

Chapter 10

Protections, remedies and sanctions for reprisals

10.1 This chapter summarises the committee's consideration of the best practice criteria on protections, remedies and sanctions for reprisals.

10.2 The committee has deliberately separated its consideration of remedies from reward and bounty systems which are considered in the next chapter. Reward and bounty systems are not part of the best practice criteria. In addition, the committee considers that remedies, including compensation, should be determined by the level of detriment suffered by the whistleblower and that a whistleblower should be able to be fully remediated for simply doing the right thing, without needing to have a financial motive.

Current legislation

10.3 Table 10.1 below sets out the best practice criteria for protections, remedies and sanctions for reprisals.

Table 10.1: Best practice criteria for protections, remedies and sanctions for reprisals

10	Broad protections against retaliation	Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action and harassment).
11	Comprehensive remedies for retaliation	Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was <i>not</i> related to disclosure).
12	Sanctions for retaliators	Reasonable criminal and/or disciplinary sanctions against those responsible for retaliation.

Source: Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 6.

10.4 The Breaking the Silence report found both public and private sector remedies were deficient. In particular, the remedies in the Corporations Act were singled out as being 'ill-defined' when compared to the best practice criteria.¹ The protections, remedies, and sanctions for reprisals in current whistleblower protection legislation are summarised in Table 10.2 below.

¹ Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, pp. 26–27.

Table 10.2: Protections, remedies, and sanctions for reprisals.

Best Practice Criteria for Whistleblowing Legislation	<i>Public Interest Disclosure Act 2013</i>	<i>Fair Work (Registered Organisations) Act 2009</i>	<i>Corporations Act 2001</i>
Broad protections against retaliation	<p>Sections 9–12 – Protection from legal liability, contractual remedies, and privilege from defamation.</p> <p>Section 13 – Protection from reprisals including dismissal, injury, alteration of position and discrimination.</p>	<p>Section 337B – Protection from legal liability, contractual remedies, and privilege from defamation.</p> <p>Section 337BA – protection from reprisals, including dismissal, injury, alteration of position, discrimination, harassment, harm including psychological harm and damage to property or reputation.</p>	<p>Section 1317AB – Protection from legal liability, contract termination.</p>
Comprehensive remedies for retaliation	<p>Section 14 – Compensation</p> <p>Section 15 – Injunctions and apologies</p> <p>Section 16 – Reinstatement</p> <p>Section 18 – Costs only if vexatious</p> <p>No reverse onus</p> <p>Section 14 allows for a court to require both an individual reprisor and the organisation to pay compensation.</p>	<p>Section 337 BB – Compensation</p> <p>Injunctions</p> <p>Apologies</p> <p>Reinstatement</p> <p>Exemplary damages</p> <p>Section 337BC – Costs only if vexatious</p> <p>No reverse onus</p>	<p>Section 1317AD – Compensation only</p> <p>The Act does not appear to provide for:</p> <p>Injunctions</p> <p>Apologies</p> <p>Reinstatement</p> <p>Exemplary Damages.</p> <p>Costs only if vexatious</p> <p>Note: civil remedies are ONLY available if a criminal offence of reprisal is shown to have been taken.</p> <p>No reverse onus</p>
Sanctions for retaliators	<p>Section 19 – Offences</p> <p>No Civil penalties, but sections 14, 15 and 16 provide that a person may still be held liable for taking reprisal action.</p>	<p>Section 337BD – Civil penalties</p> <p>Section 337BE Criminal offences</p>	<p>Section 1317AC prohibits victimisation including detriment and threats.</p>

Key: White = strongest protections; Mid grey = weaker protections; Dark grey = weakest protections.

Source: Table 10.2 represents the committee's analysis of Acts and relevant sections as listed in the table and Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 6.

10.5 Of the three Acts considered in Table 10.2, the Corporations Act has the weakest protections. While the public sector protections in the PID Act are stronger, some deficiencies remain, including the definition of reprisals, the absence of provisions for exemplary damages, and a lack of civil penalties.

10.6 The FWRO Act whistleblower protections are the strongest and as amended in December 2016 provide enhanced remedies through:

- a broader definition of reprisals which add: harassment or intimidation, physical or psychological harm or injury, and damage to a person's property or reputation;
- the potential for a court to make orders relating to: compensation, injunctions, apologies, reinstatement, and exemplary damages;
- different arrangements for remedies, including the potential for other parties to make applications on behalf of the whistleblower; and
- civil penalties that are decoupled from criminal offences.²

Evidence received during the inquiry

10.7 This section summarises views put to the committee by witnesses and submitters on the definitions of, and remedies and sanctions for, reprisals.

Definition of reprisals

10.8 Noting the FWRO Act enables a whistleblower who has made a protected disclosure to seek a remedy if they have suffered from a reprisal action, Associate Professor Kath Hall supported the broader definition of reprisals contained in the FWRO Act:

'Reprisal' is very broadly defined...as a series of behaviours but that can be connected to either a protected disclosure or even the suspicion that a protected disclosure may be made.³

10.9 Likewise, Mr Denis Gentilin supported the broad reprisal and whistleblower compensation arrangements in the FWRO Act:

Having reviewed the amendments, my layperson view is that they unquestionably provide recourse for whistleblowers who experience inferior outcomes. Not only do they give the courts the ability to award compensation, but the definition of what constitutes reprisal is broad.⁴

...it is also possible that the amendments as currently drafted will have the desired effect and motivate managers to invest in programs and processes that both encourage speaking up within their organisations and promote positive outcomes for whistleblowers. As executives and directors learn that their organisations could be liable if they fail to appropriately look after those who raise concerns, there is every likelihood this will drive increased focus.⁵

2 FWRO Act, sections 337BA–337BE.

3 Associate Professor Kath Hall, Deputy Director (Law), Transnational Research Institute on Corruption, Australian National University, *Committee Hansard*, 23 February 2017, p. 27.

4 Mr Denis Gentilin, Answers to questions on notice, 28 April 2017 (received 12 May 2017).

5 Mr Denis Gentilin, Answers to questions on notice, 28 April 2017 (received 12 May 2017).

10.10 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, supported the broader definition of reprisals and argued that deliberate reprisals against public interest whistleblowers should be criminal. However, she was also of the view that civil remedies should be made available that are accessible, equitable, predictable, and low-cost whenever a whistleblower suffers personally including in their employment.⁶

Remedies

10.11 ASIC recommended overhauling the compensation arrangements for reprisals so whistleblowers are confident they will not be disadvantaged as a result of disclosing corporate wrongdoing. ASIC suggested it is vital to:

- clearly define 'reprisal' and 'detriment' and the nature of the damages for which a whistleblower may make a compensation claim (which should not be capped); and to
- ensure cost protection for whistleblowers (unless a claim has been made vexatiously).⁷

10.12 ASIC also suggested considering the following options for securing compensation for a whistleblower if the corporation involved became insolvent. Consistent with current practice, the whistleblower would become an unsecured creditor. Alternatively, the Commonwealth could make the compensation payment to the claimant in the first instance. The payment could then be offset from penalties obtained as a result of actions by the regulator generally. The compensation payment would become a debt to the Commonwealth, standing in the shoes of the claimant as an unsecured creditor.⁸ Mr Warren Day, Senior Executive Leader, ASIC suggested there could be initial funding from government to set that fund up until it could be funded through penalties.⁹

10.13 Professor A J Brown also noted that it could be advantageous to establish a way to fund compensation in a situation where the company responsible for reprisals is bankrupt.¹⁰

10.14 Mr Matthew Chesher, Director Legal and Policy, MEAA informed the committee that it supports the creation of a protected fund, where a proportion of funds from successful prosecutions and settlements are preserved to support

6 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 2; Transparency International, *Answers to questions on notice*, 11 April 2017 (received 17 May 2017).

7 Australian Securities and Investments Commission, *Submission 51*, pp. 5, 22.

8 Australian Securities and Investments Commission, *Submission 51*, p. 24.

9 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 64.

10 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, pp. 5–6.

whistleblowers whose future employment is unviable due to their disclosing conduct.¹¹

10.15 Mr Chesher also suggested that the objective of compensation should be support for actual loss. He supported a methodology to ensure that people do not suffer financial detriment,¹² and suggested the following approach:

I believe that it would need to be a statutory office holder making that kind of determination. There would need to be some evidence of loss or prejudice. You would imagine that a whistleblower who is subject to discrimination could bring it to a regulator's attention in order to seek their assistance.¹³

10.16 Mr Gentilin argued that legislative change was necessary to improve the financial compensation arrangements for whistleblowers:

In the worst-case scenarios, the costs associated with whistleblowing, both financial and emotional, are enormous. At a minimum, the legislation should provide coverage for the financial costs, and, what is more, when an organisation has failed to create an environment that is supportive of positive whistleblowing outcomes, it should be made liable for these costs. The compensation should be generous and not be associated with any caveats that potentially make it refundable.¹⁴

10.17 Ms Julia Angrisano, national secretary of the FSU, informed the committee that compensation should be available to those who use whistleblower protections to expose unethical behaviour or corporate misconduct. Where an employee can demonstrate financial disadvantage, the compensation should recompense them and the compensation should include loss of future earnings.¹⁵

10.18 Ms Louise Petschler, General Manager, Advocacy, AICD advocated increasing the amount of compensation and the ease with which whistleblowers can access and apply for compensation if they have suffered some form of financial loss because of disclosing the alleged misconduct.¹⁶

11 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

12 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

13 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 29.

14 Mr Dennis Gentilin, private capacity, *Committee Hansard*, 28 April 2017, p. 1.

15 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 9.

16 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 26.

Remedies under the FWRO Act

10.19 Mr Howard Whitton, director of the Ethicos Group, supported the compensation arrangements set out in the FWRO whistleblower protections.¹⁷

10.20 Transparency International welcomed the other whistleblower remedies set out in the FWRO Act including exemplary damages and protecting whistleblowers against respondents' costs.¹⁸

10.21 Associate Professor Hall argued that the FWRO Act protections strike a good balance:

[T]he court is not required to make any of the orders if there is the belief or suspicion that the disclosure by the whistleblower is not any part of the reason for the reprisal. So the burden of proof for the whistleblower and the obligations in terms of the organisation are, in my opinion, much better balanced.¹⁹

10.22 Professor Brown informed the committee that Section 337BB of the FWRO Act creates an important new basis for more effective remedies by recognising the need to address foreseeable dangers and providing that liability for compensation will arise either:

- where a person by act or omission causes detriment to a person, because they believe or suspect them to be a whistleblower (a reprisal); *or*
- where detriment is caused to a whistleblower by act or omission, as the result of a failure to fulfil a duty to prevent or control that detriment – irrespective of whether any belief or suspicion that they had made a disclosure was a direct reason for the damaging acts or omissions themselves, or who was directly responsible for those acts.

This second step is akin to the recognition of organisations' duties under workplace health and safety law, to prevent foreseeable dangers from manifesting – rather than simply outlawing and penalising acts or omissions that are deliberately or negligently dangerous, after they have occurred.²⁰

Sanctions

10.23 One of the issues that arose during the inquiry was the interaction between civil remedies and the offence provisions relating to reprisal activity and how they vary across the three Acts.

17 Mr Howard Whitton, Director, The Ethicos Group, *Committee Hansard*, 23 February 2017, p. 15.

18 Transparency International, *Answers to questions on notice*, 11 April 2017 (received 17 May 2017).

19 Associate Professor Kath Hall, Deputy Director (Law), Transnational Research Institute on Corruption, Australian National University, *Committee Hansard*, 23 February 2017, p. 27.

20 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

10.24 Under section 19A of the PID Act, a person can claim civil remedies in relation to the taking of a reprisal (or the threat to take a reprisal) in addition to, or separate from, a prosecution for a criminal offence. Similarly, under section 337BF of the FWRO Act, a person may seek civil remedies even if a prosecution for a criminal offence against section 337BE in relation to the reprisal or threat has not been brought, or cannot be brought.²¹

10.25 By contrast, Professor Brown identified serious shortcomings in the current whistleblower protections under the Corporations Act because they require that a criminal offence is shown to have occurred:

This is a uniquely Australian problem. No country in the world has criminalised reprisals against whistleblowers the way that we have since the 1990s, so no other country has created the problem for itself of then trying to figure out how to provide civil compensation remedies for the same reprisals if, in fact, they have already been identified as criminal.²²

10.26 In addition, Professor Brown explained that the FWRO Act whistleblower protections have other significant advantages over current corporate whistleblower protections because the FWRO provisions include liability for a failure in the duty to support and protect a whistleblower:

...the thing that the Fair Work (Registered Organisations) Act does, though, for the first time is actually to say that civil liability can be attracted where there is a failure on the part of somebody to fulfil a duty to either protect or support, or to control others who are likely to undertake a reprisal, so it does shift the ground significantly in a positive direction. That is an issue on which there has now been some positive movement, but the ultimate solution on this is something that really needs to be worked through.²³

10.27 However, Professor Brown suggested that the way reprisals are defined in the FWRO Act whistleblower protections could be further improved:

The Committee should recommend that the grounds for criminal and civil liability be separated to make the gaining of civil remedies more realistic, and remove the current dependency (whether explicit or implicit) on the need for compensable acts or omissions to have been undertaken *for the reason* that a person was believed or suspected to have made a disclosure.²⁴

21 PID Act; FWRO Act.

22 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 28.

23 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 28.

24 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

10.28 Transparency International supported Professor Brown's suggestion for untangling the civil and criminal aspects of reprisal and detriment:

...further legislative steps should be taken to separate the criminal offence of reprisal from the breadth of circumstances that should give rise to employment or civil remedies for detrimental outcomes. Employment and civil remedies need to be available where anyone fails in their duty to support and protect a whistleblower, or to prevent or restrain detrimental outcomes, including detriment which may be unintended but could and should have been foreseen. This is distinct from a 'reprisal', which carries implications of intent or knowledge that an act or omission would result in detrimental impacts, as direct punishment or retaliation for the disclosure.²⁵

Liability for paying compensation

10.29 There was some support for increasing the penalties on companies that retaliate against whistleblowers in any way,²⁶ as well as arguments that a company that has potentially harassed or victimised the whistleblower is the party that should pay when compensation is awarded.²⁷

10.30 With respect to the apportioning of liability for compensation payments relating to reprisals in the Commonwealth public sector, section 14 of the PID Act sets out the options for courts to require both individuals and organisations to be liable for compensation. In other words, it appears that section 14 of the PID Act allows a court to determine the relative attribution of liability between the organisation and the individual or individuals that took the reprisal action.²⁸

10.31 Professor Brown was of the view that an approach similar to section 14 in the PID Act could be usefully replicated in legislation for the private sector.²⁹

10.32 If an approach similar to section 14 in the PID Act was replicated in legislation for the private sector, it may address the 'agency problem' identified by Mr Thomas (see chapter 2). To recap, the 'agency problem' relates to a situation where an organisation implements best practice procedures around whistleblowing, and yet one or more of its employees takes reprisal action against a whistleblower, primarily because the goals and incentives (and disincentives) faced by the organisation and its employees may not necessarily align.

25 Transparency International, *Answers to questions on notice*, 27 April 2017 (received 17 May 2017).

26 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors *Committee Hansard*, 28 April 2017, p. 26.

27 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 64.

28 PID Act.

29 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

Committee view

10.33 As shown in Table 10.2, evidence to the inquiry drew attention to significant inconsistencies in the current whistleblower protections across the PID Act, FWRO Act, and Corporations Act with respect to the protections, remedies and sanctions available under the respective pieces of legislation.

10.34 The committee notes that the protections, remedies and sanctions in the FWRO Act were some of the most significant reforms made to the FWRO Act in December 2016 (see 10.6). The committee further notes that there was broad support for the reforms that have been made to the FWRO Act.

10.35 By contrast, witnesses drew attention to the paucity of protections and remedies under the Corporations Act as well as the shortcomings in the legislation that make it extremely difficult to prove that a reprisal has occurred. The committee also notes there was strong support for improving the compensation provisions.

10.36 The committee considers that the evidence to the inquiry makes a strong case for extending the reforms in the FWRO Act to both the public sector and the rest of the private sector. The committee considers that this would be a sensible approach that would align legislation with best practice and have the further advantage of harmonising the provisions for protections, remedies and sanctions across the public and private sectors.

10.37 The committee also considers that the separation of the grounds for criminal and civil liability is an important reform that would draw a distinction between the criminal offence of reprisal and the wide range of circumstances that would give rise to employment or civil remedies for detrimental outcomes. This would make it easier for a whistleblower (or whistleblowers) to gain civil remedies, and would remove the current dependency (whether explicit or implicit) on the need for compensable acts or omissions to have been undertaken for the reason that a person was believed or suspected to have made a disclosure.

Recommendation 10.1

10.38 The committee recommends that the *Fair Work (Registered Organisations) Act 2009* be amended to separate the grounds for civil and criminal liability.

Recommendation 10.2

10.39 The committee recommends that a Whistleblowing Protection Act reflect whistleblower protections, remedies and sanctions for reprisals in the *Fair Work (Registered Organisations) Act 2009*, including:

- **protection from harassment, harm including psychological harm and damage to property or reputation;**
- **remedies for exemplary damages;**
- **sanctions including civil penalties; and**
- **separating the grounds for criminal and civil liability.**

10.40 As noted above, a particular advantage of the PID Act is section 14, which provides clarity on options for courts to require both individuals and organisations to be liable for compensation. The committee considers that there would be value in extending such provisions to the private sector, including corporations and registered organisations.

10.41 As with many of the reforms that the committee is recommending, this would provide greater consistency between the relevant provisions across the public and private sector legislation. Furthermore, the committee is of the view that a case in the corporate sector where an individual was held personally liable, to a greater or lesser extent, for compensation would be of value to private sector organisations. This is because it would likely address an aspect of the 'agency problem' by having a significant deterrent effect on individuals considering taking reprisal action against other whistleblowers in the future.

Recommendation 10.3

10.42 The committee recommends that current provisions in section 14 of the *Public Interest Disclosure Act 2013*, which clarify the options for courts/tribunals in apportioning liability for compensation between individuals and organisations, extend to apply to the private sector.