Whistleblowing

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Public interest disclosure laws in Australia and New Zealand: who are they really protecting?

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The author records a special thanks to his colleague Cyrelle Jan for her professional assistance.

The period 1993–94 will go down in the history of whistleblower law in Australia and New Zealand as a time when national and State governments finally moved to protect their whistleblower citizenry against the retaliatory behaviour of employers and work colleagues. Spurred on by the corruption scandals of the 1980s, and the repetitive anecdotal evidence of whistleblower suffering, the national governments of Australia and New Zealand, along with several State and Territory governments, put their minds to the complex issues of the reception of information about wrongdoing and the protection of those who bring disclosures forward. To date 12 whistleblower protection Bills have been drafted in Australia and New Zealand and five have become law.*

In New Zealand, a private member's Bill (with cautious if not begrudging government support) was introduced into the Parliament on 15 June 1994 but has still not become law.[1] In Australia, two impressive but go-nowhere Bills were tabled in the Federal Parliament in 1991 and 1993 by the WA Greens. A Senate Select Committee on Public Interest Whistleblowing tabled in August 1994 one of the most important official analyses of whistleblowing in Australia to date,[2] but the Government is yet to respond. In 1993 and 1994, whistleblower laws were passed in South Australia, New South Wales, Queensland and the Australian Capital Territory.

How does one present and evaluate this total legislative effort? Will whistleblowers have confidence in the statutory shelters planned or provided? Will this legislative effort have an impact on systemic wrongdoing? Will the legislation simply be 'bad-apple' focussed? Or are the Bills and statutes within this effort covertly designed primarily to protect their political and bureaucratic masters?

In this article, I analyse this legislative effort in order to get a little closer to the questions just raised. I evaluate each of the planned or enacted instruments with respect to several performance criteria organised under four headings: General, Scope, Protections and Services. In each section, I set out my findings in a table and then analyse each criterion in the table. Some multi-purpose Acts which respond partially to the issue of whistleblower protection are also included in the tables. My analysis has been influenced to a great extent by the findings from Australia's largest whistleblower research, the Queensland Whistleblower Study.[3]

General

Table 1 sets out the current status of the law; whether there is an independent protection authority for whistleblowers; what the qualification for protection is; whether reprisals are prohibited; whether

* The *Public Interest Disclosure Bill 1995* (Tas.) was introduced into the Tasmanian Parliament by the Leader of the Opposition, the Hon. Michael Field, on 15 November 1995. This Bill has not been included in the analysis in this article.

TABLE 1
WHISTLEBLOWER PROTECTION: GENERAL

Name	Current status	Independent authority	Qualification for protection	Disclosure defined	Reprisals prohibited	Sector penalties
Commonwealth *Whistleblowers Protection Bill 1991* (Cth)	Introduced 12.12.91, Senator Vallentine. Abandoned.	Yes	Good faith disclosure to WPA*	Yes	Yes	No
Whistleblowers Protection Bill 1993 (Cth)	Introduced 25.5.93, Senator Chamarette. Abandoned.	Yes	Good faith disclosure to WPA	Yes	Yes	No
Australian Capital Territory *Public Interest Disclosure Act 1994* (ACT)	Enacted 7.12.94	No	Disclosure to proper authority	Yes	Yes $10,000 fine and/or prison	Yes
Queensland *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld)	Assented to 2.11.90	No	Good faith disclosure to CJC*	No	No	No
Whistleblower s Protection Bills 1991, 1992 (Qld)	EARC Bill, 29.10.91. Never tabled. PEARC Bill, 8.4.92. Never tabled.	No	Good faith disclosure to proper authority	Yes	Yes Max. 3 years prison	Yes
Whistleblowers Protection Act 1994 (Qld)	Assented to 1.12.94	No	Disclosure to proper authority	Yes	Yes Max. 2 years prison	No
New South Wales *Independent Commission Against Corruption Act 1988* (NSW)	Assented to 6.7.88. Commenced 13.3.89.	No	Good faith disclosure	No	Yes Max. 5 years prison	Yes
Whistleblowers Protection Bill (No. 1) 1992 (NSW)	Introduced 30.6.92. Abandoned.	No	Voluntary disclosure to relevant authority	No	Yes Max. 1 year prison	No
Whistleblowers Protection Bill (No. 2) 1992 (NSW)	Tabled by Premier Fahey, 17.11.92. Abandoned.	No	Disclosure by public official to relevant authority, shows or tends to show wrongdoing	No	Yes Max. 1 year prison	No
Protected Disclosures Act 1994 (NSW)	Assented to 12.12.94	No	Disclosure by public official to relevant authority, shows or tends to show wrongdoing. Special disclosures possible.	Yes	Yes Max. 1 year prison	No
South Australia *Whistleblowers Protection Act 1993* (SA)	Assented to 8.4.93. Operates from 20.9.93.	No	Good faith disclosure to relevant authority	Yes	Yes Tort of victimisation established	No
Western Australia *Official Corruption Commission Act 1988* (WA)	Narrow whistleblower protections inserted by *Amendment Act 1993.*	No	No	No	Yes Max. 2 years prison	No
New Zealand *Whistleblowers Protection Bill 1994* (NZ)	Private Members Bill. Tabled 15.6.94. Referred to Committee.	Yes	Good faith disclosure to WPA	Yes	Yes	No

* WPA: whistleblower protection authority CJC: Criminal Justice Commission

public interest disclosure is defined; and whether there is provision to penalise public sector agencies.

Current status

The first column of *Table 1* shows the current status of the legislation. The abandoned Bills give an indication of the evolution of government thinking.

The first statute to protect whistleblowers in Australia was the *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld). This amended the *Electoral and Administrative Review Act* (Qld) and the *Criminal Justice Act* (Qld) to provide gap protection for whistleblowers pending the passage of a more substantive Act. The Interim Act was grossly overrated[4] and really only provided for the Criminal Justice Commission (CJC) and the Electoral and Administrative Review Commission (EARC) to seek Supreme Court injunctions against adverse personnel practices directed at CJC and EARC whistleblowers. The CJC has only ever gone to bat for a Queensland whistleblower once in the five years the Interim Act has been in force and even then did not have an unmitigated success.[5]

In April 1991, the EARC produced a draft Bill which was then abandoned.[6] The following April, EARC's political watchdog, the Parliamentary Committee for Electoral and Administrative Review (PEARC) tabled a whistleblower report in the Legislative Assembly.[7] The draft Bill it contained was almost a photocopy of the EARC proposal, indicating that Queensland Government thinking on whistleblower policy had reached a standstill. This was also abandoned.

In 1991, two abortive attempts were made to introduce whistleblower protection into New South Wales. The *Whistleblowers Protection Bill 1992 (No. 1)* was introduced into the Legislative Assembly in accordance with an agreement between the Government and the non-aligned independents. The Bill was unsatisfactory to some of the major players and it was withdrawn.[8] Five months later, the *Whistleblowers Protection Bill 1992 (No. 2)* was introduced by the Premier, Mr Fahey. After some debate it was referred to the Legislative Committee, which finally presented its report after 'numerous problems' on 30 June 1993. [9]

On 8 April 1993 the South Australian Parliament passed the first whistleblower protection statute in Australia. A well-intentioned but miserably conceived instrument, it displayed the arrogance of ignorance about the complex socio-legal issues enmeshed in the whistleblowing phenomenon. This was a shame as it served as a model for following legislation, notably the current New Zealand Bill. Since the statute came into operation in September 1993 only five workers have relied on it for protection from alleged workplace harassment triggered by acts of disclosure.[10] There has been no evaluation of the law to date, so one can only surmise that either South Australian workplaces are corruption-free or there is a lack of confidence in whistleblower protection policy.

In December 1991, the first attempt at Commonwealth protection was made when Senator Jo Vallentine (Greens, WA) tabled the *Whistleblowers Protection Bill 1991* (Cth). This bold response to the issue did not proceed for political reasons. The WA Greens made a second attempt to get whistleblower protection legislation up at the Commonwealth level, with Christobel Chamarette tabling the *Whistleblowers Protection Bill 1993* (Cth) on 5 October 1993. Like its predecessor, this was on the whole a high quality Bill. On 27 October 1993 the Senate referred it to the Committee on Whistleblowing, which unanimously recommended the passage of Commonwealth whistleblower protection legislation. This is at least the fifth high-level report recommending whistleblower protection legislation at the Commonwealth level; one would hope that this momentum will soon lead to serious decisions by the Federal Government.[11]

In New Zealand, the Hon. Phil Goff, Opposition Justice spokesperson, introduced his private member's Bill into the Parliament on 15 June 1994. It was referred to a Select Committee and then to an advisory committee appointed by the State Services Minister, the Hon. Paul East.

Finally, in December 1994, the Australian Capital Territory, Queensland, and New South Wales all enacted whistleblower protection instruments. Still to go are Tasmania, Western Australia, the Northern Territory and Victoria. [See note on p. 270.] Western Australia and Victoria were rocked with official corruption scandals in the 1980s and it is surprising that whistleblowing has not been on the political agenda (not for want of trying by various people including the Royal Commission into WA Inc and lobbyists Di Hollister and Isla MacGregor in Tasmania). There is some movement in Western Australia now. A very narrow whistleblower shelter was introduced into Western Australia via an amendment to the *Official Corruption Commission Act 1988* following the WA Inc scandal. Whistleblowing will be considered in late 1995 by the Commission on Government, which will produce a report for the Joint Standing Committee on the Commission on Government in early 1996.

Independent whistleblower authority

Table 1 indicates that only three out of 14 legislative proposals provide for an independent authority, and of these, the two Commonwealth Bills are now dead and the New Zealand Bill is fighting for survival. The Senate Committee on Whistleblowing has recommended that any Commonwealth legislation should have as its centrepiece an independent authority.

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 the official agencies responsible for receiving complaints about wrongdoing. One of the principal architects of the South Australian Act said:

> We did not want to create another bureaucracy — and we thought that we had enough authorities with investigative powers around the place to deal with issues — without having another to stumble over.[12]

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 needed. Invariably, whistleblower witnesses to the various pre-legislative public consultations throughout Australia and New Zealand have supported the need for an independent authority. Equally, almost to a tee the agency stakeholders have either argued strongly against the proposition, or advocated for getting responsibility for running the Act themselves. A lack of understanding of whistleblowing does not seem to be an impediment to bureaucratic rapacity, as shown by the Commonwealth Merit Protection Review Agency's submission to the Senate Committee on Whistleblowing. The Agency sought responsibility for employment-related matters involving public service whistleblowers, including providing counselling and guidance and protecting them against dis-

crimination or retaliatory actions. Director Ms Forward then gave oral evidence, including the following telling exchange:

> Ms Forward [MPRA Director]: . . . we do not have a special reporting category for . . . whistleblowers . . .
>
> Senator Newman [Chair]: Would that be useful, if you are going to truly know what the problem is?
>
> Ms Forward: I would have to know what a whistleblower was before I gave you a affirmative answer to that question.
>
> Senator Newman: You are about the only agency that seems to have a problem . . . We have taken evidence now round several States as well, and I cannot think of another agency that seems to have a problem of recognizing a whistleblower when they see one.
>
> Ms Forward: I could show them some files where people really do get quite paranoid about the causes for management actions. They have to find a reason to explain the situations they are in.
>
> Senator Newman: But to me the most extraordinary thing is for you to say that in all the years of your organisation . . . you have never had any whistleblowers?
>
> Ms Forward: We have had one or two who have claimed to be.[13]

With this mindset, it should be fairly obvious why whistleblowers do not use this or similar agencies. Regrettably, legislators and their advisers have chosen to ignore the obvious in favour of a status quo model where the whistleblowing phenomenon is absorbed into an existing broad-agenda agency (for example, ICAC or CJC). Their faith in existing agencies has been shown to be entirely misplaced by the research results from the Queensland Whistleblower Study. Whistleblowers reported that 83% of their immediate superiors were ineffective in dealing with their disclosures and the effectiveness rating only marginally increased as whistleblowers went up the chain of command in their public sector unit. By far the most common response to the question, 'What happened when you took the matter to your supervisor?' was, 'A superior obstructed the complaint'.[14] External agencies like the CJC and the unions were even worse, rated as ineffective in 90% of cases.[15]

The Study shows that a culture of obstruction and indifference operates right out to and beyond the borders of the organisation. Yet the drafters remain faithful to a model in which responsibility for whistleblower investigation and protection is grafted onto existing government agencies.

Qualification for protection

The pathways that the whistleblower searching for justice and protection must walk are exceedingly restrictive in all the legislative schemes. Protection is usually contingent upon good faith disclosures to governmental authorities deemed appropriate in the legislative schemes. The schemes are clearly more about state control of dissent than about the correction of wrongdoing and the protection (and indeed affirmation) of whistleblowers. In a very real sense the state, through these legislative instruments, has the whistleblower process sewn up. It alone defines whistleblowing, it alone lays out the pathways of disclosure, and it alone regulates the remedies available.

Exceptions are the recently enacted *Protected Disclosures Act 1994* (NSW) and the *Whistleblowers Protection Act 1993* (SA). As a result of an amendment moved in committee, disclosure to a member of parliament or a journalist is protected by the NSW Act if the disclosure has previously been submitted to a relevant authority and that authority has decided not to investigate or to complete an investigation, failed to recommend action, or simply failed to contact the whistleblower within six months of the original disclosure being made. Disclosure to a Minister of the Crown is protected by the South Australian Act, although I suggest this is quite different from disclosure to an MP, less flexible and accessible but potentially more effective.

Status of Whistleblower legislation

Current law:	*Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990 (Qld); Whistleblowers Protection Act 1993 (SA); Whistleblowers Protection Act 1994 (Qld); Public Interest Disclosure Act 1994 (ACT); Protected Disclosures Act 1994 (NSW)*
Current Bills:	*Whistleblowers Protection Bill 1994 (NZ)*
Abandoned Bills:	*Whistleblowers Protection Bill 1991 (Cth); Whistleblowers Protection Bill 1993 (Cth); Whistleblowers Protection Bill (No.1) 1992 (NSW); Whistleblowers Protection Bill (No.2) 1992 (NSW); Whistleblowers Protection Bill (EARC) 1991 (Qld); Whistleblowers Protection Bill (PEARC) 1992 (Qld)*
Multipurpose Acts:	*Independent Commission Against Corruption Act 1988 (NSW); Official Corruption Commission Act 1988 (WA)*

Definitions of 'public interest disclosure'

The statutory definitions of public interest disclosures include the content of the divulgence, for example, allegations about official misconduct. However, most focus as much on the process of disclosure as on the nature of alleged wrongdoing. For example, in the *Whistleblowers Protection Act 1994* (Qld), a divulgence is deemed a public interest disclosure by virtue of:

(i) content, i.e. allegations about:
- official misconduct
- maladministration
- neglect or improper management
- damage to public health or environment, and

(ii) process, i.e. disclosure to an 'appropriate entity'. [from ss 15-20, Schedule 6]

Even when the definition of protected disclosure does not depend explicitly on whistleblower methodology, all schemes make protection contingent on whistleblowers going through 'appropriate entities'. Why include the whistleblower's methodology in a definition of public interest disclosure? Is the public's 'interest' in the disclosure any less valid if the whistleblower does not or cannot report to an 'appropriate entity'? What if the 'appropriate entity' ignores or vilifies whistleblowers? Does bureaucratic obstruction reduce the public merit of the disclosure?

Public sector agencies frequently ignore or attack whistleblowers, as shown by Neil Pugmire's case. Pugmire, a senior psychiatric nurse, became concerned at the premature

release of serious offenders from the National Security Unit in New Zealand. He approached ten 'appropriate entities' with his concerns but got nowhere until he contacted the Opposition spokesperson on Justice.[16]

In making the public interest disclosure definition contingent upon the whistleblower obeying official reporting directions we detect official paranoia at what persistent whistleblowers could do. Dissent, that marvellous rejuvenative feature of democracy, is too wild for modern politics and public administration. Domesticated dissent is the undeclared goal of whistleblower legislation.

Prohibition on reprisals

All the legislative schemes prohibit reprisals by agencies against whistleblowers. South Australia has established a tort of victimisation while others like Queensland make reprisals indictable offences carrying a maximum penalty of three years in prison.

Public sector agency penalties

Only one of these schemes gets close to the enlightened vicarious liability provisions in some of the whistleblowing legislation in America. The *Public Interest Disclosure Act 1994* (ACT) provides for convictions for unlawful reprisals against whistleblowers for body corporates and fines of up to five times those for individuals. Corporate penalties for the offence of unlawful reprisals were included in the earlier Queensland Bills but were done away with in the *Whistleblowers Protection Act 1994* (Qld). This means that collective reprisal actions and management-condoned or overlooked processes of harassment are beyond the reach of most of the legislative schemes.

Scope of whistleblower protection

The object of this analysis is to examine how broad whistleblower protection is under the various legislative schemes, In *Table 2*, I set out who may make protected disclosures, private sector and media protection, protection of involuntary disclosures, protection for disclosures of previous wrongdoing, and finally, the application of the instrument to politicians.

Who may disclose

The *Protected Disclosures Act 1994* (NSW) and *Whistleblowers Protection Act 1994* (Qld) restrict protected disclosures to public officials. In NSW, this is unequivocal while in Queensland, there is provision for anybody to report wrongdoing related to the abuse of disabled people, 'substantial and specific' dangers to the environment, and the taking of reprisals. All the other legislative schemes allow for 'anybody' to report wrongdoing.

Private sector protection

If one had to choose a single litmus test to demonstrate a government's genuine intention to eradicate systemic wrongdoing and protecting whistleblowers, it would have to be whether or not the legislation extends into the private sector. Most do not, with the exception of the South Australian Act, the Queensland Act (to a very limited degree) and the New Zealand Bill. Given the opposition to that Bill from powerful groups such as the Auditor-General, the New Zealand Employers Federation and the Parliamentary Commissioner for the Environment,[17] it is uncertain whether, if it survives, it will continue to carry this private sector provision.

The Queensland Act extends into the private sector, but regrettably this extension is highly conditional. The alleged wrongdoing must be 'specific' and 'substantial' and either directed at a person with a disability or the environment, or concern the taking of reprisals against another.

However, it may only be a matter of time before private sector coverage amendments begin to be made because the force of the argument for such an extension is very strong. The traditional interface between public and private sectors is more confused now than in the past, with the private sector offering government-type services and the public sector mimicking the private sector with respect to aligning performance with profit. Further, media attention to the exploits of marketplace buccaneers in the 1980s has left the public with a cynical view of what goes on behind the corporate door. The Senate Committee on Whistleblowing favours the protection of private sector whistleblowers:

> . . . The Committee considers that accountability and constitutional responsibility does not end with the public sector . . . To align the concept of responsible government with the concept of the public sector is to give democracy so narrow a focus as to undermine its existence . . . The Committee notes that Government Business Enterprises are increasingly falling between the public and private sectors . . . Scrutiny and accountability have been reduced through the hiving off of commercial activities . . . The Committee recommends that [the endorsed Commonwealth Whistleblowers] legislation be given the widest coverage constitutionally possible in both the public and private sector.[18]

Media protection

Protection for whistleblowers who expose via the media is the big no-go area for the drafters of whistleblower legislation in Australia and New Zealand. Only the NSW statute offers protection for media whistleblowers, and that protection is so highly conditional that its effectiveness remains to be seen.

Media exposure is often the shove governments need to get them acting in the public interest. Fanny K (a pseudonymn), a Queensland whistleblower, offers a good example of this. As a worker in the Basil Stafford Centre, a government facility for intellectually handicapped people, she claimed to have witnessed countless instances of patient abuse. She went through official channels from early 1986 to November 1990, seeking action from the authorities to stop the abuse, injury and loss of life occurring at the Centre. No notice was taken of her and she was subjected to threats and victimisation, including tampering with the brakes of her car. She finally went on the Hinch TV program and the Hayden Sargent radio talk-back show in Brisbane. The media pressure sparked government interest and put the CJC into a corner: a public inquiry was now the only way out.[19] The Government went into damage control mode soon after the inquiry started and peremptorily closed the Centre.

This case also led a chastened Queensland Government to slip a provision into the new *Whistleblowers Protection Act 1994* (Qld) that was not in any previous draft, nor part of the pre-legislative consultation process. The 'Fanny K Clause' as it is referred to by the Qld Whistleblower Action Group, allows anybody to disclose a substantial and specific danger to the health and safety of a person with a disability. Without Fanny K's fortitude and a responsive media (in this particular case), this clause would never have been included. The Goss Government cites this and kindred provisions as offering sufficient protection to whistleblowers to make contact with the media unwarranted, but it is interesting to note that a proposal to bar CJC whistleblowers from contacting the

TABLE 2
WHISTLEBLOWER PROTECTION: SCOPE

Name	Who may disclose	Protection for private sector disclosures	Media protection	Involuntary disclosures protected	Protected disclosure on previous wrongdoing	Application to politicians
Commonwealth *Whistleblowers Protection Bill 1991* (Cth)	Anybody	No	No	No	No	Yes
Whistleblowers Protection Bill 1993 (Cth)	Anybody	No	No	No	No	Yes
Australian Capital Territory *Public Interest Disclosure Act 1994* (ACT)	Anybody	No	No	No	No	No
Queensland *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld)	Anybody	No	No	No	No	No
Whistleblowers Protection Bills 1991, 1992 (Qld)	Anybody	Yes	No	No	Yes	No
Whistleblowers Protection Act 1994 (Qld)	Normally public officials. Anybody re disabled, environment, reprisals.	No, except for disclosures regarding disabled, environment, reprisals.	No	Yes	Yes	No
New South Wales *Independent Commission Against Corruption Act 1988* (NSW)	Anybody	Yes	No	No	Possible	Yes
Whistleblowers Protection Bill (No. 1) 1992 (NSW)	Only public officials	No	No	No	Yes	No
Whistleblowers Protection Bill (No. 2) 1992 (NSW)	Only public officials	No	No	No	Yes	No
Protected Disclosures Act 1994 (NSW)	Only public officials	No	Yes, in special circumstances	No	Yes	No
South Australia *Whistleblowers Protection Act 1993* (SA)	Anybody	Yes	No	No	No	Yes
Western Australia *Official Corruption Commission Act 1988* (WA)	Anybody	No	No	No	No	No
New Zealand *Whistleblowers Protection Bill 1994* (NZ)	Anybody	Yes	No	No	No	No

media was considered before the tabling of the *Whistleblowers Protection Act 1994*, but abandoned as too controversial.

The argument always trundled out by government against media whistleblower protection is the risk of damage to innocent reputations by unsubstantiated media stories. While no doubt this argument has some merit, the main problem for government with disclosures via the media is that the whistleblower is 'off the chain'. Broken loose of the tight, cautious, prolonged and above all semi-secret agency procedures, the exasperated whistleblower makes media contact with stories that are usually innately newsworthy — although this is not to say that they are always followed through by the media.

The whistleblower-media relationship is virtually unresearched and seems to be different each time a whistleblower makes media contact.[20] Conflicts between sensationalism and investigative journalism; snapshot coverage and sustained reporting; and victim-focussed versus system-focussed stories swim below the surface, usually out of the sight of the whistleblower. Such conflicts are resolved by media management against the public interest more times than is realised. The fiercely free media, exposing wrongdoing wherever it finds it, is largely a myth that we and whistleblowers hold on to along with the myth of accountability and integrity in government. Bar some spectacular cases such as the Fanny K case, the government does not have much to worry about with the media, which is driven more by economic considerations: will the largely conservative media consumer 'buy' the whistleblower's story, and therefore buy the newspaper or item in the electronic news?

Protection of involuntary disclosures

The most common scenario for involuntary disclosure is a public official required to answer questions under oath before Royal Commissions, Senate Select Committees and courts of law in such a way as to disclose wrongdoing and thereby embarrass, if not harm, the government.

The only scheme that protects involuntary disclosures is the *Whistleblowers Protection Act 1994* (Qld). Drafters appear to have assumed that existing protections are sufficiently strong. While protection exists, particularly the contempt of proceedings offence, it is extremely difficult for a witness to demonstrate the causal connection between what he or she said under oath and his or her current demotion (or dismissal). Protecting this class of people is important and should have been embraced throughout the legislative effort, as they are exposed to the same whistleblowing rituals. Unfortunately the Senate Committee on Whistleblowing did not accept that these people are whistleblowers because their disclosures are not 'free acts of conscience'.

Disclosures of previous wrongdoing

Whistleblowers disclose past, present and anticipated wrongdoing. The Queensland and NSW statutes are the only laws which protect disclosures of previous wrongdoing. However, such protection seems important. The big question is, how far back should the retrospectivity apply? Clearly the further back the greater the forensic task. The Senate Committee on Whistleblowing has made a practical recommendation, suggesting a five-year period before the commencement of the Act or the first disclosure.

Whistleblowing on corrupt politicians

The only scheme which specifically protects whistleblowing on corrupt politicians is the South Australian statute,[21] although the two abandoned Commonwealth Bills also catered for the reality of political corruption. The failure of most of the schemes to reach political corruption is the result in part of an over-focussing on the wrongdoing of non-elected officials. Reporting of alleged wrongdoing of political figures is not given due recognition in the various schemes. However, reporters of alleged wrongdoing by elected officials may be able to use the legislation, albeit via alternative paths. They may also have to argue for protection more strongly than those disclosing wrongdoing by unelected officials.

A good example of this occurred recently in a shire council near Brisbane. A Deputy Mayor referred advice he received from the Auditor-General that other local politicians had breached guidelines, to the Minister for Local Government. A group in the council later declared the position of deputy mayor vacant, an action alleged to have been done as a reprisal.[22] The Deputy Mayor would have little recourse under the *Whistleblowers Protection Act 1994* (Qld) because the thrust of this Act is on wrongdoing by unelected bureaucrats. He could not report the alleged wrongdoing himself because only 'public officers' can disclose such misconduct and elected local government officials are not 'public officers' under the Act. Extraordinarily, it appears that while the Deputy Mayor could not report the *substantive* alleged wrongdoing, he could report the *consequential* alleged wrongdoing — the reprisal. Once finally within the Act by this circuitous route, he could petition the CJC to seek an interim injunction against the anticipated reprisals and in time, he may also be able to make a civil claim against the relevant councillors.

Drafting these whistleblower schemes to make it hard to reach politicians serves no purpose other than the protection of political corruption. Governments do not like corruption inquiries they inherit or develop. Inquiries such as the ICAC investigation, which led to the resignation of Premier Greiner, or the CJC 'travel rort inquiry' in Queensland have created some bad times for their political masters. However, too often official inquiries about alleged wrongdoing of politicians go to jelly.[23] In the 'travel rort inquiry', 56 politicians on both sides of the House were found to have illegally benefited but the then Chairman of the CJC, Sir Max Birghan, is said to have blocked prosecution of all but two of these politicians because he thought that too much 'blood' had already flowed in the city square.

The problems for whistleblowers disclosing political wrongdoing are highlighted by the Lindeberg case. In his opening comments to the Senate Committee on Whistleblowing, Mr Lindeberg said:

> My . . . personal experience is that anyone who endeavours to expose high level political corruption in Queensland cannot be assured that their case will be properly investigated . . . the system of corruption is so seated as to block all efforts [to] expose corruption and the achievement of justice for those who have suffered through the corruption.[24]

Lindeberg has been alleging for over five years that the Queensland Cabinet shredded documents and tapes from the Heiner Inquiry in order to avoid adverse legal action. He has experienced considerable suffering as a result of targeting high level political corruption. He was sacked on what he asserts were contrived grounds including an allegation that he had threatened a Minister of the Crown's career, and has not worked since May 1990.

The Senate Committee was sufficiently concerned at Lindeberg's allegations to bring down, as its last recommendation, a strong view that the Queensland Government should establish an independent investigation into the case. Premier Goss rejected this recommendation outright.[25] Six weeks later, in December 1994, all non-government parties and groups in the Federal Senate moved against the wishes of both the Federal and Queensland Governments to establish an Inquiry on Unresolved Whistleblower Cases, covering the shredding of the Heiner Inquiry documents and some other matters.[26] A leaked Queensland Cabinet submission revealed that instructions were issued that no public officials were to co-operate with the Senate Inquiry and were specifically not to give evidence in their public capacity.[27] That inquiry continues still.

TABLE 3
LEGAL PROTECTIONS FOR WHISTLEBLOWERS

Name	Civil and criminal indemnification	Protection from contravening secrecy enactments	Injunctions against reprisals	Absolute privilege in defamation
Commonwealth *Whistleblowers Protection Bill 1991* (Cth)	Yes	No	Yes	No
Whistleblowers Protection Bill 1993 (Cth)	Yes	No	Yes	No
Australian Capital Territory *Public Interest Disclosure Act 1994* (ACT)	Yes	No	Yes	Yes
Queensland *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld)	No	No	Yes	No
Whistleblowers Protection Bills 1991, 1992 (Qld)	Yes	Yes	Yes	Yes
Whistleblowers Protection Act 1994 (Qld)	Yes	Yes	Yes	Yes
New South Wales *Independent Commission Against Corruption Act 1988* (NSW)	Yes	Possible	Possible	Possible
Whistleblowers Protection Bill (No. 1) 1992 (NSW)	Yes	Yes	No	Only for specific disclosures to Auditor-General
Whistleblowers Protection Bill (No. 2) 1992 (NSW)	Yes	Yes	No	Yes
Protected Disclosures Act 1994 (NSW)	Yes	Yes	No	Yes
South Australia *Whistleblowers Protection Act 1993* (SA)	Yes	No	No	No
Western Australia *Official Corruption Commission Act 1988* (WA)	No	Yes	No	No
New Zealand *Whistleblowers Protection Bill 1994* (NZ)	Yes	Yes	No	No

Legal protection of whistleblowers

In *Table 3*, I look at specific legal safeguards and immunities, including civil and criminal indemnification, protection from contravening secrecy laws, injunctions against reprisals and absolute privilege from defamation actions.

Civil and criminal indemnification

Most of the legislative schemes have responded to whistleblower vulnerability by offering legal immunity against the common ways whistleblowers have been forced into silence in the past. Most offer civil and criminal indemnification to 'accredited' whistleblowers, 'accredited' because the legal protection offered has to be understood in the context of government assessment processes built into the various schemes. These processes aim not to establish whistleblower *bona fides* so much as to ensure that the whistleblower, the candidate for accreditation, matches the socio-legal thrust of the protection schemes. Preceding the question of indemnification is the issue of the state licensing of the whistleblower, in a similar way to the issue of government licences to run child care centres or export meat — no licence, no indemnification. Having passed state accreditation, for example by disclosing to an 'appropriate agency', the whistleblower-licensee can apply for the various forms of legal protection offered in the schemes.

Protection from contravening secrecy enactments

Providing legal protection against charges of contravening secrecy enactments is an important service to whistleblowers as so much of public administration is conducted in a paranoid atmosphere of semi-secrecy. Australia is, in the words of Professor Paul Finn, 'beset with very wide, very pervasive, and very oppressive secrecy laws'.[28] The Federal Government has about 141 secrecy provisions in statute form,[29] while Queensland has 160.[30] Successive administrations have acquired and passed on a powerful expertise in the control of information and seem to move gradually towards the closed society more typical of dictatorships than western liberal democracies.

Whistleblowers perform the invaluable task of exposing secrecy. Through their individual struggles to achieve official correction of the wrongdoing that they have discovered,

whistleblowers peer between the 'venetian blinds' into a secret world where power transcends principles. It is entirely appropriate that they are shielded from charges of breaching secrecy enactments, but this protection is not included in all the legislative proposals.

Injunctions against reprisals

Of the schemes in existence, only Queensland and the ACT offer injunctive relief to whistleblowers. As already mentioned, the first and only time the Queensland protection was tested in court ended in near disaster.[31] Injunctive relief for whistleblowers is important but is still an unfamiliar remedy for courts and the process is bedevilled with formality and high costs.

Absolute privilege in defamation

The other traditional mode of attack on whistleblowers, the defamation writ (actual or threatened), has been blocked by the granting of absolute privilege in all existing statutes apart from that in South Australia. It remains to be seen whether law reform will flow from decisions such as *Theophanous* (1994) 124 ALR 1 and *Stephens* (1994) 124 ALR 80 so as to make this protection largely irrelevant.

Services to whistleblowers

Finally, in *Table 4*, I focus on programs that respond to whistleblower suffering and allow for feedback on whistleblower involvement in the disclosure process. I look at counselling, compensation, entitlement to damages, whistleblower feedback and relocation.

Counselling

A consideration of the services available within the various schemes offers a glimpse of law-making unable to match the complexity of the subject matter of the enactments. With the exception of the abandoned Commonwealth Bills, no counselling is built into any of the schemes as a right. What is called 'counselling' in some of the schemes (for example, the early Queensland Bills) is nothing more than procedural advice and minor support services by staff playing the part of value-added pamphlets. Yet counselling programs are sorely needed for whistleblowers and their families. The Queensland Whistleblower Study found that 79% of the sample reported deterioration in their emotional well-being.[32] The profile of psychic pain suffered by the majority was indicative of a severe stress syndrome which we have tentatively called the Whistleblower Stress Syndrome.

Administrative compensation

The abandoned Commonwealth Bills were the only ones that provided for an administrative (as distinct from judicial) award of compensation through an independent whistleblower protection authority. It would be unfortunate if the forecast Commonwealth legislation does not retain this important service. The administrative award of compensation could provide a solution to the enormous resource problems associated with whistleblowing. In the absence of collective dissent, the employee of conscience faces the fully resourced might of the organisation, alone.

Administrative compensation could allow for the following services for bona fide whistleblowers, designed to correct the individual-organisation power imbalance:

- *Defence fund allowance* — money for costs of administering the disclosure and self-protection. Photocopying, telephone calls, witness expenses, transport costs and typing are the sort of services required by whistleblowers.
- *Special leave* — to compensate whistleblowers who must take leave to administer their disclosures and protect their careers, good names and families.
- *Professional costs* — to reimburse whistleblowers for legal, medical and counselling services where not provided or not fully provided by legal aid and health insurance.
- *Stress leave* — the ever-tightening compensation laws with respect to access to stress leave make it important that a special provision exists for people suffering from the whistleblower stress syndrome.

Entitlement to damages

Apart from the abandoned Commonwealth Bills, only the ACT and Queensland whistleblower laws make provision for a whistleblower to sue for damages. We do not know yet the breadth of this provision. For example, can a protected whistleblower in the ACT or Queensland claim damages for harm to her or his career, physical health, relationships, finances and emotional health, or will there be a narrow interpretation of what constitutes whistleblower damages? Many whistleblowers have partners and dependent children, yet when the issue of redress comes up, the whistleblower is considered single and childless. Compensation should be available to the whistleblower's partner and children, since these people (and the relationships) suffer as the whistleblower does. There should also be affirmative action provisions to assist the whistleblower's career, which invariably stalls during the disclosure process.

Whistleblower feedback

A few of the instruments have grappled with the issue of feedback to whistleblowers. The *Public Interest Disclosure Act 1994* (ACT) is probably the best in this regard. It provides that a person who makes a public interest disclosure, or an authority which refers a disclosure to another proper authority, may request the authority to which the disclosure was made or referred to provide a progress report. Where a request is made, a progress report must be provided to the person or authority who requested it as soon as practicable after receipt of the request. If the authority takes further action with respect to the disclosure after providing a progress report, a further report must be provided at least once in every three months while the authority is taking action and on completion of the action.

Under the ACT Act, the whistleblower is also entitled to know why an authority declines to act; the name of an authority a disclosure is referred to; the current status of investigation; and any findings and action taken or proposed. Similar but watered-down reporting requirements appear in the Queensland, NSW and South Australian statutes.

While whistleblowers have some rights to be kept informed, the legislative effort effectively denies them any involvement in the investigative and corrective processes that, on rare occasions, follow their disclosure. The statutes authorise state structures to take over the investigation of the disclosed wrongdoing, including any complaint of victimisation. The whistleblower is denied the opportunity to provide input into the investigation other than through the giving of testimony.

Is it not possible, even highly probable, that whistleblowers have something to contribute to the form and content of the investigative process, and even more importantly, some real expertise in structuring systemic solutions to correct the wrongdoing and alleviate the possibility of its occurring

TABLE 4
SERVICES FOR WHISTLEBLOWERS

Name	Counselling	Compensation to victimised whistleblower	Entitlement to damages	Whistleblower feedback	Right to relocation
Commonwealth *Whistleblowers Protection Bill 1991* (Cth)	Yes	Yes	Yes	No	Yes
Whistleblowers Protection Bill 1993 (Cth)	Yes	Yes	Yes	No	Yes
Australian Capital Territory *Public Interest Disclosure Act 1994* (ACT)	No	No	Yes	Report on request, every 90 days thereafter, final report	Yes
Queensland *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld)	No	No	No	No	No
Whistleblowers Protection Bills 1991, 1992 (Qld)	No (advice only)	No	Yes	On notice proper authority to report to whistleblower at least every 3 months	Yes
Whistleblowers Protection Act 1994 (Qld)	No	No	Yes	'Reasonable' information about action taken and results achieved	Yes
New South Wales *Independent Commission Against Corruption Act 1988* (NSW)	No	No	No	No	Possible
Whistleblowers Protection Bill (No. 1) 1992 (NSW)	No	No	No	No	No
Whistleblowers Protection Bill (No. 2) 1992 (NSW)	No	No	No	No	No
Protected Disclosures Act 1994 (NSW)	No	No	No	Yes, mandatory reporting to whistleblower within 6 months of disclosure	No
South Australia *Whistleblowers Protection Act 1993* (SA)	No	No	No	Notification of outcome of investigation	No
Western Australia *Official Corruption Commission Act 1988* (WA)	No	No	No	No	No
New Zealand *Whistleblowers Protection Bill 1994* (NZ)	No (advice only)	No	No	No	No

again? Governments want the whistleblower only to say what they saw and cannot countenance whistleblowers who maintain an interest in the form and content of the investigation of wrongdoing.

Right to relocation

The approach to relocation in the schemes is another example of naive law-making. The abandoned Commonwealth Bills and the whistleblower statutes in the ACT and Queensland provide for relocation of whistleblowers within and between organisations as well as physical transfers. Yet we know from the research that transfers are a favourite reprisal strategy of management: in the Queensland Whistleblower Study, 31% of the sample had been punitively transferred. The strategy of transferring the 'problem' (the whistleblower) elsewhere remains the same, whether it is orchestrated by a vindictive manager or de-fouled to appear as a 'service' within the legislative schemes.

Recent research into work stress carried out by Comcare has found that forced relocation and redeployment were frequently precipitating events which led to stress-related claims. Research also indicates that even when transfers are part of career advancement, and agreed to by the worker, they can produce a good deal of stress.[33]

Another problem is evident in the Queensland statute. The relocation option is contingent on the go-ahead from the chief executive officer (CEO) of the unit into which the whistleblower is to be transferred. Whistleblowers rarely receive positive acknowledgment, even when their disclosures are conspicuously in the public interest. There is a deep seated attitude in the work culture that whistleblowers are ratbags, subversives or whingers. What CEO is going to rejoice in discovering that one of this 'suspect group' is about to come under his or her wing? CEO veto may effectively nullify the relocation option.

Sometimes relocation can lead to tragic absurdities. In 1993, Arnold L (pseudonym), an Aboriginal welfare worker, made a public interest disclosure about gross financial mismanagement in a welfare agency in which he worked.[34] He was sacked and finally re-employed by the Aboriginal and Torres Strait Islander Commission (ATSIC). Some months later, his new employers found out about the previous whistleblowing. His workplace soon became toxic and he went on Comcare stress leave. Now he wishes to relocate from one ATSIC office to another. His transfer application has been held up because his Comcare case is still outstanding and the manager of the section into which he seeks relocation says he will not consider the application until the Comcare claim is settled. Arnold L cannot get unstressed unless he leaves his current workplace and cannot leave his current workplace while he is still stressed because his new manager won't consider him unless he is emotionally ok! This is catch 22 in bright lights.

Conclusion

> The Committee acknowledges that whistleblowing is a legitimate form of action within a democracy and that there have been, there are, and there will continue to be occasions on which whistleblowing is the only available avenue for the concerned ethical citizen to expose wrongdoing in the public or private sector.[35]

This declaration from the Senate Committee on Whistleblowing is an important message, as it puts whistleblowing in its right and proper context: the context of democracy. Whistleblowing is socially responsible dissent. At the very least, whistleblower legislation should honour this democratically enshrined speak-out role that gutsy Australians take on reluctantly from time to time.

There is conceptual diversity across the whistleblower schemes reviewed in this article. However, there is also an ideological monotony as each statute or Bill plays it safe with respect to dissent. We must remember that this package is state-owned and whistleblower legislation serves the state interest. Whistleblowers know from grim experience that the state interest is definitely not the same as public interest. Regrettably, the schemes put democratic dissent on a pedestal and promptly forget about it. If the legislative effort was serious about honouring the speak-out role, the concepts of independent agency, media protection and private sector protection, would be embedded in the law. They are clearly not. If the legislators were serious about breaking the cycles of wrongdoing, the laws would apply to corrupt politicians and would penalise workplace units guilty of wrongdoing and whistleblower harassment. These matters, on the whole, have been avoided.

The legislative effort is also dangerously unsophisticated in its response to whistleblower suffering. There is no allowance for *real* counselling and no provision exists, as in American law, for 'make-whole' orders. There are no compensatory strategies, in other words, which would return everything 'lost' to the whistleblower, from income, to career, to mental health. Most whistleblowers live in families who carry the reprisal burden. As far as the law is concerned these families do not exist.

If the interests of democracy and whistleblower-welfare have not been foremost in the minds of the legislators, what is the dynamic that has powered the laws onto the statute books? In a word: fear. Whistleblowers are feared because they, refusing to trade ethics for expediency, can do big damage to vested interests in politics and bureaucracy. Whistleblower legislation is an exercise in damage control. Whistleblowers are fettered by rigid legislation which defines wrongdoing and public interest disclosures, and sets out the narrow pathways they must travel in order to receive 'protection'. In other words, the state has effectively colonised the potentially subversive activity called whistleblowing. Or so it thinks.

The experience of the current Senate Committee on Unresolved Whistleblower Cases indicates that the whistleblower, unsatisfied and vilified, is like a cracker in a tin can. The noise they make is loud, unavoidable and directly related to the amount of state suppression they experience. Perhaps one day, the legislators will get this message.

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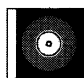

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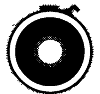

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