Chapter 6

Unlawful Reprisals

6.1 Fear of reprisals is a significant deterrent to people making a public interest disclosure. An Independent Commission into Corruption (ICAC) study into public sector corruption found that nearly three quarters of those surveyed expected that people who reported corruption would suffer for reporting it.[1]

6.2 Furthermore, this fear of reprisal has a sound basis. A Queensland study found that official reprisals occurred against over 71 per cent of those who formally reported malpractice.[2] This finding is supported by overseas studies that reveal a high level of reprisals.[3]

6.3 Creating a climate where individuals contemplating whistleblowing are confident that they will be protected from reprisal is essential to an effective public interest disclosure scheme.[4] Part four of the Bill aims to protect whistleblowers from unlawful reprisals and provide remedies if reprisals have occurred.

6.4 This chapter considers whether the provisions of the Bill aiming to provide protection and remedies for a whistleblower are adequate, and examines:

- the definition of unlawful reprisal and detriment;
- penalties;
- the defence for those accused of unlawful reprisal;
- assistance provided to complainants;
- relocation powers;
- liability in damages;
- applications for injunctions and orders;

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1 Independent Commission Against Corruption, *Unravelling Corruption—A Public Sector Perspective*, April 1994, p. 136. See also Stuart Dawson, www.uow.edu.au/arts/sts/bmartin/dissent/documents/Dawson.html 'Whistleblowing: a broad definition and some issues for Australia', p. 2 of 10 (10 July 2002).

2 William De Maria and Cyrelle Jan, 'Eating its Own: The Whistleblower's Organisation in Vendetta Mode,' *Australian Journal of Social Issues*, vol. 32, no. 1, February 1997, p. 45.

3 See www.whistleblower.org/www/Tips.htm p. 3 of 11 (10 July 2002); and Jeremy Lewis and John Bowers QC, 'Protecting the whistleblower', *New Law Journal,* 17 September 1999, p. 1377.

4 See the New South Wales (NSW) Ombudsman, *Protected Disclosures Guidelines*, 4th edition November 2001, p. iv and Criminal Justice Commission, 'Protecting Public Sector Whistleblowers-A Statutory Responsibility', *Issue Paper Series,* vol. 2, no. 1. Dec. 1995, p. 1.

- agency protection; and
- the independent investigation of unlawful reprisals.

Definition of unlawful reprisal and detriment

6.5 There are two relevant definitions regarding the treatment of unlawful reprisals and their protections and remedies—that of unlawful reprisal and that of detriment. The definitions are given in clause (3)(1) of the Bill.

6.6 Unlawful reprisal is defined as:

> conduct that causes, or threatens to cause, detriment:
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> (a) to a person in the belief that any person had made, or may make, a public interest disclosure; or
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> (b) to a public official because he or she has resisted attempts by another public official to involve him or her in the commission of an offence.

6.7 Detriment is defined as:

> (a) injury, damage or loss; or
>
> (b) intimidation or harassment; or
>
> (c) discrimination, disadvantage or adverse treatment in relation to career, profession, employment, trade or business.

6.8 These general definitions of unlawful reprisal and detriment aim to encompass the many and subtle forms that unlawful reprisal may take. The objective is to cover a range of emotional, physical, and financial harm that a whistleblower may experience as an unlawful reprisal while remaining precise enough to provide sufficient guidance.

6.9 Several submissions suggested that the proposed Bill's definition of what constitutes an unlawful reprisal requires greater specification. Ms Leslie Jane Killen, a private citizen, told the Committee that there needs to be a description of what the conduct may be 'that causes, or threatens to cause, detriment' because there are many ways of disguising unlawful reprisal.[5] The New South Wales (NSW) Ombudsman noted that the Bill's definition of detriment did not explicitly include disciplinary proceedings as the NSW legislation does.[6]

6.10 Both perspectives on defining unlawful reprisal were kept in mind by the Queensland Electoral and Administrative Review Commission (EARC) in their 1991 *Report on Protection of Whistleblowers*. The report stated that:

> … the disadvantage in specifying an all-encompassing list of prohibited actions is that it provides no deterrent against the taking of reprisals which

5 Submission no. 5.

6 Submission no. 22.

> fall short of those specified … the advantage of specifying or detailing prohibited retaliatory actions is that it gives an objective standard by which to judge whether an unwarranted action has been taken against a whistleblower.[7]

6.11 Although there are concerns that sufficient attention may not be paid to certain forms of unlawful reprisal, the advantages of a broadly-worded definition must be retained. Public interest disclosure legislation across Australia has tended to use broadly worded definitions of detriment and unlawful reprisal.[8]

6.12 The Clerk of the Senate, Mr Harry Evans, submitted that the Bill's definition of unlawful reprisal leaves room for serious difficulties to occur, including possible injustice with regard to the accused's defence. Mr Evans pointed out that the definition does not require the detrimental action to be taken because, or in consequence of, an actual or potential public interest disclosure. It is sufficient that the detrimental action occurred in concurrence with the belief that a person had made an unlawful reprisal. He stated:

> There need be no link whatsoever between the detrimental action and the actual or potential public interest disclosure. Thus, if a departmental officer were to take disciplinary action against a departmental employee for alleged disciplinary offences completely unrelated to any actual or potential public interest disclosure, while having a belief that the employee has made, or may make, a public interest disclosure, that departmental officer would be in breach of the bill, even though the disciplinary action against the employee might be totally justified by the circumstances unrelated to the actual or potential public interest disclosure.[9]

6.13 Mr Evans described a scenario in which an offending employee could seek to adopt the role of a whistleblower in order to render themselves immune from otherwise legitimate disciplinary action. This situation is not remedied by the defence provisions in clause 22(2)(a).

6.14 Instead of the Bill's current wording, Mr Evans proposed an alternate approach, derived from section 12(2) of the *Parliamentary Privileges Act 1987*, which states that an offence is not committed unless the detrimental action against the witness is taken 'on account of' the witness's evidence.

6.15 The Australian Capital Territory (ACT) and the Tasmanian Acts are the only other Australian legislation that determine whether an unlawful reprisal has occurred on the basis of 'belief' as an adequate connection between a detrimental action and the

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7 Electoral and Administrative Review Commission (EARC), *Report on Protection of Whistleblowers,* October 1991, p. 162.

8 Section 9, *Whistleblowers Protection Act 1993* (SA); section 20(2), *Protected Disclosures Act 1994* (NSW); section 4(2), *Whistleblowers Protection Act 1994* (Qld); and section 3, *Whistleblowers Protection Act 2001* (Vic.).

9 Submission no. 12.

making of public interest disclosure.[10] Legislation in South Australia, NSW and Victoria uses definitions of unlawful reprisal that require a firmer link to be made between a detrimental action and the making of public interest disclosure before an unlawful reprisal is considered to have occurred.[11]

6.16 The report of the Western Australian Commission on Government supported the test proposed by the Queensland EARC. This test provides that, for the reprisal to have occurred, it is sufficient if the public interest disclosure is a ground of any significance for the reprisal.[12] The disclosure does not have to be a sole cause of the reprisal. This approach is used in the Queensland legislation.

Penalties

6.17 Clause 22 makes unlawful reprisals a criminal offence. Penalties for unlawful reprisals are 100 penalty units or imprisonment for one year if the offender is a natural person or, if the offender is a body corporate, 500 penalty points.[13]

6.18 A number of studies on whistleblowing have concluded that conducting unlawful reprisals against those who have made public interest disclosures should constitute a criminal offence.[14]

6.19 All State whistleblowing legislation, with the exception of the first legislation passed in South Australia, makes whistleblowing a criminal offence. The South Australian Act, passed in 1993, does not provide that unlawful reprisal is an offence but section 9 stipulates that victimisation may be dealt with as a tort or as an Act of victimisation under the *Equal Opportunity Act 1984*.

6.20 Dr De Maria, Centre for Public Administration, University of Queensland, suggested that the penalties for conducting unlawful reprisals or having vicarious responsibility for their occurrence should be more severe. According to Dr De Maria, the penalties in the proposed Bill are set at a 'meaningless level'. He suggested that penalties should also be aimed at the CEO's performance bonus and a no-growth budget for the immediate division in which the reprisals occurred.[15] Similarly, Mr Chiu-Hing Chan, a private citizen, said that the penalties contained in the Bill should

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10 Section 3, *Public Interest Disclosure Act 1994* (ACT).

11 Section 9, *Whistleblowers Protection Act 1993* (SA); section 20, *Protected Disclosures Act 1994* (NSW); section 41, *Whistleblowers Protection Act 1994* (QLD); section 18, *Whistleblowers Protection Act 2001* (Vic.); and section 19, *Public Interest Disclosure Act 2002* (Tas.).

12 EARC, *Report on Protection of Whistleblowers,* October 1991, p. 166.

13 According to the section 4AA of the *Crimes Act 1914* one penalty point equals A$110, thus the provision allows for a fine of $5500.

14 See EARC, *Report on Protection of Whistleblowers*, October 1991, p. 207; the Competition Bureau of Canada-guidelines for whistleblowing legislation, http://strategis.ic.gc.ca/SSG/ct01113e.html p. 5 of 9 (10 July 2002) and Paul Finn, 'Whistleblowing,' *Canberra Bulletin of Public Administration*, no. 66, October 1991, p. 170.

15 Submission no. 2.

be harsher, and that they are not strong enough to act as a deterrent.[16] The CPSU noted that 'the sanctions are perhaps a bit light-on'.[17]

6.21 The Public Service Commissioner, Mr Andrew Podger, noted that the penalties for unlawful reprisal are:

> …a more punitive, less flexible approach than is taken under current arrangements. Under the PS Act an employee who victimises a person who has made a whistleblowing disclosure would be subject to misconduct procedures, which may result in a range of sanctions, from a reprimand to termination of employment.[18]

6.22 With the exception of NSW legislation, the penalties set out in State legislation for an individual are greater than that contained in the proposed Bill. However, the proposed Bill has the advantage, like the ACT legislation, of providing for a greater penalty for a body corporate than for an individual.[19]

6.23 The level of penalties proposed for a body corporate is in accord with section 4B(3) of the *Crimes Act 1914* which states that, where a body corporate is convicted of an offence under a Commonwealth law, the court may impose a pecuniary penalty not exceeding fives times the amount of the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence.

The defence against an accusation of unlawful reprisal

6.24 Clause 22(2) provides that it is a defence for a person accused of unlawful reprisal if it is established that:

> (a) had just and reasonable grounds for engaging in the conduct or attempting or conspiring to engage in the conduct, that would, except for this subsection, amount to an unlawful reprisal; and
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> (b) was engaging, or had engaged, in the conduct, or had conspired or attempted to engage in the conduct, before forming the belief that a person had made or may make a public interest disclosure.

6.25 The Law Society of South Australia pointed out that the Bill's defence provisions are inadequate because such a defence could only arise in relation to conduct which comes within clause (b) of the definition of 'unlawful reprisal'—causing detriment to another public official because he or she has resisted attempts by

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16 Submission no. 14.

17 Ms Mary-Ann Cooper, *Committee Hansard*, 16 May 2002, p. 28.

18 Submission no. 34.

19 Section 20(1), *Protected Disclosures Act 1994* (NSW); section 42, *Whistleblowers Protection Act 1994* (QLD); section 18, *Whistleblowers Protection Act 2001* (Vic.); section 19, *Public Interest Disclosure Act 2002* (Tas.); and section 25, *Public Interest Disclosures Act 1994* (ACT).

another public official to involve him or her in the commission of an offence.[20] This is because the nature of conduct that falls under clause (b) does not require the offender to consider whether the person had made or may make a public interest disclosure. It thus does not introduce the notion of 'the belief' that someone has made or will make an unlawful reprisal. Establishing both (a) and (b) of the defence provisions is, regarding the clause (a) of the definition of unlawful reprisal, extremely difficult and the Law Society argues that such a defence may never be available to accused people.

6.26 The Committee was also informed that the defence provisions may in fact benefit offenders and that they should be removed from the Bill. Ms Sue Streets, Lecturer in Law, Deakin University, raised concerns about the phrase 'just and reasonable grounds' stating that:

> … this defence may open the way, and indeed encourage, an attack on the whistleblower. What are just and reasonable grounds? Does a potential whistleblower have to be a person with a spotless record to avoid a claim by a person accused of reprisals that it was just and reasonable to take action against the otherwise protected person?[21]

6.27 The CPSU supported the view that the defence provisions are too broad and open to a variety of interpretations that could advantage offenders. In addition to noting that 'just and reasonable grounds for engaging in the conduct' would provide a defence to an allegation of unlawful reprisal, the CPSU observed that engaging in the conduct before the forming of a belief that a person had made or may make such a disclosure would also provide a defence. The CPSU submitted that, apart from the ACT legislation, no similar legislation allows for such a defence and that such provisions should be removed.[22]

6.28 In contrast, Mr Howard Whitton, Independent Ethics Consultant, considered a provision of this kind necessary, while stating that it could be improved by limiting the permitted action to that which is 'lawful' and removing all reference to 'conspiring to take action against a discloser. He also made the point that many people consider taking reprisal against a whistleblower to be 'just and reasonable'.[23]

6.29 The 1996 NSW parliamentary committee review of the *Protected Disclosures Act 1994* commented that individuals who have experienced a reprisal face many obstacles in criminally prosecuting for unlawful reprisals.[24] In particular, it noted the difficulty in establishing to the standard of criminal proof, that is, beyond a reasonable doubt, that an offence of detrimental action had been committed in reprisal for a

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20 Submission no. 16.

21 Submission no. 33.

22 Submission no. 20.

23 Submission no. 35.

24 Committee on the Office of the Ombudsman and the Police Integrity Commission, *Review of the Protected Disclosures Act 1994*, September 1996, pp. 46-47.

public interest disclosure. This difficulty was also noted by the report of the Western Australian Commission on Government.[25]

6.30 The CPSU further told the Committee that the NSW legislation stipulates that the defendant needs to prove that their actions were not a reprisal. The CPSU recommended that the Bill reverse the onus of proof so that a defendant must prove that their actions were not a reprisal.[26]

6.31 The 1996 *Review of the NSW Protected Disclosure Act* recommended that the NSW Act be amended to provide that, in any proceedings for an offence, it lies with the employer to prove that any detrimental action against an employee was not taken in reprisal. While not certain that such a reversal would make the provision allowing for the prosecution of unlawful reprisals more capable of being invoked, the committee concluded that the amendment would boost whistleblowers' confidence in the effectiveness of the protections available under the Act.[27]

Assistance to complainants

6.32 Clause 23(1) states that a proper authority receiving a disclosure relating to an unlawful reprisal must supply the person making the disclosure with information about the protection and remedies available under the Bill in relation to unlawful reprisal. This complements the requirement of clause 10(3) to provide information to a person who makes a public interest disclosure.

6.33 Clause 23(2) states that a proper authority must provide a person who has suffered an unlawful reprisal with access to counselling services if requested to do so.

6.34 Dr De Maria submitted that an information section should be added to the Bill that encourages the whistleblower when seeking counselling to choose interventions that focus on family and relationships.[28]

6.35 Ms Killen noted that when an agency provides counselling services to a disclosure maker it needs to be made clear who is the client—the disclosure maker or the agency disclosed. In her submission she advised the Committee that the counsellor provided must be the disclosure maker's counsellor of choice.[29]

Relocation powers

6.36 Clause 24 of the Bill provides that if a public official requests to be relocated and the agency considers that there is a danger of an unlawful reprisal occurring that can only be averted by means of relocation, the agency must make arrangements to

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25 Western Australian Commission on Government, *Report 2*, December 1995, p. 142.

26 Submission no. 20.

27 Committee on the Office of the Ombudsman and Police Integrity Commission, *Review of the Protected Disclosures Act 1994*, September 1996, p. 78.

28 Submission no. 2.

29 Submission no. 5.

relocate the official. Clause 25 requires that the agency obtains the public official's consent to the relocation. Legislation in Queensland and the ACT are the only other Australian statutes with a relocation provision.

6.37 Mr Howard Whitton made the point that organisations should be able to protect their employees and not have to resort to relocation in order to protect them.[30]

6.38 Dr De Maria submitted that clause 24 of the Bill should be amended to make it clear that relocation of the whistleblower is a last resort. In its current form the Bill states that relocation must be arranged when relocation is 'the only practical means of removing or substantially removing the danger'.

6.39 Dr De Maria also proposed amending the Bill so that the agency is compelled to cover all the costs of whistleblower relocation if the transfer is geographical.[31]

6.40 Ms Sue Streets observed that the Bill does not require that the position to which a whistle blower is moved is equivalent to, or as close as possible to, the level of their current position.[32] The CPSU submitted that 'it would be important to building protections so that when they are moved they are not moved 120 kilometres over town and they are also given a position that is commensurate with their skills and experience'.[33]

6.41 The CPSU told the Committee that, in its experience, the removal and relocation of a whistleblower from the workplace can be the occasion of further detriment. This is supported by a Queensland whistleblowing study which found that 31 per cent of whistleblowers who suffered reprisal were punitively transferred.[34]

6.42 The CPSU suggested that the legislation include a provision including the removal and relocation of offenders as part of the proposed relocation powers.[35] Dr De Maria supported this approach. However, the relocation of the offender can be logistically difficult, as the Public Service Commissioner observed:

> … the right answer ought to be that the perpetrator moves, but quite often the problem is not as easy as that. In fact, there can be a loss of team spirit in the place—for whatever reason—and you cannot identify clearly who is the perpetrator and who is not, or who has sympathy one way and who has not. These issues are very difficult for management to sort through.[36]

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30 *Committee Hansard*, 16 May 2002, p. 24.

31 Submission no. 2.

32 Submission no. 33.

33 *Committee Hansard*, 16 May 2002, p. 24.

34 William De Maria and Cyrelle Jan, 'Eating its Own: The Whistleblower's Organisation in Vendetta Mode,' *Australian Journal of Social Issues*, vol. 32, no. 1, February 1997, p. 47.

35 Submission no. 20.

36 Mr Andrew Podger, *Committee Hansard*, 16 May 2002, p. 25.

Liability in damages

6.43 If unlawful reprisals occur, the Bill provides that a person who engages in an unlawful reprisal is liable for damages to any person who suffers detriment as a result. Damages may be recovered as for a tort and any remedy that can be granted with respect to a tort may be granted.

6.44 The 1991 Queensland EARC report and the 1995 Western Australian Commission on Government Report both concluded that whistleblowers who have suffered reprisal should have a statutory right to sue for damages.[37] The Queensland, ACT, Victorian and Tasmanian Acts also include such a provision.

6.45 Further, according to the Western Australian Commission on Government, enabling whistleblowers to sue for damages provides 'a manner of redress, in particular for persons in the private sector'.[38] In the context of the proposed Bill, entitling whistleblowers to sue for damages suffered from an unlawful reprisal provides an avenue of remedy for non-Commonwealth employees, who can only be offered limited protection by Commonwealth agencies.

6.46 Mr Barry F. Grice, a private citizen, submitted to the Committee that clause 26 of the Bill offers little, if any, extra liability over common law.[39] However, according to the Committee's understanding, the common law does not provide clear guidance about the circumstances in which whistleblowing is justified. In this sense, Australian common law differs from the United States and resembles that of the United Kingdom. The Queensland EARC report stated that:

> There is no sign of any development in the common law in Australia or England to correspond with developments in the US, where the judiciary, to some extent influenced by the policy considerations underlying statutory schemes of the whistleblower protection, had developed remedies for employees discharged from employment on grounds inimical to public policy.[40]

6.47 The CPSU submitted that, while the capacity to sue an individual who engages in an unlawful reprisal is welcome, in reality a person needs to be able to sue the employing authority to have a chance of being recompensed. The CPSU advised that the provisions of the Queensland legislation, which also allows an individual to sue for damages, have been tested in respect of the liability of the employer. The outcome was that, because the repriser was seen to be acting outside the scope of his employment, the employer was not considered liable. The CPSU argued that the provisions should specifically include that employers are liable.[41] This would serve as

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37 EARC, *Report on Protection of Whistleblowers,* October 1991, p. 155.

38 Western Australian Commission on Government, *Report 2*, December 1995, p. 154,

39 Submission no. 1.

40 EARC, *Report on Protection of Whistleblowers,* October 1991, pp. 46-7.

41 Submission no. 20.

a strong incentive for agencies to have effective mechanisms and processes in place and to exercise them appropriately.

6.48 The view that employers should be clearly liable was supported by the Western Australian Commission on Government Report which recommended that any public interest disclosure legislation:

> … should create a statutory right of action enabling any person injured by a reprisal to claim damages against any person involved in that reprisal and against such person's employer unless the employees can establish that it was not knowingly concerned in the reprisal or did not know about it or did not shut its eyes to it.[42]

6.49 Regardless of who is being sued, the whistleblower needs to be able to claim for a broad range of damages.[43] In its support for the ability to sue for damages, the Queensland EARC report stated that the type of damages that could be rewarded should include:

> … damages for loss of earning and entitlements (eg. superannuation entitlements); general damages for pain and suffering if physical or psychiatric impairment causally related to an unlawful reprisal can be demonstrated; and exemplary damages to punish behaviour involving, say, the intentional infliction of emotional distress through a concerted campaign of harassment or victimisation.[44]

6.50 While the ability to sue for damages was welcomed by witnesses, work on whistleblowing notes the high cost and delays involved in litigation. This has led some to conclude that a whistleblower who has suffered a reprisal should have access to an alternative forum and course of action to the courts.[45]

Applications for injunctions or orders

6.51 Clauses 27 and 28 of the Bill enable a whistleblower, or the Public Service Commissioner or the Parliamentary Service Commissioner on their behalf, to apply for an injunction if they are suffering detriment due to an unlawful reprisal. The application can be granted if it is clear that a person has engaged in unlawful reprisal or has been collaborating in one of a number of ways in an unlawful reprisal.

6.52 Although concerned at the effectiveness of injunctions in allowing for the reinstatement of employees, the Queensland EARC report concluded that injunctions

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42 Western Australian Commission on Government, *Report 2*, December 1995, p. 156.

43 See Senate Select Committee on Public Interest Whistleblowing (SSCPIW), *In the Public Interest*, August 1994, pp. 225-226.

44 EARC, *Report on Protection of Whistleblowers,* October 1991, p. 181.

45 See SSCPIW, *In the public Interest* 1994, pp 225-6 and the Competition Bureau of Canada-guidelines for whistleblowing legislation, http://strategis.ic.gc.ca/SSG/ct01113e.html (10 July 2002). As noted, the United Kingdom legislation allows for an employment tribunal to award damages.

should provide a useful remedy in respect of other kinds of unlawful reprisals, including overturning personnel actions short of dismissal, restraining people from continuing campaigns of victimisation or harassment and threatened dismissal.[46] The Queensland, ACT, Victorian and Tasmanian legislation make such provisions.

6.53 While it is anticipated that the ability to apply for injunctions and orders will improve the protection offered to the whistleblower, the full effects of such provisions are not known and a number of concerns remain. Dr De Maria told the Committee that the only time the injunction powers in Queensland were tested they proved to be unreliable, with an initial ruling denying a substantive injunction because of inconsistencies between relevant legislation. The judge's ruling was later overturned and an injunction against termination of employment was granted.[47]

6.54 Regarding where an injunction can be applied for, the proposed Bill simply states that an application for an injunction or order may be made to 'a court of competent jurisdiction'. The Bill does not make clear what constitutes such a court.

6.55 Ms Killen submitted that Supreme, Federal and High Court actions are expensive and most disclosure makers do not have access to the levels of finance required to proceed with actions.[48]

6.56 Mr Gerard Crewdson and Mr Pascale Bourot, private citizens, submitted that clause 27 of the Bill needs to be more specific and state which courts may be applied to for an injunction.[49] Such detail has been included in the Queensland legislation which specifies that an application for an injunction against a reprisal may be made to the Industrial Relations Commission if the reprisal had caused detriment within or breaches the *Industrial Relations Act 1991* (Qld), or to the Supreme Court. Grounds for both means of applying for an injunction are explicitly laid out in section 49 of the Queensland Act, as is the evidence that is required.

6.57 Mr Grice submitted that a whistleblower might not think that applying for an injunction is a genuine option because he or she would consider it likely to be end his or her career once it was known that an injunction had been applied for.[50]

6.58 The Queensland Act authorises the Industrial Relations Commission and the Supreme Court to direct that an application for injunctive relief be heard in chambers rather than in open court, and also to order that any proceedings for an injunction not be published. The direction may be given where the Commission or the Court considers that disclosure of the proceedings would not be in the public interest, or that

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46 EARC, *Report on Protection of Whistleblowers,* October 1991, p. 178. See also Paul Finn, 'Whistleblowing,' *Canberra Bulletin of Public Administration*, no. 66, Oct 1991, p. 170.

47 William De Maria 'Whistleblowing', *Alternative Law Journal,* vol. 20 (6) December 1995, p. 278.

48 Submission no. 5.

49 Submission no. 6.

50 Submission no. 1.

persons other than parties to the application do not have sufficient reason to be informed of the proceedings. This safeguards the interests of the whistleblower where, in proceedings for injunctive relief, he or she may be subject to unsubstantiated attacks on their reputation from a party against whom the injunction is being sought.

Agency protection of whistleblowers

6.59 In addition to the whistleblower's ability to pursue solutions through the courts, it is imperative that agencies have in place measures that prevent reprisals from occurring and stop them when they do occur.

6.60 As discussed in Chapter Five, clause 10 of the proposed Bill requires that agencies establish procedures to facilitate the making of public interest disclosures and to deal with public interest disclosures it might receive as the proper authority. It stipulates that these procedures must include 'protecting a person who makes a public interest disclosure from unlawful reprisal, including unlawful reprisals taken by public officials in relation to the agency'.

6.61 Clause 19 of the proposed Bill states that if, in the course of investigating a public interest disclosure, it is made known to the proper authority 'that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal' then the authority:

> … shall take such action as is necessary and reasonable— …
>
> (e) to prevent the conduct or reprisal continuing or occurring in future; and
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> (f) to discipline any person responsible for the conduct or reprisal.

6.62 The Department of Foreign Affairs and Trade submitted to the inquiry:

> The Bill appears to allow members of the public to make public interest disclosures. This may cause practical and legal difficulties. In particular, it is unclear to what extent agencies would be able to provide protection to persons who make public interest disclosures from unlawful reprisals where those people are members of the public rather than employees of the agency.[51]

6.63 Under clause 10 and clause 19 agencies and authorities are not able to offer the same protection to non-employees as they are employees. Likewise, according to the current form of the Bill, a proper authority, which may be an agency head or the Public Service Commissioner or the Merit Protection Commissioner, while having the ability to prevent reprisals within agencies and to discipline offending officers, is limited in its ability to control reprisal should they occur in a non-APS environment.

6.64 The protections and remedies provided by the Bill for those not employed by the government are largely legal solutions by means of criminal prosecutions,

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51 Submission no. 18.

injunctions and orders, and prosecutions for damages. While it may not be possible to change this situation, clarification of those to whom clauses 10 and 19 can practically apply would grant potential whistleblowers a better understanding of the Bill's ability to protect them according to their employment circumstances.

Independent investigation of unlawful reprisals

6.65 Although not explicitly stated in clause 4 of the proposed Bill, an unlawful reprisal is disclosable conduct according to the proposed Bill. Clause 9 states that unlawful reprisals are to be treated as a form of public interest disclosure, and referred to the same authorities as public interest disclosures.

6.66 Thus the Bill's provision for the disclosure and investigation of unlawful reprisals encounters the same limitations as its provisions for public interest disclosures in general, as discussed in Chapter Four. Of particular concern regarding the treatment of unlawful reprisals as a form of public interest disclosure is the question of the independence of the investigation into an unlawful reprisal.

6.67 In Chapter Four, the Committee concluded that under certain circumstances, the agency is not the appropriate body to receive a public interest disclosure and that in such cases a separate and independent body should be available to receive and investigate reports.

6.68 The same applies when it comes to determining who should receive and investigate reports of reprisals, but in these instances there is an additional layer of complexity and a greater need to ensure that an independent authority can receive a public interest disclosure. One of the main difficulties that arises with whistleblowing is the perceived or actual conflict of interest that arises where an agency investigates a report of wrongdoing within its own ranks and then proceeds to investigate allegations of recriminations which, under the proposed legislation, it has the responsibility to prevent. The conflict of interest situation escalates if the allegations of reprisals are against the agency itself.

6.69 The SSCPIW report, *In the Public Interest,* proposed a system whereby the Merit Protection Review Agency would have responsibility for investigating unlawful reprisal, while the Public Interest Agency would investigate the disclosure, as well as play an oversight and appeal role to the MPRA's role investigating reprisals.[52]

6.70 At hearings for the Public Service Bill 1997, the Merit Protection Commissioner, Ms Ann Forward, remarked that 'the protection of whistleblowers ought not be done by the same body which investigates the subject matter of the whistleblowing'[53] Mr Peter Moylan, Industrial Officer, Australian Council of Trade Unions, supported such a position stating 'there needs to be provisions for the

52 SSCPIW, *In the Public Interest*, August 1994, p. 223.

53 Senate Finance and Public Administration Legislation, *Committee Hansard*, 24 September 1997, p. 5.

investigation of the claims and there needs to be an independent protector of the whistleblower'.[54]

6.71 As noted in Chapter Three, amendments proposed by Senator Murray in 1997 to the Public Service Bill included the establishment of an agency dedicated to the investigation of unlawful reprisals. The Whistleblowers' Protection Agency would receive and assess allegations of detrimental action against APS employees resulting from a public interest disclosure and either refer the matter to appropriate agencies for investigation or investigate the allegation itself.[55]

6.72 The NSW legislation provides for an independent avenue for reporting and investigating unlawful reprisals, with a 1998 amendment enabling the Ombudsman to investigate any allegations of detrimental action resulting from the making of a public interest disclosure, regardless of to whom the disclosure was made.[56]

Committee view

6.73 The Committee emphasises that the effectiveness of whistleblowing legislation is heavily dependent on individuals contemplating making a disclosure having confidence in the ability of legislation to protect them. In the event that legislation fails to protect a whistleblower, it must provide whistleblowers with reliable remedies.

6.74 The Committee supports the use of a general definition of 'unlawful reprisal' with reference to 'detriment', since it considers that discrimination in any form should be prevented by whistleblowing legislation. However, it also recognises that, because of the varied and subtle forms that reprisals take, there is a case for a more specific definition. The Committee believes that the suggested explanatory memorandum would address this concern and provide those contemplating whistleblowing with a better grasp as to what the legislation protects them against, as well as an objective standard against which to compare possible offences.

6.75 The Committee observes that there is a need to protect the individual accused of unlawful reprisal, as well as the individual who has made a public interest disclosure. To maintain procedural fairness, the Committee believes that the definition of unlawful reprisal should be amended so that a firm link between detrimental action and the public interest disclosure must be established for an offence to have occurred. The wording of the Queensland legislation maintains an appropriate balance.

6.76 The Committee is aware of the difficulties that have been experienced in prosecuting for unlawful reprisals in other jurisdictions. It observes that the inclusion of a defence provision for those accused of unlawful reprisal in the Bill—a provision

54 Joint Committee on Public Accounts, *Committee Hansard*, 6 August 1997, p. 76.

55 *Senate Hansard*, 17 November 1997, pp. 8923-8928.

56 Committee on the Office of the Ombudsman and the Police Integrity Commission, *Second Review of the Protected Disclosures Act* 1994, August 2000, p. 7.

that no other State legislation apart from that of the ACT includes—makes the already difficult task of prosecuting unlawful reprisals even more so.

6.77 For this reason the Committee considers that the defence provisions for those accused of unlawful reprisal should be removed from the Bill.

6.78 The Committee notes that the terms according to which the agency must provide counselling to a whistleblower could be made more specific and that this would provide less scope for abuse.

6.79 The Committee emphasises that relocation should only be considered when all other avenues of protection have been exhausted, and believes that the clauses requiring the whistleblower's consent should ensure that misuse of the relocation provisions does not occur. The Committee believes that the cost of relocation should not fall to the whistleblower and that the Bill should stipulate that the position to which he or she is relocated is equivalent, or as close as possible, to his or her current position.

6.80 The Committee suggests that the Bill be amended so that agencies are required to cover all costs of relocation and that the position to which he or she is relocated is equivalent, or as close as possible, to his or her current position.

6.81 The Committee welcomes the inclusion of provisions that allow victims of unlawful reprisals to sue for damages. It is aware that there may be advantages in making an agency liable for failing to adequately protect a disclosure maker from unlawful reprisals when it could have done so.

6.82 The explanatory memorandum suggested by the Committee would include guidelines as to the scope of damage that can be sued for, and address concerns that the provision allowing whistleblowers to sue for damages may be interpreted overly narrowly.

6.83 Although the precise outcome of the ability to apply for injunctions and orders is not yet known, the Committee welcomes the inclusion of such provisions and believes that they will provide an avenue of protection and remedy for whistleblowers.

6.84 The Committee is concerned that the Bill does not make clear what constitutes 'a court of competent jurisdiction' for the purposes of applying for an injunction or order. The Committee is also aware that the Bill does not provide for applications for injunctions to be made confidentially. Both these matters require further consideration. The Committee notes that the Queensland legislation addresses both these issues.

6.85 The Committee emphasises that, while the ability to protect the whistleblower through court action is necessary, agencies must be able and willing to protect whistleblowers and prevent such action being required. The Committee is concerned that clauses 10 and 19 provide little detail as to essential elements of agency frameworks for protecting whistleblowers, or about the form and extent of disciplinary

action. The Bill also does not establish a requirement for scrutiny of proposed frameworks to determine if they are sincere and effective.

6.86 The Committee believes that a provision ensuring that agency frameworks are of a certain standard should be included. This could occur by setting out details of their nature in legislation, as occurs with the Information Privacy Principles to be adhered to by the Commonwealth public sector. Alternatively, the Bill could state that an authority, such as the Ombudsman, will examine whistleblower frameworks to ensure they are of an adequate standard, an approach similar to arrangements surrounding privacy frameworks in the private sector whereby the Privacy Commissioner is required to approve the privacy codes of industry bodies.

6.87 The Committee also sees a clear need to have provisions in the Bill that allow a person to report an unlawful reprisal to a separate and independent authority that would have the power to investigate the allegation and direct the responsible agency to remedy the situation. In Chapter Four the Committee recommended that the Ombudsman be included as a proper authority for receiving a public interest disclosure. Extending the role of the Ombudsman to include the ability to receive complaints of unlawful reprisals, regardless of whom the initial public interest disclosure was made to, would provide a means by which unlawful reprisals could be independently investigated.

6.88 The Committee believes that the Ombudsman's office should be assigned responsibility for overseeing agency schemes for the prevention and cessation of unlawful reprisals and disciplinary procedures for officials who engage in them.

6.89 The Committee further believes that the Bill should allow for the Ombudsman to be designated a proper authority to receive reports of unlawful reprisals regardless of whom the initial public interest disclosure was made to.

Overall conclusion and recommendation

6.90 The Committee recognises the need for separate legislation addressing the matter of whistleblowing and welcomes the contribution of Senator Murray's Bill to debate on this important matter. The Committee supports the general intent of the Bill. However, the Bill contains deficiencies in some of its provisions, the remedy of which will require further consideration and redrafting.

6.91 The Committee therefore recommends that the Public Interest Disclosure Bill 2001 [2002] not proceed in its current form.

Senator Brett Mason

Committee Chair