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22 April 2013

Secretary
House of Representatives Standing Committee
on Social Policy and Legal Affairs
Parliament House
Canberra ACT 2600

Dear Dr Dacre

Submission --
Public Interest Disclosure Bill 2013 (Government)

Thank you for the opportunity to make a submission on this important Bill.

Background

It has been my privilege, and that of fellow researchers, to have provided considerable information and advice previously to the Government and the Parliament regarding the development of this legislation. The following submissions reflect a considerable body of Commonwealth-funded research, flowing principally from the Australian Research Council Linkage Project, *Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector* (2005-2011).

As the Committee will recall, this project involved some of the most comprehensive empirical research into the practicalities of whistleblowing, ever undertaken worldwide. The project was funded by the ARC and 14 public integrity and public sector management agencies, including the Commonwealth Ombudsman and Australian Public Service Commission. The research involved surveys taking in over 8,000 public officials from 118 Commonwealth, State and local agencies, 15 of whom also participated as case study agencies.

The primary results and recommendations from this research are available in:

- Brown, A. J. (ed) (2008), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* Australia & New Zealand School of Government / ANU E-Press, Canberra.

  This report was launched by the Special Minister of State, Senator John Faulkner in Parliament House in September 2008. That day, your predecessor House of Representatives Standing Committee on Legal and Constitutional Affairs also conducted a public roundtable with our research team, as part of the inquiry resulting in the report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector,* Commonwealth of Australia, 2009. Our research is widely referenced in that report.

- Roberts, P., Brown A. J. & Olsen J. (2011), *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*, Australia & New Zealand School of Government / ANU E-Press.

> This guide was launched by the Dean of ANZSOG, Professor Allan Fels AO, in Parliament House in November 2011, at an event hosted by the Commonwealth Ombudsman and Mr Rob Oakeshott MHR, Chair of the Parliamentary Joint Committee on Public Accounts and Audit.

During and since that period, in addition to informing the 2009 recommendations of the Standing Committee on Legal and Constitutional Affairs and the Government's March 2010 Response, our research has informed new or amended public interest disclosure (whistleblower protection) legislation in: Queensland, New South Wales, the Northern Territory, Tasmania, Western Australia, and the Australian Capital Territory.

The following submissions draw particularly from the analysis contained in chapter 11 of the 2008 report: Brown, A.J., Latimer P., McMillan J. & Wheeler C. (2008). 'Best Practice Whistleblowing Legislation for the Public Sector: Key Principles' in Brown, A. J. (ed), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*.

However, the Committee should note that some of the legislative developments since 2008 have also shaped current 'best practice' in this field. Given that the Government has consistently promised since 2007 to introduce and/or support 'best practice' legislation, this remains the standard underpinning the following submissions.

Basic need and outstanding priorities

The Committee will recall the numerous parliamentary and non-parliamentary inquiries that have examined the need for comprehensive legislative action by the Commonwealth to encourage and protect public interest whistleblowing. The report of the 1994 Senate Select Committee on Public Interest Whistleblowing, chaired by Senator Jocelyn Newman, is one such example. The Committee will note it is almost 20 years since that report.

The need for action was confirmed by the 2005 report of the National Integrity System Assessment, *Chaos or Coherence?* conducted by Transparency International Australia and Griffith University.

Since the 2009 Dreyfus report, the Committee will also note the recommendations of the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia,* Report 112, December 2009, which also affirmed the need for reform.

In 2010, the Australian Government committed itself to the G20 Anti-Corruption Action Plan, which includes commitments to this reform. The need for reform was also highlighted and affirmed in the recent 2012 review of Australia's implementation of the United Nations Convention Against Corruption (UNCAC).

For all these reasons, it is now clear that current legal and administrative arrangements in the Commonwealth's public integrity system are not enough. Comprehensive legislative reform remains needed to establish the systems, set the standards for and remove the legal barriers that currently impede the encouragement and protection of public interest whistleblowing by Commonwealth officials, officeholders, contractors and contractor employees.

It should also be noted that the scheme proposed by the Bill, like the *Public Interest Disclosure (Whistleblower Protection) Bill 2012,* relates only to public interest whistleblowing involving suspected wrongdoing in the Commonwealth **public sector**.

Even after one or other of these Bills is amended and passed, it will be important for the Commonwealth Parliament to maintain momentum in respect of Australia's commitments, for example to the G20 and in light of the UNCAC review, to review and enact comprehensive

whistleblower protection for the **business and non-government sectors**. The Committee will note that the Government commenced some of this process with the discussion paper, Attorney-General's Department, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, October 2009 – but no result from that process has been released.

I also note that the proposed National Anti-Corruption Plan provides an important opportunity for the Government to map out how these and related issues of whistleblower protection might be best addressed by the next Parliament.

The scope of these legislative needs provides a reminder of the importance of setting high standards in the legislation currently before the Committee. In my view the Committee would be well placed to frame its recommendations in this broader context, as a reminder to the current and future Governments of the need to maintain this momentum.

Relationship to previous submissions

The Committee will recall that the above research has already informed the development of the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* introduced by Mr Andrew Wilkie MHR in October 2012. Given the importance of this issue, and of the Parliament implementing the 2009 report, I was privileged to provide Mr Wilkie with detailed advice on the development of that Bill.

As set out in my previous submission and evidence to the Committee on that the Bill, the 2012 Bill draws as much as possible on the spirit of the 2009 Dreyfus report and the Government's 2010 Response, while also drawing on the current best practice drafting approach adopted by the ACT Government.

My previous submission to the Committee on the 2012 Bill included ten key principles that in my view needed to be reflected in any such Bill. For convenience I set out my submissions below on the 2013 Bill under the same headings.

In general, I consider that the Bill provides a framework with strong potential to provide the Commonwealth public sector with a best practice legislative regime for facilitation and protection of public interest wrongdoing. From that perspective, the Bill is an extremely welcome development in the progress towards such a scheme. In my opinion, however, the Bill would require a significant number of amendments before it is reasonably likely to lead to such a scheme in practice. Fortunately, such amendments are all readily achievable in a short timeframe; and thus I look forward to the Committee's report.

Yours sincerely

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PUBLIC INTEREST DISCLOSURE BILL 2013 (Cth) – GOVERNMENT

KEY PRINCIPLES

A J BROWN
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22 April 2013

1. Act must promote an '**if in doubt, can report'** attitude on the part of all public officials, i.e. confidence that if public interest-related wrongdoing (defined broadly) is reported, the report will be appropriately actioned and officials supported and managed appropriately.

2. Alleged public interest-related wrongdoing in **all areas of Commonwealth government** should be covered – including by Ministers, their offices, and other members of parliament – via protections under this Act, or if not, via matching protections under other legislation.

3. Any carve-outs or special procedures (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 (e.g. actual sensitivity) – not blanket exclusions or exemptions.

4. Obligations on agencies to protect and support must be **direct, proactive and preventative** (i.e. embedded in effective systems, procedures and senior management responsibilities) rather than just assumed or reactive.

5. Implementation must be supported by a **single oversight agency (Ombudsman)** with clear responsibilities, including through a 'real time' **mandatory reporting system** to ensure that protective action is taken before matters are mishandled / damage caused.

6. Oversight agency must be **properly resourced** to do the job, including handling cases directly rather than always referring back to agencies (i.e., not just another paper-go-round agency)

7. Reporting and protection systems should not be **complainant-dependent** (i.e. should not rely on discloser to trigger / complaint / litigate, unless system breaks down)

8. Clear and workable rules on when officials may/should disclose to **the media** (see further below)

9. **Compensation remedies** need to be clear, simple and accessible (see further below)

10. **Basic safeguards** against abuse/misuse of system (see further below).

1. **Act must promote an 'if in doubt, can report' attitude on the part of all public officials, i.e. confidence that if public interest-related wrongdoing (defined broadly) is reported, the report will be appropriately actioned and officials supported and managed appropriately.**

   The 2009 Committee recommended, and the 2010 Government Response accepts, the need for a comprehensive approach based on encouraging a 'pro-disclosure' ('if in doubt, report') culture within the Commonwealth public sector. Currently the Bill contains a large number of technical barriers and exclusions (including those set out below) which make the Bill more difficult than necessary to navigate. As a result, while it provides a basic framework for a potentially workable regime, it is unlikely to achieve the above objectives without substantial amendment.

   In particular:

   - Currently the definition of a 'public official' whose disclosures will trigger the Bill's protections (ss.29, 69) is comprehensive, **with the major exception** that it excludes staff of Members of Parliament (including staff of Ministers). These are merely a different form of contractor to the Commonwealth and should be covered, as recommended by the 2009 Committee Report, if only so that such a staff-member who makes a disclosure about wrongdoing anywhere in government is entitled to the same remedies as any other contractor if they later suffer adversely for it. The Government Response (2010) gave no rationale for rejecting this recommendation.

     Having such a significant category of Commonwealth taxpayer-funded contractors unable to claim protection under the scheme, is likely to raise doubts in the mind of the rest of the public sector regarding whether the Parliament is really serious about providing protection to any of the other classes of person covered.

   - Disclosure recipients – The Bill currently only protects disclosers once a disclosure is made to a designated 'authorised officer' (s.36) – and is silent on whether protection applies to a disclosure made to the most frequent/normal recipients, e.g. supervisors or managers, if these happen *not* to be authorised officers. This uncertainty compromises the Bill. The Committee should recommend a best practice approach such as provided by the Queensland (2010) or ACT (2012) Acts, which include disclosures made to persons who directly or indirectly supervise the discloser as well as others with normal roles to receive and investigate such information.

   - Disclosure disincentive – Appropriately, s.11 preserves the offence of providing false or misleading information, so that a discloser is not protected from prosecution if they commit this offence. However this should be qualified to those who 'knowingly' provide false or misleading information, as promised by the Government Response (Recommendation 12). Otherwise the Bill creates uncertainty which will discourage many officials from disclosing. (The term 'recklessly' should be avoided for similarly reasons, as it is too uncertain and can logically raise doubts in the mind of the discloser as to whether the Bill will really protect them at all.)

   - Overall simplification – In addition to the following issues being resolved in a manner that supports the above objectives and the objects in s.6, the Bill should be further simplified for maximum clarity and certainty. The aim should be to simplify to the point where the current 'simplified outline' sections (ss. 9, 25, 42, 46, 58, 64 and 68) are no longer necessary, and the Table of Contents suffices as an accurate guide to the Bill. Currently the 'simplified outline' sections may be misinterpreted to indicate that the Bill does more than it actually does.

2. **Alleged public interest-related wrongdoing in all areas of Commonwealth government should be covered – including by Ministers, their offices, and other members of parliament – via protections under this Act, or if not, via matching protections under other legislation.**

   It was implicit throughout the 2009 Committee report (Recommendation 4) 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 Bill does not currently 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:

   - Ministers, politicians or their staff (definition of 'public official': ss.29(1)(b), 69);
   - 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… whereas one who blew the whistle on mere maladministration in the court system would) (ss.32, 69(4));
   - In certain circumstances, anyone or anything associated with an intelligence agency (see below).

   Legislative action is needed to ensure that equivalent processes and protections are triggered irrespective of where the wrongdoing occurs. Best practice would be for this to occur in this proposed overarching comprehensive legislation. The 2012 (Wilkie) Bill provides examples of how this can be better achieved.

   However if for any reason this cannot be done in the 2013 Bill, then all parties in the Parliament should commit in detail to how it will be done in other, equivalent legislation. The Committee should make specific recommendations as to how this should be done, preferably in this Bill, but if not then in others.

3. **Any carve-outs or special procedures (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 (e.g. actual sensitivity) – not blanket exclusions or exemptions.**

   Currently the Bill contains three major areas of 'carve out', of such an extent that the objects of the Bill as a whole are compromised:

   - **Intelligence agencies and their activities** – The Bill does not currently meet commitments such as in the 2010 Government Response 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' (Response to Recommendation 21). However:
     - s.33 provides a definition of excluded intelligence agency conduct which could be judicially interpreted as meaning any conduct that is technically lawful and authorised (for a 'proper' purpose or exercise of a function, in administrative law terms) is not disclosable, in any way, even if it otherwise involves defined wrongdoing;
     - s.41 provides a definition of 'intelligence information' which is precluded from public disclosure, and other things, which extends to *any* information 'that has originated with, or has been received from, an intelligence agency' (s.41(1)(a)), not just any actual intelligence information whose release might carry any risk of harm to security, intelligence or law enforcement interests;

- Elements of these definitions duplicate and potentially conflict with other tests also provided in s.26(1) (see e.g. Table, Item 2, Column 3, (i)), which are of dubious workability in any event, and therefore threaten the practicality and credibility of the scheme as a whole;
- 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 there would be no such restriction *without* this legislation. This is inconsistent with the intention and commitments regarding this legislation.

The Committee should recommend: the deletion (or major clarification) of s.33; the deletion of par. 41(1)(a) or its relocation to make it a contextual or explanatory rather than operative element of the definition of 'intelligence information'; and review of the other provisions above with a view to deletion of all unnecessary tests.

- **Designated publication restrictions --** Section 40 lists 13 different types of suppression order (court orders or directions relating to a security or criminal investigative process); information which would be contrary to such an order cannot be included in any disclosure (*internal, external* or *emergency:* s.26(1), Table). Neither the 2009 Committee report nor the 2010 Government Response make any mention of such restrictions receiving special treatment, or being preserved over and above other confidentiality obligations overcome by the Bill. They create a dangerous precedent, will be difficult or impossible to implement, and compromise the Bill. If there is a policy objective to giving these issues special treatment, it is not apparent; if one exists, then more appropriate drafting solutions should be found, as the present approach appears unworkable.

- **Inappropriate public interest test –** s.26(3) provides a long and inappropriately one-sided definition of the 'public interest' that must be satisfied before any official could make a public (external) disclosure and claim protection under s.26(1). This includes many types of government information (e.g. cabinet information, information relating to intergovernmental arrangements) which are simply inappropriate to the Bill and should be deleted altogether. The fact that the test lists 13 factors mitigating *against* disclosure, and none mitigating in favour of disclosure, is wholly inconsistent with the purpose of the Bill.

  Sub-section 26(3) can and should simply be deleted, since 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'). Anything more than a test of this kind, reverses the built-in public interest test on which the entire Bill is based – which is that if information is about wrongdoing, and the factual circumstances are met, it should be disclosed, unless there are very specific and serious overriding reasons why not.

4. Obligations on agencies to protect and support must be direct, proactive and preventative (i.e. embedded in effective systems, procedures and senior management responsibilities) rather than just assumed or reactive.

The 2009 Committee Report recommended, and the Government Response endorsed, a reprisal risk prevention/minimisation approach – i.e. that disclosures be managed in a way that will best prevent adverse consequences for disclosers, rather than just offering to compensate them for damage after the event. It is a strength of the Bill that this principle is reflected in s.59(1)(a), following the ACT precedent.

However, this principle also needs to be carried through in practice in other parts of the Bill. For example, s.44(1)(d) requires the details of the identity of a discloser to be revealed whenever a disclosure is 'allocated' or referred to any agency, irrespective of any reprisal or internal witness management risk that this might entail. This contrasts with s.26(1) of the ACT Act 2012, and other equivalent provisions, which make clear that at all times, a different procedure may be followed (and implicitly, should be followed) wherever the normal procedure would entail a risk to an investigation, or to the health and safety of a person, or entail risks of reprisals or adverse consequences to the discloser. Equivalent provisions are found in the 2012 (Wilkie) Bill.

The Committee should recommend that the whole Bill be reviewed for these kinds of inconsistent requirements, with a view to their removal, and more consistent observance of the basic principle of reprisal/risk prevention and management.

5. Implementation must be supported by a single oversight agency (Ombudsman) with clear responsibilities, including through a 'real time' mandatory reporting system to ensure that protective action is taken before matters are mishandled / damage caused.

The 2009 Committee recommended (Recommendation 20) and the Government agreed 'in principle', to an active oversight regime in which oversight agencies are able to track cases in real time, and intervene to reduce reprisal risks, as demonstrated is necessary by all previous research and practice.

In this case, the oversight agencies are the Ombudsman; the IGIS (in respect of intelligence agencies); and implicitly, the Australian Public Service Commission, since it oversights the APS Act Code of Conduct regime which is preserved by the Bill as the means by which many investigations will occur, and many issues regarding adverse treatment of whistleblowers are likely to be deal with, at least in APS agencies.

There is currently insufficient clarity in the Bill as to how these relationships will work in practice, to give confidence that many difficult issues and matters will not simply fall through cracks in the system, not be detected until after matters are seriously mishandled, or fail to be addressed through want of jurisdiction. In particular:

- While the Bill provides powers to the two oversight agencies to 'assist' agencies in their implementation of the Act, it does not provide the 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.
- 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.

- The Ombudsman is given responsibility under s.74 to determine the standards that will determine how the Bill is implemented by all agencies, including intelligence agencies. Given this, s.62 of the Bill 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.
- 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.

6. Oversight agency must be properly resourced to do the job, including handling cases directly rather than always referring back to agencies (i.e., not just another paper-go-round agency)

Notwithstanding the current environment of budgetary constraint, the Committee should recommend that all public integrity agencies are properly resourced to undertake the core functions, such as administration and oversight of this regime, on which the efficient and effective functioning of the entirety of the rest of the public sector relies. The importance of this scheme should be reflected, if necessary, directly in the appropriations proposed to be made in the 2013 Budget.

7. Reporting and protection systems should not be complainant-dependent (i.e. should not rely on discloser to trigger / complain / litigate, unless system breaks down)

The system of monitoring, progress reporting and final reporting under the Act should be routine and embedded in the legislative regime, if it is to be effective. While it is possible for more detailed requirements to be spelt out in the standards and procedures developed by the Ombudsman, key requirements must be in the Act to be effective.

One requirement is that a discloser will be kept regularly informed, via progress reporting or similar, about the response to a disclosure, to the extent possible subject to investigative or other requirements. The Government Response (Recommendations 15 & 16) accepted this in principle. Currently the Bill fails to implement this, as it provides no guarantee of anything other than a final 'report' to the discloser.

The Bill is also weak and uncertain in stipulating when information must be provided, e.g. by providing that this is only necessary only 'if the discloser is readily contactable' (ss.44(2), (3), 49(3), 50(1),51(4), 52(5), 55). This qualifier should simply be removed; or if necessary, replaced with a proviso that if the identity of the discloser is simply unknown (i.e. an anonymous disclosure), then such requirements clearly do not apply.

8. Clear and workable rules on when officials may/should disclose to the media

Several points have already been made above, regarding inappropriate restrictions which affect the circumstances when an official may make a further disclosure (e.g. to the media either directly or as a last resort), as well as affecting other aspects of the scheme.

In addition to those issues, it is important that the circumstances in which an official may make such a disclosure are clear and workable. At the time of the 2009 Committee Report and 2010 Government Response, the available statutory tests for such circumstances were provided by NSW and the United Kingdom. Since then, in 2010 and 2012 respectively, Queensland and Western Australia provided further statutory tests which improve upon the NSW approach, but in many respects remain less than clear. Current best practice is the ACT Act 2012, 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, takes the same approach.

In section 26, the current Bill distinguishes between **'external disclosures'**, in general, and **'emergency disclosures'** which are external disclosures in the specific circumstances that the alleged matter involves a 'substantial and imminent danger to the health or safety' of one or more persons. There is no reason these specific circumstances could not be explicitly preserved within the type of simple legislative formulation set out above.

In other respects, however, the 2013 Bill introduces a number of further, complex thresholds and requirements which move away from current best practice:

- The Bill does not make it explicit that such further disclosures to 'any person' include disclosures to the media or a journalist, or to members of parliament; it should be amended to do so.
- In general, an external disclosure (other than an emergency disclosure) will only retain protection if an investigation and/or response to an internal disclosure is 'inadequate'. The tests for this (ss.37-39) are objective, and based on overly high legal standards (e.g. 'no reasonable person would consider that the action … in response to the recommendations is adequate': ss.38-39). These standards are also inconsistent with the 2010 Government Response (Recommendation 21) which undertook that protection would still apply to an external disclosure if a sufficient subjective standard was met, i.e. 'the discloser has a reasonable belief that the response was not adequate or appropriate'.
- Notwithstanding its greater complexity, the approach in the current Bill fails to provide clarity on whether a public disclosure will be protected if an authorised internal recipient, being a person or an agency who should receive and handle the disclosure, simply refuses to do so or takes no action. In this case, there will be no investigation, nor any response (being the current preconditions for protection).

- Notwithstanding its greater complexity, the approach in the current Bill also fails to provide any guidance on whether it is legitimate to go public if there is no safe avenue for making any internal disclosure, e.g. if the agency has no effective internal reporting systems and/or the relevant integrity agency is also compromised or corrupt, and/or there is no way that an official could reasonably be expected to disclose internally due to the evident risks of reprisal.
- The specific grounds for an 'emergency disclosure' are also unduly restrictive, and more onerous than needed for any genuine emergency disclosure, 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).

For these reasons the standards in the Bill 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. As it stands, the provisions in the Bill are onerous, uncertain, and likely to (a) dissuade most officials and agencies from taking the scheme seriously, and (b) foster unnecessary difficult complainant behaviour, as well as expensive litigation regarding the meaning of these requirements, on the part of those disclosers who seek to come under them.

Because of their onerous and impractical nature, it is also questionable whether these requirements would be consistent with the implied constitutional freedom of political communication. In other words, there are circumstances beyond or inconsistent with the proposed thresholds, in which it is reasonable to believe that a public official might need to go public, and could plausibly claim (and deserve) protection from prosecution or other liabilities based on the implied freedom. If so, this defeats the purpose of having the Act, which should be to codify these circumstances in a reasonable way, rather than inviting High Court litigation as to whether these restrictions are proportionate or reasonably appropriate and adapted to their purpose.

9. Compensation remedies need to be clear, simple and accessible

For the reasons set out in chapters 5 and 11 of our 2008 report, *Whistleblowing in the Australian Public Sector*, it is important that the organisational responsibilities of agencies and integrity agencies to manage whistleblowers effectively be placed at the core of the regime; and that failures to adequately discharge those responsibilities, resulting in adverse consequences, give rise to accessible and realistic employment or other civil remedies, commensurate with the risks and issues involved.

While important, employment and civil remedies which assume that specific individuals in an agency must have consciously taken actions either calculated or likely to harm a whistleblower's interests; or criminal remedies which assume that such individuals must have intended to cause harm, proven beyond reasonable doubt; should each be regarded as back-up provisions for the worst cases – not the primary circumstances which most commonly lead to whistleblowers suffering detrimental outcomes.

It is a welcome step that the Bill seeks to implement the 2009 Committee Report by confirming that an aggrieved person who suffers adverse treatment in the course of their employment may seek appropriate remedies under the Fair Work Act. It is also welcome that the objects clause (par 6(c)) confirms that an aim of the Bill is to protect

whistleblowers from 'adverse consequences' and not simply the more serious but less frequent problem of outright, deliberate reprisals. However, to achieve these objects and meet the criterion of current best practice, a number of amendments are required:

- The intention that Fair Work Act remedies and forums be the first port of call in employment-related matters is not carried through in the structure of the provisions (see ss.18,22), which deal first with a general right of compensation in the Federal Court and only later with the connection with FWA remedies.

- 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 have only limited impact on an employee's ability to regain work, but a wrongfully dismissed whistleblower's reputation (through no fault of their own) may suffer in ways that impact on their ability to regain suitable employment for years, or permanently.

  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 there is no capping of damages in the proposed Federal Court (non-FWA) provisions of the Bill (s.14(1)), making it doubly appropriate that the provisions have the same effect for the FWA remedies, if they are to be encouraged as the first port of call.

- There should be consequential 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 understood the distinctive nature of the jurisdiction relating to public interest disclosures.

- The Federal Court (non-FWA) remedies should be supported by (a) guarantees of exemplary damages and (b) costs provision such as in the FWA, by which applicant (whistleblower) is not required to pay respondent's costs if unsuccessful, unless abuse of process or applicant's conduct led to the particular costs (see for example the 2012 (Wilkie) Bill at s.44(4)).

- The above remedies should be available in respect of a definition of 'adverse consequences' or 'detrimental action' which is distinguishable in rational way from the elements of the criminal offence of 'reprisal' contained in s.19. This is to make clear that such remedies are available, and should be pursued, taking into account the full circumstances of how an agency has handled a matter, and irrespective of whether any specific person is alleged to have committed, or could be prosecuted at the higher standard of, the criminal offence. Currently the same definition and elements of 'reprisal' apply to both types of remedies. The relationship between criminal and civil remedies has caused confusion in some jurisdictions previously (notably Queensland). This can and should be avoided here.

- The criminal penalties available under s.19 are quite weak compared to most of it not all other Australian jurisdictions. This could be read as implying that the Commonwealth places less importance on protecting its whistleblowers than State governments do, which would be unfortunate.

Appendix 1 contains some specific recommendations regarding how the provisions in Part 2, Division 1, Subdivision B (Protection from reprisals) could be restructured and reworded to better achieve all these objectives.

10. Basic safeguards against abuse/misuse of system

Clear definitions of what types of wrongdoing covered

This is a basic requirement because it assists all parties (officials, disclosers and agencies) in making clear and rational decisions as to what types of disclosures trigger the specific processes and protections involved in this regime, as opposed to other complaints or matters that might be dealt with under different processes.

As noted above, the fact that all APS Code of Conduct breaches are automatically counted as 'public interest' disclosures irrespective of their relation with substantive types of wrongdoing may raise some difficulties in this regard.

There is also lack of clarity in the definitions of:

- *Maladministration* – The current definition (s.29, Table, Item 4) could be misinterpreted as only applying to active and deliberate 'conduct' that can be sourced to individuals, and not necessarily institutional failures (e.g. the results of badly formulated policies or programs, executed diligently by individual officials). Under standard definitions of the type of maladministration investigated by Ombudsman's offices in most/all Australian jurisdictions, any 'matter of administration' or 'administrative action' that meets a generally wider range of circumstances may qualify – not simply 'conduct'. Most of the categories of 'conduct' which trigger the Bill clearly involve 'misconduct' – whereas serious maladministration can occur without any 'misconduct' occurring. A definition closer to those found in Ombudsman and other State legislation should be preferred.

- *Corruption* – There is currently no clear definition of 'corrupt conduct' in the Bill. Rather, s.29, Table, Item 3 currently implies in par (b) that 'corruption' may involve a range of conduct of which the primary example is provided in par (a): perversion of the course of justice. This is a very strange way to define corrupt conduct, especially by contrast to the definitions in State legislation. It appears this may have resulted from some existing, broad definitions of corruption issue in other Commonwealth legislation (e.g. the *Law Enforcement Integrity Commissioner Act* 2006) being dissembled and reassembled out of relation with one another, in this Bill. A clearer, more readily recognisable definition of corruption should be preferred.

Honest belief on reasonable grounds (or objective fact) re: concern

The threshold test for protection in respect of all types of applicable disclosure is a subjective one (i.e. discloser must believe on reasonable grounds that the information concerns disclosable conduct: s.26(1)). However current best practice is a combination of both this subjective test, and an objective test whereby protection also flows if the disclosure concerns disclosable conduct, irrespective of what the discloser may believe: see ACT Act, s.7. The Bill should be amended to provide protection for a public servant who makes a disclosure which concerns disclosable conduct, on an objective test, but who did not actually realise the nature or significance of what they were disclosing.

Discretions not to investigate (oversighted)

The 2009 Committee Report (recommendation 11) identified that a sensible set of discretions should apply, consistent with other best practice in the field, to provide appropriately flexibility in the response to disclosures. Currently sub-s.48(1) (Discretion not to investigate) of the Bill contains several aspects which have the potential to defeat the purpose of the Bill, rather than providing these intended safeguards:

- Par (b) ('the information that is disclosed does not tend to show any instance of disclosable conduct') is either (a) otiose, because information that meets this description does not trigger the Bill in any event as a question of law, or (b) creates some kind of ill-defined discretion on the part of principal officers to pick and choose when they think the Bill applies. The paragraph should be deleted.
- Par (c) ('the information does not, to any extent, concern serious disclosable conduct') introduces a qualification ('serious') which is not present anywhere else in the Bill. This has the potential to be highly confusing and introduces considerable uncertainty, since many of the types of wrongdoing identified in the Bill are already objectively serious (does this mean that only doubly serious examples of this wrongdoing trigger the Bill?). It is also creates an ill-defined discretion on the part of principal officers to pick and choose when and whether a disclosure requires an investigative response, which may easily defeat the purpose of the Bill in a wide range of instances. The paragraph should be deleted.
- Par (d) ('frivolous, vexatious, misconceived or lacking in substance') is excessive, contains terms of uncertain legal meaning, and appears to further create a discretion in principal officers to prejudge the investigative action that might be needed to establish the basis of a disclosure. The uncertain terms 'misconceived' and 'lacking in substance' should be deleted.
- The Bill should be amended to require agencies to notify the applicable oversight agency of all exercises of discretion not to investigate a disclosure, according to such timing and procedure as the Ombudsman may determine through the standards.

Unless addressed, these issues will mean that the Bill fails to implement the 'if in doubt, can report' approach accepted by the 2009 Committee Report, because uncertainty as to whether or not anyone is interested in investigating the matter is well-established by research as the single most significant disincentive to disclosure.

Appendix 1

PUBLIC INTEREST DISCLOSURE BILL 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 Bill 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 Meaning of *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) treating, or proposing to treat, a person unfavourably 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; or (v) damaging a person's property; and (b) the reason, or part of the reason, for the act or omission was a belief or suspicion that a public official made, may have made or may make a public interest disclosure.	--	1) Makes language of the Bill 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.

			(2) For the purposes of this Act, action is also *detrimental action* if, by act or omission, it causes detriment to any person as a result of a failure to fulfil an obligation under this Act or procedures established under this Act. (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 18 (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 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.	--	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.

			(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."		
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, loss or damage".	--	Ensures compensation power is equivalent to tort as per best practice in state jurisdictions.
			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.
			4) Add new subsection (5): "(5) An applicant for damages in proceedings (including an appeal) under this section may only be ordered by the Court to pay costs incurred by another party to the proceedings, if: (a) the Court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause; or (b) the Court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs."	--	Matches best practice for equivalent proceedings under Fair Work Act 2009

Subdivision C – Reprisal offences					
6	Old 19, now 20	Offences	Split into two sections: 20. Taking a reprisal 21. Threatening to take a reprisal		
7	New 20	Taking a reprisal	1) In subsection (1), after "another person" insert: "because of a public interest disclosure".	--	Clarifying relationship between civil and criminal remedies.
			2) Replace penalty: "Penalty: Imprisonment for 2 years or 120 penalty units, or both."		Increase to match penalties in other similar legislation
			3) 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 intentionally takes, or threatens to take, detrimental action against that person because: (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."		
8	New 21	Threatening to take a reprisal	1) Current subs 19(3) becomes new subs 21(1).	--	
			2) Replace penalty: "Penalty: Imprisonment for 2 years or 120 penalty units, or both."		As above
			3) Current subs 19(4) becomes new subs 21(2); subs 19(5) becomes new sub 21(3)		
9	New 22	Offence not prerequisite for compensation	"Proceedings may be brought under this or any other Act for civil remedies or damages in relation to detrimental action, irrespective of whether an offence of reprisal has occurred or a prosecution for an offence of reprisal has been brought, or could be brought."	--	Makes clear that compensation available for detriment is not reliant on criminal offence having been shown to have occurred – see Qld Act 2010.