



## ARTICLES

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### PROTECTING THE WHISTLEBLOWER

WHISTLEBLOWER - *n.* a person who alerts the public to some scandalous practice or evidence of corruption on the part of someone else. [US (1965-70); from the phrase *blow the whistle on*].<sup>1</sup>

Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.<sup>2</sup>

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1 *The Macquarie Dictionary* (2nd ed 1991).

2 Qld, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald QC, Chairman) *Report* (Queensland Government Printer, Brisbane 1989) p134.

## RAISING THE MORAL ANTE

### Background

**I**N a modern democratic society it is regarded as desirable that citizens have access to as much information on how their government operates as is compatible with its effective functioning. Information ought not to be restricted out of a sense that it involves matters that are simply not the public's business. If there are countervailing considerations compelling secrecy in some areas of governmental activity, then they should be spelt out and defended as special exceptions to the general principle of open government. It is in the public's interest to know whether, in government, there has occurred any serious misconduct, gross waste of public funds, or substantial danger to the public. The first, and often the only, ones to know of these lapses are the government employees themselves. Yet there is a real risk that those who bring to light the faults of their peers or superiors by 'blowing the whistle' on them will themselves be isolated and victimised as traitors to the solidarity of their branch of public administration. Consciousness of this risk tends to deter even the most high-minded of public officials from going out on a limb.

Special legislation designed for the protection of those who do choose to defy institutional loyalty has its origins in the United States of America in the 1970s. It is associated with consumer activists, such as Ralph Nader, who called upon employees in both the governmental and private sectors to regard disclosure of information that affected the public interest as a greater moral imperative than compliance with their employer's demands for secrecy. This encouragement to raise the moral ante soon found resonance in reactions to the corrosive effects of the Vietnam war and the ethical bankruptcy of the Nixon administration. The result has been that the United States of America leads the world in state and federal legislation to protect, if not encourage, whistleblowers.<sup>3</sup>

Statutory protection was first expressly made available at the federal level in the *Civil Service Reform Act 1978* (USA).<sup>4</sup> It prohibited reprisals against any employees of the federal government who legitimately disclosed certain classes of information. Sanctions could be imposed upon those who took retaliatory action. An Office of Special Counsel and a Merits System

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3 Westman, *Whistleblowing: The Law of Retaliatory Discharge* (Bureau of National Affairs, Washington DC 1991).

4 *Civil Service Reform Act of 1978*, United States of America Public Law No 95-454, 92 Stat 1111 (1978).

Protection Board were assigned responsibility for administering the scheme. The legislation was not intended to offer protection for whistleblowers who leaked information to the press, television, or other forms of public media, but was designed to open new formal channels for complaints and to buttress them with added protection for the informant. The Office of Special Counsel could pursue a matter disclosed by an employee without the latter's identity being revealed. If a preliminary determination showed a substantial likelihood that the information exposed some illegality, mismanagement, gross waste of public funds, or substantial danger to the public, the head of the federal agency concerned could be required to investigate the complaint further and to take remedial action. The Merit Systems Protection Board was there to provide an avenue for aggrieved employees to seek corrective measures or compensatory relief for any retribution taken against them as the result of their revelations.

Despite its good intentions, the legislation had little impact in encouraging federal employees to disclose wrong-doing. Moreover, when they did make their concerns known, it failed to protect them adequately from reprisal. Congress then enacted the *Whistleblower Protection Act 1989* (USA),<sup>5</sup> which was designed to strengthen and improve protection for whistleblowers. The new Act lowered the burden of proof for employees who alleged that action had been taken against them for their whistleblowing and expanded their rights to approach the Office of Special Counsel. The powers of Special Counsel and the Merit Systems Protection Board to provide relief to the employee were enhanced.<sup>6</sup>

Australia is now following the American lead. The initiative has come from Queensland and South Australia, though in somewhat different forms. It is a response to the assistance whistleblowers have given major enquiries into corrupt practices in government. The first piece of legislation, Queensland's *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1989* (Qld), was enacted as a direct result of the Fitzgerald

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5 *Whistleblower Protection Act of 1989*, United States of America Public Law No 101-12, 103 Stat 16 (1989).

6 But see Fisher, "The Whistleblower Protection Act 1989: A False Hope for Whistleblowers" (1991) 43 *Rutgers L Rev* 355. For Canadian developments see Ontario Law Reform Commission, *Political Activity, Public Comment and Disclosure by Crown Employees* (Report No 75, 1986); Hansen, "Freedom of Expression, Whistleblowing and the Canadian Charters" (1990) 13 *Can Parl Rev* 30. No legislation specifically to protect whistleblowers has yet been passed in that country.

Inquiry.<sup>7</sup> It made it an offence to victimise any person giving evidence to or assisting the newly created Criminal Justice Commission whose function it is to investigate governmental corruption. This initial tentative effort to deal directly with whistleblowers was followed by the drafting of a more extensive *Whistleblowers Protection Bill 1992 (Qld)* by the Queensland Electoral and Administrative Review Commission,<sup>8</sup> but this Bill has not yet made its way into the Queensland Parliament. A similarly named *Whistleblowers Protection Bill 1992 (SA)* was introduced into the South Australian Parliament in November 1992. This Bill was passed in April 1993.<sup>9</sup> Though containing less in the way of machinery provisions than the Queensland model, the South Australian Act has a wider potential scope since it is not confined to the protection of disclosures from within the public sector. A *Whistleblowers Protection Bill 1992 (NSW)* was also introduced into the New South Wales Parliament in late 1992, but has yet to be passed.<sup>10</sup> In May 1993, a discussion draft of a private member's *Whistleblowers Protection Bill 1993 (Cth)* was tabled in the federal Senate, but there has been no federal government sponsored activity on this front other than a Senate Committee call for public submissions on the desirability of such legislation.

Each of these legislative initiatives has been based on the premise that government should hold out statutory protection, rather than bureaucratic intimidation, to those who have the courage to lay open evidence of administrative abuses. Like the United States federal legislation, the

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- 7 Qld, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald QC, Chairman) *Report*.
- 8 Qld, Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* (Electoral and Administrative Review Commission, Brisbane 1991) Appendix A; McMillan, "Whistleblowing" in Grabowsky (ed), *Government Illegality* (Australian Institute of Criminology, Canberra, Seminar Proceedings No 17, 1986) p93; McMillan, "Blowing the Whistle on Fraud in Government" (1986) 56 *Canberra Bulletin of Public Administration* 118; McMillan, "Legal Protection of Whistleblowers" in Prasser, Wear & Nethercote (eds), *Corruption and Reform: The Fitzgerald Vision* (University of Queensland Press, St Lucia 1990); De Maria, "Queensland Whistleblowing: Sterilising the Lone Crusader" (1992) 2 *Aust J of Social Issues* 248.
- 9 *Whistleblowers Protection Act 1993 (SA)*; SA, *Parl Debates* (26 November 1992) at 1068-1070; (17 February 1993) at 1288-1293; (18 February 1993) at 1317-1319; (2 March 1993) at 1362-1364; (3 March 1993) at 1403-1404; (4 March 1993) at 1428-1430; (9 March 1993) at 1478-1483; (10 March 1993) at 1518-1535; (30 March 1993) at 1762-1763; (23 March 1993) at 2520-2522; (25 March 1993) at 2645-2648; (25 March 1993) at 2666-2672.
- 10 It lapsed on Parliament being prorogued. The *Whistleblowers Protection Bill (No~2)* was introduced in 1993.

Queensland draft is not intended to apply beyond the public sector. Its objective is to "[encourage] the disclosure, investigation and correction of illegal conduct, improper conduct in the public sector and danger to public health or safety", by:

- (a) establishing procedures and organisations that facilitate and encourage the making of disclosures of the conduct or danger; and
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of disclosures of the conduct or danger; and
- (c) compensating persons who suffer reprisals because of disclosures; and
- (d) ensuring that disclosures are properly investigated and dealt with; and
- (e) protecting employees who resist employers' attempts to involve them in the commission of offences from reprisals that might otherwise be inflicted on them because of their resistance; and
- (f) compensating employees who suffer reprisals because they resist attempts by employers to involve them in the commission of offences.<sup>11</sup>

In South Australia the object of the Act is not only to "facilitate the disclosure, in the public interest, of maladministration and waste in the public sector" but also to disclose "corrupt or illegal conduct generally":

- (a) by providing means by which such disclosures may be made; and
- (b) by providing appropriate protections for those who make such disclosures.<sup>12</sup>

The Queensland draft legislation incorporates a more elaborate declaration of "whistleblower principles". These affirm a commitment to investigate the

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11 *Whistleblowers Protection Bill* 1992 (Qld) cl 3.

12 *Whistleblowers Protection Act* 1993 (SA) s3.

claims of whistleblowers while balancing the need for confidentiality with the openness required by principles of natural justice, viz:

- (1) ...
- (2) A public interest disclosure should be investigated to the fullest extent practicable unless [the disclosure is frivolous, vexatious, misconceived, lacking in substance, trivial or has already adequately been dealt with].
- (3) The confidentiality of information provided by a public interest disclosure is to be preserved so far as is practicable, having regard to rules of natural justice requiring the information to be disclosed to a person it may concern.
- (4) The confidentiality of the identity of a person who makes a public interest disclosure is to be preserved unless it is essential, having regard to the rules of natural justice, that the identity be disclosed to a person who the information provided by the public interest disclosure may concern.<sup>13</sup>

The introduction of whistleblowing legislation is now widely supported in Australia. The Australian Press Council has argued that whistleblowing should be protected because it represents an aspect of freedom of speech and a basic right of Australian people.<sup>14</sup> The New South Wales *Whistleblowers Protection Bill 1992* (NSW) was a priority of the newly created Independent Commission Against Corruption.<sup>15</sup> Enquiries into corruption in Western Australia have given prominence to the role of whistleblowers. At a national level, a committee to review federal criminal law in Australia has drafted proposed protections for public service whistleblowers.<sup>16</sup>

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13 *Whistleblowers Protection Bill 1992* (Qld) cl 8(2)-(4). No similar statement of principles is contained in the South Australian Act.

14 Australian Press Council, September 1991, quoted in SA, Parl, *Debates* (26 November 1992) at 1068.

15 *Independent Commission Against Corruption Act 1988* (NSW); Independent Commission Against Corruption, *Annual Report to 30 June 1991* (Sydney, 1991).

16 Aust, Department of Attorney-General, Review of Commonwealth Criminal Law, *Disclosure of Official Information* (Discussion Paper No 20, 1988); Aust,

## Paying the Price

Despite this willingness to encourage and protect those who reveal instances of public corruption or incompetence, evidence abounds that when employees reveal incidents of waste, incompetence and graft, the bureaucracy tends to react, not to the revelations themselves, but to those who are seen as muck-rakers. It is very difficult for any law to shield dissenters effectively from the subtle and not so subtle pressures that are brought to bear on them day by day, minute by minute. The crude forms of reprisal such as dismissal, transfer, reprimand, or denial of promotion are easier to address legislatively than more refined ones such as close scrutiny of work practices, lack of credit for work and ideas, physical and social isolation and the refusal to assign work within the competence of the employee. The psychological pressures are intense. In 1991, *Time Australia* reported that a 1988 United States survey found that

of 223 whistleblowers studied, 90% were sacked or demoted for their pains and 27% faced law suits, usually for breach of confidence or defamation. About a quarter of the whistleblowers subsequently required psychiatric or medical treatment and a similar number admitted alcohol abuse. Some 17% lost their homes, 15% later divorced, 10% attempted suicide and 8% ended up bankrupt.<sup>17</sup>

There have been no comparable surveys in Australia, but there is no reason to assume that in this country whistleblowers unprotected by special legislation fare any better than in the United States of America where legislative protection is, in theory, available.

In July 1992, the results of a survey of federal employees in the United States of America on their knowledge of the strengthened whistleblowing statute were released.<sup>18</sup> These showed that although 83% of the employees surveyed were aware that there was a law to protect whistleblowers, 73%

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Department of Attorney-General, "Defence of Public Interest and Protection for 'Whistleblowers'" in Review of Commonwealth Criminal Law, *Final Report* (AGPS, Canberra 1991) Ch 32; Starke, "The Protection of Public Service Whistleblowers" (1991) 65 *ALJ* 205 at 252.

17 "Integrity and Ruined Lives" in *Time Australia* No 42, 21 October 1991, pp46-51; Jos, Tomkins & Hays, "In Praise of Difficult People: A Portrait of the Committed Whistleblower" (1989) 49 *Public Administration Review* 552.

18 USA, General Accounting Office, *Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal* (USA, General Accounting Office, Washington DC 1992).

did not know *how* the law safeguarded them. Though 93% said they supported the idea of employees in their agency reporting misconduct, and 26% believed that it was a problem in their agency, 38% indicated they were hesitant or unwilling to report such behaviour. Only a little more than half (57%) said they were willing to report misconduct. Fear of the likely response continued to be a paramount consideration, with only 13% of employees believing the protection offered to be adequate. There is no doubt that American federal employees remain acutely aware of their vulnerability and of the danger that an invitation to dissent under the whistleblower legislation may serve as a trap.

### **Motivation**

In framing any legal response to whistleblowing it must be recognised that diverse forms of conduct fall within its ambit. The common element is that of an act of an employee revealing information about the illegal or harmful activities of their employer. However, the manner of disclosure may be overt or covert; the revelation may be made internally within the structure of the organisation, or externally. If externally, it may be to the public at large via the media, or to some other body with or without any direct jurisdiction or obligation to investigate. The complaint may come from a current employee, or a former one. The accusation may be based on facts of doubtful veracity. The underlying motivation may be the highest altruistic concern for the public good, or mercenary benefit, or malice and ill-will. The informant may be innocent of complicity, or may be seeking immunity from prosecution or a reduction in sentence for their role in the wrongdoing. The person may come forward voluntarily, or under duress and may have been cultivated as an informer by police or other agencies with an enforcement interest in the alleged misconduct.

Even if it were possible to differentiate disclosure driven by altruism from that moved by baser motives, such as greed or malice, motivation is rarely so clear cut. Deliberate disclosure with the best of intentions may still adversely affect the safety or defence of the country, as in the case of disclosure of defence information by anti-war protesters. A person may be pursuing a general principle (eg removal of unjustified discrimination), yet success on the point of principle will produce, for them, an immediate and direct personal benefit. An accusation in good faith may be based on little more than supposition and innuendo. While no legislative protection should be offered to those who maliciously disseminate untruths, well meaning informants may assert things that turn out to be wrong. A 'result-oriented' approach is one which concentrates on the extirpation of corruption or

incompetence in government and minimises concern with the whistleblower's motivation. Those who concentrate on the moral justification of the action will regard the rectitude of the whistleblower as important in deciding whether to provide legal shelter. The draft Queensland Bill and the South Australian Act take the former approach and recognise that motives are often mixed and high principle may be contaminated by feelings of revenge, or undermined by negligence in confirming the facts upon which the complaint depends. Under the Queensland draft, in order to be eligible for protection the whistleblower must *honestly believe on reasonable grounds* that the information disclosed *tends to show* a matter of illegality etc.<sup>19</sup> In South Australia, the person disclosing must *believe on reasonable grounds* that the information is *true or that it may be true and is of sufficient significance to justify disclosure*.<sup>20</sup> Remedial action may still be refused if the disclosure is frivolous, vexatious, trivial, misconceived or lacking in substance (Qld), or if the person knows the disclosed information is false or is reckless about whether it is false (SA).<sup>21</sup> Deliberately false disclosures are subject to criminal punishment.<sup>22</sup>

### **The Level Of Wrong-Doing**

There is a set of countervailing interests restraining efforts to encourage whistleblowing. Consideration must be given to the personal privacy, psychological well-being, professional reputation and political future of the persons against whom the allegations of incompetence or illegality have been made. Because of uncertainty regarding where the balance lies, it was thought better to define the categories of disclosure which are being encouraged under statutory protection in order to reduce the need for potential whistleblowers to make personal moral judgments about when a matter is sufficiently grave to warrant risking the reputation and morale of those about whom the complaint is being made.

It is not at all self-evident where the line should be drawn. Should it be set at violations of statutes or, more broadly, at breaches of government policy and administrative standards? Should it be widened to cover allegations of

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19 *Whistleblowers Protection Bill* 1992 (Qld) cls 10-13.

20 *Whistleblowers Protection Act* 1993 (SA) s5.

21 *Whistleblowers Protection Bill* 1992 (Qld) cl 17(1); *Whistleblowers Protection Act* 1993 (SA) s10(1).

22 *Whistleblowers Protection Bill* 1992 (Qld) cl 65(1) (maximum penalty: fine or three years imprisonment); *Whistleblowers Protection Act* 1993 (SA) s10 (fine or two years imprisonment).

waste, mismanagement and incompetence? Does the probability of danger to public safety add additional weight in favour of disclosure? The drafters of the Australian legislation did not wish to use a general formula to provide the criteria for determining permitted disclosures, for example, "in the public interest" or "official misconduct" (though they could not avoid the use of qualifying adjectives such as "serious" and "substantial"). In South Australia, immunity from civil and criminal liability and protection from acts of victimisation are offered to those who make appropriate disclosures of "public interest information".<sup>23</sup> This is defined as information that tends to show that a public officer is guilty of maladministration in the performance of official functions, or which tends to show that any adult person, body corporate or government agency has been engaged in

- (i) an illegal activity; or
- (ii) in an irregular or unauthorised use of public money; or
- (iii) in substantial mismanagement of public resources; or
- (iv) in conduct that causes a substantial risk to public health or safety, or to the environment.

The proposed Queensland legislation identifies the categories of disclosure for which protection is available, as follows:<sup>24</sup>

- (1) conduct that constitutes an offence under any local Act of Parliament;
- (2) a substantial and specific danger to the health or safety of the public or to the environment;
- (3) a serious, specific and imminent danger to the health or safety of the public;<sup>25</sup>
- (4) conduct that constitutes misconduct within the meaning of the *Criminal Justice Act 1989* (Qld);

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23 *Whistleblowers Protection Act 1992* (SA) s4.

24 *Whistleblowers Protection Bill 1992* (Qld) cls 10-13.

25 This category is included in addition to the one in (2) because disclosure in (2) may only be made to a proper authority while disclosure in (3) may be made to anyone, including the media.

- (5) conduct of a public official which constitutes misconduct punishable as a disciplinary breach; and
- (6) conduct of a public official which constitutes negligent, incompetent or inefficient management, of or within a public sector unit, resulting or likely to result, directly or indirectly, in a substantial waste of public funds.<sup>26</sup>

## OBLIGATIONS OF POTENTIAL WHISTLEBLOWERS TO SECRECY

### Generally

Since much of the work of government does involve communication of information to the public, civil servants should only be disciplined for disclosing information which they were originally under a duty not to reveal. This duty may arise in a number of ways. First, and most commonly for those engaged under contract, it may appear in the conditions of their employment. The common law imposes on all employees general obligations of skill and honesty in the discharge of their duties, secrecy in relation to matters to be treated as confidential, and good faith.<sup>27</sup> These are implied in any contract of employment. From the whistleblower's point of view, there is the important qualification that, at common law, the right of an employer to fire employees at will is subject to a public policy exception that renders such arbitrary dismissal unlawful if the cause for dismissal was the employee acting in the public interest in protecting public health, welfare or safety.<sup>28</sup>

Nonetheless, employees of government working in sensitive areas may be called upon to enter into secrecy agreements designed expressly to exclude this protection and intended to be binding even after the employment has

26 The *Whistleblowers Protection Act* 1989 (US) refers to:  
Information by an employee, former employee or applicant for employment which the employee, former employee, or applicant reasonably believes evidences:

- (a) a violation of any law, rule, or regulation; or
- (b) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

27 That is, an obligation to avoid private conflict of interest.

28 Cripps, "Protection from Adverse Treatment by Employers: A Review of the Position of Employees who Disclose in the Belief that Disclosure is in the Public Interest" (1985) 101 *LQR* 506; Cripps, *The Legal Implications of Disclosure in the Public Interest* (ESC Publishing, Oxford 1986).

ended. Or the agreements might call for the employees to submit material intended for publication to a government agency for approval or editing prior to publication. Secondly, the obligation may arise under the secrecy provisions of the legislation defining the function of the particular agency of government. There are numerous areas of government service in which, independent of contract, statutory provisions requiring secrecy by public officers apply. These are not only designed to protect the files and records of law enforcement and investigation agencies such as police, national security agencies, and anti-corruption bodies, but also those of revenue gathering ones, such as taxation, or customs and excise departments, and ones concerned with the allocation of health and welfare benefits. In addition, statutes of more general application, such as the *Privacy Act* 1988 (Cth) reinforce the obligation to respect the privacy of personal information gathered by government departments. Thirdly, apart from legislation covering specific branches of government, criminal legislation of general application is also aimed at protecting government records or punishing actions which may involve unauthorised access to state secrets; eg espionage.<sup>29</sup> Fourthly, civil proceedings for infringement of copyright can be brought where the gathering of information has involved unauthorised copying of and unfair dealing in government papers. Fifthly, there is the principle that, irrespective of particular contractual or statutory obligations, the superior courts will, as a matter of equity, restrain the publication of confidential information improperly obtained, or information imparted in confidence, which ought not to be divulged.

In its treatment of this last head, the High Court of Australia has indicated that, in its view, governmental claims to confidentiality have to be tempered by reference to the public interest:

The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. The disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations

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<sup>29</sup> *Crimes Act* 1914 (Cth) s78. See also s70 (disclosure of information by Commonwealth officers) and s79 (official secrets).

will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.<sup>30</sup>

### **The Public Interest**

The two sides of the public interest element in this principle of equity were again adverted to by the High Court in the *Spycatcher* case.<sup>31</sup> This was one in which the court refused an application by the Attorney-General of the United Kingdom for an injunction against a former officer of the British Security Service, now resident in Australia, and the publisher of his memoirs. The High Court held that this was, in substance, a claim to enforce a governmental interest of a foreign state which was, as such, unenforceable in Australia. After observing that "no doubt an Australian court, in appropriate circumstances, will enforce an obligation of confidentiality on the part of a member of ASIO", the court went on to say that "even in such a case the court may be called upon to consider whether the Australian public interest in publication overrides the interest in preserving confidentiality".<sup>32</sup>

Public interest defences which would assist a whistleblower can also be found in a number of other areas such as defamation, where the defence of truth or justification is available if the content of the whistleblower's accusation was true. Similarly, fair comment on a matter of public interest, or qualified privilege in relation to communication of information to someone who had a relevant interest or duty to receive it, are also open as defences. But even if wholly untrue, statements made in the course of parliamentary or judicial proceedings will be protected by absolute privilege.

### **TO WHOM SHOULD THE WHISTLEBLOWER TURN?**

#### **Generally**

Once the whistleblower decides the time has come to lay bare the faults of government, the choice has to be made whether to 'go public', hoping that notoriety will provoke change, or to stay 'in-house', trusting that existing review structures can handle the matter. The competing interests at stake are those of the whistleblower, the person or persons whose actions within the government agency will be impugned and the position of the government

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30 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51-52.

31 *Attorney-General (UK) v Heinemann Publishers* (1988) 165 CLR 30.

32 At 44-45.

agency itself. The existence of internal reporting procedures emphasises the primacy of the interests of the agency and the personal and professional reputations of those within it whose conduct is open to criticism. These procedures stress internal loyalty and harmony. External channels of complaint increase the level of publicity and emphasise the public's interest in knowing both the substance of the complaint, and the reporting procedures; they invoke the imperative of open government.

### **Internal Channels**

If the essence of whistleblowing is not the creation of uproar and scandal, but the correction of maladministration, the price whistleblowers may have to pay for statutory protection from reprisal is that their disclosures must first be made to an authority invested with the duty of receiving and acting on such complaints. How far should internal channels of complaint be exhausted before taking external action? This turns in part on how well defined and effective are the internal procedures for dealing with complaints. In many cases, no realistic system exists. This is one of the matters addressed by the Australian legislation. Even if internal processing of complaints is the avenue of first recourse, exceptions must be allowed to cover situations in which the whistleblower believes that the person or unit to whom they would ordinarily be obliged to report is the cause of the grievance, or where there is some statutory or legal duty to disclose evidence of wrong-doing to some outside entity such as an anti-corruption agency.

Part of the structural reforms in government service contained in the proposed Queensland whistleblower legislation, but not taken up in the South Australian Act, is that government agencies are to be directed to establish better internal procedures by which employees and others may lodge complaints or make disclosures in the public interest in relation to the functions of those agencies. As part of this reform, an obligation is to be imposed on all agencies about whom complaints have been made to publish relevant information in their annual reports of both the nature of the grievances and the remedial action taken in dealing with them.<sup>33</sup>

### **External Channels**

Those who are not confident of being afforded protection for disclosing a matter of wrong-doing internally should not be disadvantaged because they have chosen to make the disclosure to some external body. To insist that no

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33 *Whistleblowers Protection Bill 1992 (Qld)* cl 29.

protection will be afforded if the person goes public 'prematurely' would be to inhibit reporting of wrong-doing. After all, the department complained of itself is an interested party, no matter how well structured its internal procedures for handling complaints. The availability of an external avenue of complaint is needed in order to tip the balance in favour of revelation. The Queensland recommendations are that whistleblower protection legislation should allow for public interest disclosures to be made either through internal procedures, or via designated external authorities. It is not to be a pre-condition of eligibility for protection that the disclosure first be made through the internal procedures of the relevant government department.<sup>34</sup> However to gain the protection of the proposed legislation, the disclosure must be to a proper authority. This is the *quid pro quo* for the softening of the usually rigorous standards which the law requires for substantiation of allegations of personal impropriety.

The view has also been taken that the task of administering a system of whistleblower protection can be performed by enhancing the reporting, investigative and protection mechanisms of existing government agencies which already have a role to play in investigating complaints, rather than requiring complaints to be made to a new single external organisation established to administer the scheme, as in the United States of America. A number of bodies have been assigned to cover whistleblowing in relation to different aspects of the public sector. In Queensland, these are proposed to include the Criminal Justice Commission, the Ombudsman, Parliamentary Committees, and an Office of Special Counsel. In South Australia, the appropriate authorities to whom disclosures under the Act may be made are Ministers of the Crown, the police, the Auditor-General, the Police Complaints Authority, the Commissioner for Public Employment, the Chief Justice (in relation to complaints about the judiciary), the Ombudsman etc. Each is subject to a cloak of confidentiality when dealing with matters under the proposed new legislation. Under the Queensland draft, when more than one authority is required to take action, they may enter into arrangements with each other to avoid duplication of action.<sup>35</sup> It is further proposed that, if the informant has knowledge that tends to show a "serious, specific and immediate danger to the health or safety of the public", the disclosure may

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34 Qld, Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* p13.

35 *Whistleblowers Protection Bill 1992* (Qld) cl 18.

be to anyone, including the media, and still fall within the protection offered by the legislation.<sup>36</sup>

## MECHANISMS FOR PROTECTING WHISTLEBLOWERS

### Protection From Retaliation In Employment

The central features of whistleblower legislation are the attempt to create statutory protection from retaliatory measures in employment and to remedy the harm if reprisals are taken.<sup>37</sup> In Queensland, the nature of the protection offered (whether the reprisal comes in the form of discrimination by superiors having employment-related powers over the whistleblower or harassment by intimidation by co-workers) is fourfold. First, there is a criminal prohibition on persons taking, attempting to take or conspiring to take a reprisal against another because, or in the belief that, anyone has made or may make a public interest disclosure.<sup>38</sup> A "reprisal" means any conduct causing detriment.<sup>39</sup> Unlawful reprisal is to be a criminal offence punishable by a fine of 167 penalty units<sup>40</sup> (ie \$10,020) or three years imprisonment. If the defendant is a corporation, the penalty is ten times higher at 1667 penalty units (\$100,020).<sup>41</sup>

Secondly, each authority empowered to investigate a whistleblowing complaint will be obliged by the statute to provide assistance to the whistleblower by way of counselling and advice on the protections and remedies available under the Act.<sup>42</sup> The provision of counselling services is aimed at facilitating approaches to the person against whom a complaint of reprisal has been made, in order to resolve the matter, if possible, by negotiation.<sup>43</sup> Ultimately, the complaint may be referred to the Criminal Justice Commission which may itself either negotiate or use its protective

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36 *Whistleblowers Protection Bill 1992 (Qld) Part 2*; Qld, Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* paras 6.151-6.152.

37 See Qld, Electoral and Administrative Review Commission, *Protection of Whistleblowers* (Issues Paper No 10, 1990) and Starke, "The Protection of Public Service Whistleblowers" (1991) 65 *ALJ* 205; 65 *ALJ* 252.

38 *Whistleblowers Protection Bill 1992 (Qld)* cl 41.

39 Clause 4.

40 In Queensland, penalty units are worth \$60 each - *Penalty Units Act 1983 (Qld)* as amended (originally \$50).

41 In South Australia the act of victimisation is to be dealt with as a civil matter under the *Equal Opportunity Act 1984 (SA)* s86; *Whistleblowers Protection Act 1993 (SA)* s9.

42 Not included in the South Australian Act.

43 *Whistleblowers Protection Bill 1992 (Qld)* cl 55.

powers on behalf of the whistleblower.<sup>44</sup> A Whistleblowers Counselling Unit is to be created within the Official Misconduct Division of the Commission.<sup>45</sup>

Thirdly, there is a general statutory limitation of action which relieves anyone who makes a public interest disclosure falling within the proposed Act from any civil or criminal liability.<sup>46</sup> This immunity does not extend to any personal criminal or civil liability the complainant may have incurred through their own behaviour.<sup>47</sup>

Fourthly, the proposed legislation contemplates that a whistleblower may no longer be able to continue in their work setting and may have to be transferred, or if no longer employable, compensated. These measures include a statutory cause of action for damages, including exemplary damages, for the detriment suffered;<sup>48</sup> injunctive relief;<sup>49</sup> powers to order the relocation of the officer at risk of reprisal;<sup>50</sup> and the preservation of any existing remedies open to the employee, for example as disciplinary and grievance appeals. Furthermore, if the whistleblowing takes place during proceedings before a court or a tribunal, the court itself may refer the disclosure to a proper authority under the legislation for action to protect the employee against retaliation.

### **Protection From Prosecution Under A Substantive Defence Of Public Interest**

Whistleblowers face the paradox that criminal sanctions may be threatened against them for their unauthorised disclosure of information touching upon the government's own illegality. The Australian proposals expressly provide that anyone who is subject to a statutory duty to maintain confidentiality with respect to a matter is taken not to have committed an offence if they make a disclosure under the protection of a *Whistleblower Act*. However, it has also been suggested that a new and broader substantive defence of 'public interest' should be introduced to protect whistleblowing public servants prosecuted for disclosures outside the Act. The suggestion came from a committee under a former Chief Justice of the High Court of Australia (Sir Harry Gibbs) in the course of undertaking a

44 *Whistleblowers Protection Bill* 1992 (Qld) clause 35.

45 Clauses 36-37.

46 Cl 39; *Whistleblowers Protection Act* 1993 (SA) s5.

47 *Whistleblowers Protection Bill* 1992 (Qld) cl 40.

48 Clause 44.

49 Clauses 45-52.

50 Clauses 58-62.

review of Australian federal criminal law. In its 1991 final report, the Gibbs Committee noted that in recent years in Australia instances of official corruption and illegality had been usefully brought to public notice by the action of the media. While it called for the continued criminalisation of unauthorised disclosure of government information, especially when dishonesty was involved, it was prepared to allow a new statutory defence for whistleblowers charged with offences involving disclosure of information by Commonwealth officers in these terms:

Where an employee or contractor of the Commonwealth or any Commonwealth agency reasonably believes that information in his or her possession evidences

- (i) an indictable offence against a law of the Commonwealth, State or Territory;
- (ii) gross mismanagement or a gross waste of funds; or
- (iii) a substantial and specific danger to public health or safety, *he or she may, regardless of any requirement of law, disclose that information*
- (iv) to the officer in the agency to which he or she belongs designated to receive such complaints;
- (v) (in the case of a member of the intelligence or security services) to the Inspector-General of Intelligence and Security;
- (vi) (in the case of other persons) to the Ombudsman (or such other agency as the Government chooses),

and such officer or agency shall keep a record to be published in his or her annual report of the number and nature of these complaints and the nature of the response thereto.<sup>51</sup>

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51 Aust, Department of Attorney-General, "Defence of Public Interest and Protection for 'Whistleblowers'" in Review of Commonwealth Criminal Law, *Final Report* (AGPS, Canberra 1991) Ch 32.

## Protection From Identification Under Public Interest Immunity Privilege

Keeping the actual identity of the whistleblower a secret has always been regarded as an important protective mechanism. It has long been recognised that the persons who are the means by which detection of crime is made should not unnecessarily be disclosed.<sup>52</sup> Thus, where the whistleblower has been cultivated as a police informer, public interest immunity may be invoked to prevent their public identification. This permits a police officer to refrain from answering questions in cross-examination which would lead to the identification of an informer.<sup>53</sup> The courts have said that the public interest which justifies the suppression of relevant information about the identity of informers is so significant that the categories of public interest which may call for such protection are not closed. Indeed, there has been such a marked extension of the scope of public interest immunity in recent House of Lords decisions, in cases such as *D v National Society for the Prevention of Cruelty to Children*,<sup>54</sup> as to suggest that the immunity can be readily claimed for the benefit of whistleblowers in non-police contexts.<sup>55</sup> Certainly it applies where the information is supplied to anyone who is under a legal duty to investigate, prevent or prosecute crime or otherwise has a legal power to ensure compliance with the law.<sup>56</sup>

## Immunity For Witnesses Appearing Before Anti-Corruption Bodies

The *Bill of Rights 1689* (UK) asserts that "freedom of speech and debate or proceedings in Parliament are not to be impeached or questioned in any court or in any place out of Parliament". This provision, as adopted in Australia, means that persons who give evidence to parliamentary

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- 52 *R v Hardy* (1794) 24 How St Tr 199; *Marks v Beyfus* (1890) 25 QBD 494.
- 53 Eagles, "Evidentiary Protection for Informers - Policy or Privilege?" (1982) 6 *Crim LJ* 175; McNicol, *Law of Privilege* (Law Book Company, Sydney 1992), p416.
- 54 [1978] AC 171.
- 55 The informer rule is not limited to information supplied to the police. The rule itself ante-dates the establishment of a permanent police force by at least a century. It must, of course, be recognised that not everyone supplying information to law enforcement bodies is an informer. Most fully expect to give evidence.
- 56 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. In *Rensonnet v Carpenter* (1911) 156 CCC Sessions Papers 261, giving information directly to the DPP was held to be within the informer rule. This means it includes disclosure to customs, revenue, police and other specialist statutory bodies.

committees do not incur any liability for the evidence thus provided. Statutory protection is also given to those who give evidence before Royal Commissions or other special inquiries. In Queensland, the statute which authorises special inquiries makes it an offence for an employer to dismiss or prejudice an employee on account of the latter having given evidence to a Commission of Inquiry.<sup>57</sup>

Australia already possesses a number of standing anti-corruption bodies with investigatory and hearing powers. The Independent Commission Against Corruption (NSW),<sup>58</sup> and the Criminal Justice Commission (Queensland),<sup>59</sup> are examples. In New South Wales, no criminal or civil liability attaches to any person for supplying information in compliance with any of the provisions of the governing Act.<sup>60</sup> The Queensland *Criminal Justice Act 1989* (Qld) expressly makes it an offence to victimise anyone who has given evidence to or assisted the Commission in discharging its functions. Further, pursuant to the *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1989* (Qld), the Commission has the power to seek injunctions from the Supreme Court to restrain persons who are breaching the prohibition on victimisation. Persons called as witnesses at the in-camera investigatory hearings held by the federal National Crime Authority<sup>61</sup> are protected from identification and from the use of their evidence in subsequent litigation. Australia is also beginning to see the enactment of special legislation to provide new legal identities for persons who are at risk because they have been witnesses in serious criminal prosecutions.<sup>62</sup>

### Rewards and Indemnities for Whistleblowers

In the United States of America, there is in place a system whereby state and local law enforcement agencies who co-operate with the federal government in supplying information which leads to seizures of criminal assets can receive up to 25% of the forfeited assets in the form of cash or property to be used in support of their on-going enforcement activities. This form of asset sharing is authorised under the *Comprehensive Crime Control Act 1984* (USA).<sup>63</sup> In the five years between 1986 and 1991, almost \$859

57 *Commissions of Inquiry Act 1950* (Qld) s23.

58 *Independent Commission Against Corruption Act 1988* (NSW).

59 *Criminal Justice Act 1989* (Qld).

60 *Independent Commission Against Corruption Act 1988* (NSW) s109(5).

61 *National Crime Authority Act 1984* (Cth).

62 *Witness Protection Act 1991* (Vic).

63 There is also similar legislation allowing the US Customs Service to distribute forfeited assets.

million in cash and property was shared by the Justice and Customs Departments with state and local police agencies.<sup>64</sup> In 1990, new legislation authorised the payment to whistleblowers of up to US\$50,000 for information leading to the prosecution of savings and loan offenders.<sup>65</sup> In Australia, the drafters of the Queensland whistleblower legislation debated the introduction of a system of rewards along US lines, but declined to institute this. Nonetheless, the idea is still being canvassed in Australia. There has already been a report of the proposed use of rewards of up to 50% of the value of recovered assets to informers at a federal level.<sup>66</sup> This new policy was being entertained in relation to the major central government departments including those dealing with taxation, social security, veterans' affairs, primary industries, customs, education and defence.

Another, more indirect, form of reward for a whistleblower is the use of indemnities. These are written undertakings of immunity from prosecution given to witnesses by the prosecuting authorities in return for giving evidence on behalf of the Crown. Such an indemnity promises that no prosecution will be taken against a specified person arising out of particular offences in which they were a participant and to which they are to give evidence. There is also in Australia a modern and controversial practice of 'prospective' indemnities in which the prosecuting authorities offer a person undertaking to commit an offence in an entrapment situation an indemnity against being prosecuted for any defined future crimes which may be committed in the course of exposing other offenders. Under the *Director of Public Prosecutions Act 1983* (Cth), the Federal Director of Public Prosecutions may give an undertaking that information produced by a person will not be used in evidence against that person. On such an undertaking being given, the information is no longer admissible in evidence against the person in any civil or criminal proceedings in a court exercising federal jurisdiction.<sup>67</sup>

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64 USA, General Accounting Office, *Asset Forfeiture: Improved Guidance Needed for Use of Shared Assets* (USA, General Accounting Office, Washington DC 1992) pp3-4.

65 Marx, "Some Reflections on *Undercover*: Recent Developments and Enduring Issues" (1992) 18 *Crime, Law and Social Change* 193 at 199; Marx, *Undercover: Police Surveillance in America* (University of California Press, Berkeley 1988).

66 Davies, *Big Brother: Australia's Growing Web of Surveillance* (Simon and Schuster, East Roseville 1992) p12.

67 *Director of Public Prosecutions Act 1983* (Cth) s9(6A). The circumstances in which such an indemnity may be granted are discussed in Aust, Department of Attorney-General, *Prosecution Policy of the Commonwealth: Guidelines for the*

## Preservation Of Legitimate Access Under Freedom Of Information Acts

The need to rely on whistleblowers is reduced when external accountability is enhanced by information on the functioning of government being more freely available. Federally, the *Freedom of Information Act* 1982 (Cth) provides for access, subject to certain restrictions, to documents held by ministers and government agencies. There are similar Acts at State level. Under the legislation anyone, whether or not a party to a dispute, or affected by a Commonwealth government decision, may obtain access to any document held by a federal agency, unless it falls within one or other of the exemptions or exclusions specified by statute. These include documents affecting national security, defence, international relations, cabinet deliberations, documents of the Executive Council, those affecting law enforcement and public safety, documents to which express legislative secrecy provisions apply, and papers affecting personal privacy, or subject to professional legal privilege, etc. These exemptions are 'permissive' to the extent that an agency is not bound to refuse disclosure of a document which falls within the exempt category.<sup>68</sup> Persons giving access to information as required under the Acts do not commit a criminal offence.<sup>69</sup>

### Fundamental Values As Protection

In the United States of America, the initial legal protection for whistleblowers was simply their first amendment right of freedom of speech. Though the Australian Constitution does not offer an express guarantee of freedom of speech or of the press, as in the United States of America, the right to speak out and criticise government is coming to be recognised as an implicit one. First, the Australian courts are hesitant to restrain disclosure of government information as a breach of confidence unless there is evidence that the disclosure is likely to injure the public interest. Thus, in 1980, in *Commonwealth v John Fairfax & Sons Ltd*,<sup>70</sup> it was said, in the High Court of Australia, that "it is unacceptable in our democratic society that there should be restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action". Secondly, late last year, in *Australian Capital Television Pty Ltd v*

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*Making of Decisions in the Prosecution Process* (AGPS, Canberra 1986) paras 4.12-4.16.

68 *Freedom of Information Act* 1982 (Cth) s14.

69 Section 92.

70 (1980) 147 CLR 39 at 52.

*Commonwealth*,<sup>71</sup> a majority of judges in the High Court overturned restrictions imposed upon political broadcasts as unconstitutional because they would have severely impaired fundamental freedoms to discuss public and political affairs and to criticise federal institutions. They held that there was an implied freedom of political discourse. The scope of this implied freedom has not been settled, but it seems apt to assist those whistleblowing public servants who would use the media to bring to public attention governmental maladministration.

## **CONCLUSIONS**

### **Ambivalence Towards Whistleblowers**

The current inhospitality of the legal system to whistleblowers is a product of communal ambivalence towards them. Admiration for the moral courage and social utility of those who defy the system in order to expose corruption or incompetence in the body politic is balanced by discomfort at their perceived disloyalty and by an awareness of the danger of encouraging mischief and malcontents. Current common law and statute sends out dual messages: breaches of confidence may be permitted or punished. The paradox is that if there is a moral imperative that the community accept an obligation to provide better protection for those who have the civic courage to disclose matters which it is in the public interest to have revealed and corrected, it comes at the cost to government of betrayal from within and the bestowal of a right on individual employees to assess unilaterally the merits of their own complaint. It seems to involve an admission that not only is government less efficient than it would like to appear, but also that control of its excesses may ultimately lie in the hands of those individuals who, though usually not the ones directly responsible for correcting the abuse, choose to defy established lines of accountability.

### **The Elusive Balance**

Any effort to increase the protection of whistleblowers is an exercise of subtle balance. Once the equilibrium produced by inertia is upset by evidence of institutional corruption and incompetence (which is the usual stimulus for interest in whistleblower legislation), the government has to face the reality that far more of its law enforcement is reactive than proactive. It is more dependent on citizens and organisations reporting information about themselves and others, whether this be by way of anonymous crime reporting, neighbourhood watch information exchange,

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71 (1992) 66 ALJR 695; 108 ALR 577.

routine transmission of information on unusual financial transactions, or other forms of information sharing about actual or potential wrong-doing, than on strategic initiatives taken by enforcement agencies. One of the advantages of offering better protection for whistleblowers through more formal procedures for revelation of illegality, is that government is now overtly seeking to elicit criminal information from those in a position to know, thus reducing its reliance on more covert and problematic undercover and entrapment methods.

But if the intended legislation makes it too hard for whistleblowers to get the protection which it offers, it will be ignored, and potential sources will continue to be inhibited by the risk of reprisal. This would be counter-productive and wasteful. On the other hand, if it makes it too easy to recklessly or maliciously allege wrong-doing, it will undermine the integrity and morale of government by subjecting government agencies to repeated and unwarranted demands to defend themselves. It will also put at risk the justifiable confidentiality which attaches to many political, social, or commercial aspects of their work. It is therefore not surprising that a central feature of the American whistleblower legislation and that proposed or enacted in Australia is that, although it does not prohibit disclosure to the media, the statutory protection against recrimination and the access to compensatory measures it offers is ordinarily only available if complaints have been communicated through confidential investigatory channels, thus protecting the organisation and its impugned staff from premature and potentially damaging publicity. It relies on the assumption that the majority of employees of government have no wish to engineer a confrontation with their organisation, either through the media, or through the intervention of another government agency, if there are adequate means of having the matter dealt with internally in an honest, confidential, and fair manner.

In setting the balance in Australia, the drafters did not believe that the state needed more investigative authorities, nor more bureaucratic structures. They took the view that the best course was to improve internal mechanisms for review of complaints and to draw on the range of existing authorities already holding responsibility for and possessing expertise in different sectors of public administration.

### **Continued Vulnerability of the Whistleblower**

Even though an attitude may be developing in which informing is seen as an element of good citizenship, whistleblowers continue to be at risk of rejection and isolation as persons whose actions are the "dissident act[s] of

lone crusaders".<sup>72</sup> It is therefore wise for counselling and compensatory elements to be included in the whistleblower legislation. The United States experience with the first whistleblower legislation,<sup>73</sup> and the result of the most recent survey of federal employee opinion,<sup>74</sup> casts serious doubt on the ability of current administrative or legislative schemes to protect whistleblowers effectively against the limitless capacity of large organisations to intimidate those who have defied them.

On the other hand by enacting whistleblower legislation as evidence of a commitment to the containment of corrupt and incompetent administration, the legislature is seeking to arrest the debilitation of morale which inevitably occurs when government itself appears to have placed insuperable obstacles to the ability of truth and honesty to prevail.

De Maria regards the influence of whistleblowing as self-limiting because of its individualistic nature and "its inability to reach down to the fundamental patterns of status and power at the heart of bureaucratic life".<sup>75</sup> He fears that it is a form of dissent which is hard to protect by conventional legal measures because of the ease with which departments can reframe their responses in order to resist the law and create a deterrent climate for others who are inclined to follow suit. In his view:

Rather than only constructing a protective policy for whistleblowers the government should be stimulating more collectivised workplace dissent - whistleblowing as a class action in other words. This could be achieved through a range of strategies including: encouraging the development of more public interest lobbies outside the bureaucracy; establishing full defamation immunities for dissenters; incorporating 'speak-out' clauses in professional associations codes of ethics; establishing whistleblower support groups within the workplace ... which provide socially conscious programs for young professionals such as lawyers, doctors and engineers; a strong place for discussion

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- 72 De Maria, "Queensland Whistleblowing: Sterilising the Lone Crusader" (1992) 2 *Aust J of Social Issues* 248 at 251.
- 73 McMillan, "Blowing the Whistle on Fraud in Government" (1986) 56 *Canberra Bulletin of Public Administration* 118 at 122.
- 74 USA, General Accounting Office, *Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal* (USA, General Accounting Office, Washington DC 1992).
- 75 De Maria, "Queensland Whistleblowing: Sterilising the Lone Crusader" (1992) 2 *Aust J of Social Issues* 248.

of dissent in continuing education programs to reinforce the norm of social responsibility ... [and] an American-type constitutional protection for free speech as well as an employees' Bill of Rights.<sup>76</sup>

### **The Symbolic Nature of the Legislation**

This gives a clue to the essential nature of the new protective legislation. Its value is largely symbolic. It is as much to do with ethics, education and morale as with law. Its worth is less in its immediate efficacy in exposing wrongdoing than its ability to bring about a shift in attitude from the notion of the whistleblower or informer as a person betraying a secret to one revealing a truth. In the long haul the solution cannot be one that involves tagging an employee as a whistleblower and then trying to protect the person thus singled out. The emphasis has to be on creating a climate in which agencies possess the managerial willingness and internal capacity to investigate themselves in an open and direct manner to ensure that they conform to their own publicly stated ethical and professional standards. External authorities will still be called upon to investigate disputed matters and to provide the necessary further checks, but the need to go public to expose misconduct will be reduced by a greater commitment to open government. Indeed the attitudes and skills of the internal dissenters could be harnessed to improve the agency's own performance. That openness will be advanced by the incorporation of whistleblowing obligations in the ethical codes of the professional associations whose members are in government service and in the codes of practice for all public sector employees.

It is important that too great a concentration on the protection of the whistleblower does not deflect attention from the need to take steps to correct the situations giving rise to the maladministration in the first place. As has been suggested, these require changes of a more fundamental nature than can be achieved by legal fiat alone. The extent to which conservatism is institutionalised and authoritarianism is entrenched within the public sector has to be challenged. New efficiency and managerial practices, improved auditing arrangements and anti-fraud measures, enhanced external accountability, and codes of conduct for government officials have to be brought in. Employees and the general public must be given better access to

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<sup>76</sup> De Maria, "Queensland Whistleblowing: Sterilising the Lone Crusader" (1992) 2 *Aust J of Social Issues* 248 at 258-259.

complaint mechanisms,<sup>77</sup> and new anti-corruption and anti-fraud agencies with teeth have to be part of the reform package if the public interest in competent government, which is at the heart of whistleblowing, is to be fully respected.

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<sup>77</sup> Including ones which maintain their anonymity through techniques such as 'complaints hot lines'.