ARTICLES

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POLICY CONSIDERATIONS IN THE FORMULATION OF WHISTLEBLOWERS PROTECTION LEGISLATION: THE SOUTH AUSTRALIAN *WHISTLEBLOWERS PROTECTION ACT 1993*[1]

INTRODUCTION

Any consideration of a comprehensive strategy designed to combat fraud and corruption would not be complete without some attention being given to the legal and social situation of those who 'blow the whistle on others'. It is undoubted that those who are, in common parlance, called 'whistleblowers', very often are treated by others with extreme harshness.[2] Those others, be they the persons on whom the whistle is blown, or those whose interests become engaged at a subsequent time, are usually those who, generally for their

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2 See, for example, Fox, 'Protecting the Whistleblower' (1993) *15 Adelaide Law Review* 137, 143–4. A contemporary and very vivid account, often on a highly personal basis, of the experiences of some of Australia's most high profile disputes about whistleblowing can be found in De Maria, *Deadly Disclosures* (1999). The account is colourful and readable. However, as will appear later, the account of the law in the book is to be approached with, at best, extreme caution.

own personal benefit,[3] may be manipulating a system of governance, be it governmental or corporate (usually from the inside), and the legal framework within which whistleblowers may obtain protection from victimisation consequent upon their disclosures. The purpose of this paper is to provide both information about and insight into the complexities that legislation to protect whistleblowers demands and which the South Australian *Whistleblowers Protection Act 1993* was designed to address. The South Australian Act provides a convenient vehicle for the exploration of these ideas because the author was directly involved in its formulation and, therefore, had to think through the appropriateness of every word and phrase. It is not intended to provide a comprehensive overview of the differing (sometimes widely divergent) regimes that have been enacted in other Australian jurisdictions,[4] the United States[5] and, most recently, in England.[6] Such an account would require a very much larger paper.

The initial decision in the early 1990s to enact South Australian whistleblowers protection legislation was grounded in the policy recommendations of, for example, the Report of the Fitzgerald Royal Commission,[7] Ontario Law Reform Commission,[8] and Gibbs Committee.[9] The tide in favour of whistleblowers protection had been flowing strongly in the late 1980s and early 1990s in Australia and overseas.[10] But to fashion the legislative principles which were to govern this powerful and emotive

3 The benefit may be financial or non-financial. While the natural tendency is to think of bribery in terms of profit and money, the fact is that people often blow the whistle on those who are guilty of mistakes or mismanagement and who are trying to protect what is seen to be an error or incompetence. In these cases, the 'benefit' to be protected by the malfeasor is non-financial.

4 Apart from South Australia, see: *Whistleblowers Protection Act 1994* (Qld); *Public Interest Disclosure Act 1994* (ACT); *Protected Disclosures Act 1994* (NSW). In addition, see *Public Service Regulations 1935* (Cth) reg 9. There were various Bills in these and other States. See discussion below.

5 There is a plethora of law in the United States on whistleblowing. See, generally, Anechiarico and Jacobs, *The Pursuit of Absolute Integrity* (1996).

6 *Public Interest Disclosure Act 1998* (UK). See, generally, Gobert and Punch, 'Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998' (2000) 63 *Modern Law Review* 25; Bowers, Lewis and Mitchell, 'Subject Matter for Disclosure', *Solicitors Journal*, 25 Feb 2000, 177.

7 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Poice Misconduct, *Report of a Commission of Inquiry Pursuant to Orders In Council* (1987–1989).

8 Ontario Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (1986).

9 Review of Commonwealth Criminal Law, *Final Report* (1991). This review was chaired by Sir Harry Gibbs, a former Chief Justice of the High Court of Australia.

10 For an account of the American experience, see Fong, 'Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s' (1991) 40 *American University Law Review* 1015.

protection and simultaneously accommodate competing principles was not easy. While there seemed to be *general* support for the *general* principle among interested groups and people, that surface consensus masked considerable divisions about the defensible limits of this idea. As ever, for example, media interests lay in as much protected disclosure as possible. By contrast, for example, the Local Government Association[11] was generally concerned about preserving confidentiality. An observer's perspective always depends on where he or she stands.

The purpose of this paper is to describe how Australia's first[12] *Whistleblowers Protection Act* was formulated and the reasoning that lies behind its provisions. The Bill was originally conceived as part of a package of measures designed to combat, at the legislative level, fraud and corruption.[13] It was announced as a part of the government's response to the final report of the National Crime Authority on South Australian Reference No 2 and was first introduced into parliament on 26 November 1992. After due debate and passage through parliament, it was proclaimed to come into effect on 20 September 1993.[14] The details of the amendments that were proposed and debated during the course of the passage of the Bill are set out in the discussion which follows.

THE FIRST PRINCIPLES

Coverage: Private And Public Sectors?

The Report of the Fitzgerald Royal Commission (the 'Fitzgerald Report') – and its consequences – set the then contemporary Australian national agenda. But the resulting draft Queensland Bill, from which South Australians could work, dealing with whistleblower protection, produced by that state's Electoral and Administrative Review Commission contained seventy sections, several pages of definitions and

11 This association is the peak body representing local government bodies (both city councils and rural district councils) in South Australia.

12 Technically speaking, the first Australian whistleblowers protection legislation was enacted in Queensland via the *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld). But this was merely an interim measure, as the name and contents prove.

13 This package included the enactment of the *Statutes Amendment and Repeal (Public Offences) Act 1992* (SA) which comprehensively overhauled and modernised the criminal offences relating to public sector corruption; the development of a code of ethics for police officers and public sector employees and the establishment of an Anti-Corruption Branch within the South Australian Police Force.

14 SA, *Government Gazette*, 16 September 1993, 1140.

was highly bureaucratic.[15] It involved, for example, the establishment of a Whistleblowers Counselling Unit.

This model did not appeal for a number of reasons. Some general principles were involved.

1. First, it was decided that the legislation should be in such a form and style that it could be read by potential whistleblowers with some chance of understanding, not only as a matter of general principle, but also as a matter of the audience to which such legislation ought to be addressed.

2. Second, a multiplicity of investigating agencies already existed in South Australia. For example, there was the Ombudsman[16] (an independent statutory officer), the Police Complaints Authority[17] (an independent statutory officer to investigate complaints against the police), and the Anti-Corruption Branch of the SA Police Department (with an ex-judicial auditor as oversight).

3. Third, to set up such an entity as a counselling unit (or some other agency) not only threatened to overlap with existing agencies and organisations, it also posed impenetrable difficulties as to an independent location. It would be better to get the general principles right first, and to see if their implementation posed detailed problems. Nevertheless, the Queensland Bill pointed to some decisions of general principle required initially.

These decisions were as follows.

First, what institutions should be subject to a regime of protected whistleblowing? The key problem here turned out to be whether to extend it to the private sector. The Queensland recommendations were that it should.[18] It was decided that this was correct because:

- In public interest terms, the distinction between private and public sector was then and is now blurred and there is every indication that it will be even more blurred in the future. The influence of privatisation and 'outsourcing' of a range of governmental or semi-governmental functions is the most obvious example.

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15 See Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* (1991).

16 Established under the *Ombudsman Act 1972* (SA).

17 Established under the *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA).

18 For a summary of the arguments on this issue in Queensland, see Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Whistleblowers Protection* (1992) 15–16.

- The consequence of entirely excluding the private sector would mean that, if a local council disposed of its own rubbish appallingly, the whistle could be blown on it, but if that same appalling service was contracted to a private company, it could not. This would make no sense.

- There are hard cases at the margins. For example, are universities public or private sector entities?[19]

However, it did make sense to discriminate between private and public sector in terms of matters in which the public interest, in revealing information, outweighs the private interest in concealing something. The private sector could hardly argue that it should be able to conceal information about criminal activity, improper use of public funds, or conduct causing a substantial risk to public health, safety or the environment. On the other hand, while there is a public interest in disclosure of information which, for example, tends to show that a public officer is incompetent or negligent, that is not so with the private sector. There is insufficient public interest in the balance to override the desire of a private company to keep secret the fact that its managing director is incompetent. The legislation was structured to reflect those concerns. Subsequently, the Western Australian Royal Commission came to a similar conclusion:

> While the primary purpose of our proposal is to protect our system of government from the actions of public officials, this inquiry has revealed that it can be the actions of persons in the private sector that put public funds and government itself at risk. For this reason, while the Commission does not now positively recommend that its proposed whistleblowing legislation be extended generally to the private sector, a step which has been taken in the United States of America and which in modified form has been recommended by EARC in Queensland, it is essential at least that it extend to allow disclosures about companies and persons dealing with government where those dealings could result in fraud upon, or the misleading of, government.[20]

Remedies: How To Protect

The next question was what sort of protection to offer genuine whistleblowers. There was no lack of options. The core of debate centres around the protection of the whistleblower's employment from victimisation because of the disclosure of

19 See *The Age*, 10 August 1992, (whistleblowers who exposed fraudulent research).

20 WA, *Report of the Royal Commission Into Commercial Activities Of Government and Other Matters* (1992) 4, 7, 10.

confidential information.[21] Working from the principle that it would not be sensible to create another agency or bureaucracy if a capable one existed, normal industrial grievance tribunals were a possibility to provide such protection. However, this solution would have been quite complex because of the bifurcation between private and public sector rules about such matters as dismissal and avenues of appeal. The Ombudsman had the reputation, experience, powers and procedures; but again, if the private sector was to be included, it would be necessary to amend the Ombudsman's legislation, not only to widen the scope of the powers of that office, but to do so far beyond the traditional role of inspector of *public service* wrongdoing. This would involve a very controversial transformation of that office.

The clue to the solution came from the Gibbs Committee suggestion that unlawful discrimination in Commonwealth Government employment could be dealt with via the Merit Protection and Review Agency.[22] The South Australian Equal Opportunity Commissioner has the powers and procedures, and covers private and public sector employment. Further, the general remit of the Commissioner deals with discrimination in employment on grounds deemed to be contrary to public policy.[23]

The other central component was protection from civil and criminal liability. That is common to all schemes.[24] Other options for protection were a criminal offence of taking reprisals and a public sector disciplinary offence. Both were rejected. The criminal offence was contrary to the general principle of parsimony in the criminal process; that is, the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it. A public sector disciplinary offence was possible, but it could not deal with the private sector part of the legislation, and, in any event, would reveal a certain lack of faith in the ability and willingness of the Commissioner for Public Employment to take appropriate action against public servants who failed to comply with legislative

21 Unsurprisingly, that was the focus of such common law controversy and doctrine as exists on the subject. See discussion below.

22 Review of Commonwealth Criminal Law, *Final Report* (1991) para 32.36. The agency is established under the *Merit Protection (Australian Government Employees) Act 1984* (Cth) and, as its name suggests, protects the merit principle in government employment. The committee noted that the Act would require amendment to give the agency the power to carry out a whistleblower protection task.

23 *Equal Opportunity Act 1984* (SA). Obvious examples are discrimination on the grounds of sex, sexuality, marital status or pregnancy (Part III), race (Part IV) and impairment (Part V).

24 See, for example, Draft Bill Protection of Whistleblowers 1991 (Qld) s 39, Whistleblowers Protection Bill 1992 (NSW) s 13, and Whistleblowers Protection Bill (No 2) 1992 (NSW) s 17.

directions in the public interest. So the original Bill contained the shield of immunity and the sword of unlawful discrimination.[25]

When the Bill was debated in the South Australian Legislative Council, the opposition moved to create a tort of victimisation as an additional option for the victimised whistleblower, subject to the proviso that a person must elect which of the two alternative remedies he or she will pursue.[26] A civil remedy is strictly unnecessary as the South Australian *Equal Opportunity Act* contains power to make the equivalent of injunctive orders and award compensation for loss or damage.[27] The government decided that it would accept the amendment. The real argument against giving a victim a choice of remedy is that the equal opportunity route, unlike the court based option, is designed to reduce confrontation, and encourage conciliation and education if possible. The question was whether that outweighed the benefits of choice. On balance, the matter of principle was too fine to be worth pursuing at the possible cost of defeating the legislation.

DEFINING A WHISTLEBLOWER

It is necessary to define what is meant by a 'whistleblower' before legislation can be enacted to protect the species. It is necessary to define the boundaries of the public interest in powerful protection.

The core of whistleblowing is definable as the disclosure of information in the public interest to an appropriate body for genuine reasons. That definition has three elements: (a) What information engages the public interest sufficiently to warrant this protection? (b) What is the test for genuineness in a whistleblower? and (c) What restrictions, if any, should legislation impose on the ability of whistleblowers to 'go public'? Each question had key implications for the legislation's scope.

What Information?

On the first question, the original Bill contained a definition of 'public interest information':

'public interest information' means information that tends to show:

> (a) that an adult person (whether or not a public officer), or a body corporate, is or has been involved (either before or after the commencement of this Act) -

25 In its enacted form, see *Whistleblowers Protection Act 1993* (SA) ss 5(1) (shield), 9 (sword).

26 See South Australia, *Parliamentary Debates*, 10 March 1993, 1532–3.

27 *Equal Opportunity Act 1984* (SA) s 96.

(i) in an illegal activity; or

(ii) in an irregular and unauthorised use of public money; or

(iii) in conduct that causes a substantial risk to public health or safety, or to the environment; or

(b) that a public officer is guilty of impropriety, negligence or incompetence in or in relation to the performance (either before or after the commencement of this Act) of official functions.[28]

This definition was *relatively* uncontroversial. However, some of its features need elaboration.[29]

- Several of those consulted questioned the restriction of the first part of the test to adults. The answer is an excellent example of the real power of the measure, and an illustration of why it was necessary to be cautious. The definition was limited to information about adults to preserve the confidentiality of the identity, or information that might disclose the identity, of children who are the victims of crime or offenders or alleged offenders. It was thought that legislation should not invade that area of confidentiality. On the other hand, the consequence is that the conduct of a 16-year-old that, for example, poses a substantial risk to the environment remains outside the Act. There was no effective way to frame the legislation to resolve that hiatus without massive consequential complexity.

- Several of those consulted felt uncomfortable with the possible width of the term 'incompetence'. It was originally inserted because it was in the Queensland Bill.[30] On the other hand, the first New South Wales Bill covers 'maladministration' which is extensively defined[31] and this was also in the

28 Whistleblowers Protection Bill 1993 (SA) cl 4(1). The version that came through the legislative process is also s 4(1) of the Act.

29 There are other issues of detail. For example, when the definition referred to a person generally, it was not necessary to include a corporate body because of *Acts Interpretation Act 1915* (SA) s 4, but once the Bill referred to an 'adult person' that may have carried an exclusionary implication. The original Bill was altered before introduction to accommodate a submission that the legislation should apply to information about conduct occurring before the Act came into operation. It does not, of course, apply to disclosures of information made before that date. Again, the Act was proclaimed on 20 September 1993.

30 Draft Bill Protection of Whistleblowers (1991) (Qld) s 11(1)(b).

31 Whistleblowers Protection Bill 1992 (NSW) s 9(2):

> For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction that is:
>
> (a) contrary to law; or

second NSW Bill.[32] The Gibbs Committee recommendations are far more restrictive and require 'gross mismanagement'.[33] The WA Royal Commission referred to the necessity of coverage of allegations about 'the protection of public funds from waste, mismanagement and improper use'.[34] The interim report of the (Finn) Integrity in Government Project also recommended the coverage of 'maladministration'.[35] There was clearly no consensus. In the final analysis, the Local Government Association articulated a very persuasive argument for change, arguing that the public interest concerned the *effects* of incompetence rather than its mere existence. Maladministration is the effect. That was persuasive. Therefore, the Bill was amended to replace 'impropriety, negligence or incompetence' with 'maladministration', defined to *include* 'impropriety and negligence'.[36]

- There was also discomfort with what was perceived to be the vagueness of the descriptive language. The problem from the perspective of legislative drafting is that any attempt to frame law which will, in the public interest, adequately cover the range of possible misconduct in private and public sectors necessarily contemplates a deal of uncertainty. This is demonstrated by the fact that the similar words are used in all Bills and reports on this issue. Because these words and phrases are designed not to have a fixed meaning but to convey a spectrum or continuum of meaning within the parameters of the ordinary meaning of words (they would be resistant to definition but would rather require description) using other words of similar meaning would also be susceptible to criticism as being vague.[37] This would have complicated the legislation unnecessarily.

- When the Bill was debated in the Legislative Council, the government accepted an opposition amendment to add 'the substantial mismanagement of public resources'.[38] The Bill already covered this conduct, but there could be no objection to indicating that explicitly.

(b) unreasonable, unjust, oppressive or improperly discriminatory; or
(c) based wholly or partly on improper motives.

32 Whistleblowers Protection Bill (No 2) 1992 (NSW) s 11(2).

33 Review of Commonwealth Criminal Law, *Final Report* (1991) para 32.32.

34 *Report of the Royal Commission Into Commercial Activities Of Government and Other Matters* (1992) 4, 7, 9.

35 Finn, *Official Information: Integrity in Government Project: Interim Report 1* (1991) 51.

36 See South Australia, *Parliamentary Debates*, 10 March 1993, 1527.

37 A good example is the attempt in New South Wales to define 'maladministration'. That is contained in n 31. The definition is clearly descriptive and indicative, but not more certain.

38 See South Australia, *Parliamentary Debates*, 10 March 1993, 1527.

Disclosure to Whom?

A central question in any whistleblower legislation is whether protection should be restricted to disclosure via 'the proper channels' or whether, and if so in what circumstances, the whistleblower could divulge information to the media. Because this is central, it can be answered only by reference to the basic rationale for the legislation.

If the legislation makes it too hard for whistleblowers to obtain the protection offered, it will be ignored, and people will take the risk of reprisals as they do presently. That would not be a good result. The martyrdom of the whistleblower obscures the truth or otherwise of the allegation, and that is the heart of the matter. Further, a major point of legislating is to try to encourage whistleblowers to do the right thing and go to a responsible authority if that is reasonable in the circumstances. Equally, on the other hand, if the legislation makes it too easy to obtain the protection in the sense of sensational media allegations, it would have a tendency to undermine the integrity of government and the justifiable need for a politically impartial public service to keep some matters confidential; or, undermine the integrity and corporate ethos of a private sector employer and put at risk justifiable commercial and industrial confidentiality.[39]

Fox makes a similar point in a different way. The difference is revealing of the shades of perspective that are brought to this particularly vexed question:

> 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

39 See also the discussion by Fox, above n 2, 150–1:

> 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 or acting on such complaints ... [but] ... [i]n many cases, no realistic system exists. ... 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. ... [T]o gain the protection of the proposed legislation, the disclosure must be made to a proper authority. This is the *quid pro quo*.

> put at risk the justifiable confidentiality which attaches to many political, social or commercial aspects of their work.[40]

Given these perspectives, setting the appropriate balance is not easy. The Gibbs Committee and New South Wales Bills took the position that protection was conditional on disclosure via an official channel.[41] By contrast the Queensland and Western Australian recommendations were that the scheme should not be confined to disclosure via an official mechanism.[42] The rationale for the scheme, as stated above, supports the latter view. In addition, common law contains a vague and ill-defined public interest exception to certain kinds of legal action in relation to the unauthorised disclosure of information.[43] There is some inconclusive authority on its meaning.[44] But the point is that there is an argument that this exception might allow a defence in some cases in which the whistleblower goes beyond proper channels. The legislation was not intended to restrict existing rights. So a non-derogation clause was inserted to save the existing law, whatever it may be.[45] That necessarily meant a tolerance of disclosure of information outside official channels. This

40 Ibid 160.

41 See Whistleblowers Protection Bill 1992 (NSW) s 7(1); Whistleblowers Protection Bill (No 2) 1992 (NSW) s 8.

42 Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* (1991) para 5.74; *Report of the Royal Commission Into Commercial Activities Of Government and Other Matters* (1992) para 4.7.7.

43 This is sometimes called the 'iniquity' rule, so called after the phrasing of its first major appearance in *Gartside v Outram* (1856) 26 LJ Ch 113, 114. Gibbs CJ considered the doctrine without enthusiasm in *A v Hayden* (1984) 59 *Australian Law Journal* 6. See generally Starke, 'The Protection of Public Service Whistleblowers: Part 1' (1991) 65 *Australian Law Journal* 205, 213–19; Stewart and Chesterman, 'Confidential Material' (1992) 14 *Adelaide Law Review* 1, 14–21; Webber, 'Whistleblowing and the Whistleblowers Protection Bill, 1994' (1995) 7 *Auckland University Law Review* 933.

44 The Queensland EARC found that the common law protection was 'uncertain, uneven, potentially costly, and it does not protect a person against all of the different forms of overt or subtle retaliation'. See Queensland, Legislative Assembly, *Parliamentary Committee for Electoral and Administrative Review Whistleblowers Protection* (1992) 7. The Australian Press Council says that the current law is 'unsatisfactory, ambiguous, time consuming and discouraging': Australian Press Council, *Submission to EARC On Protection of Whsitleblowers* (1991).

45 This also meant that the legislation had to discourage 'double dipping': see *Whistleblowers Protection Act 1993* (SA) s 9(3), which provides that a complaint to the Commissioner of Equal Opportunity about victimisation may be declined if the complaint has already been dealt with by a competent authority.

approach also has the very significant advantage that it then became unnecessary to list every single appropriate official authority for all possible eventualities.[46]

The strategy of the South Australian Act is to indicate that in order to get protection, disclosure must be made to a person 'to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure'.[47] The Act deems disclosure to an 'appropriate authority' to be reasonable and appropriate. The legislation then lists 'appropriate authorities' in relation to types of disclosure. A Minister of the Crown is always appropriate: in relation to illegal activity it is the police; in relation to the police, the Police Complaints Authority; in relation to mismanagement of public funds, the Auditor-General; in relation to public employees, the Commissioner of Public Employment; in relation to a judge, the Chief Justice; in relation to public officers not police or judges, the Ombudsman; in any event, a responsible officer of the relevant government unit; and so on.[48] The task of specifying what is reasonable when the disclosure is about the Chief Justice, or the Ombudsman, or the Auditor-General (for example) is unnecessary because the list is not exclusive.[49]

Once it was clear that the system was that a whistleblower could go to *anyone* if (and only if) that was reasonable and appropriate, there was minimal agitation about that list. There are, however, three additional points.

- There was some pressure to make members of Parliament 'appropriate authorities'.[50] This was not possible. The Act is very powerful. Once a disclosure falls within its scope, it provides very complete protection against all legal action. It follows that it potentially protects the leakage of confidential information from all levels of the State public service. If a Parliamentarian was, as such, an 'appropriate authority', then any member of the public service could with impunity leak information to any Member of Parliament and seriously compromise the integrity of Government.

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46 The debate on this issue continued to be a source of controversy in New South Wales. The *Sydney Morning Herald* (Sydney), 1 July 1993, reported that a state parliamentary committee had split on this issue, with the government maintaining an 'official channels only' position.

47 *Whistleblowers Protection Act 1993* (SA) s 5(2)(b).

48 During debate in the Legislative Council, the opposition moved to add two new ones: in relation to MPs, the presiding officer of the relevant House, and in relation to local government, a responsible officer of that local government authority. Both were eminently sensible additions. See South Australia, *Parliamentary Debates,* 10 March 1993, 1529.

49 This is all done in *Whistleblowers Protection Act 1993* (SA) s 5(3), (4).

50 The Australian Democrats moved an amendment to the Bill to achieve this. The amendment was defeated. See South Australia, *Parliamentary Debates*, 10 March 1993, 1527–8.

- The Commissioner of Police made the point that the Anti-Corruption Branch of the Police Force should be an appropriate authority in relation to allegations of corruption and allied matters. The legislative response to this submission was to write the Branch into the legislation as a clearing house for information of this kind. Consequential amendments to the Bill ensured that this did not conflict with the jurisdiction and role of the Police Complaints Authority.[51]

- There was a concern that new 'appropriate authorities' might be created subsequently. The most obvious example was the policy of the Government to introduce legislation to establish an Environment Protection Authority.[52] Clearly, the EPA would be the appropriate authority in relation to at least environmental matters. The Bill was, therefore, amended to include a regulation making power to add and delete appropriate authorities.[53]

Honesty and Good Faith?

The third question was the hardest: in general terms, how to define a genuine whistleblower. That leads to the research and anecdotal evidence on the nature of whistleblowers. What kind of behaviour and motivation is involved? De Maria, summarising the available research, distinguishes between whistleblowers, informants, perpetual complainants, and activist groups, and continues:

> All participants appear to define wrong-doing in their own moral terms, usually as a breach of some absolute rather than relative ethic, and all want to do something to improve the situation, whatever it is. Beyond these matters there appear to be big differences. Perpetual complainants express their grievances randomly to any sympathetic ear, their behaviour being cathartic rather than change-oriented. Unlike whistleblowers, informants are usually not bureaucratically contexted in the same setting in which the breaches occur. ... Informants and whistleblowers also differ in terms of motive. When the informant discloses a serious breach, he or she could be motivated by a desire for prosecutorial immunity. Whistleblowers are usually motivated by a concept of public interest. ... An attempted working definition would go something like this. The whistleblower, born of frustration with bureaucratic unresponsiveness, is a lone dissident, usually in a public authority, who observes a practice in the course of work, that is personally judged as wrong in law or ethics. At the risk of reprisal ... the

51 *Whistleblowers Protection Act 1993* (SA) s 5(5). See South Australian, *Parliamentary Debates*, 10 March 1993, 1529–31.

52 Now the *Environment Protection Act 1993* (SA).

53 *Whistleblowers Protection Act 1993* (SA) s 5(4)(j). See South Australian, *Parliamentary Debates*, 10 March 1993, 1529.

> whistleblower plans and executes a media-sensationalised and often clumsy strategy of public disclosure. ... The purpose of the disclosure strategy ... seems to be to correct a part of the total, rather than seeking a transformation of the organisation's world view.[54]

Laframboise has distinguished between 'public heroes' – whistleblowers to be admired and protected – and 'vile wretches' – what De Maria has called perpetual complainants. Laframboise essentially blames what he perceives to be the poor record of the American system on its failure to distinguish between the two:

> One reason for these relatively fruitless results is that compulsive moralists tend to be difficult people, and it has been hard for the special counsel to separate reprisals perceived to be due to whistleblowing from those due to personality defects that make these employees such a pain in the neck to work with. They 'tend to exhibit a distinctive approach to moral issues and decision-making'. By 'distinctive' it is plain that the authors mean 'at odds with peer group values'. During my career I've run across a few of these compulsive moralists. They grieve everything grievable, appeal every competition they lose, incite other employees to complain, and generally make nuisances of themselves. As a class, they are the ones who deliver 'brown envelopes' to opposition members and to media people.[55]

The Laframboise article is also valuable for pointing out a more subtle clash of policy values. There can be no doubt that many 'whistleblowers', whether they began as 'genuine' public heroes or not, have become in the process obsessive troublemakers. The Senate Select Committee on Whistleblowers commented in 1994 that:

> For whistleblowers this can be reflected in obsessive behaviour, pursuing their case with a consuming passion and a loss of judgment in responding to people in relation to their case.[56]

However, despite Laframboise's analysis, some research indicates that true whistleblowers are not neurotics or troublemakers. They act precisely because they

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54 De Maria, 'Queensland Whistleblowing: Sterilising the Lone Crusader' (1992) 2 *Australian Journal of Social Issues* 248, 252–3.

55 Laframboise, 'Vile Wretches and Public Heroes: the Ethics of Whistleblowing in Government' (1991) 34 *Canadian Public Administration* 73, 76.

56 Parliament of the Commonwealth of Australia, *In the Public Interest: Report of the Senate Select Committee on Public Interest Whistleblowing* (1994) paa 5.47. Unfortunately, the committee did not trouble itself with the hard question of what to do in these circumstaces.

are highly committed to public interest goals of the organisation for which they work.[57] This may be as good a distinction as any between the whistleblower and the perpetual complainant. One is committed to the public interest which provides the motivation, and the other is committed to the private interests of individual morality and self righteousness. But it is not possible, even if it was desirable, to accurately reflect the complexities of this behaviour in legislation. Moreover, people normally do not conform to the stereotype. It is more likely that they will exhibit a mix of characteristics.

This is not the place to debate whether or not there are absolute moral values and whether or not moral relativism is an abandonment of principle, but if one accepts that moral and ethical issues commonly consist of shades of grey rather than black and white, then one must also accept that the ethics of whistleblowing will depend very much on individual cases and have good and bad effects. Legislation can do very little more than sketch boundaries within which judgement must be made and trust specific application to dispute resolution mechanisms (such as courts and tribunals).

Nevertheless, perceptions of behaviour do shape the legislation in subtle ways. It exhibits a desire to mark out a boundary between the whistleblower and perpetual complainant, by providing that the victimisation remedy should not be available where a person alleged to fall within the legislative protection has had the issues fully aired in some other forum, such as a court or a grievance procedure. The legislation is not intended to allow a person to engage in multiple litigation.[58]

This issue of genuineness is all the more central because of the possible consequences. For example, Goldring states:

> There is a problem when public servants go to the media: if they do so without good reasons the result could be disastrous. There are unnecessary restrictions on public servants' communication with the media, but when people are revealing corrupt conduct, maladministration

57 See, for example, Harders, 'Whistleblowing: Counting The Cost' (1991) *Canberra Bulletin of Public Administration* 66. The same conclusion can be found in Bowman and Elliston, *Government and Public Policy: A Reference Guide* (1988) 57.

58 *Whistleblowers Protection Act 1993* (SA) s 9(3). As a matter of detail, this issue also arises in the test for victimisation. The test settled on says that discrimination exists where the action is on the ground, or substantially on the ground, that the person is a whistleblower (s 9(1)). 'Substantiality' is, of course, subjective, but the legislation merely reflected the test that already exists in *Equal Opportunity Act 1984* (SA) s 6(2). To require that it be the only reason would make the task of the victim impossible, while making it any part of the reason would make the task of the employer impossible.

> or substantial waste they ought to be protected. ... However, an unfounded or malicious complaint can do untold harm to the career and personality of officials. The interests must be balanced.[59]

The original form of the Bill was not coherent on this issue, and served only to show its complexity. 'Genuineness' criteria occurred in three places. First, the whistleblower had to genuinely believe that the information was true to be a 'whistleblower' for protection purposes. Second, the Bill provided a defence to a victimisation allegation if 'the disclosure is false or not made or intended in good faith'. Third, the Bill contained a criminal offence of making a false allegation knowing it to be false and misleading, or being recklessly indifferent as to whether it is false or misleading.

Consultation revealed this was not a coherent sequence of tests. No-one approved of the defence to an action for victimisation, so the Bill as introduced did not contain it. However, whistleblower legislation must have an offence to deal with malicious complaints. If the information is true, it does not matter if the motivation was malice. The offence should, therefore, concern disclosures of false information. But many had concerns about the uncertainty inherent in the word 'misleading' in the offence. It is one thing to tolerate a degree of uncertainty in dealing with discretionary remedies, but the criminal law should be as certain as possible. Thus, the Bill was introduced with an offence that covered disclosure of information that is false knowing or being reckless about the fact that it is false.

Respondents to the consultation process were not happy with the requirement that the whistleblower genuinely believe that the information is true. First, as a general proposition, many were concerned that it catered too much for a person who was very credulous and/or self-deluding. Second, a person could genuinely believe that the information was true - thus attracting the protection - and still be aware of the possibility that it was false - thus also being guilty of the offence.

Whistleblowers protection legislation must start from the premise that if the disclosure is true, there is no need for any further objective test. The objectivity lies in the truth of the disclosure. It does not matter if the disclosure is made in bad faith or for all of the wrong reasons, because the public interest lies in disclosure of the truth of those defined categories of information.[60]

The problem arises in an acute form when examining what the test should be if the disclosure is false. It is difficult to justify a test which is different according to

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59 Goldring, 'Blowing the Whistle' (1992) 17 *Alternative Law Journal* 298, 299–300.

60 Finn, *Official Information: Integrity in Government Project: Interim Report 1* (1991) 66.

whether the information is true or not. The metaphysical decisions that would be required and the minute dissection of possibly complex information, perceptions, judgments and statements that such a distinction would involve would make it unworkable.

As it happened, the respondents in consultation preferred the test in the Queensland Bill[61] that there must be a belief on reasonable grounds that the information is true. That is the test now contained in the South Australian Act.[62]

There is a further, more subtle, point. The Commissioner for Equal Opportunity commented that the requirement that the person genuinely believe that the information is true created an unfair distinction as follows:

> As a matter of fairness it would seem to me that the Act ought to protect the fair-minded and objective person, who is unable to make up his or her own mind about the truth of the allegations, to the same extent as it protects the person who rashly accepts and believes everything he or she hears.

That seemed right and was incorporated into the Act. The test of belief on reasonable grounds in the Act is supplemented by an alternative if a person

> is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigate.[63]

EVALUATION

The need for whistleblowers protection legislation has been a constant theme in Australia and overseas[64] in the past decade. South Australia set out to provide principled, workable legislation which conformed to defensible social policy in the area but which did not erect yet another set of investigative structures or another bureaucracy, and which could be read and understood by the audience to which it is addressed. Other jurisdictions followed suit. The much debated Queensland[65] and

61 That is also one part of the test recommended by Professor Finn: see ibid 63, 66–7.

62 *Whsitleblowers Protection Act 1993* (SA) s 5(2)(a)(i).

63 Ibid s 5(2)(a)(ii).

64 See also Webber, 'Whistleblowing and the Whistleblowers Protection Bill, 1994' (1995) 7 *Auckland University Law Review* 933 for a detailed analysis of a proposal in New Zealand. That Bill is entirely different and beyond the scope of this paper beyond noting that it was a private member's Bill and did not pass.

65 *Whistleblower Protection Act 1994*.

New South Wales[66] Bills were finally enacated in 1994 and the Australian Capital Territory also enacted a version.[67] Despite the 1992 recommendations of the Western Australian Royal Commission Into The Commercial Activities of Government and Other Matters, legislation has not followed in that jurisdiction.[68] A Bill was introduced into the Tasmanian Parliament in 1995[69] but did not pass.

There have been a number of developments subsequent to the passage of the South Australia legislation (and that passed as noted above). First, while the Commonwealth Government showed no sign at all of implementing the recommendations of the Gibbs Report,[70] a political party with two members in the Commonwealth Parliament's Senate (the WA Greens) had introduced two successive private member's Bills for the establishment of a very complex and detailed system of whistleblowers protection.[71] They failed to attract the support of any major party and lapsed. However, as a result of the 1993 Bill, the Senate established a Senate Select Committee on Public Interest Whistleblowing, which reported in August 1994.[72]

This is a lengthy report running to over 250 pages. There is not space to do it or its arguments justice here. However, it is significant that the committee recommended the creation of not one but two wholly new and separate bureaucracies to deal with whistleblowing. First, there should, it was said, be a Public Interest Disclosure Agency to receive the disclosures, arrange for their investigation by an appropriate agency, protect whistleblowers and oversee the implementation of recommendations. Second, it was said that there should be a Public Interest Disclosures Board, which would 'direct and control' the agency and consist of a reference group of stakeholders such as the Privacy Commissioner, a whistleblowers protection group, a trade union and so on.[73]

While the Senate Committee specifically declined to comment adversely on the structure of the South Australian Act (lacking such independent agencies) given its then recent enactment, the lack of a similar bureaucratic structure lies at the core of a virulent attack on the effectiveness of the South Australian (and similar) legislation

66 *Protected Disclosures Act 1994.*
67 *Public Interest Disclosures Act 1994.*
68 A very limited version of whistleblower protection is contained in 1993 amendments to the *Official Corruption Commission Act 1988.*
69 Public Interest Disclosure Bill 1995.
70 See n 9 above.
71 Whistleblowers Protection Bill 1991; Whistleblowers Protection Bill 1993.
72 Parliament of the Commonwealth of Australia, *In the Public Interest: Report of the Senate Select Committee on Public Interest Whistleblowing* (1994).
73 Parliament of the Commonwealth of Australia, *In the Public Interest: Report of the Senate Select Committee on Public Interest Whistleblowing* (1994) para 7.47.

by De Maria. He asserts that the Act is 'well intentioned but miserably conceived' and 'displayed the arrogance of ignorance about the complex socio-legal issues' principally, it seems, because:

> The failure to provide for an independent body appears to be because of an economic rationalist-driven reluctance to expand the state into this area and a blind faith in the effectiveness of official agencies responsible for receiving complaints about wrong-doing. ... The issue of whether or not to install an independent authority highlights how much at odds the whistleblowing community is with government on what is investigated.[74]

The reader may judge for him or herself whether, in light of the contents of this paper, decisions were made in ignorance or after careful thought. The reader is also capable of judging, short of rhetoric, the merits of positions. Two points should be made, however, in addition to that which has gone before.

The first is theoretical. It lies in the interesting and, without doubt, correct assertion that there is a 'whistleblowing community'. Indeed there is, and it is dominated by those obsessed by their claims, right or wrong. The key here is that the establishment of an entire agency – nay, two – is really seen by them as the key to symbolic legitimacy, whatever the price. In this regard, Whitton remarked, in relation to a similar series of assertions by De Maria, that

> whistleblowing is to be understood as a positive contribution to public sector transparency and accountability, and is not an end in itself: it is irrelevant, for this purpose, whether the whistleblower is believed or not, and their state of mind and motivation are likewise irrelevant. The whistleblower serves only as a vehicle for bringing to attention a matter which an appropriate body already has the power to investigate: the only matter of relevance is the substance of the disclosure.[75]

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74 All quotations are from De Maria, 'Whistleblowing' (1995) 20 *Alternative Law Journal* 270, 272. This article provoked a lively and instructive correspondence in (1996) 21 *Alternative Law Journal* 91, 130 and 194 involving the author, Mr De Maria, the SA Ombudsman and a representative of whistleblowers in South Australia. The article was later incorporated as a chapter in his book, De Maria, *Deadly Disclosures* (1999) without reference to the exchange in the *Alternative Law Journal*, which, in my submission, simply shows that the author is wrong in law. However, his work may be assessed as a matter of politics.

75 Whitton, 'Ethics and Principled Dissent in the Queensland Public Sector: A Response to the Queensland Whistleblower Study' (1995) 54 *Australian Journal Public Administration* 455, 461. This is part of a general symposium on the subject.

The key issue here is who is really a whistleblower, for it is on the answer to that question that all depends. *Good* whistleblowers acting in the public interest deserve all the help that they can get against the insidious forces that seek to silence and punish them. There is plenty of evidence, referred to above, of the activities and suffering of such people. On the other hand, *bad* complainers deserve little if any compassion and should be consigned to the rightful consequences of their own obsessions. The truth is that 'whistleblower' is, in the end, a socially pejorative term which says more about the evaluator than the person evaluated. Legislation is incapable of capturing that distinction, nor should it try to do so, except in the most general of terms. Legislation can try to capture the ends of the spectrum, but not the centre.

The second issue is plainly practical, but is consequential upon the first. If one sets up something like a Public Interest Disclosure Agency, the necessary corollary is that the Agency will have to determine who is and who is not a genuine whistleblower in advance and, what is more, whether anything should be done about the disclosure. It is hoped that this paper, if it has done nothing more, has shown that that is a remarkably hard decision to make. The whistleblower is, of course, by definition, convinced that he or she is a genuine whistleblower, *but* he or she is not always right. Someone has to make a judgment about that. The point of the South Australian scheme is that the judgment has to be made only if it is absolutely necessary, that is, when there is a complaint of victimisation or the issue arises as a result of legal action. Under the South Australian model, if a whistleblower blows the whistle and is treated properly and fairly by the person or agency to which he or she complains, there is no legal problem at all. This confines the hard decision to the hard cases and the cases in which the hard decision really *needs* to be made.

These are complex issues and enough has been said about them. What has been the on the ground experience in South Australia? There has been no survey of the effect of the legislation and the quite considerable efforts that were made to publicise it.[76] The legislation itself imposes onerous duties of confidentiality in order to protect the whistleblower, and so it is not possible to conduct an examination of files or anything like it. Hence, the evidence is sketchy. Three matters stand out.

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76 The results of surveys in NSW (which has an Independent Commission Against Corruption) have been published in Zipparo, 'Encouraging Public Sector Employees to Report Workplace Corruption' (1999) 58 *Australian Journal Public Administration* 85. It appears from these surveys that the majority of those surveyed expected to suffer victimisation if they blew the whistle. That can hardly be regarded as surprising. Legislation may discourage offences but cannot change human nature (however bad).

1. First, the Commisioner for Equal Opportunity has been kind enough to provide the figures for complaints of victimisation made to her office. They are in the following table:

Year	Number of complaints
1992–1993	0
1993–1994	5
1994–1995	2
1995–1996	13
1996–1997	12
1997–1998	4
1998–1999	3

2. Second, there has been some litigious activity. Two individuals, King and Sutton, made disclosures to the Ombudsman which they alleged were protected disclosures under the Act. In each case, the Ombudsman made an initial inquiry and, in each case, decided to take no further action in relation to the complaint. Upon that decision, each of the complainants then alleged to the Commissioner of Equal Opportunity that each of them had been 'victimised' by the Ombudsman's decision not to take any further action. They asked for orders that the decision of the Ombudsman be reviewed and for compensation. The matter was litigated all the way to the South Australian Supreme Court.[77] The question was whether the failure by the Ombudsman to investigate a matter *could* amount to 'victimisation'. The court held that it could. However, the court also pointed out, quite correctly it is submitted, that the South Australian Act imposes no duty on any authority to investigate any allegation and, in one of the cases, the Ombudsman simply could not do so because of the limitations of his jursidiction. On referrral back, the Equal Opportunity Tribunal found, on a close examination of the evidence, that no victimisation had occurred in that the

77 *King v State of South Australia; Sutton v State of South Australia* (1996) 189 LSJS 127.

office of the Ombudsman had done all that was reasonable to deal with the complaints.[78]

3. The Act may, of course, be used as a 'shield' (or defence) to civil or criminal proceedings. It is hard to determine how many of these cases there have been. One has, however, reached Supreme Court level. In *Morgan v Mallard*[79] the defendant was sued for defamation. The facts, while complex, amounted to this: the defendant wrote several letters to officers of the statutory workers compensation scheme alleging impropriety in the operation of the scheme by other officers. Most of the case is about the law of defamation. However, the defendant sought to rely on the *Whistleblowers Protection Act.* If it applied, it would have provided a complete defence. It did not. The judgment of the court was succinct:

> As the learned magistrate found, even if it be accepted that the content of the two letters in question constituted a disclosure of public interest information, his findings necessarily exclude a conclusion that it was an 'appropriate disclosure' within the contemplation of the section. The plain fact is that the statements made were not only false, but they were not made in circumstances in which the appellant believed, on reasonable gounds, that the relevant information was true. *Cadit quaestio!*

The lesson here is that the requirement of some kind of objective test based on criteria beyond the subjective beliefs of the person making the disclosure is crucial to the proper working of any scheme protecting real whistleblowers in the public interest.

It might and has, as noted above, been argued that the lack of any mechanism by which the effectiveness of the Act can be assessed is a major flaw in its structure. It may readily be conceded that assessment of measures advocated by government and passed by parliament is, if not essential, then at least advisable, as a control on and scrutiny of the power exercisable by these governmental structures.

However there are countervailing considerations, the most significant of which is that carefully considered defensible legislative policy should not be significantly distorted by measures which are designed to make sure that a system, designed to work in a very difficult legal environment, does not work, or is significantly hampered in its effective operation, because it is now designed to be evaluated.

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78 *King v State of South Australia* (Unreported, SA Equal Opportunity Tribunal, Judgment D 3682, 7 October 1997).

79 (Unreported, SA Supreme Court, Judgment 6056, 13 March 1997).

There is a continuum of such measures. Reports to parliament are one such measure. The effectiveness of that particular measure depends, of course, upon both the actual performance of parliament and its committees (if it has such a system) and, of course, public perceptions of the effectiveness of such a system.

Given the argument made above that the term 'whistleblower' is in essence pejorative, it may be that real evaluation of any whistleblowers protection scheme, whether accompanied by a range of specialist bodies or not, is impossible. If the design of the South Australian Act is such that need for the identification of who is and who is not a *legal* 'whistleblower' is *minimised*, then a lack of identified whistleblowers may be an indication that the existing systems of disclosure evaluation and treatment are actually working well rather than otherwise. It is simply not possible to tell. That reasoning may equally be true of other protection regimes.

Fox concludes (relevantly to the question of evaluation):

> Its [this type of legislation] value is largely symbolic. It is as much to do with ethics, education and morale as with law. Its worth is less in 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.[80]

We will continue to learn as time goes by. Despite the rhetoric of increasingly vested interests in the whistleblowers industry, the appropriate requirements of this particular difficult part of the re-inforcement of public and private sector ethics require careful and thoughtful responses.

80 Fox, above n 2, 162.