing (corrupt conduct, maladministration etc) – rather than any and all APS Code breaches, including minor ones which may simply be disciplinary or personnel matters which have no larger 'public interest' content.
>
> By contrast, while the 2012 (Wilkie) Bill (subs.26(2)) provides that APS Code breach investigations *may* be used as the means of investigating matters under the Act, it differs from the current Bill by *not* presupposing that every APS Code breach reported by an APS employee is necessarily a 'public interest' disclosure. No similar State legislation contains any such presupposition. Recent amendments to the Public Service Act were also intended to give greater flexibility for distinguishing between public interest and non-public interest whistleblowing under the APS Act. The current Bill seems to have gone in a reverse direction."

At the same time, the Review should recommend tightening sub-section 48(1) of the Act (Discretion not to investigate) of the Act, by deleting paragraph (c), which provides that an agency may elect not to investigate a disclosure if 'the information does not, to any extent, concern serious disclosable conduct'.

This discretion had some utility when the overall definition of disclosable conduct was cast too wide, as above – and there was justification for a mechanism for filtering out disclosures about APS Code breaches that were not sufficiently serious to warrant the application of the PID Act. Apart from that purpose, however, paragraph (c) has the potential to defeat the

purpose of the Act, especially as it allows for qualifications to be placed on which disclosures will be dealt with ('serious') which is not present or defined anywhere else in the Act. It is also unnecessary (once the APS Code breach issue is sorted) because by definition, all the substantive types of wrongdoing defined as disclosable conduct are – or should be – serious in and or their nature ('corrupt conduct', etc). The paragraph creates considerable uncertainty: if the type of wrongdoing identified is already objectively serious, does this mean that only doubly serious examples of this wrongdoing trigger the Act?

If clarification or simplification about relative seriousness is needed for any particular classes of disclosable conduct, this should be included in the class itself, and not offered to decision-makers as a convenient excuse to pick and choose when and whether a disclosure requires an investigative response, which may easily defeat the purpose of the Act in a wide range of instances. Other paragraphs provide plenty of flexibility for escaping or dealing appropriately with disclosures that do not warrant investigation, e.g. vexatious ones. Hence, paragraph (c) should be deleted.

4. Separation of compensable detrimental acts & omissions, and criminal reprisals

The PID Act criminalises reprisals, with an increase in penalties to a maximum of two years' imprisonment, consistently with state laws, also a late amendment (s19). However, there is a major problem that, as with other Australian laws, the definition of criminal reprisals and civilly-actionable reprisals are the same – raising the problem of whether only reprisals of sufficient seriousness to sustain criminal action can also give rise to civil remedies.

Overall, the criminalization of reprisals in Australia has proven more symbolic than substantive, with few prosecutions, and no known successes. The recent failed *Kear* prosecution in NSW demonstrates why this may never the case, under current approaches. The priority given to such offences in legislation may also have made *real* whistleblower protection more difficult by distracting from, or masking, the reality that the vast bulk of adverse outcomes unjustly suffered by whistleblowers are plainly non-criminal.

In partial response, the Act provides that civil remedies are available even if a prosecution for criminal reprisal 'has not been brought, or cannot be brought' (*PID Act 2013* (Cth), s 19A; following *PID Act 2010* (Qld), sub-s 42(5). However, an even better approach would be to create civil remedies for detrimental action that are entirely distinct from the criminal offence, to make clear that investigations which are unable to find evidence of deliberate, criminal reprisals do not obviate the different question of whether civil and employment duties of care towards a whistleblower have been breached.

For a possible improved formulation of these provisions for this purpose, see *Appendix.*

5. Completion of the compensation provisions

It is important that the full nature of the damages suffered by employees who fail to be supported and protected properly, be reflected in the compensation provisions. For example, a wrongful dismissal on many well-understood grounds may *normally* have only limited impact on an employee's ability to regain work, but the reputation of a wrongfully dismissed *whistleblower* may suffer in ways that impact on their ability to regain suitable employment for years, or permanently, through no fault of their own.

Current best practice in this regard is provided by the UK Employment Relations Act 1996 (as amended by the Public Interest Disclosure Act 1998 UK), which makes it explicit that

there is no cap on damages for adverse actions up to and including, but not limited to, dismissal on basis of a PID.

It is noteworthy that under the PID Act 2013 (Cth), there is no capping of damages in the Federal Court (non-Fair Work Act) provisions of the Act (s.14(1)). This makes it doubly appropriate to ensure that no caps apply to the compensation that may be obtained if an applicant pursues remedies under the Fair Work Act, as also provided for under the Act, and which would be the desirable first port of call. Hence, there should also be amendments to the Fair Work Act to put the availability of those remedies beyond doubt, and ensure that the agencies and tribunals administering the Fair Work Act understand the distinctive nature of the jurisdiction relating to public interest disclosures.

The Act also still misses the more fundamental point that obligations to protect whistleblowers are not simply obligations to refrain from or to deter active reprisals, but instead flow from a general duty of care to take reasonable steps to provide employees with a safe and supportive workplace. Failures of this duty, not necessarily involving any intention to punish, are the more likely cause of most unfair detriment; and may be systemic or institutional, more than reflect intent on the part of managers, individually or collectively, to actually cause detriment.

As a result, it is important to make clear that compensation rights will flow in respect of any detriment suffered as a result of the failure of, or anyone's failure to follow, the systems that agencies are required to have for preventing and minimising detrimental outcomes. The requirement for direct *intent or awareness* on the part of individual managers that their acts or omissions would negatively impact is not the crucial element. Many, if not most chains of events leading to allegations of reprisal stem from negligent, accidental or even unwitting failures in the proper management of disclosures, including collateral impacts such as the failure to take into account the stress impacts of a disclosure process in other management decisions. Extension of the civil and employment remedies to these circumstances is an important step, and would make the Act consistent with its important object (section 6, par (c)) of protecting whistleblowers from 'adverse consequences' and not simply outright, deliberate reprisals.

Such an outcome might be achieved by an additional sub-section 13(4):

> 'Notwithstanding subsection (1), a person (including an agency) is liable for compensation for a detrimental act or omission for the purposes of section 14, 15 or 16 if the act or omission is the result of:
>
> (a) a failure to fulfil an obligation under this Act; or
>
> (b) a failure to follow procedures established under this Act;
>
> irrespective of whether any particular person responsible for the act or omission knows, believes or suspects that the person who suffered the detriment made, may have made or proposes to make a public interest disclosure.'

The *Appendix* contains some specific suggestions for how the provisions in Part 2, Division 1, Subdivision B (Protection from reprisals) could be restructured and reworded, including to achieve this outcome.

6. Clarification of onus & standards of proof

Section 13 of the PID Act requires that in either a criminal or civil case, the 'reason, or part of the reason' for the detrimental act or omission must be a 'belief or suspicion' that someone had made, might have made or proposes to make a public interest disclosure.

In addition to achieving the objectives identified above, it is important that this method of framing the grounds for liability is revisited – not only to make clear that civil remedies are available even if the act or omission was not undertaken with the intention of punishing a person for a disclosure, but to make clear when the onus should revert to the employer or the alleged source of the detrimental act or omission to show that the act or omission was reasonable or justified, rather than the other way around. It is also unclear what 'part of the reason' is intended to mean. For example, if or when this is tested in a tribunal or court, it remains too easy for a tribunal member or judicial officer to presume that the fact that a disclosure was or could be made must be a 'substantial' reason for the detrimental act or omission – which may set the bar too high. A preferred test is for liaibility to be recognised where the making of the disclosure was a factor 'of any significance' whatsoever in any deliberate or preventable act or omission, culminating in detriment.

7. Revisions to support the Ombudsman's roles and responsibilities

Serious revision of the Act is needed to support an effective role for the Ombudsman, and possibly also the Inspector-General of Intelligence & Security, in actively implementing and oversighting the Act. This should include an ability to monitor how agencies are handling disclosures in 'real time'; to issue advice or intervene early in matters where there is a higher risk that protective action needs to be taken in order to avert mishandling or detriment; to actively follow up on cases and outcomes; and to support the pursuit of remedies by or on behalf of individual whistleblowers, where the case shows this to be warranted, rather than every whistleblower being left to fight out any compensation case on their own.

Unless the Ombudsman and IGIS are properly resourced in these tasks, then there also remains a high risk of their oversight never extended beyond the role of yet another 'paper-go-round', after the event, without achieving the objects of the Act.

The Act should be amended as follows (with commensurate resources provided):

- Rather than simply empowering the two oversight agencies to 'assist' agencies in their implementation, the Act should provide all he powers necessary to allow them to establish and maintain active oversight. In support of the proposed regime, there should be clear provision requiring agencies to notify the Ombudsman or IGIS of suspected, alleged or confirmed disclosures covered by the Act, 'as soon as practicable' and subject to the Ombudsman's guidelines for doing so, to ensure that effective and agreed risk management approaches are put in place by agencies.

- There should be explicit power in the Ombudsman and IGIS to review and make recommendations **at any time** regarding the results of notifications, decisions made by agencies about how a disclosure will be handled, investigations, and/or the way in which a discloser is proposed to be managed, or has been managed.

- The Ombudsman is given responsibility under s.74 to determine the standards that determine how the Act is implemented by all agencies, including intelligence agencies. Given this, s.62 should be amended to make explicit that – even though the IGIS will be the primary oversight agency in respect of disclosures emanating from or relating to

intelligence agencies – the Ombudsman may also, if he or she considers it to be in the public interest to do so, investigate or review the question of whether the standards have been properly applied in respect of intelligence agencies, as a matter of administration.

- There should be clarification by way of consequential amendment to the Ombudsman Act and, if necessary, the IGIS Act, to ensure that nothing (for example, the fact that a case involves personnel management matters) artificially excludes either oversight agency from investigating, reviewing or making recommendations relating to the way in which a particular disclosure or discloser has been managed.

In particular, there should be reconsideration of the current backstop arrangement for ensuring that agencies fulfil their support and protection obligations under Part 4, Division 1 and other parts of the Act, which is simply a theoretical ability of the Ombudsman to receive and investigate complaints, or initiate own-motion investigations, under the *Ombudsman Act 1976*. At present, this is supported simply by a 'Note' to this effect in section 58 of the Act; and consequential amendments to the *Ombudsman Act* which defined 'disclosable conduct' under the *Public Interest Disclosure Bill* as also a 'matter of administration' under the *Ombudsman Act.*

In my view, this approach was always inadequate. Paragraph 5(2)(d) of the *Ombudsman Act 1976* precludes the Ombudsman from investigating any 'action taken by any body or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment'. This is crucial because concerns about support and protection may have nothing to do with the 'disclosable conduct' itself, nor even the way that conduct has been investigated. Rather these concern acts or omissions by agencies with respect to the discloser themselves. This typically includes actions whose investigation remains barred by par. 5(2)(d) of the *Ombudsman Act*, taken with respect to persons employed (the discloser), relating to their employment (provision or withholding of managerial support, transfers and relocations, reallocation of duties, etc).

It is vital that there be **no doubt** that the Ombudsman has not only a jurisdiction, but an obligation, to investigate alleged mismanagement of disclosers' welfare, in a manner that overcomes the very explicit jurisdictional bar in paragraph 5(2)(d). Otherwise the credibility of the entire protection regime is in doubt. It would not be adequate nor conducive to a trustworthy regime if the Ombudsman is forced to 'outsource' such questions to other agencies that may have power to investigate, preventing the Ombudsman from being able to review the matter as a whole, or from expressing their own opinion about how a public employee has been handled. Nor, indeed, is there any obvious agency to which the function could be outsourced for the many non-APS entities to which the Act applies.

Consequently:

- The Act should be amended to set out the full oversight functions of the Ombudsman and IGIS, rather than these being left to supposition;

- The Ombudsman Act should be amended to make clear that a 'matter of administration' includes not only disclosable conduct, but any actions taken by an agency relating to that disclosable conduct or to the disclosure of that conduct, including in compliance or non-compliance with its protection and support obligations;

- The Ombudsman Act should be amended to explicitly provide that, in respect of the management of a public interest disclosure, paragraph 5(2)(d) of the *Ombudsman Act 1976* does not apply.

8. Inclusion of members of Parliament and their staff

It is a major shortcoming of the Act that it provides no protections to officials or contractors who blow the whistle on public interest-related wrongdoing involving Commonwealth Ministers, members of parliament, or their staff.

This is contrary to the 2009 Legal and Constitutional Affairs Committee report (including Recommendation 4) which assumed that the proscribed wrongdoing would be reportable, *wherever* found in government, i.e. including legislators, the political executive, and judicial officers, subject only to constitutional constraints. The Act failed to provide that promised comprehensive coverage of public sector wrongdoing, because there is no protection of any officials if they disclose alleged or suspected wrongdoing by:

- Judicial officers or persons engaged in judicial work (e.g. an ordinary public servant or court staff who blew the whistle on serious corrupt judicial conduct would not receive protection, where one who blew the whistle on mere maladministration in the court system would);
- In certain circumstances, anyone or anything associated with an intelligence agency (see below).
- Ministers, politicians or their staff (definition of 'public official': ss.29(1)(b), 69);

The credibility of the Act continues to be undermined as long as such significant exemptions and loopholes remain.

9. Rationalisation of the principles and tests relating to third party or public disclosure

It is important that the circumstances in which an official may make such a disclosure are clear and workable. Current best practice is the *Public Interest Disclosure Act 2012 (ACT)*, s.27, which, in effect, provides that such a disclosure will continue to attract the protections under the Act, if there is/was:

- a total failure to act on the disclosure internally or by an integrity agency; or
- investigative action taken but no evidence of progress or outcome; or
- an investigation produces no action but there remains 'clear evidence' of wrongdoing; or
- there is/was no safe way of reporting internally or to an integrity agency, and no way this could reasonably be expected;
- BUT the protection only extends to information that it is reasonably necessary to disclose, to get action on the wrongdoing.

The 2012 (Wilkie) Bill, ss.31-33, took the same approach.

By contrast, protections continue to apply to public disclosures under the current Commonwealth Act, only where they amount to 'emergency' disclosures or the whistleblower 'believes on reasonable grounds' that a prior investigation is 'inadequate' (s 26(1), Table, Item 2, par (c)). While this mixed subjective-objective test provides more useful guidance than the equivalent Queensland or WA provisions, and is in some respects a lower threshold for whistleblowers to meet than the NSW or ACT provisions, it fails to recognise circumstances where it may be reasonable for a discloser to argue that a first internal or

regulatory disclosure was impossible or unsafe, or where no investigation or other action was undertaken, or it was not undertaken in a reasonable time.

The specific grounds for an 'emergency disclosure' are also unduly restrictive, and more onerous than needed, by requiring that there must be an 'imminent' danger to health or safety of one or more persons, as opposed to simply a 'substantial' one. In effect the formulation increases the risk of dangers manifesting into *actual* harm, rather than encouraging action in response to risks of potential or likely harm, because it requires that someone must actually be on the verge of harm before the disclosure is protected (e.g. a terrorist attack must actually be underway, not just made possible by the wrongdoing).

Finally, the PID Act imposes an additional test that a further disclosure must not, on balance, be 'contrary to the public interest', with a range of criteria specified to guide this judgment, including a repetition of the basic public interest objectives of the Act (sub-s 26(3)). This is an unnecessary complication. A general public interest test regarding public (external) disclosures is already contained in the Table in s .26(1) ('(f) No more information is publicly disclosed than is reasonably necessary in the public interest'). Further, there is already a "built-in" public interest test in the entire Act, which presumes that if information is about disclosable conduct, it should be disclosed, unless there are very specific and serious overriding reasons why not.

For these reasons the standards in the Act should be replaced with the simpler formulations provided by current best practice, such as the ACT approach – possibly with amendment to incorporate a new test for 'emergency' disclosures. In particular, sub-section 26(3) can and should simply be deleted.

10. A rational definition of intelligence & law enforcement information

Any "carve-outs" or special procedures under the Act (e.g. in relation to political, judicial, or intelligence agencies or matters) should be fully justified with reference to the nature of the information requiring special treatment, such as its actual sensitivity – and should not be dealt with by way of blanket exclusions or exemptions. However, as mentioned above, a significant area of "carve out" that compromises the Act relates to the excessive degree to which intelligence agencies and their activities are treated differently to other agencies.

The Act did not honour commitments such as in the 2010 Government Response to the Committee on Legal and Constitutional Affairs, that intelligence agencies would be covered equally with all other agencies, save that 'public disclosures will not be protected where the public interest disclosure relates to intelligence-related information' (2010 Response to Recommendation 21).

In particular, section 41 defines 'intelligence information' which is precluded from public disclosure, and other things, as extending to *any* information 'that has originated with, or has been received from, an intelligence agency' (s.41(1)(a)) – not just information whose release might carry any actual risk of harm to security, intelligence or law enforcement interests. Any public disclosure relating to any conduct involving intelligence agencies will only be protected if it meets the above definition of an 'emergency disclosure'. This means that unless an emergency arises (and perhaps even if it does), intelligence agency whistleblowers are treated differently from those in all other agencies; if they make an internal disclosure, then irrespective of its subject matter, they cannot take that disclosure public even if the investigation is patently inadequate, and even if the wrongdoing involved has nothing to do with a security or intelligence function or activity of the agency.

In practice, the definition of 'intelligence information' is also so broad, that even an emergency disclosure by an intelligence agency whistleblower is probably unprotected. This is because the definition still includes precludes disclosure of *any* information 'that has originated with, or has been received from, an intelligence agency', which would appear to include any information relating to such an agency.

An additional effect of s.41 is to restrict what information can be provided to normal investigative agencies (e.g. Australian Federal Police or Australian Crime Commission) to investigate (s.34, Table, Item 2), even if under normal circumstances there would be no such restriction *without* this legislation. This is inconsistent with the intent of the legislation.

By revisiting this issue, and undertaking quite minor and technical amendments, the Commonwealth can not only correct an unworkable arrangement, but provide international leadership in the formulation of a more suitable balance on this important issue. It should be informed in this regard by the most comprehensive policy principles to date in this area, the Tshwane Principles (2013), developed by the Open Society Justice Initiative:

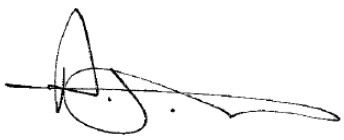
> Open Society Justice Initiative, *Global Principles on National Security and Freedom of Information*, June 2013 http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles

These principles affirm that governments may legitimately withhold information in defined areas of genuine sensitivity, such as defence plans, weapons development, the operations and sources used by intelligence services, and confidential information supplied by foreign governments that is linked to national security matters; but that non-sensitive information should be subject to the same disclosure systems and tests as other official information.

To achieve an Act which not only complies with, but exemplifies these principles, section 41 of the Act should be amended so that the definition of 'intelligence information' is confined to classes of information whose release could indeed be logically argued to have sufficient, real sensitivity to warrant a presumption in favour of retention. Most of the content of section 41 deals with information of this kind. To overcome the principal difficulties described above, all that is needed is the deletion of one paragraph – par 41(1)(a) – which wrongly extended this principle to all information originating with or received from an intelligence agency, irrespective of its content or sensitivity.

I hope these submissions assist the Review.

Yours sincerely



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Appendix

PUBLIC INTEREST DISCLOSURE ACT 2013

RECOMMENDED AMENDMENTS – PROTECTION PROVISIONS

Part 2 – Protection of Disclosers

No.	Section	Title/subject	Amendment	Other associated amendments	Reason
1	Part 2, Div 1, Subdiv B	Protection from reprisals	Split into two subdivisions: "B - Protection from detrimental action" "C – Reprisal offences"	--	Retitling and other reordering below makes language of the Act re: protections line up with language in objects re: adverse consequences – s.6(c).
Subdivision B - Protection from detrimental action					
2	13	What constitutes taking a reprisal	Omit section; replace with: "13 What constitutes *detrimental action* (1) For the purposes of this Act, action is *detrimental action* if, by act or omission: (a) it causes detriment to any person, including: (i) unfavourable treatment, or likely or proposed unfavourable treatment, in relation to the person's reputation, career, profession, employment or trade; or (ii) dismissing a person from a position of employment; or (iii) harassing or intimidating a person; or (iv) causing harm or injury to a person, including psychological harm; or (v) damaging a person's property; and (b) the reason (or if more than one, a reason of any significance) for the act or omission was a belief or	--	1) Makes language of the Act re: protections line up with language in objects – s.6(c). 2) Adopts language of detrimental action instead of 'reprisal' to better distinguish between civil remedies and criminal offence, and give priority to civil remedies, in line with best practice. 3) Adopts broader definition of 'detriment' including based on ACT Act 2012, s.39.

			suspicion that a public official made, may have made or may make a public interest disclosure. (2) For the purposes of this Act, action is also *detrimental action* if, by act or omission, the detriment is caused to any person as a result of (a) a failure to fulfil an obligation under this Act; or (b) a failure to follow procedures established under this Act; irrespective of whether any particular person responsible for the act or omission knows, believes or suspects that the person who suffered the detriment made, may have made or proposes to make a public interest disclosure. (3) Despite subsections (1) and (2), action is not detrimental action to the extent that it is administrative action that is reasonable to protect the person concerned from detriment as a result of the person making, or being believed or suspected to have made, a public interest disclosure."		
3	New 14	New 14	After section 13, insert new section 14 based on existing section 22 (Interaction with protections under the Fair Work Act 1999): "14. Protection available under *Fair Work Act 1999* (1) Without limiting the operation of the *Fair Work Act 2009*, Part 3-1 (General protections), Part 4-1 (Civil remedies) and paragraph 772(1)(e) of that Act apply in relation to the making of a public interest disclosure by a public official who is an employee as if, for the purposes of that Act: (a) this Act were a workplace law; and (b) making that disclosure were a process or proceeding under a workplace law. (2) A person to whom detrimental action is caused, who is an employee, is entitled to any and all of the remedies available to a person entitled to seek protection under the provisions identified in subsection (1). (3) In proceedings under the *Fair Work Act 2009* for unfair dismissal, a person who is dismissed shall be regarded for the	--	Recognises that *Fair Work Act* remedies should be first port of call for disclosers who suffer detriment – not last. Makes *Fair Work Act* remedies equivalent to current best practice (UK Employment Relations Act 1996) as promised by the Government.

			purposes of that Act as unfairly dismissed if the reason (or, if more than one, a reason of any significance) for the dismissal is that the person made, was suspected to have made, or might make, a public interest disclosure under this Act. (4) In proceedings under the *Fair Work Act 2009* for unfair dismissal, subsections 392(4), (5) and (6) of that Act do not apply to compensation awarded where a person is regarded as unfairly dismissed by virtue of subsection (2), but shall be such amount as Fair Work Australia considers just and equitable in all the circumstances having regard to the loss (including likely future loss) sustained by the person in consequence of the dismissal in so far as that loss is attributable to acts or omissions of the employer. (5) In proceedings under the *Fair Work Act 2009* to which this section applies, a public official who is an employee who is an applicant in proceedings for protection or a remedy (including an appeal) may only be ordered to pay costs incurred by another party to the proceedings, if: (a) Fair Work Australia or the Court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause; or (b) Fair Work Australia or the Court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs."		
4	Old 14	Compensation	Renumber and retitle: 15. Alternative avenue for compensation		
5	15	Alternative avenue for compensation	1) Omit "a reprisal"; replace with "detrimental action".	Also replace "a reprisal" in new sections 15, 16 and 17	Clarifying relationship between civil remedies and criminal offence of reprisal.
			2) In paragraph 15(1)(a), omit: "compensate the applicant for loss and damage"; replace with: "pay fair and reasonable compensation to the applicant for any injury,	--	Ensures compensation power is equivalent to tort as per best practice in state jurisdictions.

			loss or damage".		
			3) Insert new subsection (2): "(2) An order under subsection (1) may include an order for exemplary damages."	--	Matches best practice in Qld Act 2010, s.42 and ACT Act 2012, s.41.
Subdivision C – Reprisal offences					
6	Old 19	Offences	Split into three sections: 20. What constitutes a reprisal 21. Taking a reprisal 22. Threatening to take a reprisal		
7	New 20	What constitutes a reprisal	Insert: For the purposes of this Act, a *reprisal* is an act or omission by a person which, causes detriment to another person, including: (i) unfavourable treatment, or proposed unfavourable treatment, in relation to the person's reputation, career, profession, employment or trade; or (ii) dismissing a person from a position of employment; or (iii) harassing or intimidating a person; or (iv) causing harm or injury to a person, including psychological harm; or (v) damaging a person's property.		
8	New 21 (old 19)	Taking a reprisal	1) In subsection (1), after "another person" insert: "because of a public interest disclosure".	--	
			2) After subsection (1), insert new sub-section (2): "(2) For the purposes of this Act, a reprisal is taken against a person because of a public interest disclosure if the offender knowingly or reckless takes, or threatens to take, detrimental action against that person, and the reason (or, if more than one, a		

			reason of any significance) for the action is that: (a) any person has made, or may make, a public interest disclosure; or (b) the offender believes or suspects that any person has made, or may make, a public interest disclosure."		
9	New 22	Threatening to take a reprisal	1) Current subs 19(3) becomes new subs 22(1).	--	
			2) Current subs 19(4) becomes new subs 22(2); subs 19(5) becomes new sub 22(3)		
10	Current 19A, becomes new 23	Interaction between civil remedies and offences	Retain and expand: "To avoid doubt, a person may bring proceedings under subdivision B in relation to detrimental action: (a) if a prosecution for an offence against this subdivision in relation to the same or related acts or omissions has also been brought, or could be brought; or (b) even if a prosecution for an offence against this subdivision in relation to the same or any related act or omission has not been brought, or cannot be brought."		Clarifying relationship between civil and criminal remedies.