

INQUIRY INTO PUBLIC INTEREST DISCLOSURES BILL 2021

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**NSW LEGISLATIVE COUNCIL - INQUIRY INTO PUBLIC INTEREST
DISCLOSURES BILL 2021**

Monday, 15 November 2021

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Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University; Board Member, Transparency International Australia (via videoconference)

Key Points:

1. Overall strengths and implications of the Bill

- A positive step change in the NSW public sector whistleblower protection regime, as observed by NSW Ombudsman
- The challenges of effective whistleblower protection mean that such legislation, especially with its additional very important compliance machinery, is not self-enforcing: substantial resources are required.

2. A world-leading advance in proactive protection, but ongoing review is needed with respect to full effectiveness of the remedies provisions, in general

- Sections 61-62, supporting s.43(1)(c), represent a **world-first achievement** in explicitly creating a basis for liability and remedies where damage results from an agency's failure to fulfil its obligations to assess and take reasonable steps to minimise risks of detriment to a whistleblower
- This clearly applies to omissions and failures to provide support or action to minimise foreseeable personal and employments, not simply deliberate or knowing reprisals
- Other improvements to Part 3 (Protection) (ss.32-36) in respect of scope of detriment, grounds for relief and onus of proof are also welcome and positive steps – however:
 - In general the provisions continue to be framed with the effect that the **criminal offence** of causation of detriment (s.33) is likely to overshadow and complicate the feasibility of civil remedies and relief (s.35) (other than where covered by ss.61-62), for the reasons that the constituent elements remain more aligned with active, deliberate or knowing reprisals, rather than individual negligent omissions, “turning a blind eye” reprisals or damage caused by individual failures of duty
 - These limitations should remain under scrutiny by the Steering Committee with a view to further law reform as more experience emerges.
- Section 43(1) has a **notable omission**, in that it requires agencies to have procedures for dealing with allegations of “offences” of detrimental action, but not procedures for remedying actual detriment (whether caused through offences or through other non-criminal acts or omissions). *If possible, this should be remedied in the bill.*

3. Meaning / content of public interest disclosures: apparent and actual exclusions

- As recommended by the Ombudsman, there is scope for further amendments to better explain the meaning and scope of “serious wrongdoing” particularly with respect to matters primarily only covered by the general class of “serious maladministration”.
- The intended exclusion of disagreements with **government policy** (s. 26(2)) would be better worded to make clear that the exclusion is intended to relate “purely” or “only” to such a disagreement (as per the Cth PID Act), notwithstanding the slightly different wording in this Bill (“to the extent that”). *If possible, this should be remedied in this bill.*
- The intended exclusion of purely *individual*, personal **work-related or employment grievances** (s. 26(3)) would be better worded to make clear that the exclusion is intended to be for grievances that “only personally affect” that individual, or affect that “individual alone” – again, notwithstanding the slightly different wording in this Bill (“to the extent that”). Cf. the more complicated equivalent wording in the Corporations Act 2001 (Cth) as amended in 2019. *If possible, this should also be remedied in this bill.*

4. Potential confusion for the future: voluntary versus mandatory

- Section 23: query the ease with the Ombudsman and agencies will be able to ensure that normal disclosures by public sector employees in line with codes of conduct, normal duties of every public official will be recognised as “voluntary” disclosures protected by the Act – given that the definition of “mandatory” disclosures includes disclosures made “while meeting the ordinary requirements of the official’s particular role or functions” (s.23(1)(a)).

Especially given the term “ordinary”, this would seem to arguably include disclosures made subject to a standard code of conduct obligation or other general reporting expectation – not simply, as presumably intended, to disclosure as part of a designated role (e.g. manager, auditor, etc).

5. Disclosure to journalists and parliamentarians

- Section 28: It is highly regrettable that the circumstances for **public disclosure** to be protected continue to include a requirement for the disclosure to be “substantially true” (whatever that means), among other things; and that a more serious revision of this provision was not undertaken by the Government informed by policy debates in response to the varying deficiencies of equivalent provisions across the Commonwealth.

This issue should remain under consideration by the Steering Committee and Parliament with a view to further reform, which is going to be inevitable for the Act to achieve reasonable best practice, even if the Bill is passed as currently drafted.

EVIDENCE | How well have Australian whistleblowing laws worked to date?

Repercussions and remedies for Australasian whistleblowers

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Jane Olsen, Centre for Governance & Public Policy, Griffith University
Office of New South Wales Ombudsman

3rd Australian National Whistleblowing Symposium – 11 November 2021

Summary

- New analysis of over 1,300 whistleblowing cases as described by managers and governance professionals in 33 Australian and New Zealand organisations - 29 of them public sector
- Over half of the public interest whistleblowers who were the clearest priority for protection, and experienced serious repercussions, received no remedy at all, according to their own organisational managers and governance staff
- Only 6% ever received any compensation, including 8% of those who lost their job as a result of reporting, and only 4% of those assessed as having experienced serious harassment, intimidation or harm from managers or colleagues
- The results highlight just how little traction current whistleblower protection laws have been having, despite in most cases years of being in force
- The results are a wake up call for the extent and urgency of reform needed to legal remedies for whistleblowers and consequences for employers, especially public sector agencies, when they fail to fulfil the protection obligations expected by the law and community.

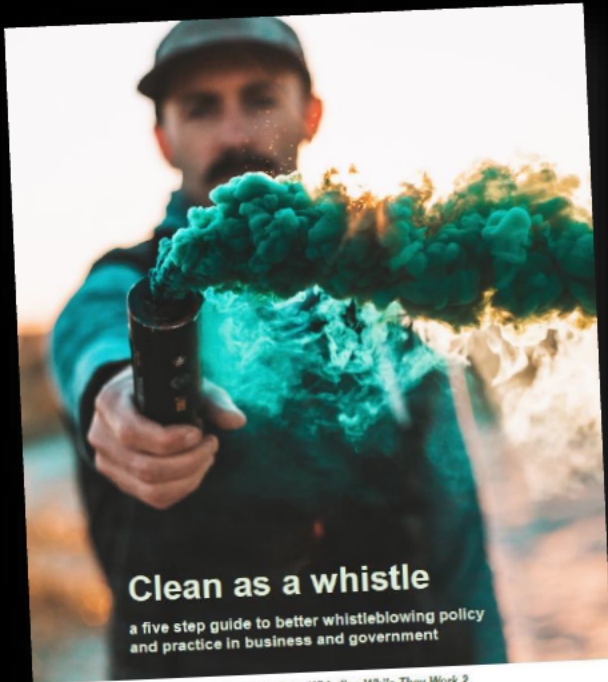
Whistling While They Work 2

Improving managerial responses to whistleblowing in public & private sector organisations

- Australian and New Zealand organisations with >10 employees
- *Survey of Organisational Processes & Procedures (2016)*
699 organisations (436 public sector; 263 private/not-for-profit)
- *WERQ Survey (Workplace Experiences & Relationships Questionnaire)*
(2017-2018)
46 organisations (36 public sector; 10 private sector)
17,778 individuals
5,055 whistleblowers (reporters)
3,604 whistleblowing cases observed or dealt with by
managers & governance professionals (managed cases)

34% of reporters treated badly according to managers & governance professionals

42% treated badly according to reporters themselves



Clean as a whistle

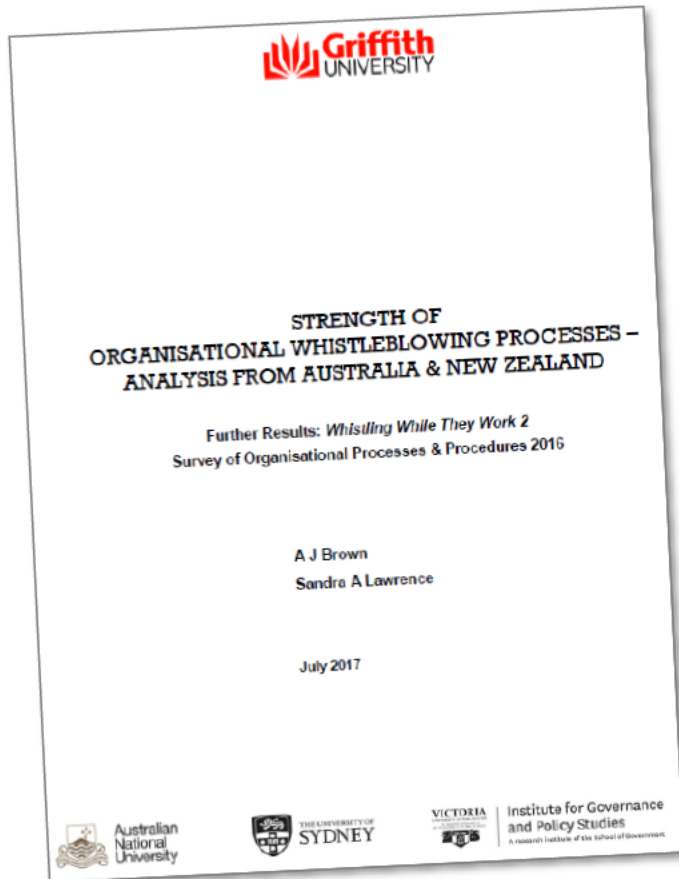
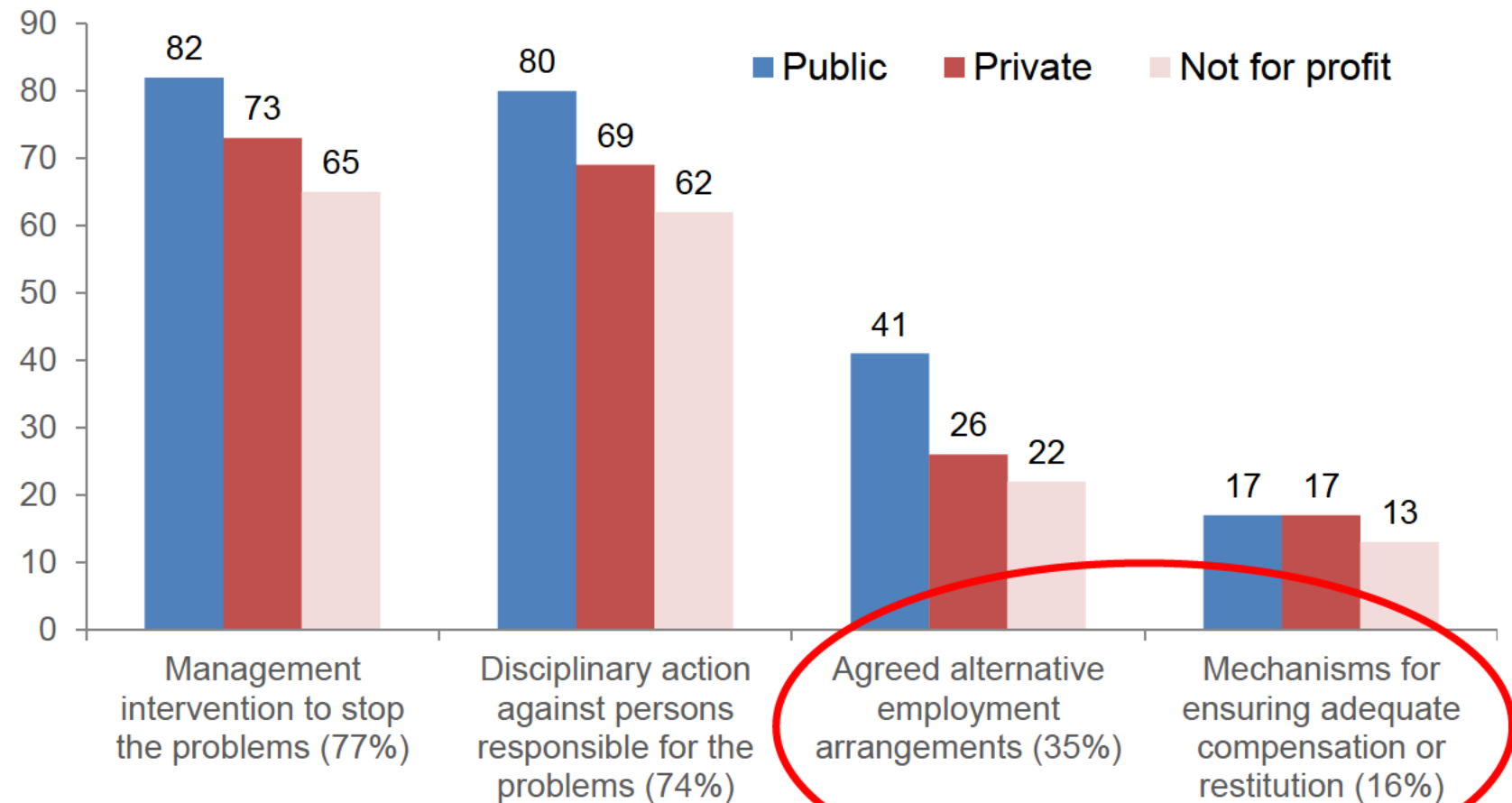
a five step guide to better whistleblowing policy and practice in business and government

Key findings and actions from Whistling While They Work 2 August 2019

Figure 9: Reporter treatment (reporters and managed cases)



Where staff experience issues (e.g., reprisals, workplace conflicts, stress or other detrimental impacts) after raising wrongdoing concerns, what processes does your organisation have for seeking a resolution?
(n=699 organisations)



So... what proportion of whistleblowers who deserve remedies, are getting any?

Our data:

- 17,778 individuals across 46 organisations, including
- 5,055 whistleblowers (reporters)
- **3,604 reporting cases observed or dealt with by managers and governance professionals (observed / managed cases)**



2,672 in organisations with 5%+ response rate (n=33: 29 public sector; 4 private sector)

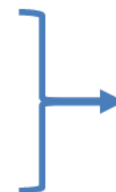
'All reporting cases'

1,621 with data on whether the reporter experienced repercussions

1,322 with data on whether or not the reporter then received any remedies



66% involved **public interest** concerns (clear policy trigger)
94% were perceived to be **correct** (there was wrongdoing)
93% perceived as **deserving the organisation's support**



'Protection priority whistleblowers'

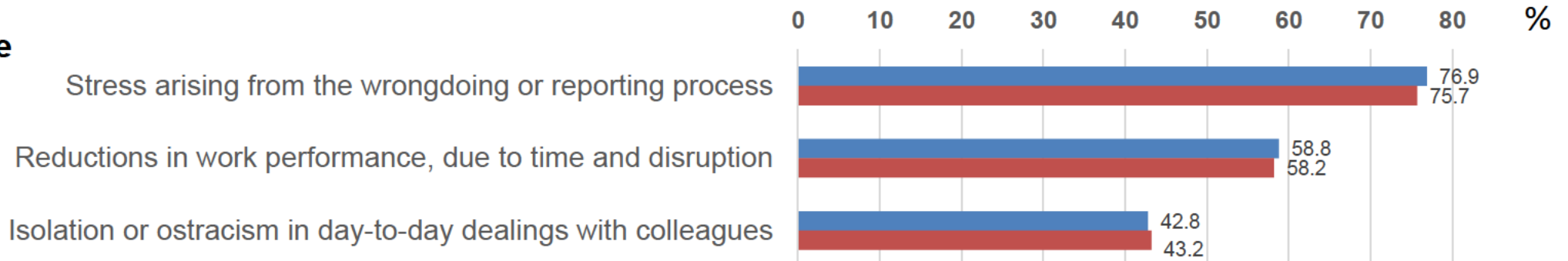
797 w. repercussions data

646 w. remedies data

% of whistleblowers perceived as experiencing any level of repercussions or detriment for reporting (by detriment type)

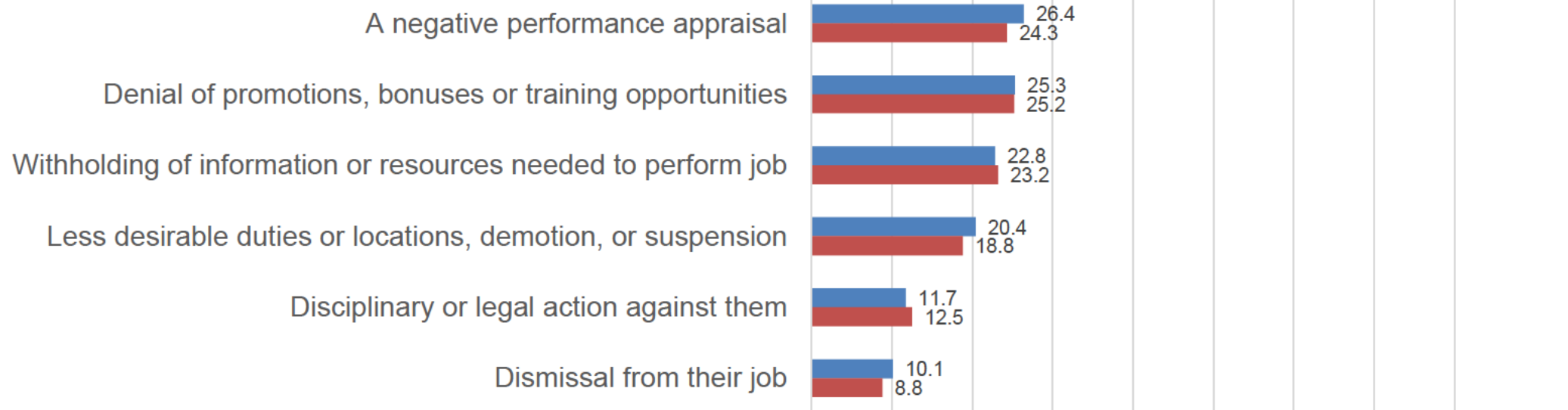
Collateral damage

All: 77.7%
PPW: 76.5%



Direct damage

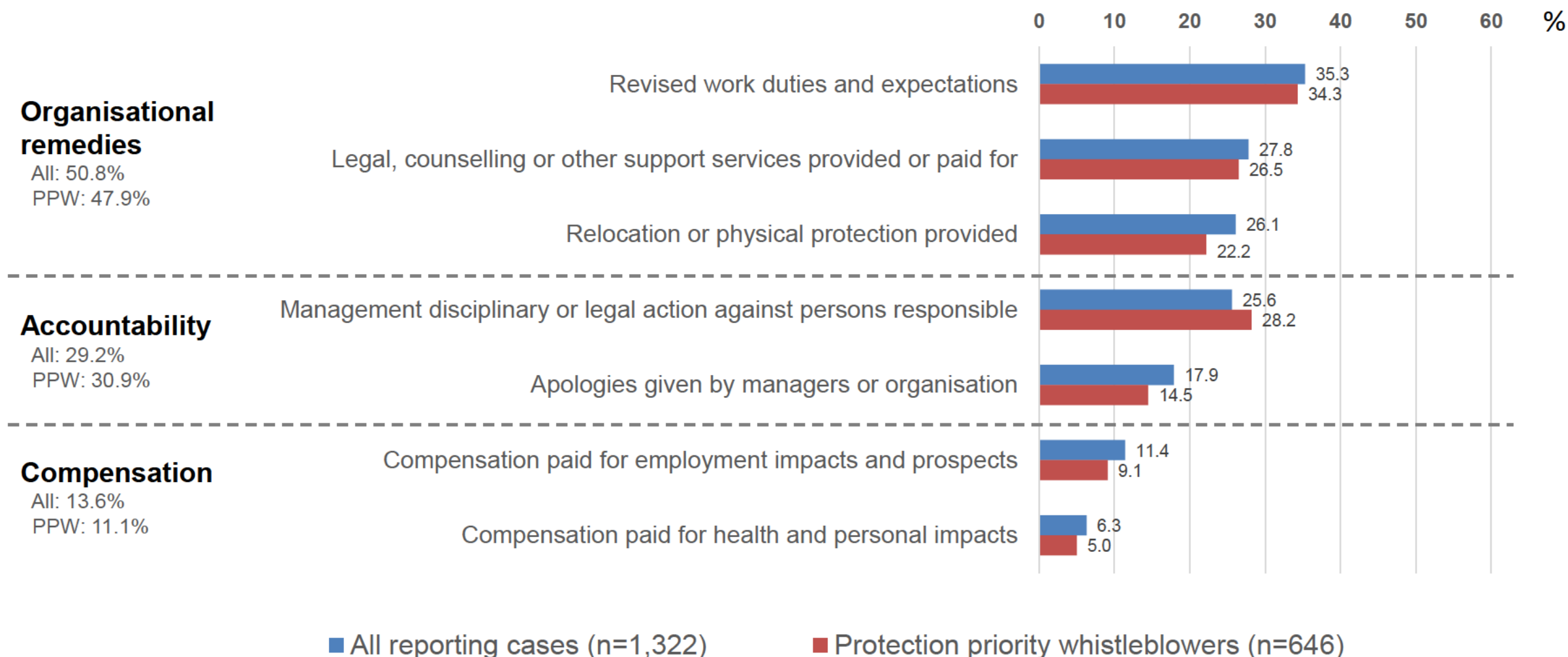
All: 43.7%
PPW: 44.1%



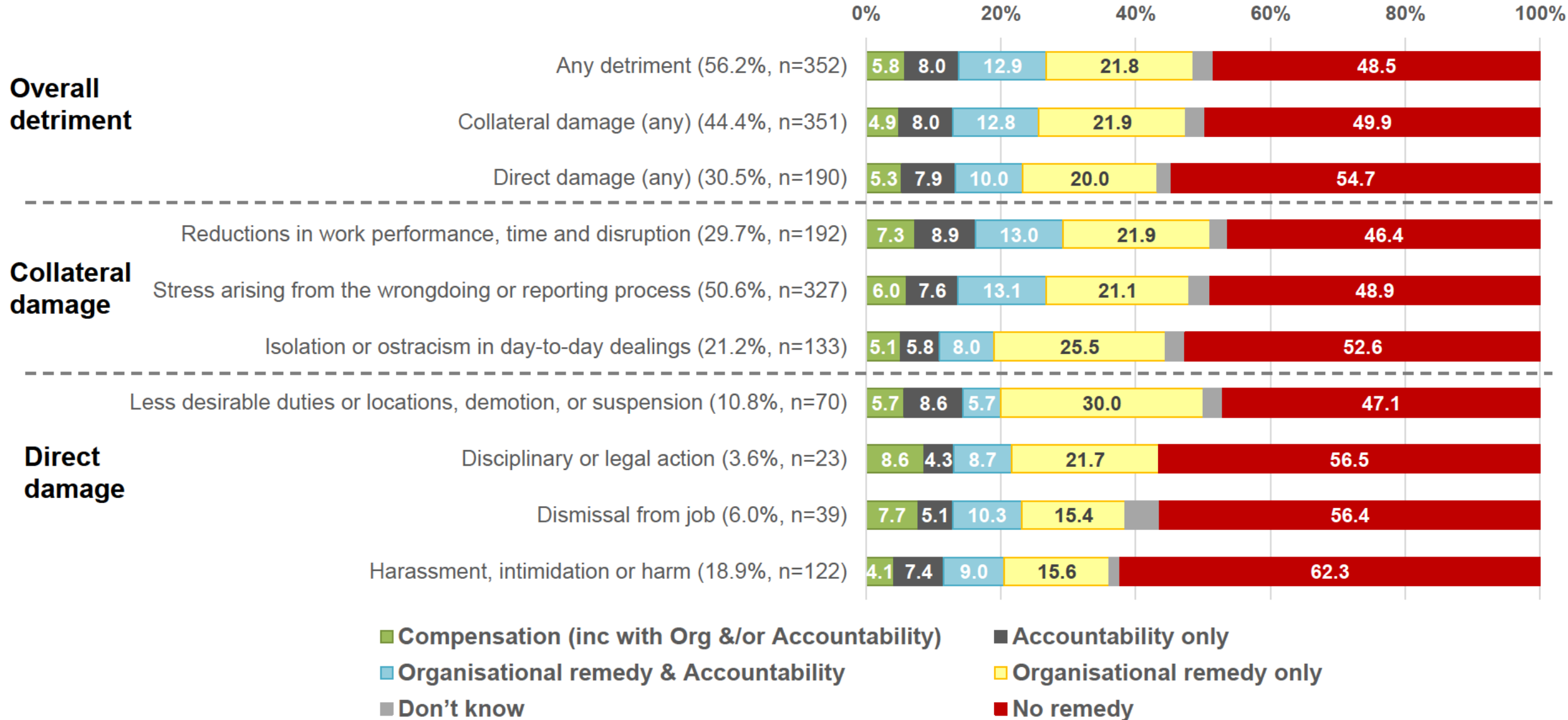
■ All reporting cases (n=1,621)

■ Protection priority whistleblowers (n=797)

% of whistleblowers perceived as receiving any level of remedies for any level of repercussions or detriment (by remedy type)



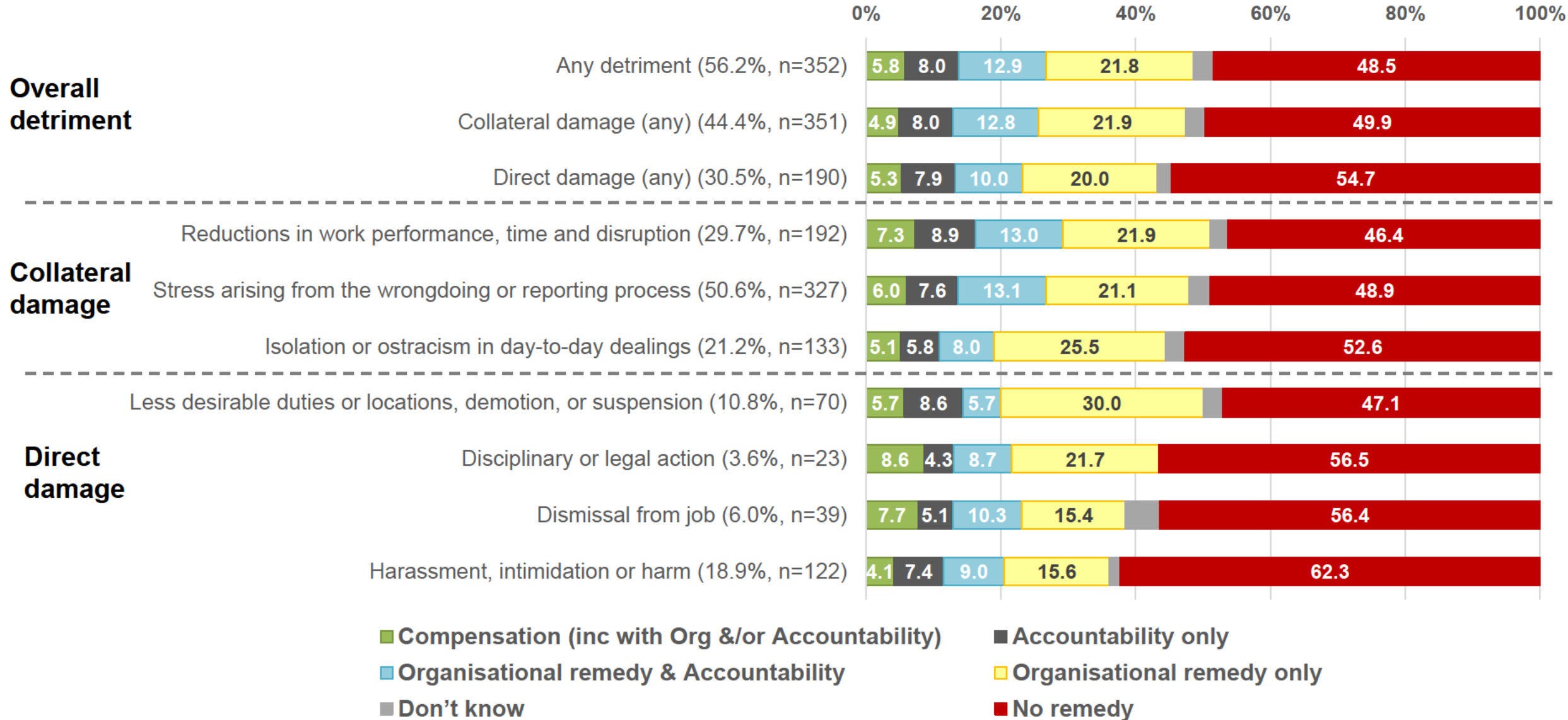
% of protection priority whistleblowers suffering ‘quite a lot’ or ‘great deal’ of detriment, who received any remedies (by detriment and remedy type) (n=646)



Relationship (or lack thereof) between severity of repercussions (combined) and amount of remedies (combined) ('protection priority whistleblowers')

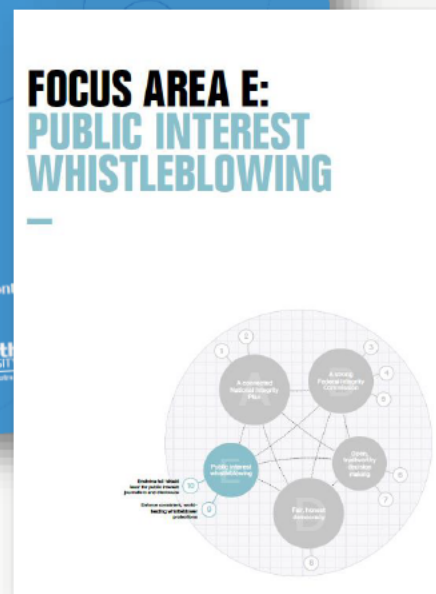


% of protection priority whistleblowers suffering 'quite a lot' or 'great deal' of detriment, who received any remedies (by detriment and remedy type) (n=646)



Key findings & implications

- Of whistleblowers who are clearly high priority for protection, and who experienced serious repercussions:
 - Less than half (49%) received *any* remedy; worse for direct damage (55% no remedy)
 - Compensation is extremely rare (e.g. only 4% who experienced serious harassment received any compensation; and only 2% received at least 'moderate' compensation)
 - Pattern the same across all whistleblowers (outcomes for priority group no better)
- No relationship between extent of repercussions and amount of remediation
- Reliable but optimistic interpretation (org self-selection; positive managerial perspectives)
- Most common repercussions are collateral damage – yet most laws and policies still framed only towards remedying direct damage (reprisal; and often poorly, i.e. criminal)
- Helps highlight, explain and reinforce weaknesses in effective prevention and remediation for detriment – in organisational policies, implementation, and legal outcomes.



ACTIONS NEEDED

ACTION 9

ENFORCE CONSISTENT, WORLD-LEADING WHISTLEBLOWER PROTECTIONS

- Law reform to ensure public interest whistleblowers (private and public) have effective access to remedies for any detriment suffered for reporting, whether through acts or omissions
- Consistent best practice thresholds across sectors for onuses of proof, public interest costs indemnities, exemplary damages and civil penalties
- A reward and legal support scheme based on returning a proportion of the financial benefits of disclosures directly to whistleblower welfare
- A whistleblower protection authority to assist reporters, investigative agencies and regulators with advice, case support, enforcement action and remedies for detrimental conduct.

ACTION 10

ENSHRINE FULL 'SHIELD LAWS' FOR PUBLIC INTEREST JOURNALISM AND DISCLOSURE

- Stronger journalism shield laws to ensure full confidentiality of public interest sources, ensure media freedom and protect journalists from prosecution for receiving and using whistleblower disclosures
- Clearer rules for when public whistleblowing is protected, including:
 - Simple, realistic principles for justified disclosure of wrongdoing to journalists by public or private employees
 - Removal of blanket carve-outs for 'intelligence information' and 'inherently harmful information' from federal whistleblowing and journalism protection laws
- Clear, legislated public interest defences for any citizen for unauthorised receipt or disclosure of official information, where revealing wrongdoing.

<https://transparency.org.au/australias-national-integrity-system/>