The Public Interest Disclosure Bill 2013

Submission of the Accountability Round Table to the

Senate Legal and Constitutional Affairs Committee

Introduction

May we commence by referring to two submissions[1] that were made to the House of Representatives Committee last year on the Public Interest Disclosure Bills 2012.

In those submissions, we drew attention to the long standing principle stated as "Public office is a public trust"[2], (abbreviated in this submission as "*public office - public trust*"), and the responsibilities that principle imposes on public officials and holders of public office, particularly in the preparation and consideration of legislation which directly addresses the integrity of the operation of our democratic system of government.

We submitted that honouring that principle requires the introduction of a best practice system of integrity measures. We also drew attention to Australia's commitments under the UNCAC convention, the OECD Foreign Bribery Convention, and the Anti-corruption Action Plan of the G 20 - to which may now be added the responsibility of being a member of the Security Council.

Bearing these matters in mind, it may fairly be said that both domestically and internationally, Australia needs at the federal level of government a best practice public interest disclosure system. The government, in its response to the 2009 House of Representatives Committee Report, undertook to introduce" best-practice legislation".

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[1] http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill public interest disclosure/subs.htm

[2] French,C J., "Public Office and Public Trust",2011; http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun11.pdf

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It should be noted that the Bill expressly acknowledges the *public office - public trust* proposition in its definition of a key concept, "disclosable conduct"[3], by including "conduct that is an abuse of public trust". The Bill also commences well in its statement of its Objects, which identify and state the key issues and objectives to be addressed as follows:

> **"6 Objects"**
>
> The objects of this Act are:
>
> (a) to promote the integrity and accountability of the Commonwealth public sector; and
>
> (b) to encourage and facilitate the making of public interest disclosures by public officials; and
>
> (c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and
>
> (d) to ensure that disclosures by public officials are properly investigated and dealt with."

Paragraphs (b) to (d) of s6 identify the key objectives that need to be addressed in a best practice system to achieve the ultimate objective of promoting "the integrity and accountability of the Commonwealth public sector".

It is our submission, however, that the Bill, in its current form, falls short of best practice in a number of significant respects and, as a result, significantly fails to meet its stated objectives.

In Appendix A we have analysed what we submit are the Bill's shortcomings in policy and practice, and the steps which could be taken to address those deficiencies. We submit that that analysis reveals significant shortcomings in the Bill in the following areas:

- The people,[4] conduct[5] and disclosures[6] it covers,
- The system for the making of disclosures[7] that will be protected,
- The system for investigating [8]protected disclosures,
- The support and protection [9]to be provided to whistleblowers, and
- The supervision of the whole system.

[3] s 29 –item five

[4] Appendix A, para 1(a),

[5] Ibid,Para1(b)

[6] Ibid, para 2

[7] Ibid, para 3

[8] Ibid, para 4

[9] Ibid,para5

We submit that of particular concern are the gaps and the restrictions to be found in the definition of the term "public interest disclosure". It provides the critical threshold that must be satisfied for a disclosure to be protected under the Bill. It is also a key term in the operation of major parts of the proposed system, notably, the allocation of disclosures and their investigation, the protection and compensation of disclosers and the prosecution of offences. As a result of the gaps and restrictions in this key definition, the Bill will significantly:

- discourage intending whistleblowers from making disclosures:
- cause public officials with the responsibilities of allocating and investigating disclosures to decline to do so; and
- deny the Bill's protections to those making *bona fide* disclosures of misconduct.

Addressing the defects in that definition will address a large proportion of the issues raised in Appendix A below [10].

Conclusion

Views will, of course, differ on appropriate solutions. In addition, despite all the efforts that have been made, and will be made, to ensure an effective Bill is passed, its application will inevitably reveal areas needing improvement.

The Committee will be pressed to make many recommendations. Ultimately, we submit that the most important recommendation the Committee can make is that a plan be put in place to ensure a genuine review, in the next Parliament, of the operation of the Bill that is passed in this Parliament. We also submit that it should identify an inclusive list of those issues that it considers would benefit from review in light of the debate that will emerge on the Bills during the consideration of this reference. We submit that the best place to spell out the detail of that review will be the National Anti-corruption Plan.

Finally, we urge that we do not lose sight of the fact that several serious attempts have been made to introduce whistleblower protection legislation since 1994. Since then the need for such legislation has increased. The opportunity presented by the Wilkie and Government Bills must not be wasted.

Hon Tim Smith QC,

Chair Accountability Round Table

[10] Almost 50%

Appendix A - Public Interest Disclosure Bill 2013

Issues requiring attention to achieve best practice

We set out below matters that we submit require attention in the Bill in each of the critical areas identified in S 6 of the Bill if best practice is to be achieved. Those areas are:

- the coverage of the bill - in particular, the conduct that comes within the proposed disclosure system and the disclosers, and their disclosures, that are covered,
- the encouragement and facilitation of the making of public interest disclosures,
- the investigation of disclosures and responses,
- the support provided and protection given for those who make disclosures, including the sanctions to be available against reprisal taken, or threatened, against a whistleblower or a person suspected of being a whistleblower.

In addition effective oversight of the operation of the system is essential.

1. Coverage of the Bill – people and conduct

(a) Public officials not included in the proposed disclosure system

(i) Members of Parliament and judicial officers

The Bill, in defining "public official" [11], does not include the elected members of the executive branch or their personal staff or the judiciary. As a result, wrongdoing of the kind covered by s29, in respect of other public officials, is not something that falls within the system to be established under the Bill. A public official who discloses such wrongdoing by a member of parliament or a judge will not receive protection under the Bill, and the claimed wrongdoing will not be subject to investigation under the Bill. Thus, while maladministration may be the subject of disclosures protected under the Bill where they involve other public officials, information pointing to corrupt conduct by members of parliament or judicial officers will not.

We submit that in the absence of any persuasive argument for excluding misconduct by such persons, such exclusion is contrary to the '*public office - public trust*' proposition that is central to the legislation, and in this respect undermines the integrity of the Bill.

[11] S 69

We submit that they should be brought within the Bill. It is best practice elsewhere[12]. If the Committee is not persuaded, we submit it should consider recommending that there be a review of the operation of the Bill during the next Parliament in the course of which the issue of the Bill being extended to apply to conduct of such public officials would be reconsidered. Such a review would be a very relevant matter to include in the Government's National Anti-corruption Plan.

(ii) Staff of Members of Parliament. They too are not included in the definition of "public officials", with the same consequences as for MPs. The Committee[13] however recommended that they be entitled to make protected disclosures -- to the Commonwealth Ombudsman. Even if misconduct of Members of Parliament is not disclosable under the legislation, members of their staff deal with the executive officers of the public sector and, consistently with the s6 Objects, ought to be encouraged to reveal misconduct in that branch that comes to their attention and receive the protection and support of the Bill.

Again, we submit that in the absence of any persuasive argument for excluding misconduct by such persons, such exclusion is contrary to the '*public office - public trust*' proposition that is central to the legislation, and thereby undermines the integrity of the Bill.

The issue having been examined, reported on and protection recommended by the Committee, no further detailed consideration should be required. The recommendation should be implemented.

(b) Conduct expressly addressed that should be disclosable but effectively excluded from the disclosure system

(i) Intelligence agencies. The Bill sets out a special disclosure regime for information concerning misconduct in intelligence agencies. In reality, however, information concerning such conduct is effectively excluded from the proposed disclosure system. This is a result of a number of different provisions:

- ***s33.*** The Bill excludes from the class of disclosable conduct, any conduct engaged in by an intelligence agency or one of its public officials "in the proper performance of its functions or the proper exercise of its powers". Unless there is some special meaning attaching to the word "proper" this section does no more than purport to exclude conduct that is not included in the first place.

[12] Members of Parliament ; Public Interest Disclosure Act 2012 (ACT) – (ACT Act) ,s9,10, Dictionary "Legislative Assembly Entities" Judicial officers; Public Interest Disclosure Act 2010 (Queensland - Queensland Act), s 6,7

[13] Recommendation 4

The exclusion is, however, capable of being construed as referring to conduct that is engaged in while exercising a legal authority given by law - which would exclude most if not all intelligence agency conduct from the system. We submit that this provision should be deleted. Alternatively, the purpose of the provision needs to be clarified and an appropriate alternative provision recommended, enabling the effective disclosure of emergent 'wrongdoing' on the part of intelligence agencies and officials, on the basis that it is consistent with the objects of the Bill to do so.

- ***s41."*** Intelligence information" is defined in this section. To be able to make a protected external, emergency or legal practitioner disclosure, information must not consist of or include intelligence information. But the definition includes any information "that has originated with, or has been received from, an intelligence agency". It does not attempt to identify a class of information the disclosure of which might carry a real risk of harm and damage to security, intelligence or law enforcement. The result is, for example, that a public official wishing to blow the whistle on possible corruption in the procurement of office supplies in an intelligence agency could not seek legal advice, (even if the legal practitioner has the appropriate security clearance[14]) and can only make an internal disclosure. If the internal investigation or response is inadequate, the fact that an external disclosure will inevitably include "intelligence information" means that the disclosure will not be a protected disclosure. It also prevents the supply of such information to investigative agencies such as the AFP or ACC to investigate situations where normally it could be[15].

- **s26** item 2 column 3 (i). In addition, this provision excludes protection for external disclosures if any of "the conduct with which the disclosure is concerned relates to an intelligence agency"

Obviously, appropriate distinctions need to be drawn to enable the objects of this legislation to be achieved in relation to information about conduct within intelligence agencies while protecting the secrecy where necessary of sensitive information. This can be done.

If such approach is not taken, it may, paradoxically, make more sense to remove the complexities created by the present draft's definitions and limit protected disclosures of conduct of intelligence agencies to internal disclosure to the agency concerned or to the Ombudsman and/or the IGIS and remove the limitations on the legal practitioner disclosure to enable disclosers to get legal advice, relying instead on the

- fact that the recipient of the information is a legal practitioner bound by client legal privilege to treat the disclosure as confidential and will be alive to the need for care in dealing with the information conveyed; and

[14] see section 26 item 4

[15] S34 Table, item 2

- the criminal offence created for lawyers who disclose information received as a public interest disclosure under the Bill (s 67)

(ii) Generally.

- ***Definition of disclosable conduct***

  The definition includes "maladministration" but the only guidance to the meaning of that term is an inclusive list which focuses on individual misconduct of individual officials.[16] As a result it is likely that it will not be interpreted as applying to maladministration in relation to the programs, procedures or policies within agencies, especially when carried out diligently by the individual officers concerned. This should be amended to address more closely the stated objects of the Bill. If the best practice adopted elsewhere were to be adopted, the issue would be addressed by defining "maladministration" by reference to "administrative action" which would also be defined[17] .

2. Gaps in the protected disclosure system itself

(a) External disclosures. The definition of "public interest disclosure" provided by the Bill fails to:

- include the situation where the authorised receiving officer refuses to receive the disclosure, or takes no action or inadequate action[18].
- address the situation where there is no safe avenue to make an internal disclosure. This could arise from a failure by an agency to adopt an effective internal system or the corruption of the system or the risk of adverse consequences in spite of the existence of a system. Best Practice – compare ACT Act s27 and Queensland Act, 12, 13, and 20 .

(b) Emergency disclosures. The definition is too limited being confined to imminent as well as substantial danger to health or safety of one or more persons. The requirement of 'imminence' should be removed. The definition should at least cover the situation where the information points to a risk of substantial danger to health or safety - for example from a compromised airport security system (the Kessing disclosure). It should also expressly extend to substantial environmental risks – only environmental risks that pose a substantial danger to health or safety would be covered by the Bill's provisions. Best Practice; compare Queensland Act s 12 and 13.

The Bill should be amended to address these gaps.

[16] S29 Table Item4)

[17] Cf the definitions of both terms in Queensland Act Schedule 4

[18] S26 Table Item2 (d) and (e) assume that an investigation has occurred

3. Encouraging and facilitating public interest disclosures

In a number of ways, the Bill makes the intending whistleblower's decision as to whether or not to make a disclosure under the Bill much more difficult than it should be.

(a) *Discouragement- Setting the bar for protection too high*

S26 requires that, for an internal or external disclosures to be a public interest disclosure", the discloser must believe "on reasonable grounds that the information may concern one or more instances of disclosable conduct". The protection from civil, criminal and administrative proceedings under s 10 is lost if the statement of the disclosure is "false or misleading"[19]. This will include situations where a statement is subsequently proved to be wholly or partly mistaken, false, or misleading, even though the disclosure was originally made by the discloser on the basis of an honest belief held on reasonable grounds that it was not false or misleading. This is far too strict and contrary to the objectives of the Bill, and will be a major disincentive to whistleblowers.

Section 11(1) should be amended to apply only in respect of '*knowingly*' making a statement that is false or misleading and intending to attract the protections available in respect of genuine disclosures. Best practice, compare Queensland Act ss66, 67.

(b) Provisions discouraging public interest disclosure

(i) Restrictions on the persons to whom internal disclosures may be made

Internal disclosures are the starting point for activating the protected disclosure system. The Bill limits those who may receive disclosures to "authorised internal recipients" and goes on to spell out a range of official options.[20] It is quite substantial but does not include the option used elsewhere in best practice legislation of disclosure to people in a supervisory or management position. That option recognises the experience that whistleblowers will go to someone they know and trust rather than an authorised officer. It enables whistleblowers to choose a person in whom they have confidence.

If it is not included, the whistleblower also runs the risk of not identifying the correct prescribed internal recipient and making an unprotected disclosure. . Best Practice: compare Queensland Act s 17(3) (d) and ACT Act s15(1)(c)(i).

(ii) ***internal, external and emergency disclosure.*** A requirement for each of these categories is that "the disclosure is not contrary to a designated publication restriction". Those restrictions are identified in section 40 by referring to 13 statutory provisions in different Acts. They broadly fall into two categories -- provisions that themselves impose restrictions on publication such as the Family Law

[19] S 11(1)

[20] s34

Act 1975 and various suppression orders made by courts from time to time under the statutory provisions such as the Judiciary Act 1903. Conscientious whistleblower are expected by this statutory requirement to check that what they wish to disclose is not restricted by or pursuant to one of these 13 Acts. It may be said that it is not a requirement that is attached to a legal practitioner disclosure and the legal practitioner can investigate the question and advise. But that will not remedy the problem because the task of establishing that the disclosure would not be contrary to a designated publication would be, in practice, well-nigh impossible and, if attempted, very expensive. The result is that conscientious whistleblowers will have to take their chances on an assessment of the probability of there not being in existence some such restriction in relation to the information they want to disclose. This will discourage many. For example, particularly people working in agencies where there has been some publicity about alleged particular corrupt conduct -- such as Customs, Defence or Austrade is.

There is a further problem in the potential for it to be used to deny an allocation of a disclosure for investigation and it is that. Under the Bill, the would-be discloser will have to weigh up the following:

- the authorised allocating officer[21] may insist on proof that the disclosure satisfies the requirements for an internal disclosure including that it is not contrary to a designated publication restriction .

- the investigating officer may decline to investigate "the disclosure" as "misconceived" [22] unless it satisfies the requirements for internal disclosures including that it is not contrary to a designated publication restriction.

Such problems will cause the would-be whistleblower to either give up or ignore the legislation entirely. Again, a few, as now, may simply go public regardless of the risks to themselves.

This particular requirement also carries with it the risk for the future that agencies may lobby successfully to have other unrelated types of restrictions included.

We have not identified this sort of designated publication restriction provision in best practice legislation. It would be understandable that Parliaments have taken the view that, in such a situation, the public interest in encouraging disclosure within government of misconduct should be given

[21] This results from s43 (2)

[22] S 48(1)(d)

priority. Our best guess of a genuine purpose for such a provision is that there is concern about the possibility of s 10 of the Bill (which protects a person who makes a public interest disclosure under the Bill from “civil, criminal or administrative liability”) being used to get around such publication restrictions by purporting to make the disclosure under the Bill. If that is the concern, it may be best dealt with by adding a subsection to section 11 which in substance would provide that s 10 does not apply where a person knowingly and without reasonable excuse breaches a "designated publication restriction" . Best practice -- Compare ACT Act and Queensland Act disclosure provisions.

(iii) ***internal and external disclosure***

In relation to internal and external disclosures, to receive protection under the Bill, it is necessary that the discloser "believes on reasonable grounds that the information may concern one or more instances of disclosable conduct". There are two major deficiencies in this approach that in the long term will seriously discourage disclosures.

- It does not take account of the reality that often public officials make internal disclosures about matters that appear relatively minor such as an inability to find files and other concerns where it will not occur to them that they might be going to need the protection of the legislation. But they should have that protection.

- To receive the protection, the discloser must direct his or her mind to the question of whether information concerns “disclosable conduct” before making a disclosure. "Disclosable conduct” is defined in section 29 and so the belief on reasonable grounds must include a belief that the information to be disclosed may concern conduct within the statutory definition. But that definition is extensive. He or she will need to obtain legal advice.

This narrow and technical approach is not taken in best practice jurisdictions. Instead they include an objective test that has the result that a person who makes a disclosure will receive protection under the Act so long as the objective criteria are satisfied.

There should be added to the Bill an objective test. Best practice; compare ACT Act s 7 and Queensland Act ss 13, 14.

(iv) ***Legal Practitioner Disclosures.*** A further obstacle is placed in the path of a discloser who knows or ought reasonably to have known that any information he is considering disclosing has a national security or other protective security classification. If that person wants legal advice, to make a disclosure that is protected to a legal practitioner, he or she must find one

with “an appropriate level of security clearance”.[23] We have made enquiries that might be made by a potential whistleblower to bodies such as the Law Institute of Victoria, Victorian Bar Council, Legal Services Board and Legal Aid. Each looked into the matter and advised that they do not have that information available. Is there a satisfactory answer to this problem? If it can't be found, we submit that the Committee should recommend that this requirement be removed and instead reliance should be placed upon the professional ethical obligations placed on all legal practitioners to protect the confidentiality of the information received from clients and secrecy obligations placed upon legal practitioners by section 67 of the Bill.

(v) External disclosures

There are several concerns relating specifically to external disclosures.

- The key grounds upon which an external disclosure is allowed [24]are that theinvestigation of the internal disclosure or the response to investigation, or both, were inadequate. The test is an objective one, not a subjective one, and as a result too restrictive. Best practice requires a subjective test. That was in fact proposed by the government in its response (recommendation 21). Compare - ACT s27.

- Significant discouragement is also provided by the requirement that the disclosure "is not, on balance, contrary to the public interest”[25]. It should be noted that the onus is placed again on the person considering making the external disclosure to establish a negative proposition – always very difficult. It is not warranted because the preceding specific requirements must also have been satisfied and, if they are, will provide a strong public interest in favour of external disclosure: for they involve both the information about the original disclosable misconduct and also information about the inadequacy of the investigation and/or the response to the investigation - that is, further disclosable conduct.

  To them should also be added the further condition imposed that "no more information is publicly disclosed than is reasonably necessary in the public interest"[26]. That is a reasonable requirement and together with the preceding requirements should be enough to ensure that the public interest is served.

[23] S 26 Table, item 4(b)

[24] S 26 Table item 2 (d)

[25] Ibid, (e)

[26] Ibid, (f)

The section goes on, however, to then list effectively 13 factors to which regard must be had in determining whether disclosure would be contrary to the public interest - as to most, if not all of which, most disclosers would be in no position to make an assessment or produce evidence.[27] It also does not identify or list any positive factors that should be taken into account.

The external disclosure option must be a real option if

- whistleblowers are to be encouraged to proceed under the legislation and
- those charged with the responsibility of allocating and investigating and responding to internal disclosures are to be adequately encouraged to fulfil their roles.

The option is also vital to ensure that where an internal disclosure system breaks down, the information will still see the light of day.

We submit that the "not, on balance, contrary to the public interest" requirement in Item 2 (e) of S26 Table and s26 (3) will defeat the stated objects of the Acts and should be deleted.

4. Ensuring disclosures are properly investigated and dealt with.

Plainly there needs to be an appropriate discretion vested in persons conducting investigations allowing them to decide not to investigate. The Bill attempts to address this in s 48(1) providing a discretion that can be exercised at the outset before an investigation starts and after it starts. Most of the criteria are appropriate but 3 are not. We refer to the following:

> "(b) the information that is disclosed does not tend to show any instance of disclosable conduct; or
> (c) the information does not, to any extent, concern serious disclosable conduct; or
> (d) the disclosure is frivolous, vexatious, misconceived or lacking in substance; or"

Paras (b) and (c) and the words "misconceived or lacking in substance" in para (d) should be deleted. They are most inappropriate in circumstances where the investigation has not commenced – particularly in the context of whistleblowing where often the information available will often be sketchy and may point to no more than suspicion of misconduct. Para (c) has the additional problem that until there has been an investigation it will not be possible to reach a conclusion about the seriousness of the conduct in question. In Victoria that fundamental error has been made in the legislation which prescribed the threshold test for IBAC to conduct any investigation. The legislation has been heavily criticised on that point – recently by the Hon Stephen Charles Q.C. who pointed out that IBAC could not

[27] S26(3)

investigate an Obeid type of case because the initial information raised no more than suspicions of misconduct. Best Practice: compare ACT Act s20 and Queensland Act s 30.

5. Support and protection for disclosers

The Bill relies on a combination of deterrence and compensation to give support and protection and also direct support through

- the creation of a criminal offence of taking reprisals or threatening to do so, and
- avenues provided for the discloser to seek a variety of civil remedies including injunctions and compensation where a person takes reprisals or threatens to do so, and
- Direct measures to support.

The essence of a satisfactory system is provided in the Bill but it needs to be considerably strengthened to adequately address the Bill's stated objectives.

(a) Compensation system

(i) **A fundamental obstacle - the definitions of the 4 public interest disclosures.** We refer to the earlier discussion of the various elements spelt out in the Table to s 26 which will significantly discourage disclosures under the Act.

They will also prevent bona fide whistleblowers from receiving the benefit of the protection from civil, criminal or administrative liability provided by s10 to which they should be entitled. This will flow primarily from the fact that those protections are available only where there has been a "public interest disclosure". That will require proof of the elements prescribed in the s26 Table. They include, for example, the designated publication restriction and the special requirements identified for external disclosures, (especially – that "the disclosure is not on balance contrary to the public interest"). The result of those provisions is that disclosers seeking to rely on s10 for protection will carry the onus of proving those negative propositions and have to do so in relation to matters on which they will generally not have the information required to discharge the onus, or the capacity or funds required to obtain it.

This will defeat the purposes of this key provision and provides a further reason for the removal of those requirements from the s 26 Table.

They also seriously compromise the provisions giving compensation and other relief where the discloser has suffered from "reprisals". That concept is defined by reference to "public interest disclosure" in s13 and includes a requirement that when the act or omission of reprisal occurs the person responsible "believes or suspects".... that the discloser or another person "may have made or proposes to make a public interest disclosure". We suggest that the difficulty this poses is that while a person can have suspicions based on little evidence, the way the provision is drafted, the person

responsible for the alleged reprisal must know what constitutes a "public interest disclosure" before he or she can suspect that what occurred was a “public interest disclosure”.

This could be addressed[28] to some extent by direct amendment. We should mention, however, that our primary submission, developed in the next paragraph (and below “best practice compensation”), is that the sections in Part 2 Division 1 Subdivision A dealing with protection, compensation and offences including s 10 need amendment to their structure and content and, in that, this issue can also be addressed.

(ii) Other Definitional problems

- ***More accurate use of terminology needed.*** The Bill inappropriately uses the term “reprisals” to cover the range of conduct encapsulated in Objects s 6 (c) by “adverse consequences”. The word “reprisal” is appropriate only for the situation where physical force is used to cause physical injury or take property in retaliation for a perceived wrong. We are dealing here with a range of actions, intentions and outcomes. But the use of the term carries the danger of encouraging a narrow interpretation of the provisions. It should be avoided.

  The term “reprisals” also is used for both the civil and criminal procedures provided. But this runs the risk of continuing to encourage the sort of thinking that we understand has occurred that before considering compensation a criminal conviction must be obtained. The terminology describing the civil and criminal remedies should be different. (see definition of “detrimental action”, ACT Act s39).

- ***Definition of detriment.*** s13 (2) defines the key concept narrowly resulting in less than best practice. (compare the ACT Act 2012 s 39 .

(b) ***Protection –***

(i) Identity

An issue not addressed adequately in the Bill is the need on occasions to conceal the identity of the discloser. It is important that this is recognised in other provisions where it presently is not. For example, an exception is

[28] For example, This could be addressed to some extent by an amendment along the following lines:

(b) when the act or omission occurs, the first person believes or suspects that

(i) the second person or any other person made, may have made or proposes to make a disclosure , and

(ii) the disclosure could constitute a public interest disclosure; and

Best Practice: compare A CT Act s 35

needed in s 44(1) to enable the identity to be withheld or otherwise protected when necessary when the principal officer is advised of the allocation. The Bill needs to be checked for provisions placing obligations on officials, compliance with which could increase the risk of adverse consequences. Best Practice: compare : ACT Act 2012, s26 and Queensland Act s 65.

(ii) Deterrence

The statutory scheme generally should serve that purpose. The shortcomings we have raised will detract from that.

One additional matter should be mentioned - the penalties provided for the offence of taking or threatening a reprisal.

The penalties in the bill are six months imprisonment or 30 penalty points. Bearing in mind the sort of range of conduct that could be involved, this is a very low penalty. We recognise that, much of the more serious conduct will probably involve the commission of other criminal offences with higher penalties. Nonetheless, the proposed penalty lags well behind those in best practice jurisdictions such as Queensland (s 41 -2 yrs) and ACT (s 40-1 yr). We submit that the penalty should be raised to 2 years.

(c) Support

(i) Direct Support.

Support of bona fide whistleblowers should be part of the culture of all public trust agencies. But it is also critical for the effective management and investigation of disclosures under the Bill that disclosers be adequately supported. One aspect of that is regular reporting on the progress of the disclosure, and its investigation, and the ultimate response.

The Bill creates a structure with a number of provisions which place discretionary obligations on the identified officers to provide progress reports. But the obligations are made remarkably weak by limiting the obligation to the situation where the discloser is "readily contactable"[29]. There is no need for a qualification. A failure to achieve contact at a particular time on a particular matter will be excused if it couldn't be done.

If a test for an excuse is thought to be necessary, it should be that contact was not possible. Best Practice: compare Queensland Act, s32 and ACT Act s 23.

(ii) *Indirect support - Best practice compensation*

[29] See ss44(2) and (3) ,49(3), 50(1),51(4),52(5),55

- *Remedies.* Best practice is to ensure that the law and procedures of Work Place law are available as the primary remedy to the discloser in the event of detrimental action as the primary remedy. The Bill makes provision for the reality that they are available but appears to give priority to civil court proceedings, the cost of which will be a major deterrent. The Bill should expressly address the issue and spell out the protection available under the Fair Work Act 1999 and in doing so ensure that the remedies provided are at least equal to those provided by the UK Employment Relations Act 1996. This would include removing the caps on compensation that would otherwise apply.

- *Accessibility to courts.* The rule that costs following the event and that the loser pays the costs of the winner is a major deterrent to people bringing court proceedings. Consideration should be given to including a provision that an unsuccessful applicant for compensation will not be ordered to pay the respondent's costs unless the proceedings were an abuse of process or the applicant's conduct led to particular items of costs incurred.

- *Ensuring all appropriate remedies available in civil proceedings.* Having regard to the deterrent potential and purpose of remedies and the range of culpability of conduct and extent of detriment possible, the legislation should make clear that compensation includes exemplary and punitive damages. Both are particularly appropriate when it is remembered that a bona fide whistleblower is merely honouring his or her obligations as the holder of a position of public trust and is seeking to have an alleged breach of that public trust investigated and addressed. In addition, a public official who causes adverse consequences to that person breaches his or her position of public trust.

6. **An effective oversight system**

The proposed primary handling and investigation system is an internal investigation by the agency in which the alleged disclosable conduct occurred. For such a system to be effective and achieve its objectives, it is critical that there be an independent oversight system.

The Bill places the Ombudsman and IGIS in oversight positions but does not address the issue of their oversight in sufficient detail. (see ss 52, 53, 62,63,74,75) In particular, while the Bill empowers

- the Ombudsman and the IGIS to assist agencies to perform their duties under the Bill, and the agencies to assist them, and provides that all use their best endeavours(s61) and

- empowers and requires the Ombudsman to set standards of conduct by legislative instrument (s74 (1) (a) (b) (c) for procedures for dealing with disclosures, the conduct of investigations and reports of investigations, it does not oblige the Ombudsman to do so for the purpose of gathering information from agencies for its annual reports (s74 (1)(d) including data about disclosures and their handling

and the ultimate responsibility for the operation of the Public Interest Disclosure system rests with no-one or any agency.

As to details, there is a lack of specificity and direction as to matters such as the detail of the assistance and the obligations of all agencies involved to actively participate in the oversight of the system. The Bill's approach appears to be to delegate the task of developing such details to the principal officers of agencies (e.g. s59).

In addition, the Ombudsman and IGIS do not appear to have the power to intervene directly in the handling of a disclosure and will have to depend on the whistleblower making a further internal disclosure to them about the investigation before they can - another discouragement for whistleblowers. The Ombudsman and IGIS should have an obligation to at least initiate contact with the whistleblower from time to time to be sure that from his or her perspective the handling of the disclosure is proceeding satisfactorily and, if not, establish and consider the concerns.

Ultimately to discharge their obligation to assist agencies the oversight agencies should be able to track the handling of disclosures as they occurs and intervene as part of the system for minimising the risk of adverse consequences. Best Practice -compare A CT Act, Part 6 and Queensland Act, Chapter 5.