Public Interest Disclosure Bill 2013

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Law and Bills Digest Section

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Public Interest Disclosure Bill 2013

Date introduced: 21 March 2013
House: House of Representatives
Portfolio: Public Service and Integrity

Commencement: The substantive provisions commence six months after Royal Assent or earlier by Proclamation.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Public Interest Disclosure Bill 2013 (‘the PID Bill’ or ‘the Bill’) is to establish a framework to encourage and facilitate reporting of wrongdoing by public officials in the Commonwealth public sector. The Bill also aims to ensure that Commonwealth agencies investigate and respond to public interest disclosures and it provides protections to public officials who make qualifying public interest disclosures.

Structure of the Bill

The Bill is divided into five parts:

- **Part 1** sets out preliminary matters including commencement information, an objects clause, an overview of the proposed Act and definitions relevant to the Act
- **Part 2** sets out the various protections for public officials who make public interest disclosures and defines four categories of public interest disclosures: internal disclosures, external disclosures, emergency disclosures, and legal practitioner disclosures
- **Part 3** deals with the processes of investigations that would follow public interest disclosures
- **Part 4** deals with various administrative matters including the setting out of additional obligations and functions for officers and agencies involved in public interest disclosure investigations. It also contains offence provisions aimed at protecting information obtained through processes connected with the proposed Act and provisions containing definitions of key concepts underpinning the Act and
- **Part 5** deals with miscellaneous matters. It includes provisions dealing with: the Ombudsman’s annual reporting requirements; delegations of power within agencies; and the development of standards relating to investigation procedures.

Overall, the Bill’s structure is complex and relies on a series of long and complicated definitions.
Background

The Bill largely implements the Government’s response to the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs report Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector (the 2009 Whistleblower Protection report). ¹

Public interest disclosures (whistleblowing)

Public interest disclosure, more colloquially known as ‘whistleblowing’, has been defined as a ‘disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action’. ² It is argued that whistleblowers are important ‘because they can promote an informed society and provide an essential and valuable service to the public by exposing wrongdoing’. ³

Laws protecting public interest disclosures

Laws protecting whistleblowers aim ‘to protect disclosures which would otherwise breach the law such as the law of confidential information and of defamation’ and ‘provide legal remedies for whistleblowers if they suffer reprisals for making the disclosure’. ⁴

At present, the Commonwealth is the only Australian jurisdiction that does not have legislation dedicated to facilitating public interest disclosures and protecting those who make them. Since the 1990s there have been a number of unsuccessful attempts to introduce more comprehensive whistleblower protection laws with a series of parliamentary and non-parliamentary inquiries and a number of private members Bills, most of which were initiated by the Australian Democrats and the Greens. However these Bills all lapsed due to a lack of Government support.⁵

⁴. Ibid.
⁵. The Bills also lapsed because of prorogation of the various Parliaments. Further detail about the various Bills and inquiries is in the 2009 whistleblower protection report, op. cit., p. 15.

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The existing statutory framework for reporting wrongdoing in the Australian Public Service (APS) is set out in the Public Service Act 1999. Section 16 of that Act provides explicit protection for APS employees from victimisation and discrimination for reporting suspected breaches of the APS Code of Conduct to an authorised person and Division 2.2 of the Public Service Regulations 1999 provides a framework for the investigation of such reports. If an APS employee is not satisfied with the investigation of their whistleblowing report within an agency they may refer their report to the Public Service Commissioner or the Merit Protection Commissioner for a new investigation into the matter. 6

This current APS scheme has been criticised for being inadequate as it includes only limited categories of public servants, provides a limited range of protections and there is little or no standardisation and oversight. Some of the problems with the existing system were summarised in the 2009 Whistleblower Protection report as:

Only two-thirds of the 232,000 employees in the Australian Government sector are covered by the whistleblower protections under the Public Service Act 1999. […]

Within the APS, procedures for handling whistleblower disclosures are varied. There is no requirement for agencies to have standard procedures in place and no requirement for agencies to publicly report on the use of those procedures. […]

Whistleblowers under the current arrangements remain exposed to the criminal law, and civil actions such as defamation and breach of confidence.

There is some confusion in the public service as to what types of reported misconduct should be protected. […]

There are no provisions for public servants to make authorised and protected disclosures to third parties, which could include their professional association, trade union, legal advisor, Member of Parliament or the media.

The same process is used for quite different types of misconduct such as workplace grievances, personnel-type issues and genuine matters of public interest that, if not addressed, would result in a significant harm to the community. […]

6. Note that 2013 amendments to these provisions (Public Service Amendment Act 2013) due to commence in July 2013 attempt to clarify the existing scheme by including in the Public Service Act a specific regulation-making power to prescribe how the scheme will operate, and by providing for some matters to be excluded from inquiry as whistleblower reports. However essentially the scope of the scheme remains the same. See: Australian Public Service Commissioner, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Public Interest Disclosure Bill 2013, 18 April 2013, viewed 26 May 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill/2013/public_interest_disclosure/subs.htm
Overall, the current Commonwealth public sector whistleblower protection provisions were described in many submissions as the most limited and problematic of all legislative approaches across Australian jurisdictions.  

House of Representatives Standing Committee on Legal and Constitutional Affairs: Whistleblower protection: a comprehensive scheme for the Commonwealth public sector

On 10 July 2008, following a 2007 election commitment to provide ‘best-practice’ whistleblower legislation, the new Labor Government asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector.

The Committee’s report, released on 25 February 2009, recommended that the Australian Government introduce legislation to provide whistleblower protections in the Australian Government public sector and that it do so as a matter of priority.

The Government responded to the report on 17 March 2010 (the 2010 Government Response) accepting many of the Committee’s recommendations and promising also that the Government would develop legislation reflecting this government response for introduction during that same year.

The PID Bill has been anticipated for some time with the Government’s proposed legislation list first indicating it would be introduced into Parliament during the Spring Sittings of 2011. This did not occur.

The Wilkie Bill

On 29 October 2012, Independent Mr Andrew Wilkie introduced two bills into the Parliament relating to whistleblower protection— the Public Interest Disclosure (Whistleblower Protection) Bill 2012 and the Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012. This Digest refers to the first of these Bills as ‘the Wilkie Bill’.

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7. See the 2009 whistleblower protection report, op. cit., at paragraphs 1.38–1.49 for a fuller description.
10. Ibid.
11. This was followed by the Special Minister of State’s media release of 27 June 2011 stating: ‘The Government is currently finalising the Public Interest Disclosure Bill with the agreement of the independent members of Parliament. The legislation is expected to be finalised by the end of 2011.’ This did not happen.

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When tabling the Bills in Parliament, Mr Wilkie expressed frustration at the apparent tardiness of the Government to introduce its own Bill. Noting that the Government had promised to have whistleblowing legislation in place by the end of 2012, Mr Wilkie said his Bills would get things ‘back on track’ and ‘would realise the aspirations of Liberal, Greens and Democrat senators and deliver on the promises of this and the previous Labor government’. The Wilkie Bill draws on the 2009 Whistleblower Protection report and the 2010 Government’s Response but also adopts the drafting approach in the whistleblowing legislation recently enacted by the ACT Government.

On 1 November 2012 the House of Representatives Selection Committee, asked the House of Representatives Standing Committee on Social Policy and Legal Affairs to inquire into and report on both of Mr Wilkie’s Bills. That inquiry along with the inquiry into the PID Bill is still progressing.

While the Wilkie Bill is not the subject of this Bills Digest it is frequently referred to in order to provide comparisons with equivalent provisions in the PID Bill.

**Committee consideration**

**House of Representatives Standing Committee on Social Policy and Legal Affairs Committee**

On 21 March 2013 the PID Bill was referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report. As the Committee was already inquiring into Mr Wilkie’s Bills, the Committee decided to consolidate evidence from both inquiries into a single report for the House.

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Committee report

On 28 May 2013, the Committee tabled its advisory report (the Committee advisory report). While initially expecting to table its report in early June the Committee instead chose to report earlier in order to give the Parliament more time to debate the Bill before the end of the Parliamentary sittings.

In the advisory report, the Committee recommends that the House of Representatives pass the PID Bill after having given consideration to amendments based on issues raised in the Committee advisory report, in particular:

• the scope of protections offered where disclosures are made in good faith, though they may later be found to be false or misleading
• the scope and clarity of protections offered for external disclosures and
• the scope of protections from reprisals.

It was also the Committee’s view that on balance the PID Bill, rather than the Wilkie Bill is more appropriately situated in terms of applying a comprehensive framework for public interest disclosures across the Commonwealth public sector. The report continues:

While a number of issues have been raised, particularly in regard to the PID Bill, the Committee notes the overwhelming support for the introduction of public interest disclosure protections. The degree of interest in this inquiry reflects the urgent need to develop a pro-disclosure culture and an accompanying protective scheme.17

The Australian Greens

In a media release following the tabling of the House of Representatives Committee advisory report, Australian Greens leader Christine Milne condemned the Committee for failing to recommend changes to the PID Bill. She notes the complexity of the Bill and says it could expose Australian public servants to greater retribution for exposing wrongdoing:

This proposed legislation essentially sets up trip wires at every turn and one wrong step means the whistleblower is out on their own, exposed to lengthy and stressful legal retribution. […]

Whistleblower protection must encourage those hesitant about speaking out, but there are so many specific requirements for a disclosure in this bill that I fear it will do the opposite. […]


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The Australian Greens are committed to standing up for Australia’s public servants and we want to see a world’s best practice whistleblower protection scheme, just like the Greens-ALP ACT Assembly provided for its public servants.18

Senate Legal and Constitutional Affairs Legislation Committee

The PID Bill has also been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 25 June 2013.19

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) has reported on the PID Bill and commented on specific provisions that raise questions about:

- reversal of the onus of proof (clause 23(1))
- delegation of legislative power (subclause 29(1))
- privilege against self-incrimination (clause 57) and
- exclusion of the Legislative Instruments Act (subclause 59(2) and clauses 65 and 67).20

For further information the reader is referred to the specific provisions under the ‘Key issues and provisions’ section below or to the Committee’s Alert Digest.21

Position of major interest groups

The submissions to both the Senate and House of Representatives inquiries into the PID Bill provide substantial analysis on the Bill. In general, there is strong support for the Government’s intention to increase whistleblower protection and encourage reporting of wrong doing within the Commonwealth public sector. However many submissions recommend amendments to the Bill aimed at increasing that protection and strengthening the system of reporting. A sample of submitters’ views is provided here and further comment is provided under the ‘Key issues and provisions’ section below.

21. Ibid.

The disclaimer sets out the status and purpose of the digest.
Law Council of Australia

The Law Council writes its submission on the PID Bill in comparative terms with the Wilkie Bill. The submission notes there are significant differences between the PID Bill and the Wilkie Bill in what is defined as internal disclosures and in what is sufficient justification for external disclosure to be protected. The Law Council claims these differences highlight weaknesses in the protection proposed by the PID Bill and further argues that the protection provided by the PID Bill is so qualified that it is not likely to provide encouragement to individuals to make public interest disclosures in many situations.22 Some of the more specific recommendations of the Law Council are set out in the ‘Key issues and provisions’ section below.

Commonwealth Ombudsman

The Ombudsman’s submission is fully supportive of the introduction of the public interest disclosure scheme (the PID scheme) and the role envisaged for the Ombudsman’s office.

It states that the Bill provides the Ombudsman with a role that strikes the right balance between oversight and day to day involvement in the operation of the scheme:

This will ensure that the scheme operates consistently and effectively while placing responsibility on agencies to rectify their problems and is more likely to generate a cultural shift toward accepting the benefits of disclosures than a centralised scheme. Importantly the Bill recognises the existing integrity framework within Government, and does not seek to displace specialist mechanisms that are working.23

The Ombudsman further endorses the Bill stating that perhaps one of its most important and well developed aspects is the recognition of the existing integrity framework within the Commonwealth Government:

The Bill recognises the unique position of investigative agencies, including the Australian Commission for Law Enforcement Integrity, Information Commissioner, Human Rights and Equal Opportunity Commission and the Australian Public Service Commission.24

SBS, the ABC and media groups

There are a number of submissions from media groups and in general they express very similar concerns with the Bill.

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24. Ibid., p. 4.

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For example, SBS in its submission supported by a number of other media groups, believes that the scope of disclosure to external parties (including the media) is far too narrow. They say it has the potential to limit the free flow of information to the public and undermines freedom of speech. In particular they are critical of the onerous test of nine requirements which must all be satisfied to enable an external public interest disclosure and are also critical of the limits imposed on emergency disclosures.

These submissions also argue the PID scheme is too narrowly cast and that it ‘should apply to all areas of government including the Executive, the Legislature and the Judiciary.’

SBS and the ABC also raise an issue of more specific relevance to the journalists relating to the disclosure of identifying information in clause 20 (discussed below).

Inspector General of Intelligence and Security (IGIS)

The IGIS supports the objectives of the PID Bill to promote the integrity and accountability of Australian government agencies by encouraging the disclosure and proper investigation of misconduct. It states:

The oversight and investigative functions allocated to the IGIS in the PID bill appear to align well with the current role of the IGIS in receiving and handling complaints and conducting inquiries, and in the oversight of the activities of intelligence agencies.

Andrew Wilkie

Mr Wilkie submits that the PID Bill excludes crucial elements required to fulfil its intent and appropriately protect whistleblowers. His concerns are fourfold.

Firstly, the Bill imposes overly strict conditions on the circumstances allowing public officials to make public interest disclosures relating to intelligence agencies. While acknowledging that it is certainly appropriate for sensitive information to be subject to special treatment, he argues the current Bill includes blanket exemptions for intelligence agencies, which prohibit public interest disclosures relating to intelligence agencies in almost all circumstances.

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26. Ibid., p. 7.


Secondly, the Bill places extreme and unrealistic limitations on external disclosures effectively ensuring that external disclosures would very rarely be protected. Mr Wilkie cites the case of Allan Kessing’s 2005 public interest disclosure which he describes as the ‘Allan Kessing test’ and argues the Bill should be robust enough to provide protection in such circumstances. Mr Wilkie argues the PID Bill would not provide such protection.\(^{29}\)

Thirdly, Mr Wilkie sees no valid reason for members of parliament (including Ministers) and their staff to be excluded from protection for public interest disclosures.\(^{30}\)

Finally Mr Wilkie states the PID is complex and ambiguous and that it:

\[
\ldots\text{weaves a web of extraordinarily complicated definitions to negatively frame the circumstances in which public interest disclosures are protected.} \ldots
\]

Professional officials considering public interest disclosures must be able to clearly determine whether their disclosure will be protected without seeking assistance from a lawyer or other third party.\(^{31}\)

**AJ Brown—Professor of Public Policy and Law, Griffith University**

Professor AJ Brown has a long history in whistleblower protection research being Project Leader of the Australian Research Council research project, *Whistling While they Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector* (2005–2011). He was also a key advisor on the Wilkie Bills.

Professor Brown’s detailed submission sets out his response under ten headings which he considers are the ten key principles that need to be reflected in whistleblower protection legislation. The reader is referred to his submission for an account of those principles.\(^{32}\)

Professor Brown’s overall impression is that the Bill provides a framework with strong potential to provide the Commonwealth public sector with a best practice legislative regime for facilitation and protection of public interest wrongdoing. From that perspective, he says, the Bill is an extremely welcome development in the progress towards such a scheme. However it is also his opinion that the Bill would require a significant number of amendments before it is reasonably likely to lead to such a scheme in practice.\(^{33}\) Some of Professor Brown’s more specific recommendations are set out below under the ‘Key issues and provisions’ section.

**ASIO and ASIS**

Both ASIO and ASIS support the Bill as currently drafted, noting the special conditions applying to intelligence agencies within the PID scheme and the special oversight role given to IGIS. The joint submission states:

\[^{29}\] Ibid.
\[^{30}\] See the ‘Key issues and provisions’ section below for a discussion about whether Ministers are covered.
\[^{31}\] Ibid.
\[^{33}\] Ibid.
The Bill recognises the appropriateness and efficacy of the IGIS as a mechanism for whistleblowing complaints relating to ASIO or ASIS or intelligence information. Additionally, it ensures intelligence officers and intelligence information, including sources, methods and technologies, are appropriately protected. This scheme balances the interests of national security with the importance of openness and integrity in governance achieving a balance which accommodates both objectives.  

In their view, the IGIS provides an independent mechanism for concerns with the actions of Australian intelligence agencies to be raised and appropriately considered without the need for an external disclosure mechanism. They argue this avoids the significant risks for national security, global intelligence relationships and the safety of individuals that any external disclosure mechanism would carry. Their submission concludes:

The IGIS has ably provided the ‘whistle blowing’ function for ASIO and ASIS to date and will continue to do with increased protections for those seeking to make a disclosure to that office under the regime to be introduced by the Bill.

Civil Liberties Australia

Civil Liberties Australia (CLA) welcomes the introduction of the Bill and supports the establishment of minimum standards of procedures for internal disclosures and the utilisation of external oversight agencies. CLA is especially pleased that the Bill addresses the current lack of practical remedies available for public officials who incur damages to their reputations and careers as a result of making a disclosure in the public interest.

However CLA like many submitters is critical of the external disclosure provisions arguing that the Bill fails to achieve a balance that will yield a pro-disclosure culture. Some of CLA’s more specific concerns relate to:

- the 90-day period required before an external disclosure can be made
- the exclusion of Senators, Members of the House of Representatives and their staff from the definition of a public official and
- the blanket exclusions for intelligence agencies in relation to external disclosures.

CLA argues an alternative option for the Government would be to support the Wilkie Bill.

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35. Ibid.
36. Ibid.
38. Ibid.
39. Ibid.
Community and Public Sector Union (CPSU)

It is the CPSU view that it is essential for the Parliament to capitalise on the work of the 2009 Whistleblower Protection report. It broadly supports the Bill and also makes a number of recommendations where, in its view, the Bill could be improved or where clarification is required. In particular it provides suggestions concerning external disclosures, the role of the Ombudsman and the provisions concerning immunity and protection from reprisals.  

CPSU states it is particularly pleasing that the Bill makes it explicit that reprisal action is a matter covered by the General Protections provisions of the Fair Work Act 2009. It states:

For persons covered by the Fair Work Act, this will provide an effective remedy in a well-known jurisdiction. It provides the option of less formal and easily accessible resolution processes as an alternative to, or prior to, Federal Court action.

Further comment is provided below.

Australian Public Service Commissioner

In the Commissioner’s view, it is important that a public interest disclosure scheme for the Commonwealth meet several key objectives:

- the scheme should work effectively within the existing APS misconduct regime
- the scheme should not provide an avenue for ‘forum shopping’ and
- the scheme should not impinge on the existing statutory responsibilities of statutory office holders, or provide for one office holder to be in the position of second-guessing another.

The Commissioner states that it is difficult to assess whether the PID Bill is consistent with these principles until the Government has introduced the consequential bill that will support the PID Bill. He notes, for example that the PID Bill does not compel the Commonwealth Ombudsman, or the IGIS, to transfer matters which are the statutory responsibility of the Public Service Commissioner or the Merit Protection Commissioner to those office holders.

Financial implications

The Explanatory Memorandum states that ongoing funding has been provided to the Office of the Commonwealth Ombudsman and the Office of the Inspector-General of Intelligence and Security for

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41. Ibid.
42. Australian Public Service Commissioner, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Public Interest Disclosure Bill 2013, op. cit., p. 3.
43. Ibid.
their roles under the proposed scheme. No other financial impact is anticipated with agencies to absorb costs associated with establishing internal processes for handling and investigating public interest disclosures.\footnote{Explanatory Memorandum, Public Interest Disclosure Bill 2013, p. 3, viewed 31 May 2013, http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5027_ems_a8faba5-c605-4803-8c4f-776183c718cb%22}

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.\footnote{The Statement of Compatibility with Human Rights can be found at pages 5–7 of the Explanatory Memorandum to the Bill.} The Government considers that the Bill is compatible.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (the Human Rights Committee) considers that the Bill in general promotes freedom of expression, but seeks clarification about the prohibition on the public disclosure of certain categories of information and the impact on the right to freedom of expression.\footnote{Parliamentary Joint Committee on Human Rights, Sixth Report of 2013, May 2013, paragraph 1.182, viewed 26 May 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm}

More specifically, the Human Rights Committee asks for clarification and information on:

- why it is necessary to allow for broad exceptions to the use of protected disclosure information and asks how this is compatible with the right to privacy
- the exceptions available to information pertaining to intelligence agencies and
- provisions that provide for the reversal of the burden of proof and abrogation of the prohibition against self-incrimination.\footnote{Ibid., paragraphs 1.183–1.184.}

Further comment from the Human Rights Committee report is found under the relevant provisions in the ‘Key issues and provisions’ section of the Bills Digest.

**Key issues and provisions**

As has already been noted, the Bill’s structure is complex and relies on a series of long and complicated definitions. For this reason the Bills Digest deals with various provisions out of numerical sequence in an attempt at bringing common themes and definitions together.

\footnotesize{\textit{Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.}}
Immunity from liability for disclosers

**Subclause 10(1)** protects a person (referred to as a discloser) who makes a public interest disclosure from any civil, criminal or administrative liability for making the disclosure and provides that no contractual or other remedy may be exercised against the person on the basis of the disclosure.

**Subclause 10(2)** provides the discloser with absolute privilege in defamation proceedings in respect of a public interest disclosure. It also states that a contract to which the discloser is a party must not be terminated on the basis that the disclosure constitutes a breach of contract.\(^{48}\)

**Clause 11** states that these protections from immunity do not apply to liability for making false or misleading statements or in relation to similar offences under the *Criminal Code 1995*. Nor does the protection affect a discloser’s own liability in relation to the conduct (**clause 12**).

**Comment**

Many submissions comment on **clause 11** arguing that its effect would be to weaken unnecessarily the protection that should be afforded to those who make public interest disclosures.

For example, SBS states that **clause 11** is uncertain, which acts as a deterrent for potential whistleblowers to disclose. Acknowledging it is appropriate that protection is *not* provided for false and misleading statements that are knowingly made, SBS argues that therefore protections should only be lost for disclosures that are ‘knowingly’ false and misleading.\(^{49}\) SBS further notes that this aspect of the PID Bill is to be contrasted with paragraph 8(2)(a) of the Wilkie Bill which takes out of the definition of public interest disclosure a disclosure of information by a person ‘that the person knows is false or misleading’.\(^{50}\)

SBS, along with other submitters, therefore recommends that **clause 11** should be amended so that it only operates for statements that the discloser knows to be false or misleading. They also observed that the matter is supported by the *2009 Whistleblower Protection report* at Recommendation 12\(^{51}\), which was also accepted in the *2010 Government Response*.

While the Explanatory Memorandum does not explain the omission of the word ‘knowingly’ from **clause 11** there may be an argument that it is unnecessary because of the wording in **clause 26**. **Clause 26** provides that when making a public interest disclosure, the discloser must believe on *reasonable grounds* that it is such a disclosure (see below at **clause 26**, table item 1). However it is

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\(^{48}\) **Clause 23** sets out how a person may seek to invoke the protections provided under **clause 10** for making a public interest disclosure where court proceedings have been instituted against the person. See below.

\(^{49}\) SBS, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Public Interest Disclosure Bill 2013*, op. cit., p. 9.

\(^{50}\) Ibid.

\(^{51}\) Recommendation 12: ‘The Committee recommends that protection under the PID Bill not apply, or be removed, where a disclosure is found to be knowingly false’.
also of note that the Law Council’s submission discusses these two provisions together and still argues that the word ‘knowingly’ is needed in clause 11 to properly protect disclosers.

Meaning of ‘public interest disclosure’

Clause 26 is a key provision as it describes what constitutes a public interest disclosure for the purposes of the Bill. A public interest disclosure is a disclosure of information made by a person who is or has been a ‘public official’ (described below). Public interest disclosures may be made orally or in writing and may also be made anonymously (subclauses 28(1) and (2)). A public interest disclosure may be made without asserting that the disclosure is made for the purposes of the Act (subclause 28(3)).

There are four categories of public interest disclosures:

- internal disclosures
- external disclosures
- emergency disclosures and
- legal practitioner disclosures.

These are described in a table in clause 26 and discussed below.

Internal disclosures

Internal disclosures are central to the PID scheme as there is an underlying assumption in the Bill that public interest disclosures should be ‘internal’ unless there is sufficient justification for the disclosure to be ‘external’.

A disclosure will be an internal public interest disclosure if made to an ‘authorised internal recipient’ and the discloser believes on reasonable grounds that the information concerns one or more instances of disclosable conduct (clause 26, table item 1). The disclosure must also not be contrary to a designated publication restriction.52 A list of authorised internal recipients is set out in clause 34 and disclosable conduct is defined in clause 29. Both concepts are important and described below.

Meaning of ‘disclosable conduct’

52. ‘A designated publication restriction’ is defined in clause 40 and includes suppression and non-publication orders made by a court, orders under the Witness Protection Act 1994 and non-publication directions issued by examiners under the Australian Crime Commission Act 2002. Some submitters question the exclusion of ‘designated publication restrictions’ from being disclosed. The CPSU argues that while there may be a legitimate need to protect certain types of confidential information from publication, there does not seem to be an obvious reason why internal disclosures, which are not made public, need to be subject to this restriction. In addition it is likely that if a designated publication restriction existed, the person making the public interest disclosure would not be aware of it. This adds another layer of uncertainty which may dissuade people from making a public interest disclosure. CPSU, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Public Interest Disclosure Bill 2013, op. cit.
The meaning of ‘disclosable conduct’ is important as it sets the boundaries for when public officials may make internal or external public interest disclosures under clause 26.

Subclause 29(1) states that disclosable conduct is conduct of a particular type engaged in by an agency\textsuperscript{53}, or a public official in connection with his or her position as a public official\textsuperscript{54}, or a contracted service provider for a Commonwealth contract\textsuperscript{55}, where that conduct relates to or is connected with the particular position or contract. The particular types of disclosable conduct are conduct that:

- contravenes a Commonwealth, state or territory law
- in certain circumstances, contravenes a law in force in a foreign country
- perverts the course of justice or involves corruption of any other kind
- constitutes maladministration\textsuperscript{56} including conduct based on improper motives, that is unreasonable, unjust or oppressive, or is negligent
- is an abuse of public trust
- is fabrication, plagiarism or deception in relation to scientific research
- results in wastage of public money or public property
- unreasonably results in a danger to health or safety or unreasonably results in or increases a risk of danger to health or safety
- results in danger to the environment or increases the risk of danger to the environment
- is of a kind prescribed by the PID rules.

Disclosable conduct is also:

- conduct where a public official abused his or her position and
- conduct that could give reasonable grounds for disciplinary action (subclause 29(2)).

It is immaterial whether the disclosable conduct in question occurred before or after commencement of this Act; whether the agency involved has ceased to exist; or whether the particular public official or contract service provider involved in the conduct no longer hold these particular positions (subclause 29(3)).

\textsuperscript{53} An agency is defined in clause 71 to mean a Department, an Executive Agency or a prescribed authority. Clause 72 defines prescribed authority.

\textsuperscript{54} Defined in clause 69.

\textsuperscript{55} Clause 30 defines officers or employees of a contracted service provider.

\textsuperscript{56} Several submissions including those of Professor Brown and the CPSU suggest that there is a need for clearer definitions of terms such as maladministration and corruption.

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What is not disclosable conduct

There are further clarifications on the meaning and the boundaries of disclosable conduct. Significantly the following are not disclosable conduct and therefore excluded from the PID scheme:

- conduct that relates only to government policy or proposed policy or to the expenditure related to Government policy with which a person disagrees (clause 31)
- action or proposed action of a Minister or the Presiding Officers of the Parliament with which a person disagrees (clause 31)
- in relation to the courts or tribunals, conduct of judicial officers or tribunal members is not disclosable conduct. Nor is the conduct of the chief executive officers (CEOs) and staff of these bodies when engaged in judicial matters. However the conduct of CEOs and staff when dealing with administrative matters is disclosable conduct (clause 32) and
- conduct engaged in by intelligence agencies and by public officials of these intelligence agencies, which relates to the proper performance of their functions and powers (clause 33).

Comment

A number of submissions question the need or reason for these exclusions from the definition of disclosable conduct.

The Government’s stated rationale for the exclusions in clause 31 which include the exclusion of actions of a Minister with which a person disagrees is that the PID scheme is intended to provide a framework for identifying and addressing wrongdoing in the Commonwealth public sector. It is not the scheme’s purpose to investigate or review government policy decisions.57

In relation to the exclusion in clause 32 (conduct of judicial officers etc.), the Explanatory Memorandum does not provide a reason for this, however the drafting of this provision would indicate that judicial matters are seen as belonging to a different arm of government and therefore beyond the scope of the PID scheme.

The exclusion in clause 33 (proper performance of intelligence agency functions and powers etc.) received the most comment in submissions and was also questioned by the Human Rights Committee. In relation to this exclusion, Professor Brown states that the Bill does not currently meet commitments such as in the 2010 Government Response that intelligence agencies would be covered equally with all other agencies, save that ‘public disclosures will not be protected where the public interest disclosure relates to intelligence-related information’ (response to recommendation 21).58

The Human Rights Committee notes with some concern the Explanatory Memorandum’s rationale for this exclusion which is:

58. AJ Brown, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Public Interest Disclosure Bill 2013, op. cit., p. 6.
The clause is necessary as in certain circumstances intelligence agencies are authorised to engage in conduct in a foreign country, in the proper performance of a function of the agency, which might otherwise be inconsistent with a foreign law or, in certain circumstances, Australian law. [...] 59

As the Human Rights Committee notes, the Explanatory Memorandum makes it clear that Australian officials may be authorised to take action that would be in violation of Australian law or foreign law (or both). However the Committee says that the concept of the rule of law underpins the human rights treaties that fall within the Committee’s mandate and the apparent possibility of diverging from it gives rise to human rights concerns. 60 The Committee therefore intends to write to the Minister to seek clarification about the procedures by which authorisation is given to staff members or agents of an intelligence agency to engage in conduct in violation of Australian law and the laws of an overseas country, and whether any of this ‘authorised’ illegal activity may involve the violation of relevant human rights. 61

Meaning of ‘public official’

The meaning of ‘public official’ is important as it sets the boundaries for who may make public interest disclosures under clause 26 and the persons whose conduct a public interest disclosure can be made about.

The list of public officials is set out in clause 69 and include:

- a Secretary of, or an APS employee in, a Department
- a Head of, or an APS employee in, an Executive Agency
- a principal officer of, or member of the staff of, or an individual who constitutes, a prescribed authority 62
- a member of a prescribed authority (other than a court)
- a director of a Commonwealth company
- a member of the Defence Force
- an Australian Federal Police appointee
- a Parliamentary service employee (within the meaning of the Parliamentary Service Act 1999)
- an individual who is employed by the Commonwealth otherwise than as an APS employee and who performs duties for a Department, an Executive Agency or prescribed authority
- certain statutory officeholders 63

60. Parliamentary Joint Committee on Human Rights, Sixth Report of 2013, op. cit., paragraph 1.205.
61. Ibid., paragraph 1.206.
62. A prescribed authority is defined in clause 72.
63. Defined in subclause 69(2).
• an individual who is a contracted service provider for a Commonwealth contract or an officer or employee of a contracted service provider for a Commonwealth contract and who provides services for the purposes of the Commonwealth contract and

• individuals (other than a statutory officeholder, a judicial officer or an official of a registered industrial organisation) who exercises powers, or performs functions, conferred on the individual by or under laws of the Commonwealth or a Commonwealth territory.

In addition, authorised officers\textsuperscript{64} may determine persons to be ‘public officials’ for the purposes of the Act (\textbf{clause 70}). To determine an individual to be a public official, the authorised officer must believe, on reasonable grounds, that an individual has information that concerns disclosable conduct. The Explanatory Memorandum states that the purpose of this clause is to enable those with knowledge of unacceptable conduct who are not public officials according to the definition to make disclosures and to receive the protection provided by the Bill.

\textbf{Comment}

Many submissions note that the list of public officials does not include members of parliament and their staff, thereby excluding them from the PID scheme. Some submitters also suggest that Ministers are not covered.\textsuperscript{65}

In relation to Ministers, while they are not actually listed in \textbf{clause 69} it would appear that a Minister would be a ‘public official’ by virtue of being an individual who ‘exercises powers or performs functions, conferred by or under a law of the Commonwealth’ (\textbf{clause 69, item 17}).\textsuperscript{66} Also, the specific exclusion of actions of a Minister with which a person disagrees (see \textbf{clause 31} above) would also suggest that in other respects Ministers are covered by the PID scheme.

In relation to staff of members of parliament, Professor Brown argues they are merely a different form of contractor to the Commonwealth and should be covered, as recommended by the 2009 Whistleblower Protection report, ‘if only so that such a staff-member who makes a disclosure about wrongdoing anywhere in government is entitled to the same remedies as any other contractor if they later suffer adversely for it’. He notes that the 2010 Government Response gave no rationale for rejecting this recommendation.

While the Bill’s explanatory materials do not refer to the omission of members of parliament from the definition of public officials, the 2010 Government Response does. The Government rejected the recommendation that members of parliament and their staff be covered by the PID scheme stating:

\begin{quote}
The PID Bill will not authorise employees under the Members of Parliament (Staff) Act 1984 to make disclosures under the scheme.
\end{quote}

\begin{itemize}
\item 64. An ‘authorised officer’ is defined in \textbf{clause 36} as the principal officer of the agency or a public official of the agency appointed by the principal officer to be the authorised officer.
\item 65. For example, see A Wilkie, op. cit.
\item 66. Note that this form of drafting differs to that of the Criminal Code where Ministers are actually listed as being Commonwealth public officials.
\end{itemize}
Disclosures will not be able to be made under the scheme about Members of Parliament. Allegations of wrongdoing by Members of Parliament should be addressed by the Parliament. Similarly, disclosures will not be able to be made under the scheme about Members of Parliament (Staff) Act 1984 employees.67

And again:

The Government notes that parliamentary privilege and the implied right to freedom of political communication already provide some protection to Members of Parliament and persons who provide information to them in certain circumstances. 68

Meaning of ‘authorised internal recipients’

This definition is also significant as it defines and sets the boundaries around where and to whom public officials may make public interest internal disclosures under clause 26. There are four categories of authorised internal recipients and these are set out in a table in clause 34 and summarised here:

• in the case of conduct concerning an agency:
  – the disclosure may be made to an authorised officer of any of the following:
    – the particular agency, the agency to which the discloser belongs or last belonged, to the Ombudsman (providing there are reasonable grounds for believing disclosure to the Ombudsman is appropriate) or to an investigative agency69 which also has power to investigate that matter.

• in the case of conduct concerning an intelligence agency70 the disclosure may be made to the authorised officer of:
   – the relevant intelligence agency, the IGIS or another relevant investigative agency71 (but in this last case only where none of the information is intelligence information).

• in the case of conduct concerning the Ombudsman, the disclosure may be made only to the authorised officer of the Ombudsman and

• in the case of conduct concerning the IGIS, the disclosure may be made only to the authorised officer of the IGIS.

An ‘authorised officer’ is defined in clause 36 as the principal officer of the agency or a public official of the agency appointed by the principal officer to be the authorised officer.

68. Ibid., recommendation 22.
69. ‘Investigative agency’ is either the Ombudsman, or the IGIS, or an agency prescribed by the PID rules to be an investigative agency for the purposes of this Act (clause 8).
70. Intelligence agencies for the purposes of the Act are described in clause 8.
71. See footnote 69.
Comment

The Rule of Law Institute and others\(^{72}\) are concerned that the Bill offers no protection for an initial disclosure made to someone other than an authorised internal recipient. It notes that studies of whistleblowing indicate that most disclosures are made to immediate supervisors. It therefore recommends the definition of authorised officer of an agency be broadened and suggests that the recently enacted ACT Public Interest Disclosure Act 2012, which allows a disclosure by a public official to be made to ‘a person, who, directly or indirectly, manages the discloser’, could serve as a model.\(^{73}\)

The Law Council asks why protection for the individual who makes disclosure to the Ombudsman should be subject to the further requirement that there be reasonable grounds for believing that the matter was appropriate for disclosure to the Ombudsman. The Law Council suggests that disclosures to the Ombudsman of information about conduct relating to government agencies do not represent any threat to good government and therefore it recommends clause 34 should be amended to remove this extra condition.\(^{74}\) While the Explanatory Memorandum does not provide a rationale for imposing this extra condition, it may be a matter of protecting the resources of the Ombudsman to ensure that disclosures go first to another more relevant agency.

External disclosures

This category of public interest disclosure has significant cumulative requirements and preconditions as set out in clause 26, item 2. An external disclosure is a disclosure by a public official to anybody, other than a foreign public official\(^{75}\) where the discloser believes on reasonable ground that the information concerns ‘disclosable conduct’\(^{76}\) and where certain listed requirements are met. Importantly an external disclosure can only occur if there has been a previous internal disclosure and the following conditions apply:

- either or both the internal disclosure process has been completed or the investigation has not been completed within the time set under the PID Bill (which is 90 days (clause 52)) and
- the investigation was inadequate and/or the response to the investigation was inadequate.\(^{77}\)

There are other restrictions that also apply, for example the information disclosed must not include intelligence information, nor relate to an intelligence agency, and it must not be contrary to a

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72. Including submissions of the CPSU and Professor Brown.
74. Law Council of Australia, op. cit., p. 7.
75. Defined to have the same meaning as Division 70 of the Criminal Code (clause 8).
76. As defined in clause 29.
77. Clause 37 outlines when an internal investigation conducted under Part 3 is inadequate and clause 38 sets out when a response to an investigation under Part 3 is taken to be inadequate.
'designated publication restriction'. The disclosure must not be, on balance, contrary to the public interest and no more information must be publicly disclosed than is reasonably necessary in the public interest. Guidance on the meaning of ‘not, on balance, contrary to the public interest’ is provided in subclause 26(3) and includes amongst other things, disclosure that may relate to and pose a risk of causing damage to Australia’s international relations, or involve information that was communicated in confidence by a foreign government on the understanding that it would remain confidential.

Unless all of these conditions are met then this would not be considered a public interest disclosure and the discloser would not be able to rely on the protections in clause 10.

Comment

External public interest disclosures would be relevant to disclosures to journalists and to other persons such as Members of Parliament. A number of submissions are critical of these provisions.

For example, the Law Council suggests the external disclosure provisions do not adequately support disclosures in the public interest because they do not give sufficient clarity about when there will be protection.79

The Law Council explains the provisions in the following way:

Unless all of these provisions [listed above] are met, item 2 will not apply and the discloser will not be able to rely on cl 10 protection. It is not sufficient that the discloser has a belief on reasonable ground that these preconditions have been met. Whether or not all of these preconditions have been met would ultimately be a matter for decision by a court.

This leaves the individual who is considering making a disclosure in a most uncertain position. Whether he or she does benefit from the protection intended to be afforded by clause 10 and related provisions of the Bill may depend on a court’s assessment at some time in the future and with more information than is available to the individual when they make their disclosure about broader and imprecise concepts:

Whether the investigation was inadequate

Whether the response was inadequate, and

Whether disclosure was ‘on balance’ contrary to the public interest, by reference to a long list of matters in clause 26(3) which are to be taken into account in considering public interest.

It is not realistic to expect individuals to make decisions about whether or not to make a disclosure in the public interest with this level of uncertainty about whether or not they will be protected by the provisions of the legislation, and having regard to the high risks those individuals face if the legislation does not protect them.80

78. Defined in clause 40.
79. Law Council of Australia, op. cit.
80. Ibid.
The Law Council suggests that the provisions in the Wilkie Bill in clauses 31-33 show how there can be tighter drafting giving both certainty and a fair and balanced approach to govern the extent to which disclosure to journalists and others – including MPs should be protected.\textsuperscript{81}

Emergency disclosures

An emergency disclosure is a public interest disclosure by a public official to anybody other than a foreign public official\textsuperscript{82} and the discloser believes on reasonable grounds that the information concerns a substantial and imminent danger to the health and safety of one or more persons. Again there are further restrictions that apply, including:

- the extent of the information disclosed is no greater than is necessary to alert the recipient to the substantial and imminent danger
- there must be exceptional circumstances justifying why the discloser failed to first make an internal disclosure or
- where there has been a previous internal disclosure, there must be exceptional circumstances justifying the disclosure being made before the internal investigation had finished and
- the disclosure must not be contrary to a ‘designated publication restriction’\textsuperscript{83} nor include ‘intelligence information’.\textsuperscript{84}

Comment

A number of submissions, including from the Law Council observe that it is not clear why this emergency disclosure protection is limited to situations of \textit{substantial and imminent danger to health and safety}.\textsuperscript{85}

The Law Council states there may be other situations calling for urgent response where there may be a substantial and imminent threat to other public interests such as protection of public moneys or public assets.\textsuperscript{85}

Professor Brown also states that the specific grounds for an emergency disclosure are unduly restrictive, and more onerous than needed for any genuine emergency disclosure, by requiring that there must be an ‘imminent’ danger to health or safety of one or more persons, as opposed to simply a ‘substantial’ one. Brown recommends that the standards for external and emergency disclosures be replaced with the simpler formulations provided for example in the recent ACT legislation.\textsuperscript{86}

\begin{itemize}
  \item \textsuperscript{81}Ibid.
  \item \textsuperscript{82}This has the same meaning as in Division 70 of the Criminal Code (clause 8).
  \item \textsuperscript{83}Defined in clause 40.
  \item \textsuperscript{84}Defined in clause 41.
  \item \textsuperscript{85}Law Council, op. cit., p. 11.
  \item \textsuperscript{86}AJ Brown, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, \textit{Inquiry into the Public Interest Disclosure Bill 2013}, op. cit., p. 11.
\end{itemize}
Legal practitioner disclosures

A legal practitioner disclosure is where a disclosure is made to an Australian legal practitioner\textsuperscript{87} by a public official for the purposes of obtaining advice or assistance in relation to a public interest disclosure (clause 26, item 4). Such disclosures must not include intelligence information. There are further requirements where the information has a national security classification or other protective security classification.

Meaning of ‘intelligence information’

As has already been noted, intelligence information can never be the subject of a public interest disclosure other than an internal disclosure. In other words, external disclosures, emergency disclosures and legal practitioner disclosures may not include ‘intelligence information’ nor may they concern conduct of an intelligence agency.

Clause 41 defines intelligence information. It is defined broadly and covers a wide range of information and sources with the categories:

\begin{quote}
\ldots{} designed to protect Australia’s relationships with other governments, the conduct of law enforcement, intelligence gathering or crime disruption operations, protect the identity of a person who is an agent or member of staff of an Australian intelligence agency and to protect the safety of witnesses and informants and those involved in their protection, amongst other purposes.\textsuperscript{88}
\end{quote}

It also includes:

\begin{quote}
\ldots{} information that has originated with, or has been received from, an intelligence agency and information received by a public official from a foreign government’s intelligence agency that is about, or might reveal, a matter communicated by that authority in confidence.\textsuperscript{89}
\end{quote}

Many submitters comment that the definition is drafted very broadly, also arguing that it stretches beyond the boundaries of intelligence information which may pose a risk to the security of the nation.

The Human Rights Committee commented on this provision. It acknowledged that certain categories of intelligence information are very sensitive and that to reveal them may lead to serious injury or damage to individuals and may undermine important law enforcement or other legitimate activities. Nonetheless, the Committee expressed concern that:

\begin{quote}
\ldots{} these restrictions may be too broadly drawn, and there are some circumstances in which disclosure of wrongdoing (including potentially the disclosure of wrongdoing by a foreign government) may outweigh other interests. Under the bill as presently drafted, it would not be possible to disclose these matters to the media, for example, if internal procedures proved inadequate.\textsuperscript{90}
\end{quote}

\textsuperscript{87} Defined in clause 8.
\textsuperscript{88} Parliamentary Joint Committee on Human Rights, Sixth Report of 2013, op. cit., paragraph 1.200.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid., paragraphs 1.201–1.202.
Despite these concerns, the Committee also acknowledged the role that IGIS would play in relation to internal public interest disclosures. The Committee is therefore seeking further information from the Minister as to processes that apply in relation to the internal disclosure of intelligence information to the IGIS. 91

Protection from reprisals for disclosers

Clauses 13 to 17 provide a range of remedies for a person who is the subject of reprisals because of a public interest disclosure, including compensation, empowering a court to direct a person from taking reprisals or requiring an apology and reinstatement of employment.

Taking a reprisal

Clause 13 clarifies what actions constitute a reprisal. A person takes a reprisal if the person by act or omission causes any detriment to another person (the second person) because they believe or suspect that the second person or any other person may have made or proposes to make a public interest disclosure (subclause 13(1)). Detriment is defined to include any disadvantage including, but not limited to dismissal, injury, alteration of an employee’s position to their detriment and discrimination between an employee and other employees of the same employer (subclause 13(2)).

Where a person takes administrative action that is reasonable to protect a discloser from detriment, this action is not considered to be taking a reprisal (subclause 13(3)).

Remedies

Clauses 14 to 17 define reprisals and deal with the various remedies available for those suffering a reprisal or threat of reprisal.

In particular, under subclause 14(1) if satisfied on application of a person that another person took, or threatened to take a reprisal action against him or her, the Court may make an order requiring compensation for loss, damage or injury as a result of the reprisal or threat of reprisal (clause 14). The orders may apply to:

- the person making or threatening the reprisal (the respondent)
- the employer of the respondent or
- both the employer and the respondent—in that case they are jointly and severally liable (subclause 14(3)).

Under subclause 14(2), the Court must not make an order against the respondent’s employer if the employer took reasonable precautions and exercised due diligence, to avoid the reprisal or threat concerned.

91. Ibid., paragraph 1.203.
92. The Court being the Federal Court of Australia or the Federal Circuit Court of Australia.

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Clause 15 provides other remedies in relation to reprisals including Court orders granting injunctions, apologies and any orders the Court considers appropriate. The Court also has the power to order reinstatement where a person has been dismissed from their employment because they made a public interest disclosure (clause 16).

Interaction with remedies under the Fair Work Act 2009

Clauses 18 and 22 deal with the interaction between the PID Bill and the Fair Work Act.

Part 3-1 of the Fair Work Act provides for general workplace protections. These protections include protection from adverse action because a person has a workplace right or has exercised a workplace right. A workplace right includes a benefit a person is entitled to or a role or responsibility under a workplace law.93 Clause 22 of the PID Bill confirms that the proposed Public Interest Disclosure Act would be a workplace law under Part 3-1 of the Fair Work Act, the effect being that the right to make a public interest disclosure would be a workplace right for employees under the Fair Work Act, thereby gaining protection from adverse action because of that workplace right. Clause 18 of the Bill provides that a person who wishes to pursue a remedy in relation to a public interest disclosure must choose to take action under either the Fair Work Act or the Public Interest Disclosure Act, but not both.94

Offences—reprisals

Subclause 19(1) makes it an offence for a person to take a reprisal against another person. In a prosecution for such an offence, it is not necessary to prove that a public interest disclosure was made or was intended to be made (subclause 19(2)).

Subclauses 19(3) to 19(5) deal with the offence of threatening to take a reprisal against another person. Subclause 19(3) provides that a person commits an offence if he or she threatens to take a reprisal against another person, intending that person to fear that the threat will be carried out or is reckless as to this occurring. The threat may be express or implied as well as conditional or unconditional (subclause 19(4)). In a prosecution for this offence it is not necessary for the prosecution to prove that the person threatened actually feared that the threat would be carried out (subclause 19(5)).

The penalty for both offences under clause 19 is imprisonment for six months and/or 30 penalty units.95

Comment

Several submitters support the provision that provide protection from reprisal action against whistleblowers and they welcome the provisions that provide interaction with the Fair Work Act.

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93. See sections 340 and 341 of the Fair Work Act.
94. Although subclause 18(3) provides that this limitation will not apply if an application has been discontinued or failed for want of jurisdiction.
95. A penalty unit is defined under section 4AA of the Crimes Act 1914 as $170.
However there are also suggestions for amendments such as those proposed by the CPSU which include:

- whistleblowers that bring a civil action in the Federal Court should only be liable for the other parties’ costs if the action was brought vexatiously or if there is some abuse of process
- there should be a clear distinction between criminal and civil actions under the proposed Act and it should be clear that criminal charges being laid is not a prerequisite for a successful outcome in civil proceedings for reprisal action and
- explanatory and education material should be made available to workers to explain the different available remedies and procedures with emphasis on the more accessible Fair Work Act remedies where they are applicable.  

Several submissions commented that the penalties for offences to do with reprisals are weak compared to most other Australian jurisdictions, noting it would be unfortunate if this implied that the Commonwealth places less importance on protecting its whistleblowers than state governments do.

Protection of the identity of disclosers

**Clauses 20 and 21** are provisions aimed at protecting the identity of persons making public interest disclosures.

Under **subclause 20(1)** it is an offence where a person discloses ‘identifying information’ related to a public interest disclosure that is likely to enable the identification of a person who has made the disclosure. **Subclause 20(2)** creates an offence where a person uses identifying information. The penalty for both offences of disclosing and using identifying information is imprisonment for six months and/or 30 penalty units (subclause 20(2)). **Subclause 20(3)** sets out exceptions to these offences which include where the disclosure or use is for the purposes of this Act or of another Commonwealth or state or territory law. The defendant bears an evidential burden in relying on these exceptions.

**Clause 21** provides that public officials (or former public officials) are not required to disclose identifying information in court proceedings except where necessary for the purposes of this Act.

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96. CPSU, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Public Interest Disclosure Bill 2013*, op. cit. AJ Brown suggests some amendments that would ensure that the Fair Work Act remedies and forums be the first port of call in employment-related matters before going to the Federal Court.


98. A penalty unit is defined under section 4AA of the *Crimes Act 1914* as $170.
Comment

The ABC and SBS raised questions about clause 20 and how the presumption of criminal liability for the use and or disclosure of identifying information could impact on journalists. The ABC notes that the exceptions to criminal liability, as currently drafted do not recognise the way confidential sources of information might be used and disclosed during the course of responsible journalism and may create undue pressure on journalists to reveal their source’s identity or face imprisonment.99

The ABC suggests that consideration should be given to amending subclause 20(3) to include an exception that recognises that authorised recipients can use or disclose identifying information for the purpose of inquiring into a whistleblower’s concerns where that use or disclosure does not adversely affect a person’s safety or create or increase a risk that a person will be victimised. The submission concludes:

Where the recipient is a media organisation, such an exception would acknowledge and promote the use of responsible journalism in gathering and presenting news reports relating to the whistleblower’s concerns, while ensuring the whistleblower’s identity is not used in a manner that would cause them harm.100

Claims for protection

Clause 23 provides that if a civil or criminal proceeding is instituted against a person, a person may seek to claim immunity as a public interest disclosure. Under paragraph 23(1)(a) a person seeking to rely on clause 10101 to claim immunity from prosecution bears the onus of pointing to evidence that suggests a reasonable possibility that she or he is entitled to the protection of clause 10. Paragraph 23(1)(b) provides that if the initial onus is discharged, then the party instituting the proceedings bears the onus of proving that the claim is not made out. The issue of immunity must be dealt with before the primary proceedings, which are to be adjourned (paragraphs 23(1)(c) and (d)).

Comment

Both the Scrutiny of Bills Committee and the Human Rights Committee comment on this provision—the Scrutiny of Bills Committee noting that in the context of criminal proceedings, paragraph 23(1)(a) is analogous to placing an evidential burden of proof to establish an exception to an offence based on clause 10 of the Bill. The Committee asks:

100. Ibid., p. 8.
101. Clause 10, discussed above, provides that a person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability on that account.
Investigations of public interest disclosures

Clauses 42 to 67 set out the procedures to do with investigations by agencies of public interest disclosures.

Allocating an investigation

Clause 43 provides that if a person discloses information to an authorised officer of an agency, the officer must allocate the handling of the disclosure to one or more agencies (which may be or include the recipient agency). This obligation does not apply if the authorised officer is satisfied on reasonable grounds that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure. Subclauses 43(3) to 43(6) set out the principles that an authorised officer is required to consider in allocating the disclosure to an appropriate agency. Clauses 44 and 45 deal with other protocols that must be followed in allocation including notice requirements and re-allocation.

Investigations

Clause 47 requires the principal officer of an agency to investigate the disclosure allocated to the agency. Investigate in relation to a disclosure means consideration of whether there is evidence of disclosable conduct and could also mean consideration of whether a different type of investigation should be conducted by the agency or by another body under a different Commonwealth law.

A principal officer has a discretion not to investigate a disclosure, providing one of the grounds set out in subclause 48(1) apply. These include where the disclosure is lacking in substance or relates to conduct that has already been investigated, or where the information does not, to any extent, concern serious disclosable conduct, or the disclosure is frivolous, vexatious, misconceived or lacking in substance.

Comment

Professor Brown suggests that this provision contains several aspects which have the potential to defeat the purpose of the Bill, rather than providing the intended safeguards. For example he takes issue with the term ‘serious’ which is not used anywhere else in the Bill. This has the potential to be highly confusing and introduces considerable uncertainty, since many of the types of wrongdoing identified in the Bill are already objectively serious. Professor Brown states that it also creates an ill-defined discretion on the part of principal officers to pick and choose when and whether a

102. Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 5 of 2013, op. cit.
103. An ‘authorised officer’ is defined in clause 36 as the principal officer of the agency or a public official of the agency appointed by the principal officer to be the authorised officer.
104. Clause 73 sets out in a table who would be the principal officer of the various agencies covered by the proposed Act.
disclosure requires an investigative response, which may easily defeat the purpose of the Bill in a wide range of instances.\textsuperscript{105}

CPSU also suggests the discretion not to investigate a disclosure must be sufficiently precise so as to only arise in circumstances where there has been no public interest disclosure or investigation is otherwise impossible.\textsuperscript{106}

\textbf{Clause 50} places an obligation on the principal officer to inform the discloser of any decision to investigate, not to investigate, or to investigate under another power. He/she must provide reasons for the decision not to disclose and other possible courses of action that may be available to the discloser.

\textbf{Clause 49} deals with discretions regarding investigations conducted by the investigative agencies (that is by the Ombudsman or by the IGIS). Where an investigative agency has a separate investigation power in relation to the disclosure, the principal officer of the investigative agency may decide to investigate the disclosure under its own investigative power rather than under the provisions of this Bill.\textsuperscript{107}

\textbf{Subclause 51(1)} requires the principal officer of an agency to prepare a report upon completing an investigation under this Bill. The report must contain matters such as the principal officer’s findings, the action taken or recommended to be taken, and must also deal with any claims of detrimental action and the agency’s response to that action (\textbf{proposed subclause 51(2)}). A copy of the report must also be given to the discloser within a reasonable time (\textbf{subclause 51(4)}) with the copy having appropriate deletions to comply with privacy, FOI, security and intelligence requirements (\textbf{subclause 51(5)}).

Investigations must be completed within 90 days after the disclosure is allocated to the agency, although the Ombudsman or the IGIS may extend this period. Failure to complete the investigation within the time limit does not affect the validity of the investigation (\textbf{clause 52}).

Principal officers may conduct an investigation as they think fit and are allowed to obtain information and make inquiries as they see fit for the purposes of the investigation (\textbf{subclause 53(2)}). Under \textbf{subclause 53(3)} the principal officer must comply with any standards in force under \textbf{clause 74} and must comply with the \textit{Commonwealth Fraud Guidelines} where appropriate. Under \textbf{subclause 53(5)} the principal officer must also comply with procedures established under subsection 15(3) of the \textit{Parliamentary Service Act 1999} or the \textit{Public Service Act 1999} to the extent the investigation relates to an alleged breach of the Codes of Conduct under those Acts.

\begin{footnotesize}
\begin{enumerate}
\item AJ Brown, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, \textit{Inquiry into the Public Interest Disclosure Bill 2013}, op. cit.
\item CPSU, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, \textit{Inquiry into the Public Interest Disclosure Bill 2013}, op. cit.
\item The Ombudsman has powers to investigate a disclosure under the \textit{Ombudsman Act 1976}. The IGIS has power to investigate a disclosure under the \textit{Inspector-General of Intelligence and Security Act 1986}.
\end{enumerate}
\end{footnotesize}
Comment

The Ombudsman believes that this part of the Bill provides a very flexible approach and recognises the benefits of allowing existing investigative process, and the experiences and expertise that go with them to be best utilised for the investigation of public interest disclosures and will ensure the most beneficial outcomes.\(^\text{108}\)

Disclosure of information to police

**Clause 56** confirms a person’s right to disclose information to a member of an Australian police force where a person conducting an investigation suspects on reasonable grounds evidence of the commission of an offence. In the case of a suspected more serious offence (that is, one that is punishable by imprisonment for life or by imprisonment for a period of at least two years) then the person must inform the police.

Protection of witnesses

**Clause 57** provides that a person is not subject to any criminal or civil liability because the person gives information or a document when requested to do so during a disclosure investigation, but that this does not apply:

- to any information that is false or misleading according to relevant offences under the *Criminal Code*
- to a proceeding for breach of a designated publication restriction and
- to affect a person’s liability for his or her own conduct.

Comment

The Human Rights Committee observes that as this clause is currently drafted, it would appear to abrogate the privilege against self-incrimination. The Committee therefore intends to seek clarification from the Minister as to whether this is the intention and if so, how these provisions are consistent with the right to be presumed innocent in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).\(^\text{109}\)

The Scrutiny of Bills Committee is also seeking clarification on this provision.\(^\text{110}\)

Additional obligations and functions

**Clauses 59 to 61** impose additional obligations on principal officers, authorised officers and public officials in relation to the public interest disclosure scheme.

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\(^{110}\) Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 5 of 2013*, op. cit., p. 80.
In particular, principal officers are obliged to establish procedures for dealing with public interest disclosures relating to the agency. They must also take reasonable steps to protect public officials of the agency from detriment resulting from their public interest disclosures and they must provide ready access to authorised officers of the agency (clause 59).

Authorised officers have obligations to ensure that people who may have information of disclosable conduct are aware of the Bill and its protections (clause 60).

Public officials have obligations in assist others in the conduct of their functions under the Act (clause 61).

Clauses 62 and 63 set out additional functions for the Ombudsman and the IGIS respectively. The Ombudsman has the functions of assisting principal officers, authorised officers, and public officials in relation to the operation of the public interest disclosure scheme and conducting education and awareness programs for agencies and public officials in relation to the scheme (clause 62). The IGIS has similar functions in relation to intelligence agencies (clause 63).

The Ombudsman has other important functions that include the setting of standards relating to procedures for dealing with internal disclosures, the conduct of investigations, the preparation of reports of investigations and the provision of information and assistance and the keeping of records for the purposes of the Ombudsman’s annual reporting (clause 74).

Comment

Professor Brown and others note that while the Bill provides powers to the two oversight agencies to ‘assist’ agencies, it does not provide the powers necessary to allow them to establish and maintain active oversight.

The CPSU says that an additional role for the Ombudsman in reviewing the decisions regarding public interest disclosure made by agencies is warranted. It suggests that one appropriate model for this may be the Ombudsman’s review powers as contemplated by clauses 49 and 50 of the Wilkie Bill. These provisions would provide discretion for the Ombudsman to review decisions relating to public interest disclosures and make recommendations or take other action.

In contrast, the Ombudsman’s submission indicates support for the allocated functions.

Secrecy obligations

Clauses 64 to 67 deal with secrecy obligations.

111. For example, the CPSU.
112. AJ Brown, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Public Interest Disclosure Bill 2013, op. cit., p. 8.
113. CPSU, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Public Interest Disclosure Bill 2013, op. cit.
114. See above under the heading, ‘Position of major interest groups’.

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Under **subclause 65(1)** it is an offence for a person to disclose or use information (protected information) obtained through a disclosure investigation or in performing a function under the Act. The penalty for this offence is imprisonment for two years and/or 120 penalty units. **Subclause 65(2)** provides a number of broad exceptions to such an offence, which allow disclosure or use of the information if it is for:

- the purposes of a law of the Commonwealth
- the purposes of, or in connection with, the performance of a function, or the exercise of a power, of a person under a law of the Commonwealth or
- the purposes of, or in connection with, the exercise of the executive power of the Commonwealth.

Other exceptions include where the information has previously been lawfully published, and is not intelligence information. A defendant bears an evidential burden in relation to these matters.

**Comment**

The Human Rights Committee is seeking clarification from the Minister about the intention of the first three of these exceptions in **clause 65** suggesting they provide significant scope for the use of personal information which would appear to limit the right to privacy. It states:

> The vagueness of these exceptions may raise concerns regarding whether the limitation on the right to privacy, in so far as the clause deals with personal information, satisfies the ‘quality of law’ test, namely precision and predictability.

**Concluding comments**

It is often acknowledged that robust whistleblower protection is necessary to foster transparency and accountability in government. As the now Attorney-General Mark Dreyfus said back in 2010, legislation to protect whistleblowers in the Commonwealth public sector is long overdue.

Submissions to the inquiries into the PID Bill indicate an overwhelming support for the introduction of a new PID scheme and also point to the importance of not squandering the opportunity to implement a new system based on the important work done in the 2009 Whistleblower Protection report. Indeed one of the disappointments with the Bill is that its introduction has been delayed until so near the end of the life of this Parliament. It is a complex Bill and the difficulties of fine tuning it would seem to require closer scrutiny than this short time will allow.

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115. A penalty unit is defined under section 4AA of the **Crimes Act 1914** as $170.
116. In the case of intelligence information, to avoid an offence, the information must have been lawfully published and the disclosure or use occurs with the consent of the principal officer of the agency.
It is of interest that despite many submissions showing a preference for the Wilkie Bill, the House of Representatives Committee has chosen to recommend the PID Bill to the Parliament indicating that the PID Bill is ‘more appropriately situated in terms of applying a comprehensive framework for public interest disclosures across the Commonwealth public sector’.119

Common themes appeared in the submissions of the stakeholders including: the strict conditions on the circumstances allowing public officials to make public interest disclosures relating to intelligence agencies; the limits on the scope of external disclosures; and the exclusion of members of parliament and their staff from the scheme. Some criticisms, such as the scope of protections offered where disclosures are made in good faith, though they may later be found to be false or misleading (clause 11) would be relatively easy to address should the Parliament so choose. Others, such as the exclusion of members of parliament from the scheme, the total exclusion of intelligence information from external disclosures, and the strong barriers to external disclosures are part of Government policy and were flagged in the 2010 Government Response. A number of submissions suggested a need to follow the so called ‘best practice’ model of legislation recently introduced in the ACT. However it could be argued that model may not be the perfect fit for a much bigger Commonwealth public sector scheme needing to take greater account of national security, international issues and also constitutional constraints, than a territory government would need.

The Bill’s drafting style is undoubtedly complex and there are arguments that its complexity would discourage potential whistleblowers. This therefore places a greater onus on the Ombudsman to fulfil its educative functions to ensure a better understanding of whistleblower rights and protections and to provide diligent oversight of implementation of the new PID scheme.

Despite the criticisms made in submissions, the PID Bill would seem to offer a significantly enhanced and comprehensive framework for public interest disclosures in the Commonwealth public sector. Compared to the current system in the Public Service Act, the PID Bill is much broader in its application both in terms of those protected by the system and in the types of misconduct it covers. It also offers a greater range of protections and remedies, and there is scope (if limited) for those working in the public sector to make authorised and protected disclosures to external parties including journalists and members of parliament.

Given the short time-frame for debate on this Bill, the Committee advisory report suggestion that there be a review of the PID scheme in 12 months (assuming Parliament chooses to pass this Bill) would seem a sensible recommendation.

119. House of Representatives Standing Committee on Social Policy and Legal Affairs, Advisory report, op. cit. paragraph 4.15.
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