# Public Interest Disclosure Legislation in Australia:

# Towards the Next Generation

***An Issues Paper***

**Dr A J Brown**

***November 2006***



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# Towards the Next Generation

## *An Issues Paper*

Prepared as part of the Australian Research Council 'Linkage' Project *'Whistling While They Work'* by


**Dr A J Brown**

Senior Research Fellow, Griffith Law School
Visiting Fellow, Australian National University College of Law


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**Commonwealth Ombudsman**
GPO Box 442
Canberra City ACT 2601
Tel: 1300 362 072
www.ombudsman.gov.au

**NSW Ombudsman**
Level 24, 580 George Street
Sydney NSW 2000
Tel: 02 9286 1000
www.ombo.nsw.gov.au

**Queensland Ombudsman**
Level 25, 288 Edward Street
Brisbane QLD 4000
Tel: 07 3005 7000
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## Foreword

Whistleblowing, or the preparedness of officials and employees to make public interest disclosures about wrongdoing within their organisations, is vitally important to ensuring integrity and accountability in the public sector. It will not happen unless there is a sound legislative structure to facilitate and protect public interest disclosures.

There are now many laws around Australia that guide how disclosures in the public sector can be made, how they should be acted on, and how those who make them should be managed and protected. There are variations in style, coverage and principle among the different laws. There are strengths in some laws that other jurisdictions could heed. There are weaknesses in all laws that need to be addressed, perhaps by common answers.

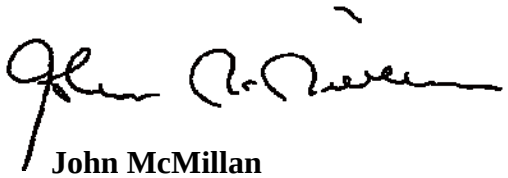
Ombudsman offices have a special interest in ensuring the effectiveness of public interest disclosure laws. Partly that stems from our role in safeguarding the integrity of public institutions. Partly too it is a special responsibility given to Ombudsman offices in some of the current legislation.

With other government agencies and oversight bodies with a shared interest, we joined a national research project initiated by Griffith University to review Australian laws and practices. The project is titled 'Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector'.

This paper by Dr A J Brown comparing Australian legislation has been prepared as part of this national project. The paper analyses the current public interest disclosure legislation by asking a series of ten fundamental questions that any such legislation needs to address. While our final views on the issues raised by Dr Brown will not be formed until after considerable further research and discussion, our own practical experience is that these issues need to be considered in revising the legislation. His call for a national and coherent approach deserves special attention.

We encourage government agencies and the public to consider the issues raised in this paper, and to respond with comments to the project's research team. Your comments will help inform our collective thinking about what might constitute 'best practice' in public interest disclosure legislation, and contribute to recommendations for reform.

We commend the paper to you and invite your feedback.



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| | |
|---|---|
| *Commonwealth* | Commonwealth Ombudsman<br>Australian Public Service Commission |
| *NSW* | Independent Commission Against Corruption<br>New South Wales Ombudsman |
| *Queensland* | Crime & Misconduct Commission<br>Queensland Ombudsman<br>Office of the Public Service Commissioner |
| *Western Australia* | Corruption & Crime Commission<br>Ombudsman Western Australia<br>Office of the Public Sector Standards Commissioner |
| *Victoria* | Ombudsman Victoria |
| *Northern Territory* | Commissioner for Public Employment |
| *Australian Capital Territory* | Chief Minister's Department |
| *Non-government partner* | Transparency International Australia |

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## Responding to this paper

Submissions or comments in response to this paper are invited by **30 March 2007** and should be directed to:

Dr Yasmine Fauzee
Project Manager
Whistling While They Work Project
Socio-Legal Research Centre
Griffith University
Nathan QLD 4111 Australia

Ph: +61 (0)7 3735 5803
Fax: +61 (0)7 3735 5608
*y.fauzee@griffith.edu.au*

Or direct to the author: *a.j.brown@griffith.edu.au*.

# Contents

# Public Interest Disclosure Legislation in Australia: Towards the Next Generation

## Summary

The willingness of public officials to voice concerns on matters of public interest is increasingly recognised as fundamental to democratic accountability and public integrity. At the same time, 'whistleblowing' is one of the most complex, conflict-ridden areas of public policy and legislative practice.

This paper reviews the eleven legislative proposals that have dealt with the management of public sector whistleblowing in Australia since 1993, including the nine Acts now in force and two current proposals:

***Table 1. Australian public interest disclosure Acts & Bills, in date order***

| No. | Act / Bill | Jurisdiction |
|---|---|---|
| 1 | *Whistleblowers Protection Act* 1993 | South Australia |
| 2 | *Whistleblowers Protection Act* 1994 | Queensland |
| 3 | *Protected Disclosures Act* 1994 | New South Wales |
| 4 | *Public Interest Disclosure Act* 1994 | Australian Capital Territory (1) |
| 5 | *Public Service Act* 1999, section 16 'Protection for whistleblowers' | Commonwealth (1) |
| 6 | *Public Interest Disclosure Bill* 2001 [2002] (Private member's Bill) | Commonwealth (2) |
| 7 | *Whistleblowers Protection Act* 2001 | Victoria |
| 8 | *Public Interest Disclosures Act* 2002 | Tasmania |
| 9 | *Public Interest Disclosure Act* 2003 | Western Australia |
| 10 | *Public Interest Disclosure Bill* 2005 (Government Bill) | Northern Territory |
| 11 | *Public Interest Disclosure Bill* 2006 (Government Bill) | Australian Capital Territory (2) |

The paper presents – and suggests some possible answers to – ten fundamental questions about the current tapestry of Australian whistleblower protection laws.

Comparative analysis of the legislation is difficult because, over time, different jurisdictions have experimented with the result that no two frameworks are the same. There has also been little empirical evidence of their performance. These gaps are currently the focus of a national research project, 'Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector'.

Comments are welcome on the legislative issues reviewed here, which will be fed back into the research and the deliberations of the participating governments.

Table 15 summarises the results of the analysis, ranking existing provisions according to those which are most problematic, or missing, or appear closest to legislative best practice. While this produces overall rankings, the first general conclusion is that no single existing Australian whistleblower protection law or Bill provides a 'best practice' model. Every jurisdiction has managed to enact at least some elements of best practice, but all have problems – sometimes unique, sometimes general or common problems.

## *Table 15. A ranking of Australian public interest disclosure provisions*

**3** = current best practice
**2** = provisions are adequate / conventional
**1 =** not applicable / law is silent or weak
**0** = current major problem or problematic omission

| | | *1* **SA** **1993** | *2* **Qld** **1994** | *3* **NSW** **1994** | *4* **ACT** **1994** | *5* **Cth** **1996** | *6* **Cth Bill 2001** | *7* **Vic** **2001** | *8* **Tas** **2002** | *9* **WA** **2003** | *10* **NT Bill 2005** | *11* **ACT Bill 2006** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **1. How should whistleblowing be defined, etc?** | a. Title | 0 | 0 | 2 | 3 | 1 | 3 | 0 | 3 | 3 | 3 | 3 |
| | b. Objectives / long title | 2 | 2 | 3 | 0 | 0 | 0 | 3 | 3 | 2 | 3 | 3 |
| **2. Who should be eligible for whistleblower protection?** | a. Internal information sources | 0 | 2 | 3 | 0 | 2 | 0 | 0 | 3 | 0 | 0 | 0 |
| | b. Any public official | 1 | 3 | 2 | 1 | 0 | 1 | 1 | 2 | 1 | 1 | 1 |
| | c. Public contractors & employees | 1 | 2 | 0 | 1 | 0 | 1 | 1 | 3 | 1 | 1 | 1 |
| | d. Anonymous disclosures | 1 | 2 | 1 | 0 | 1 | 0 | 3 | 3 | 1 | 3 | 0 |
| | e. Former organisation members | 1 | 1 | 2 | 1 | 1 | 1 | 1 | 3 | 1 | 1 | 1 |
| | f. Supplement/additional information | 1 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 1 | 2 | 0 |
| | g. Other internal witnesses | 1 | 2 | 0 | 1 | 0 | 1 | 3 | 1 | 1 | 3 | 2 |
| | h. Any reprisal target | 2 | 3 | 0 | 3 | 1 | 3 | 2 | 2 | 3 | 2 | 2 |
| **3. Public & private sector covered by same law(s)?** | | 0 | 0 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 |
| **4. What types of wrongdoing should be able to be disclosed?** | a. Comprehensive categories | 3 | 3 | 3 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 |
| | b. Criminal etc thresholds | 2 | 2 | 2 | 2 | 2 | 2 | 0 | 0 | 2 | 0 | 1 |
| | c. Wrongdoing by any / all officials | 3 | 3 | 2 | 2 | 0 | 2 | 2 | 2 | 3 | 2 | 2 |
| | d. Wrongdoing by contractors | 2 | 2 | 0 | 2 | 0 | 2 | 2 | 0 | 3 | 2 | 2 |
| **5. How do we guard against misuse?** | a. Offence for false / misleading | 0 | 3 | 2 | 1 | 1 | 1 | 2 | 2 | 0 | 2 | 1 |
| | b. Subjective / objective test | 2 | 2 | 2 | 2 | 1 | 2 | 0 | 0 | 2 | 0 | 2 |
| | c. Entirely policy disputes | 1 | 3 | 0 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| | d. Entirely personal grievances | 1 | 2 | 2 | 2 | 0 | 2 | 2 | 2 | 2 | 2 | 0 |
| | e. Vexatious (abuse of process) | 1 | 1 | 3 | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 1 |
| | f. Discretions not to investigate | 1 | 1 | 1 | 2 | 1 | 2 | 2 | 3 | 3 | 2 | 2 |

| *Table 15 continued* | | *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* | *11* |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | **SA 1993** | **Qld 1994** | **NSW 1994** | **ACT 1994** | **Cth 1996** | **Cth Bill 2001** | **Vic 2001** | **Tas 2002** | **WA 2003** | **NT Bill 2005** | **ACT Bill 2006** |
| **6. How should disclosures be received, handled & investigated?** | a. Receipt mechanisms | 2 | 3 | 2 | 2 | 0 | 0 | 2 | 2 | 3 | 2 | 2 |
| | b. Obligation to investigate | 1 | 2 | 1 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| | c. Independent review of discretions | 1 | 1 | 1 | 1 | 1 | 1 | 3 | 3 | 2 | 3 | 1 |
| | d. Clearinghouse for all investigations | 1 | 2 | 1 | 1 | 1 | 1 | 3 | 3 | 2 | 3 | 1 |
| | e. Coordinated investigation systems | 2 | 2 | 2 | 2 | 0 | 2 | 0 | 0 | 3 | 0 | 0 |
| | f. Public reporting requirements | 0 | 3 | 0 | 2 | 2 | 2 | 3 | 3 | 2 | 3 | 2 |
| **7. What legal protection should be provided?** | a. Relief from liability | 2 | 3 | 3 | 2 | 0 | 2 | 3 | 1 | 1 | 3 | 1 |
| | b. Loss of protection | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 0 | 1 | 1 | 0 |
| | c. Anti-reprisal offences | 0 | 1 | 2 | 1 | 0 | 1 | 1 | 1 | 1 | 2 | 1 |
| | d. Civil law remedies | 2 | 2 | 0 | 2 | 0 | 2 | 2 | 2 | 2 | 2 | 0 |
| | e. Industrial & equitable remedies | 2 | 3 | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 1 | 2 |
| | f. Injunctions & intervention | 1 | 3 | 1 | 2 | 1 | 2 | 2 | 2 | 1 | 2 | 1 |
| **8. Disclosures to non-government actors?** | a. Members of parliament | 1 | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | b. Media | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **9. How should whistleblowers & internal witnesses be managed?** | a. Internal disclosure procedures | 0 | 2 | 0 | 2 | 1 | 2 | 3 | 0 | 3 | 3 | 0 |
| | b. Confidentiality | 2 | 3 | 3 | 1 | 0 | 1 | 1 | 1 | 3 | 3 | 2 |
| | c. Information | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 3 | 2 | 2 | 0 |
| | d. Reprisal risk, prevention etc | 0 | 2 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 1 | 1 |
| **10. How can public integrity agencies play more effective roles?** | a. Internal witness management | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| | b. Reprisals and compensation | 1 | 2 | 1 | 2 | 1 | 2 | 1 | 1 | 1 | 1 | 1 |
| | c. Monitoring, research, policy | 1 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 2 | 2 | 1 |
| | | 126 | 50 | 82 | 63 | 61 | 37 | 59 | 65 | 67 | 73 | 71 | 47 |
| | | **%** | 39.7 | 65.1 | 50.0 | 48.4 | 29.4 | 46.8 | 51.6 | 53.2 | 57.9 | 56.3 | 37.3 |

1. **How should whistleblowing be defined (and what should be the title and objectives of the legislation)?**

   Whistleblowing is the 'the disclosure by organisation members of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action'. The objectives of current public interest disclosure laws are largely consistent: to facilitate public interest disclosures by establishing processes by which they can be made, ensuring that they are properly dealt with, and protecting those who make them.

   However in practice the term 'whistleblower' is also subject to opposing stereotypes. Legal uses of it in four laws (SA, Qld, Cth, Vic) are problematic. The best title for all Australian public sector legislation is *Public Interest Disclosure Act*.

2. **Who should be eligible for whistleblower protection?**

   Currently only three Acts (NSW, Cth, Tas) are consistent with the above definition of whistleblowing. The rest enable not just 'organisation members' but 'any person' to make disclosures as if they were a public official. This requires reform.

   Public sector whistleblowing laws should be limited to disclosures or other evidence provided by public officials, public contractors or their employees, some volunteers, former officials at risk of reprisals, and anonymous persons who appear to be in the above categories. Protection should flow to further witnesses and family, friends or associates of those who provide information. No existing law achieves best practice in all these respects, although the closest is the Tasmanian Act.

3. **Should public and private sector whistleblowing be in the same law?**

   Not in Australia, at least for the foreseeable future. While sector-blind laws have proved possible in some countries such as the UK, for a variety of reasons Australian private sector whistleblower protection is now better provided under other laws, which are expanding. The two public sector laws (SA, Qld) which attempt to cover certain types of private sector wrongdoing do not do so comprehensively, and would be best amended to maintain a clear public sector focus.

4. **What types of wrongdoing should be able to be disclosed?**

   Only three laws (SA, Qld, WA) currently take a reasonably comprehensive approach to identifying the public sector wrongdoing that can be contained in disclosures. Current best practice is found in WA, whose law is the only one nationally to clearly permit disclosures about public contractors.

   Three laws (Vic, Tas, NT) contain an extremely high threshold allowing the reporting and protection of only the most serious types of disclosures (e.g. criminal wrongdoing). The adoption of this threshold in Victoria was apparently the result of a drafting error, since repeated elsewhere. Consequently this legislation represents a highly problematic model for other jurisdictions.

5. **How do we guard against misuse of whistleblowing processes?**

   All laws require a revised approach to allow clearer and more effective identification of those public interest matters requiring the protection of the scheme, better filtering of disclosures not intended to be protected, and clearer discretions for when investigation is not required. Currently only the NSW Act provides that vexatious disclosures are not protected (as opposed to need not be investigated).

**6. How should disclosures be received, handled and investigated?**

A revised approach to the relationship between whistleblower protection laws and existing integrity systems is needed in many jurisdictions, especially the Commonwealth, Victoria, Tasmania, NT and the ACT. New approaches are needed for ensuring that whistleblowers have multiple disclosure avenues, with prospective best practice lying in a mix of the Queensland and WA approaches.

The Victorian, Tasmanian and NT instruments have a confusing dual classification (both 'protected' and 'public interest' disclosures) which should be abolished. However they attempt to provide a central agency with a clearinghouse role, with the potential for a more coordinated approach to investigations and review of decisions not to investigate disclosures, which needs to be revised and developed. While most legislation provides for public reporting of activity under the Act, two jurisdictions (SA, NSW) lack any system of reporting, leaving implementation largely unknown.

**7. How can legal protection of whistleblowers be made more effective?**

Some jurisdictions still have no or weak legal protection for whistleblowers (notably Cth, SA, NSW). Prosecutions for reprisal offences are still difficult, with a need to re-examine reprisal provisions as well as a more strategic approach to test cases. Only three jurisdictions (SA, Qld, WA) provide flexible injunction or compensation remedies for aggrieved whistleblowers based in employment and discrimination law, rather than supreme court action. While little is known about their use, there appears to be insufficient official support for the process of ensuring that detriment suffered by whistleblowers is remedied.

**8. The public interest 'leak': when should disclosures to non-government actors be protected?**

Only one jurisdiction (NSW) extends protection, in certain circumstances, to officials who make public interest disclosures to members of parliament or the media. Further debate is needed on when public whistleblowing remains necessary or reasonable, so that this glaring deficiency might be rectified in all jurisdictions, and legal protection extended in these instances.

**9. How should whistleblowers and internal witnesses be managed?**

Practical protection is as important as legal protection. All jurisdictions, save the Commonwealth, have confidentiality requirements. However in many jurisdictions (SA, NSW, Cth, Tas) there are no requirements for agencies to develop procedures for the protection of whistleblowers, or other internal witness management systems. The development of clearer statutory guidance for such systems is a major priority.

**10. How can public integrity agencies play more effective roles in the management of whistleblowers and internal witnesses?**

A variety of integrity agencies play important roles under current regimes, especially in investigations. Under only three instruments (Vic, WA, NT) is a central integrity agency given a clear overall coordination responsibility. In most instances there is insufficient legislative support for integrity agencies to ensure effective internal witness support, reprisal investigations, monitoring and policy development.

The second general conclusion is that the most effective path to better legislative practice involves a new ‘second generation’ of whistleblower laws, drawing on all the lessons of the first generation, rather than trying to solve individual problems through continuing amendments to the existing laws.

There are also strong arguments why the laws should be more uniform across Australia’s nine federal, state and territory public sectors. While existing diversity provides valuable lessons, the key issues are fundamentally common, and public integrity and standards would benefit nationally from a clearer legislative consensus on these questions.

It is open to any existing jurisdiction to replace current provisions or proposals with the first of this ‘second generation’. Various current Bills and reviews provide an opportunity for this. An obvious candidate to initiate comprehensive reform is the Commonwealth Government, whose current provisions have been shown on this analysis to be the most limited and problematic.

While progress is needed towards more comprehensive reform, the most important need is care and deliberation over the nature of current legislative strengths and weaknesses. This legislation is of great public importance. By suggesting a new framework for comparison and evaluation of these laws, it is hoped that new steps can be taken towards ensuring its effectiveness, through clearer discussion of its fundamental principles, and a clearer consensus on what ‘best practice’ might represent.

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## Introduction

Since the 1970s, the willingness of public officials to voice concerns on matters of public interest has been recognised as fundamental to democratic accountability and public integrity. At the same time, 'whistleblowing' is one of the most complex, conflict-ridden areas of public policy and legislative practice.

Since 1993, at least eleven legislative proposals have dealt with the management of whistleblowing in the Australian public sector, including the nine Acts now in force, and two current proposals (Table 1). The purpose of this paper is to present – and suggest some possible answers to – ten fundamental questions about this current tapestry of Australian whistleblowing laws.

***Table 1. Australian public interest disclosure Acts & Bills, in date order***

| No. | Act / Bill | Jurisdiction |
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| 10 | *Public Interest Disclosure Bill* 2005 (Government Bill) | Northern Territory |
| 11 | *Public Interest Disclosure Bill* 2006 (Government Bill) | Australian Capital Territory (2) |

The legislation reviewed in this paper is based on common principles, and some common drafting. For example, the 2001 Commonwealth Bill repeated much of the ACT Act; the Tasmanian Act and NT Bill repeat much of the Victorian Act; and the Western Australian Act follows key elements of the South Australian Act. However as recently highlighted by the NSW Ombudsman, many questions are thrown up by the diversity of current laws.[1] Comparative analysis has been made difficult by the extent of experimentation between jurisdictions, with no two laws exactly the same.

There is also rarely contest that there are substantive problems with the current legislation. However there has been little agreement on the relative significance of the problems, nor on the possible answers, nor on what might be working well. Little empirical evidence has been collected on the performance of the regimes.

[1] NSW Ombudsman (2004), *The Adequacy of the Protected Disclosures Act [NSW] to Achieve Its Objectives*, Issues Paper, April 2004 / June 2005.

These gaps in knowledge are currently the focus of a national Australian Research Council-funded research project, 'Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector'. This project is led by Griffith University's Socio-Legal Research Centre and involves five universities and the 14 partner organisations listed in the Acknowledgements.

Within this project, new empirical data on the performance of existing regimes is being collected among Commonwealth, NSW, Queensland and Western Australian public agencies. In 2005, a total of 318 agencies responded to a survey about whistleblowing practices and procedures. One hundred and thirty of these agencies have participated in further research into the attitudes and experiences of their officials.

This research is already confirming the importance of the legislation discussed in this paper. Preliminary results suggest that most public officials (56%) do not know whether they are covered by legislation setting out their rights and responsibilities if they report wrongdoing.[2] However, as shown by Table 2, those officials who believe they *are* covered by such legislation appear to place considerable trust in it. For example, 66% of these respondents agreed that the existence of the legislation made it easier for them to consider reporting, and 57% indicated confidence that its principles were followed in their organisation. Only 12% of these respondents indicated a belief that the legislation was ineffective.

***Table 2. Confidence in Australian public interest disclosure legislation*** [3]

| | ***Strongly disagree*** | ***Dis-agree*** | ***Neither disagree nor agree*** | ***Agree*** | ***Strongly agree*** | ***Miss-ing*** | ***Total*** |
|---|---|---|---|---|---|---|---|
| a. The existence of the legislation makes it easier for me to consider reporting corruption. | **1%** (16) | **7%** (97) | **26%** (351) | **55%** (742) | **11%** (154) | (19) | 100% (1379) |
| b. I am confident that the legislation has the power to protect me from any negative consequences if I were to report corruption. | **5%** (68) | **20%** (279) | **35%** (474) | **34%** (464) | **6%** (76) | (18) | 100% (1379) |
| d. The principles of the legislation are followed in this organisation. | **1%** (17) | **5%** (67) | **37%** (504) | **50%** (682) | **7%** (91) | (18) | 100% (1379) |
| e. I believe that the legislation is ineffective. | **5%** (61) | **33%** (454) | **50%** (679) | **10%** (138) | **2%** (25) | (22) | 100% (1379) |

[2] Preliminary responses to 2006 Workplace Experience & Relationships Questionnaire, Q16: (a) Yes, 1379 (42%), (b) No, 55 (2%), (c) Don't know, 1872 (56%), Missing 136, Total 3442.
[3] Preliminary responses to 2006 Workplace Experience & Relationships Questionnaire, Q17.

While this is a relatively positive picture, it reinforces the importance of identifying and achieving legislative 'best practice'. The need for review and reform of the legislation is widely accepted in many jurisdictions. For example:

- The NSW Legislative Assembly Committee on the Independent Commission Against Corruption is well advanced on a formal review of the NSW Act;
- In Queensland, amendments to the Act are currently being considered following recommendations for reform by the Parliamentary Crime and Misconduct Committee, the Bundaberg Hospital Commission of Inquiry and the Office of the Public Service Commissioner;
- In Victoria, the Ombudsman has reported on the need for review of the Act;
- In Western Australia, a first statutory review of the Act is about to commence;
- In the Australian Capital Territory, a recent formal review of the Act has led to a replacement Government Bill currently before the Legislative Assembly; and
- At the Commonwealth level, the Australian Public Service Commission is currently reviewing key sections of the *Public Service Act* 1999.

This paper is intended to support these and other reviews, and general public debate, by provoking informed discussion about the strengths and weaknesses of the current public interest disclosure legislation.

The analysis in this paper is based on comparison of the instruments listed in Table 1, within the context of recent public debates about key problems with these instruments. It is important to note that these are not the only laws relevant to public interest disclosures in Australia, with other legislation also containing provisions relevant to whistleblower protection in the public sector.[4] Comparable requirements are also increasingly found in the private sector, as discussed in part 3. The purpose here is to review the legislation most often seen as providing, or intended to provide, the main public sector whistleblowing framework in each jurisdiction.

Each of the ten major questions asked about these frameworks, is answered by a range of specific conclusions about current best practice, current known problems and gaps, and possible solutions. 'Best practice' is taken here to mean the best provisions or drafting approach for the purpose of achieving the common underlying objectives of the legislation, further discussed in part 1. In some areas no current best practice is identified, because no instrument appears to have yet achieved an effective solution to an issue. In these areas, possibilities for best practice are discussed in the text.

The overall results of the analysis are summarised in Table 15, which highlights where current or proposed provisions can be identified as most clearly problematic, or missing, or closest to legislative best practice. As shown in the conclusions, this summary can be used to produce a final 'ranking' of the existing instruments. However this ranking is naturally the product of a range of contestable assumptions. What are more important than the ranking, are two general conclusions.

[4] For example, four other NSW Acts also contain anti-reprisal provisions: Ombudsman Act 1974 (NSW), s.94; Independent Commission Against Corruption Act 1988 (NSW); Police Act 1990 (NSW), s.206; Police Integrity Commission Act 1996 (NSW), s.114; and s.16 of the *Parliamentary Services Act 1999* (Cth) mirrors the *Public Service Act 1999* (Cth).

First, it is clear that no existing Australian whistleblowing law or Bill provides a single 'best practice' model. As Table 15 shows, every jurisdiction has managed to enact at least some elements of best practice, but all also have problems – sometimes unique, sometimes general or common problems. For this reason alone, a more considered debate is needed on the strengths and weaknesses of the legislation, so that all jurisdictions might progress towards more satisfactory frameworks.

Second, the most effective path to better legislative practice would appear to involve a new 'second generation' of more consistent whistleblower laws, drawing on all the lessons of the first generation. The current state of the legislation with respect to the issues summarised in Table 15 shows this to be a preferable alternative, than trying to solve individual problems through continuing amendments to the existing laws. There are also strong arguments why these laws should be far more uniform across Australia's nine federal, state and territory public sectors. This is not because uniformity is vital for its own sake – indeed, the existing diversity provides valuable lessons – but because the key issues are fundamentally common, and because public integrity and standards would benefit nationally from a clearer legislative consensus on the responses to these questions.

These conclusions are further discussed in the final part of the paper.

As mentioned in the Foreword, comments are welcome on both the analysis and these conclusions. All comments will inform a final analysis to be fed back into the deliberations of participating governments through the project's research team and partner organisations. This legislation is of great public importance. By suggesting a new framework for comparison and evaluation of these laws, it is hoped that new steps can be taken towards ensuring its effectiveness.

## 1. How should whistleblowing be defined (and what should be the title and objectives of the legislation)?

Careful definition of the key terms relating to whistleblower protection is vital, not only for legal precision, but due to the political symbolism that surrounds such legislation both publicly and within the operations of the public sector.

Despite their purposes, none of Australia's current legislative instruments actually define the term 'whistleblower' or 'whistleblowing' – not even the four Acts (SA, Qld, Cth, Vic) that use '*whistleblower protection*' in their title or the relevant provision. Instead, true to the title of the remainder of the laws, their core subject is more properly identified as the making and handling of:

- 'public interest disclosures' (SA, Qld, ACT(1), Cth(2), WA, ACT(2)); *or*
- 'protected disclosures' (NSW); *or*
- *both* 'protected disclosures' *and* 'public interest disclosures' (Vic, Tas, NT).

Despite this confusion, an important objective of this legislation does remain the protection of whistleblowers. However this objective is closely interrelated with others. The titles of most laws are a reminder that whistleblower protection is being pursued not just for the individuals concerned, but because of its wider public importance. The formal objects of most instruments reflect this in a clear and consistent way, as set out in Appendix 1. These objects are:

1) to facilitate public interest disclosures – i.e. to encourage whistleblowing;
2) to ensure that disclosures by whistleblowers are properly dealt with – i.e. properly assessed, investigated and actioned; and
3) to ensure the protection of whistleblowers from reprisals taken against them as a result of their having made the disclosure.

According to the NSW Ombudsman,[5] these objects properly reflect the three "almost universal pre-requisites" that need to be fulfilled before most employees will make a disclosure about problems in their organisation:

- they must be aware they can make a disclosure, and how to go about doing so, including to whom, how, what information should be provided, etc;
- they must believe that making a disclosure will serve "some good purpose", including that appropriate action will be taken by the recipient; and
- they must be confident that they will be protected from suffering reprisals or from being punished for having made the disclosure.

Particular strengths and weaknesses in how the legislation tries to meet these objects are detailed throughout this paper. Here, there are two threshold questions. Does 'whistleblowing' itself require statutory definition? And is there a best practice title for such legislation and/or the disclosures it seeks to encourage?

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[5] NSW Ombudsman (2004), *The Adequacy of the Protected Disclosures Act [NSW] to Achieve Its Objectives*, Issues Paper, April 2004 / June 2005, p.8. For further analysis of key factors in a positive reporting climate, see Brown AJ et al (2004), *Speaking up: creating positive reporting climates in the Queensland public sector*, Crime & Misconduct Commission, Brisbane, Building Capacity 6.

The most accepted definition of 'whistleblowing', in public policy and the social sciences, is:

> the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.[6]

This broad definition, arrived at by two American social scientists, was also endorsed in Australia by the Senate Select Committee on Public Interest Whistleblowing.[7] It accords with most public understandings of what a whistleblower is, why their actions are important, and why they are often likely to need protection.

While this definition is important, there are nevertheless arguments against the adoption of 'whistleblowing' as a legal term. Parts 2 and 8 of the paper will discuss the fact that at best only three of the Australian instruments, and possibly only one, are currently consistent with this definition. However even if they were all consistent, there is a major problem that the term is subject to many public stereotypes that threaten to defeat meaningful legal interpretation. These vary widely, and can be mutually exclusive:

- For most people, the term 'whistleblowing' implies an ethical choice on the part of an individual, by which they single themselves out apart from others. However most, if not all public officials are under a professional duty to report illegal, immoral and illegitimate practices. Many are happy to fulfil these duties and move on, without wanting to single themselves out as having higher ethical standards than colleagues.
- For some people, given the risks, whistleblowers are by definition always heroes, and should be entitled to protection from all adverse treatment – of any kind. However, this is not a feasible objective for legislation, because even if whistleblowers should be protected from reprisals resulting from their disclosure, it is not in the public interest that they are also then always protected from unrelated actions.
- For some commentators, whistleblowers are not only always heroes, but always destined to suffer for their experience.[8] If this definition were to be placed in statute, it would defeat a major purpose of the legislation, which is to recognise the role of whistleblowers in order to try to *prevent* such suffering.
- Many people, even those who support the principle of whistleblowing, believe the term is far more negative than positive in its public connotations. Consequently its use is perceived as doing more harm than good. One public officer summed it up this way, in response to our current research:

  > … [T]his term 'Whistle Blower' has <u>extremely</u> negative connotations in the public mind and the term alone will surely negate much of the work done to change the culture [of organisations]. It would hardly encourage me to come forward (despite support and assistance being available), if I knew that despite this I was still going to be labelled a 'whistle blower'. We may as well just call them 'dobbers' and be done with it. Not to put too fine a point on it but it's a bit like why parents don't name their babies 'Adolph' anymore.[9]

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[6] Near, JP & Miceli, MP (1985), 'Organisational dissidence: the case of whistleblowing', *Journal of Business Ethics* 4: 1–16, p.4.
[7] Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994, Parliamentary Paper No. 148/1994.
[8] de Maria, W (1999), *Deadly Disclosures: whistleblowing and the ethical meltdown of Australia*, Wakefield Press, Adelaide, p.25.
[9] WWTW project correspondence, email 28 July 2006.

A final reason why 'whistleblower' is best avoided as a legal term, is that the more that official action focuses on the whistleblower in response to a disclosure, the more difficult it can become to protect that person, and others. It is now widely argued that the best responses are those which remove the public focus from the whistleblower, and instead focus on the substance of the disclosure and minimisation of workplace conflict surrounding it.[10] As will be discussed, a range of individuals may need to be carefully managed and protected in various ways, once a public interest disclosure has been made – not just a person who makes an original disclosure.

Similarly, even if the making of a disclosure is almost always stressful, there is good reason to believe that individuals will be better placed to survive this stress and proceed with their careers, if protected from becoming the centre of attention. Once tagged as a whistleblower, it appears more difficult for an employee to 'exit' the disclosure and investigation process and move on. The consequences can be destructive for employees and organisations alike, if legislative regimes indirectly encourage individuals to wear this official tag for all time.

Given these considerations, there is a strong argument that 'whistleblowing' should not be statutorily defined, and that the four jurisdictions that have used the term 'whistleblower' or 'whistleblowing' in their legislation probably made a counterproductive choice (SA, Qld, Cth(1), Vic). Even though these can be accurately described in the vernacular as whistleblower protection laws, the term is simply too uncertain of meaning to be used in legislation.

If the title *Whistleblower Protection Act* is to be phased out, then what is its best practice replacement? The logical choice is *Public Interest Disclosure Act*, already the term used by most Australian jurisdictions and increasingly by other countries around the world, such as the United Kingdom.[11] The benefits include symbolic reinforcement that the legislative processes are intended to focus on the substance of disclosures, more than individual personalities; and that not every type of grievance will trigger those processes, rather only those disclosures with 'public interest' content. These are more honest signposts to how the legislation does, and should, work.

Of the state legislation, only the NSW *Protected Disclosures Act* uses a wholly different term. The Victorian, Tasmanian and NT instruments use both (i.e. a person can make a 'protected' disclosure which may then also be assessed to be a 'public interest' one); but as argued in parts 5 and 6, these dual designations are unnecessarily confusing. The term 'protected disclosure' can itself be confusing, because it may encourage expectations of protection that are beyond the scope of the Act, and may be misinterpreted as having more to do with the secrecy of documents (being akin to security classifications like 'top secret') than with legal and management protection of individual persons. Consequently the only term that appears necessary, and the better term for the title of the legislation, is 'public interest disclosure'.

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[10] Whitton, H (1996), 'Whistleblowers and whistleblower protection - trouble-makers or open government?', Paper to *A.I.C. Conference - Achieving quality decision-making at administrative law*, 21-22 November 1996; see also Anderson, P (1996), 'Controlling and managing the risk of whistleblower reprisal', *National Occupational Stress Conference*, 1996; Brown, AJ (2001), 'Internal witness management: an art or a science?', *Ethics & Justice* 3(2), pp. 45–61.

[11] *Public Interest Disclosure Act 1998* (UK). See Dehn, G & Calland, R (eds) (2004), *Whistleblowing Around the World: Law, Culture and Practice*, Open Democracy Advice Centre, Cape Town & Public Concern at Work, London.

## 2. Who should be eligible for whistleblower protection?

The answer to this question appears obvious – those eligible for protection should be whistleblowers. However, in only three jurisdictions is the current law consistent with the definition of whistleblowing outlined earlier, by being focussed on 'organisation members': NSW, the Commonwealth, and Tasmania.

The overall picture is set out in Appendix 2, showing who may make a public interest disclosure. The above three laws are focused on whistleblowing, because their provisions only apply to disclosures about public sector wrongdoing made by people internal to the public sector (usually 'a public officer' or 'public official'). The Queensland Act is mostly similar, but also allows 'anybody' to make some types of disclosures, irrespective of whether that person is internal to the organisation or sector to which the disclosure relates (Qld ss.19, 20). The remaining instruments provide open standing, under which 'any person' or 'any natural person' may make disclosures about public sector wrongdoing – i.e. irrespective of whether the person is internal to the public sector (SA s.5(1); ACT(1) s.15; Cth(2) cl.12; Vic s.5; WA s.5; NT cl.7; ACT(2) cl.15).

Why have many jurisdictions departed from the definition of whistleblowing, and thrown whistleblower protection open to so many people? The main explanation appears to be that in the early 1990s, many advocates argued strenuously that whistleblower protection was needed not only in the public sector, but also the private sector; and the first two laws (South Australia and Queensland) tried to function this way, extending public sector wrongdoing to some types of private sector misconduct.

Whether this is still a sensible approach is discussed in part 3 of the paper. The principle sought to be achieved, was that 'any person', if they were a whistleblower, should be able to seek protection. The problem lies in its implementation, which requires no institutional or employment connection between the complainant and the organisation or wrongdoers about which they are complaining.

Why is this institutional connection – i.e. the internal position of a whistleblower – so crucial? First, it is because of their internal position that we recognise whistleblowers as so often having information that is worthy of disclosure. Other complainants who are members of the public only rarely have the same insights.

Second, and most importantly, it is because they are internal that whistleblowers require special legal and management protection, and special encouragement to come forward. 'Outside' members of the public do not usually need legislative protection to report wrongdoing, especially concerning services or matters that affect them personally – because they are not normally subject to the same organisational loyalties and risks of reprisal that affect an organisation's own employees. The aim of whistleblowing laws is to compensate for these internally-based disincentives to reporting, by reducing or removing the risk that organisation members will be harassed, victimised, demoted, sacked or prosecuted by their own colleagues and management.

There seem to be few reasons why such laws should remain focussed on 'any person'. In most jurisdictions, the consequences of open standing appear to be more negative than positive, diluting the purpose and focus of the legislation, confusing its operation, and creating 'floodgate' fears about the potential number of complaints, which have in turn led to attempts to narrow the scope or implementation of the Act in other areas (e.g. by limiting the types of wrongdoing that may be reported). The reputation of the legislation

may suffer because it can be used by complainants who are not actually whistleblowers, as an alternative avenue for pursuing non-whistleblowing grievances. Such complainants themselves may end up unhappy, because the legislation was never actually designed to help them, but the open standing provision created a strong legal illusion that it could.

The solution to this issue is twofold:

- Those jurisdictions that currently provide open standing for the making of disclosures about public sector matters, should return to the original goal of whistleblower protection by providing that it is only public officials – *and* others who might properly be classified as 'internal' to the public sector – whose disclosures may trigger the Act; and
- All jurisdictions should provide *other* complainants with general protection against reprisals in other legislation, where this protection is currently lacking – e.g. through standard anti-reprisal provisions in the criminal code or the enabling legislation of investigative agencies such as the ombudsman or health care complaints commissioner. These provisions would mirror existing offences, such as perversion of the course of justice and witness intimidation.

Who, then, should be protected? A clearer checklist is needed, both of the types of people who should be able to make a disclosure which attracts protection, and of the people to whom that protection should then be able to extend – who may not be the same people. Table 3 provides a suggested checklist:

***Table 3. A checklist of who may need protection in respect of disclosures***

| | | |
|---|---|---|
| Persons who should be able to make a disclosure about public sector wrongdoing (and receive protection in respect of that disclosure) | 1 | Any public official |
| | 2 | Public contractors (in respect of their contracts) |
| | 3 | Employees of public contractors |
| | 4 | Volunteers in publicly-funded programs<br>(on matters not covered by elective processes) |
| | 5 | Former officials, contractors, employees or volunteers<br>(especially if still subject to risk of reprisals) |
| | 6 | Anonymous persons whose information reasonably suggests they may be one of the above |
| Other circumstances in which persons may need protection as a result of a disclosure | 7 | Any of the above, in respect of supplementary or additional information they supply to an investigation |
| | 8 | Other internal witnesses – e.g. others internal to the organisation who supply information to an investigation (including compelled evidence) |
| | 9 | Any person who might suffer reprisals as a result of any of the information provided above, including:<br>(a) Any of the above;<br>(b) Any persons internal to the organisation who are wrongly believed to be one of the above; and<br>(c) Friends, family or associates of any of the above, whether internal or external to the organisation. |

The rest of this part of the paper deals with each category in turn.

### *(1) Any public official*

The NSW, Commonwealth, Tasmania and Queensland laws have at least some focus on public officials, but different definitions of the officials covered (see Appendix 3).

Current best practice is in the Queensland Act, where the definition of 'public officer' for this purpose includes, in effect, everyone employed by state government, including legislators, judicial officers, and officers of government-owned corporations. The NSW definition is as good but for, at least on its face, the limitation that to make a disclosure an official must him/herself be subject to the jurisdiction of specified authorities (s.4). In reality this may be wide, but in other settings may not be. The Tasmanian definition similarly means that certain officials, about whom it is not possible to make a disclosure, are themselves unable to make one (subs.4(2)).

In contrast, there are large gaps at the Commonwealth level, where only APS employees can receive support from s. 16 of the *Public Service Act 1999* (or the equivalent s.16 of the *Parliamentary Service Act 1999*). This excludes large sections of the Commonwealth sector, including all legislators, judicial officers and administrators, government corporations, and the employees of many major agencies including the Australian Federal Police and Australian Defence Force.[12]

### *(2) Public contractors &*
### *(3) Employees of public contractors*

It is now widely accepted that private contractors, and their employees, should be able to blow the whistle on wrongdoing they discover as either (a) private providers of services to government or (b) providers of public services that have been 'contracted out' to private providers. In both cases, contractors and their employees can be considered 'internal' to the public sector whenever they are positioned to observe wrongdoing of public significance, and whenever they are at risk of reprisals if they report it (e.g. through suspension from a contract or being barred from future contracts). In effect they can easily be subject to the same legal and cultural obstacles to reporting that afflict officials. The main advantage of those laws with open standing is that all such persons are currently able to make disclosures.

Among the more focused laws, best practice can be found in Tasmania. This is the only Act to specifically provide for contractor disclosures, although still somewhat too narrowly. Section 6(2) of the Act provides that "a contractor" may disclose improper conduct by "a public body with which the contractor has entered into a contract"; while s.3(1) defines "contractor" to mean "a person who at any time has entered into a contract with a public body for the supply of goods or services to, or on behalf of, the public body". Even better practice would be for contractors to be able to make disclosures about individual public officials, and not just the conduct of a "public body"; and for a contractor's employees to be able to make disclosures independently of their employer, and even against their own employer, in respect of the discharge of public contracts.

### *(4) Volunteers in publicly-funded programs*

A further category of persons with roles within the delivery of publicly-funded services are volunteers (in effect, unpaid contractors), such as State Emergency Service, Rural Fire Service and a variety of health care volunteers. These persons can also be subject to

[12] The 74 Commonwealth agencies whose staff come under the definition of 'APS employees' – including 12 agencies with dual staffing powers – can be found at http://www.apsc.gov.au/apsprofile/agencies.htm.

reprisal risks for disclosing information. Currently volunteers are only clearly able to make public interest disclosure where 'open standing' permits them to do so, or the jurisdiction of investigative bodies extends to them. One issue is the fact that some of the concerns of volunteers may already be properly dealt with by elective processes (representative committees etc) rather than by formal investigation.

### *(5) Former organisation members*

Organisation members can still face legal and reprisal risks even after they leave an organisation, which act as disincentives to disclosure. None of the current laws which limit disclosures to public officials provide for former officials to also receive protection – for example against actions for defamation or breach of confidence.

While the NSW and Tasmanian Acts provide for a disclosure made by a public official to remain protected "even if the person who made it is no longer a public official" (NSW s.8(3); Tas s.25(1)), this is not the same as allowing former officials to make disclosures. Current best practice is to be found in the Tasmanian Act's treatment of contractors, who may make a disclosure even after they cease "to hold or be a party to a contract with the public body" (s.25(2)). This principle should be extended to all eligible whistleblowers.

### *(6) Anonymous disclosures*

Current laws deal with anonymous disclosures in inconsistent ways. While it would be ideal if all officials were prepared to make disclosures openly, there is a strong policy argument for providing that disclosures may be made anonymously, if authorities' first priority is indeed to identify and rectify wrongdoing. Most public programs that rely on volunteered information, such as Crimestoppers and the National Security Hotline, are promoted with the assurance that callers can remain anonymous.

Arguably, from an anonymous disclosure it is not possible to know whether a complainant is a whistleblower (i.e. internal to the organisation or sector), nor to protect that complainant. In practice however, the information provided by a complainant can usually be used to determine whether they are a whistleblower; and either unique features of the information, or a procedure such as a codename or number can be used as identification measures in the event of reprisals. In reality many whistleblowers make their first contact with authorities anonymously, but reveal their identities once assured of discretion and confidentiality.

Current best practice is to provide that "a person may make a disclosure… anonymously" notwithstanding these questions (Vic s.7, Tas s.8, NT cl.10). The Queensland Act is less clear, providing for anonymous disclosures unless a receiving authority "establishes a reasonable procedure for making a public interest disclosure" which provides otherwise (s.27). Four of the instruments (SA, NSW, Cth (1), WA) are silent.

The most obvious problems are to be found in the ACT and the 2001-2002 Commonwealth Bill, which as well as being silent emphasise that authorities may decline to investigate "if the person making the disclosure does not identify himself or herself" (ACT (1) s.16; Cth (2) s.13; ACT (2) cl.25(b)). While this may sometimes be valid, in fact there are more important criteria for when authorities might decline to investigate (see part 5), and these provisions can be misread as suggesting that anonymous disclosures are inherently illegitimate.

### *(7) Whistleblowers who supply supplementary or additional information*

Whistleblowers in all the above categories may be eligible for legal protection in respect of their original disclosure – but sometimes it can be unclear whether this extends to further information they might supply as an investigation proceeds. Does each separate piece of information they supply need to be classified as a separate disclosure, for them to be protected in respect of it?

Most legislation is silent on this issue. The best approach can be found in provisions that "if a person who makes a disclosure… provides further information relating to that disclosure…, that further information is to be treated as if it were a protected disclosure" (Vic s.13; Tas s.15; NT cl.23). However these and other provisions are also limited by the way in which the protection of further information may also be lost in circumstances where this is not justified (Vic s.23; Tas s.24; NT cl.24; ACT (2) cl.49(2)) – a problem which will be discussed later, in relation to loss of protection.

### *(8) Other internal witnesses*

Contrary to many stereotypes, whistleblowing does not always take the form of a direct allegation that is then the sole or main trigger for an investigation. Integrity investigations are also triggered in a variety of other ways – for example, by supervisor suspicions, a random audit, a complaint from outside the organisation, media comment on organisational failures, or a combination of these things. In any of these situations, internal staff may then subsequently choose to come forward, or may be directly called on to give evidence which, when they elect to tell the truth, becomes decisive. Some employees may disclose vital evidence by accident, or without fully understanding its significance – in which case it should still be treated as a public interest disclosure, since they may still need careful management and protection.

These non-stereotypical whistleblowers fall within the wider term 'internal witness', a useful alternative developed by the NSW Police.[13] However, most existing laws were framed before it was understood that there was this larger diversity of whistleblowing roles. Most of the laws are therefore silent on whether such persons are protected, but fortunately, their definitions of protected or public interest disclosures are typically wide enough to cover most disclosure scenarios. Three instruments go further and touch obliquely on the need for wider protection, by recognising that a person who makes a disclosure in the course of evidence "to a court or tribunal" should then receive legal protection, even though the court is not a designated entity to receive that type of disclosure (Qld s.35; less satisfactorily, ACT(1) s.5, Cth (2) cl.5).

Appendix 4 sets out current best and worst practice in this area. The Victorian and NT provisions sensibly suggest that anyone who provides information in support of a disclosure or investigation should be entitled to similar protections as if they had made the original disclosure or served as a witness in a court. The proposed replacement ACT provision is also better, but for an unnecessary distinction between the protections available to an original 'discloser' and a subsequent 'informant', when their status should really be identical. Best practice would involve a new provision based on the better elements of the Victorian and ACT(2) provisions.

The clearest problem is found the NSW Act, which only protects those who make disclosures voluntarily (NSW s.9). Consequently, many of those who report information because they are legally compelled to do so – for example, mandatory reports by teachers

[13] See Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 402.

or nurses of child or sexual abuse in state institutions – do not receive protection under the Act, even if they do somehow attract it under another Act. The counterproductive nature of this restriction is emphasised by the fact that sub-sections 9(3), (4) and (5) immediately go on to provide exceptions to it. The section should be repealed.

### *(9) Any person who might suffer reprisals*

Finally, some protections can only be effective if they extend wider than the individuals who supply information. This is especially true of provisions intended to deter reprisal actions, by making such actions criminal offences. Whistleblowers themselves are not the only potential targets for reprisals, particularly 'unauthorised' or 'unofficial' harassment and intimidation. Such reprisals can also be taken against other internal witnesses, persons wrongly believed to be internal witnesses, and the family, friends or associates of internal witnesses.

The Commonwealth Act is silent on criminal or civil anti-reprisal remedies. A clear problem can be found in the NSW Act, which provides that a reprisal is only an offence when taken against "another person", substantially in reprisal for that "other person" making a protected disclosure (NSW subs.20(1)). Consequently it only outlaws reprisal actions taken *directly* against someone who made a protected disclosure. The Victorian, Tasmanian and NT instruments probably do outlaw reprisals against third persons, but are ambiguous (Vic s.18; Tas s.19; NT cl.19). The South Australian and proposed ACT replacement instruments outlaw reprisals against third persons, but suffer other problems to be discussed later.

Best practice is to be found in the Queensland, ACT and WA Acts, and the Commonwealth 2001-2002 Bill, which clearly outlaw reprisals against any third person as well as any whistleblower or other internal witness – as shown below:

***Table 4. Third party protection in anti-reprisal provisions***

| **Legislation** | **Relevant provision(s)** |
|---|---|
| **2. Qld 1994** | **41 (1).** A person must not cause, or attempt or conspire to cause, detriment to **another person** because, or in the belief that, **anybody** has made, or may make, a public interest disclosure. |
| **4. ACT (1) 1994** | **4. …** ***unlawful reprisal*** means conduct that causes, or threatens to cause, detriment— (a) to **a person** in the belief that **any person** has made, or may make a public interest disclosure…; **25**. |
| **6. Cth (2) Bill 2001-2** | **4. …** ***unlawful reprisal*** means conduct that causes, or threatens to cause, detriment— (a) to **a person** in the belief that **any person** has made, or may make a public interest disclosure…; **22**. |
| **9. WA 2003** | **14 (1).** A person must not take or threaten to take detrimental action against **another** because **anyone** has made, or intends to make, a disclosure of public interest information under this Act |

## 3. Should public & private sector whistleblowing be in the same law?

Why should whistleblower protection laws be confined to disclosures by public officials about the public sector? As discussed in the previous part of the paper, there have long been arguments that equivalent protection is needed for private sector employees, in respect of wrongdoing in or by their own organisations. Some of the best-known whistleblowing involves disclosure by private sector employees about such misdeeds.

Clearly, private sector whistleblowers also deserve legislative protection. The problem is how to achieve this private sector coverage, since – as discussed earlier – effective protection does not lie in simply allowing any person to make disclosures about any wrongdoing, irrespective of whether they are a whistleblower. The question thus becomes whether private sector coverage should be pursued by extending the public sector laws in this paper, perhaps using an alternative strategy.

In the early 1990s, the Senate Select Committee on Public Interest Whistleblowing endorsed the ideal that whistleblower protection should occur in a 'sector blind' fashion. As mentioned earlier, Australia's first two laws also tried to go in this direction:

- In South Australia, the law covers disclosures by any person about any "illegal activity" (s.4) whether within public agencies or private companies. However for the reasons discussed earlier, this goes beyond protecting private sector whistleblowers, and includes anyone who provides information to police about any criminal offence – for example, normal criminal victims and complainants.
- In Queensland, the law allows public officials to disclose dangers to public health or safety arising in any sector, and any person (including private sector whistleblowers) to disclose any dangers to the environment or the health or safety of persons with disabilities, also in any sector (ss.18 & 19).

However, these experiments have not been followed elsewhere. Instead private sector whistleblower protection has been pursued in other ways:

- An Australian Standard on Whistleblower Protection Programs for Entities (AS 8004-2003) sets out systems for all medium-to-large organisations;
- In 2004, a new Part 9.4AAA "Protection for whistleblowers" was introduced into the *Corporations Act 2001 (Cth)* by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth),* providing statutory protection for any company employee who blows the whistle on breaches of the Corporations Act, including breaches of directors' and managers' duties; and
- Other existing regulatory regimes contain their own statutory protection for internal informants, including company employees, who blow the whistle to regulators. Examples include regulation of financial services[14] and of unions and employer associations under Part 4A (ss.337A-337D), Schedule 1, Chapter 11 of the *Workplace Relations Act 1996* (Cth) (insert 2004).

Is there a right approach to be followed in Australia? The answer appears to be that public and private sector whistleblowing are now destined to follow separate tracks, for a range of reasons.

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[14] E.g. Latimer, P (2002), 'Whistleblowing in the Financial Services Sector' *University of Tasmania Law Review* 21(1): 39-61; (2003), 'Whistleblowing in the insurance industry' *Australian Law Journal* 77(9).

The first reason is that Australia's public sector laws have evolved with the threefold objectives set out in part 1, with consequences that do not necessarily extend easily to the private sector. Their provisions deal not only with broad principles of whistleblower protection, but with the making and investigation of disclosures, including detailed mechanics for how agencies and investigative authorities should handle disclosures. These mechanics are different in each jurisdiction. Even if they were extended to the private sector, they would similarly vary between different types of regulatory regime (e.g. company regulation, investor and shareholder protection, consumer and environmental protection etc). Their necessary complexity mitigates against combining all public and private sector wrongdoing under one law.

Second, there are differences between sectors in the way that 'public interest' disclosures are defined, and agencies are expected to respond to them. Some types of misconduct in the public sector may more readily give rise to a private cause of action in the private sector, than raise questions of public interest. Public sector legislation is also properly able to set out more rigorous requirements for public agencies, than might be reasonably expected of all private sector entities.

A third and final explanation for parallel legislation is Australia's federal system. Much private regulation is now undertaken as a unified national jurisdiction, through mechanisms such as the *Corporations Act* and *Trade Practices Act*; while the public sector falls under nine separate jurisdictions. Under the continuing trend towards uniform national business regulation, there is little interest in state laws trying to regulate private sector whistleblowing. Similarly, even if there were national 'sector-blind' legislation, it would not replace the need for state public sector laws.

These answers contrast with the type of 'sector-blind' whistleblower protection scheme now achieved under British law. Under the *Public Interest Disclosure Act 1998* (UK), public and private employees alike can make a range of disclosures about wrongdoing within the control of their employers, and receive legal protection for doing so. This is possible because (a) the law deals primarily with whistleblower protection, and in particular compensation in the event of reprisals, not detailed investigative systems; (b) British remedies are based in employment law, rather than separate public and private regulation, using Part 4A "Protected Disclosures" of the *Employment Rights Act 1996* (UK); and (c) Britain's employment law system operates nationally for public and private employers alike, rather than being split as under Australia's federal system.

In time, as Australia moves to a more unified industrial relations system, it may be possible to use the employment law system to deliver alternative remedies – as will be discussed later. Until that time, it is important to clean up the confusion caused by the private coverage inadequately attempted by the South Australian and Queensland laws. Both jurisdictions would be better served by a comprehensive law focused simply on the public sector, with anti-reprisal mechanisms for other complainants placed in other legislation. Such reform would help clarify the purpose and nature of these schemes.

## 4. What types of wrongdoing should be able to be disclosed?

As outlined earlier, whistleblowing is normally understood to involve the disclosure of 'illegal, immoral, or illegitimate practices' in the whistleblower's organisation. However views can legitimately differ on the type or seriousness of the matters that should trigger whistleblower protection, and the different people whose behaviour requires scrutiny. Very different approaches are taken in current legislation.

### *Types of disclosable wrongdoing*

Table 5 below sets out the substantive types of wrongdoing that can currently be the subject of public interest disclosures. The table also identifies a second issue: that similar types of disclosures may also be subject to additional statutory thresholds in different jurisdictions, providing different standards for how serious this conduct must be before the disclosure comes under the Act. Appendix 5 sets out the detail regarding substantive categories, while appendix 6 sets out the detail regarding these statutory thresholds.

The first issue is whether the legislation provides for comprehensive coverage of the major issues of potential public concern: illegal conduct, corrupt conduct, public wastage, maladministration, and dangers to public health, safety and the environment.

Best practice can currently be found under the South Australian, Queensland and Western Australian legislation which provide for disclosures in all these categories. NSW can be seen as also meeting this standard if dangers to public health, safety or the environment are also seen as maladministration. The Commonwealth scheme deals with breaches of the APS Code of Conduct, which can cover almost any misbehaviour.

More problematic are the ACT(1), Victorian, Tasmanian and NT instruments which, for no known reason, omit 'maladministration' as a subject for public interest disclosures. This is despite the fact that maladministration represents the normal jurisdiction for the Ombudsman, and the Acts provide specifically for the Ombudsman to investigate or oversee the investigation of disclosures (see e.g. ACT(1) s.12; Vic s.27). The omission of maladministration from the definition of disclosures is a major deficiency.

Most problematic, but for a different reason, is the proposal in the current ACT Bill to redefine public interest disclosures to include, literally, any "conduct contrary to the public interest" (cl.8). This generous definition is likely to be extremely difficult to administer, given competing views of the 'public interest' and the fact that many policy disputes and personal grievances are capable of being brought within this term. As discussed later, this approach would probably increase rather than reduce confusion.

The second issue concerns the different statutory thresholds for the behaviour.

Many of the definitions set out in Appendix 5 already qualify the categories of wrongdoing so as to filter out less serious complaints. In Queensland and NSW, for example, public wastage or maladministration must be "substantial", "substantial and specific" or "serious" before they can justify a public interest disclosure. In addition, the second line for each instrument in Table 5 shows whether a further statutory threshold applies to each type of alleged wrongdoing. Where it does, the relevant behaviour *also* has to amount to either a criminal offence, a disciplinary offence, or a matter capable of justifying the dismissal of a public official, before the disclosure comes within the Act.

***Table 5. What types of wrongdoing can be the subject of disclosures?***

| Legislation | Illegal activity | Corrupt / official misconduct | Misuse/waste of public funds / resources | Maladmin-istration | Danger to public health or safety | Danger to environ-ment |
|---|---|---|---|---|---|---|
| **1. SA 1993** | **Yes** | ***(Yes)*** | **Yes** | **Yes** | **Yes** | |
| Threshold? | **No** | | | | | |
| **2. Qld 1994** | ***(Yes)*** | **Yes** | **Yes** | **Yes** | **Yes** | |
| Threshold? | | **Criminal or dismissable** | **No** | | **Yes** | |
| **3. NSW 1994** | ***(Yes)*** | **Yes** | **Yes** | **Yes** | | |
| Threshold? | | **Criminal, disciplinary or dismissable** | **No** | | | |
| **4. ACT(1) 1994** | ***(Yes)*** | **Yes** | **Yes** | | **Yes** | |
| Threshold? | | **Criminal, disciplinary or dismissable** | **No** | | | |
| **5. Cth(1) 1999** | **Yes** | **Yes** | **Yes** | **Yes** | | |
| Threshold? | **No** | | | | | |
| **6. Cth(2) Bill 2001-2** | ***(Yes)*** | **Yes** | **Yes** | | **Yes** | |
| Threshold? | | **Criminal, disciplinary or dismissable** | **No** | | | |
| **7. Vic 2001** | ***(Yes)*** | **Yes** | **Yes** | | **Yes** | **Yes** |
| Threshold? | **Criminal or dismissable** | | | | | |
| **8. Tas 2002** | ***(Yes)*** | **Yes** | **Yes** | | **Yes** | **Yes** |
| Threshold? | **Criminal or dismissable** | | | | | |
| **9. WA 2003** | **Yes** | **Yes** | **Yes** | **Yes** | **Yes** | |
| Threshold? | **No** | | | | | |
| **10. NT Bill 2005** | ***(Yes)*** | **Yes** | **Yes** | | **Yes** | **Yes** |
| Threshold? | **Criminal or dismissable** | | | | | |
| **11. ACT(2) Bill 2006** | **← Yes →** | | | | | |
| Threshold? | **No** | | | | | |

Appendix 6 sets out the origins of these thresholds, which lie in the statutory definitions of corruption and official misconduct adopted under separate laws in NSW and Queensland respectively. In both these states, since 1988 and 1990, these statutory definitions have involved a two-part test, based firstly on the nature of the conduct and secondly on whether it met the threshold that it was serious enough to potentially warrant criminal or disciplinary action. Under these states' public interest disclosure laws, this threshold continues to apply to corrupt conduct and official misconduct respectively – but not to other types of wrongdoing. This approach is also followed in the ACT Act and Commonwealth 2001-2002 Bill, which include a similar threshold in respect of 'disclosable conduct' (i.e. corrupt conduct), but not other categories.

In contrast, under four of the instruments, no such additional threshold applies to any of the relevant categories of disclosable conduct (SA, Cth(1), WA, ACT(2)).

The major problem identified by Table 5 lies with the Victorian Act, and the two instruments that have copied its approach (Tasmania and NT). These instruments require the additional threshold of criminality or dismissability to met not simply by disclosures about corrupt or official misconduct, but disclosures about any kind of wrongdoing. Consequently even serious allegations about maladministration, public wastage or organizational negligence will not be covered by the Act, unless at least one officer can be identified as sufficiently individually culpable to be sacked or charged with a criminal offence. A great many serious disclosures about defective practices and procedures would never meet this threshold in Victoria, Tasmania or the Northern Territory, even though they would immediately fall within the legislation in any other jurisdiction.

The only apparent explanation for this defect is that a drafting error may have occurred, when Victoria tried to use this particular law to transpose the NSW and Queensland definitional approach into its own legal system for the first time. Whatever the explanation, the approach appears to threaten the utility of the entire Act in many instances. Indeed, even under other Acts there are qualifications about the seriousness of conduct which are difficult to apply, and could usefully be relaxed.

### *Whose wrongdoing?*

Earlier the paper highlighted differences in who may make public interest disclosures. Current laws also involve significant differences in who can be the subject of a disclosure if they engage in the wrongdoing outlined conduct. These are described in Table 6.

Many of these differences relate to the different public integrity regimes of the jurisdictions. In some jurisdictions, notably the Commonwealth, there are no independent mechanisms for the investigation of wrongdoing involving some public officials, such as legislators and judges. In these situations, unsurprisingly, no mechanisms exist for officials to make protected disclosures about such persons or agencies. General best practice is to be found in South Australia, Queensland and Western Australia where the public integrity system covers every type of official, including all parliamentarians and judicial officers. However, achieving similar coverage in other jurisdictions depends on broader reform than simply recasting the relevant whistleblower protection law.

Specific best practice is found in Western Australia, where the definition of 'public authority' is sufficient to include government-owned corporations, and the definition of 'public sector contractor' is particularly comprehensive (s.3(1)).

***Table 6. Whose wrongdoing can be subject to disclosure?***

| Legislation | Govt departments and authorities | | Govt owned corpor-ations | Contractors | MPs | Judicial officers |
|---|---|---|---|---|---|---|
| | Some | All | | | | |
| **1. SA 1993** | | Any disclosure | | | | |
| **2. Qld 1994** | | Any disclosure | Any disclosure (at least to the GOC) | Negligent or improper mgt / waste of public funds | Official mis-conduct | Any disclosure |
| **3. NSW 1994** | | Any disclosure | Any disclosure | | Corrupt conduct | |
| **4. ACT(1) 1994** | | Any disclosure | ? | Any disclosure? | ? | ? |
| **5. Cth(1) 1999** | Any disclosure | | | | | |
| **6. Cth (2)Bill 2001-2** | | Any disclosure | ? | Any disclosure? | ? | ? |
| **7. Vic 2001** | | Any disclosure | Any disclosure | Any disclosure | Any disclosure | |
| **8. Tas 2002** | | Any disclosure | Any disclosure | | Any disclosure | |
| **9. WA 2003** | | Any disclosure | Any disclosure | Any disclosure | Any disclosure | Any disclosure |
| **10. NT Bill 2005** | | Any disclosure | Any disclosure | Any disclosure | Any disclosure | |
| **11. ACT(2) Bill 2006** | | Any disclosure | | Any disclosure | | |

'Any disclosure' means disclosure about any of the types of wrongdoing that apply from Table 5.

The ACT Act and Commonwealth 2001-2002 Bill may include contractors, as opposed to simply individual public servants on contract, in the definition of a 'public official' about whom disclosures may be made ("(b) a person employed, by or on behalf of the Territory or in the service of a Territory authority or Territory instrumentality, whether under a contract of service or a contract for services…; or (c) a person otherwise authorised to perform functions on behalf of the Territory…": s.4(2)). However this is not explicit.

An anomaly exists in the Tasmanian Act, which does not appear to permit disclosures *about* contractors or their services, even though it contains best practice in allowing contractors to *make* disclosures about the public bodies with which they deal.

For the same reasons outlined in part 2, the largest gap is at the Commonwealth level. Under the *Public Service Act 1999* (Cth) only employees of Australian Public Service agencies, including agency heads, are subject to the APS Code of Conduct, breaches of which are the trigger for the limited protection ordered by s.16. No equivalent general legislative provision exists in relation to disclosures about non-APS agencies, government-owned corporations, contractors, legislators, or judicial officers.

## 5. How do we guard against misuse of whistleblowing processes?

By its nature, whistleblowing is usually linked to interpersonal, organisational or professional conflict. In some cases conflict only emerges after a disclosure is made, but often employees first try to raise problems informally without success, and the resulting conflict forms the backdrop to a more formal disclosure to higher authorities. In other cases, the trigger for employees to blow the whistle on 'public interest' wrongdoing is conflict over matters affecting them personally, whether related or separate. It is precisely because whistleblowing is so surrounded by conflict, and rarely involves a 'clean' public interest disclosure, that legislative protection is necessary.

At the same time, there are personal and organisational conflicts that do *not* raise public interest concerns, or where other processes exist for the investigation and resolution of private conflicts – for example, for ensuring that employees are treated fairly in respect of their employment and not victimised for lodging their grievances. One of the greatest challenges in the implementation of public interest disclosure laws is that of ensuring that these systems are not used – or not over-used – as alternative vehicles for conflicts better dealt with under other processes. This involves a delicate balance:

- If staff can use public interest whistleblowing processes to pursue matters that are only personal grievances, this helps give 'whistleblowing' a bad name and stands to discourage other staff from making public interest disclosures; *but*
- The same result flows if authorities place too many filters over who can make a public interest disclosure, and are then perceived to be 'picking and choosing' those whistleblowing cases they want to treat as 'genuine'; *and*
- In between, the reality remains that many public interest disclosures are mixed up with personal grievances. Even in the unlikely event they are not, personal motives typically *appear* to be mixed up in them because personal motives are attributed to the whistleblower by colleagues or management, whether real or not.

For these reasons, it has long been held that decisions about how a disclosure is treated and whether it is investigated should be based on the substance of the disclosure, not the motives or apprehended motives of the whistleblower.[15]

All current laws contain provisions intended to help guard against misuse, by filtering out inappropriate cases while still trying to encourage public interest whistleblowers. However there is often concern that the legislation does not adequately support the decisions that agencies need to make to get this difficult balance right. Sometimes this appears to be because not all laws contain all the appropriate discretions. There is also confusion as to when a discretion to 'filter out' a disclosure should mean the whistleblower does not receive legal protection, and when protection remains but the disclosure can reasonably be determined as not warranting investigation.

Consequently, a new checklist is required of the filters that can be used to ensure proper use of whistleblowing processes, distinguishing between these different consequences. Such a checklist is suggested in Table 7. The rest of this part deals with each category of information in turn.

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[15] See e.g. Dozier, J B & Miceli M P (1985), 'Potential Predictors of Whistle-Blowing: A Prosocial Behavior Perspective', *The Academy of Management Review* 10: 823-836; Fox, R G (1993), 'Protecting the whistleblower' *Adelaide Law Review* 15(2): 137-163.

***Table 7. Filters against misuse or abuse of public interest disclosure legislation***

| | | |
|---|---|---|
| Information which should not amount to a public interest disclosure (i.e. does not trigger *either* legal protection *or* investigation under the Act) | 1 | False or misleading information (i.e. intentional) |
| | 2 | Information which does not satisfy a subjective or objective test that it concerns wrongdoing (i.e. is not based on an honest reasonable belief about, and/or does not tend to show, wrongdoing) |
| | 3 | Entirely a policy dispute |
| | 4 | Entirely a personal grievance |
| | 5 | Vexatious (abuse of process) |
| Information which need not necessarily be investigated (even though the whistle-blower may still require protection for having made the disclosure) | 6 | Incorrect information (e.g. unintentional) |
| | 7 | Trivial matters |
| | 8 | Old matters |
| | 9 | Matters already investigated, litigated or more appropriate for litigation |

### *(1) False or misleading information (intentional)*

In all jurisdictions, it is a criminal offence to knowingly supply false or misleading information, intending it be acted on as a public interest disclosure. The provision that currently strikes the best balance is Queensland's, which provides that a person may not make a statement intending it be acted on as a public interest disclosure and "in the statement, or in the course of inquiries into the statement", intentionally give information that is "false or misleading in a material particular" (Qld, s.56(1)).

Six other instruments also provide comparable offences (SA s.10; NSW s. 28; Vic s.106; Tas s.87; WA s.24; NT cl.84). The ACT and Commonwealth instruments contain no such offence, but rely on general offences against false or misleading information in the course official business under their respective criminal codes (s. 338 ACT *Criminal Code*; s. 137.1 Cth *Criminal Code*).

Currently, the provisions in South Australia and Western Australia also create the problematic offence of "being reckless about whether" information in an intended disclosure is false or misleading. Such recklessness is not only difficult to prove, but is a potential deterrent to whistleblowers, who might reasonably fear being exposed to such a prosecution if some aspect of their information proves incorrect.

On the other hand, only SA and WA specifically provide that a disclosure based on false or misleading information does not attract the legal protections under the Act (SA ss.5(2), 10(2); WA ss.5(2), 24(2)). This is a legitimate deterrent to inappropriate disclosures, since anyone who knowingly provides such information should clearly have no expectation of being protected in respect of it. Best practice would be for all jurisdictions to make this lack of protection explicit, but only in respect of information found false or misleading in a 'material particular' (in order to ensure protection is not lost on insignificant grounds) and only in respect of misinformation supplied intentionally (not accidentally).

### *(2) Subjective and/or objective test as to the conduct*

For practical purposes, the most important current filters are the statutory definitions of what type of information about wrongdoing can amount to a public interest disclosure. There are two different approaches, the most common being an entirely subjective test about the content of the information. On this test, for any matter to amount to a public interest disclosure that triggers any part of the Act, the person making a disclosure must "believe" or "honestly believe", "on reasonable grounds", either:

(a) that the information they provide either "shows" or "tends to show" a proscribed form of wrongdoing (Qld s.14(2); ACT(1) s.4; Cth(2) s.3) or

(b) that a person or body has engaged, is engaging or proposes to engage in the wrongdoing they are disclosing (Vic s.5; Tas s.6; NT s.7).

The problem with this first approach, is its silence on what happens if a person discloses information which they did not know or believe concerned any wrongdoing – or a particular type of wrongdoing – but which *does* contain such evidence. This information might be vital, and the person who discloses it may well need protection, but there could grave doubts about its status because the whistleblower supplied it innocently, ignorantly or without fully understanding its significance.

By contrast, three Acts contain an entirely objective test, and consequently suffer from a reverse problem. Under this legislation, the disclosure must include information that "shows or tends to show" a proscribed form of wrongdoing (NSW ss.10-15), or simply "tends to show" it (SA s.4; WA s.4(1)). In each case, the whistleblower must also believe on reasonable grounds that the information is true, or may be true (SA s.5(2); WA s.5(2)), but in effect this is simply a further requirement it not be false or misleading. Under these tests, a whistleblower might honestly and reasonably believe that the information concerns wrongdoing, but if they are mistaken, and in retrospect the information does not *in fact* tend to show wrongdoing, there is some room for doubt about whether it ever attracted legal protection.

In a variation on this approach, the ACT Bill provides that a disclosure must be a statement made "honestly and without recklessness" (cl. 49), "that the person knows, believes or suspects something about an event, action or circumstance" (cl. 7(2)). While it is not clear what the 'something' must be, the Bill also requires that the disclosure must contain "information that tends to show" conduct contrary to the public interest (cl.8(1)). Accordingly this final objective test appears to prevail.

Under the Victorian, Tasmanian and NT instruments, this objective test is also used but not to determine whether the information amounts to a 'protected' disclosure – only to determine whether it meets the test of a 'public interest' disclosure which deserves to be investigated by either a public body or the Ombudsman (see e.g. Vic ss. 24(1) & (2), 29(1)(b), 31, 32). As discussed earlier, it would be less confusing not to have these dual classifications, and this procedure is further discussed in the next part of the paper. The key thing here is that it does not solve the first problem noted above.

Best practice would lie in a simpler provision that a disclosure attracts protection if *either* (a) the whistleblower honestly believes on reasonable grounds that the information tends to show proscribed wrongdoing, *or* (b) the information does tend to show wrongdoing, irrespective of the whistleblower's belief. In either case, the information should be provided honestly with no undisclosed belief that it could be fabricated or inaccurate; and in either case, it may or may not then warrant investigation.

### *(3) Entirely a policy dispute*

Most current laws provide for disclosures about negligent management, wastage of public funds or resources and maladministration, but require such disclosures to detail some specific damage or wrongdoing – rather than being general disputes over government policy or the quality of administration.

Two Acts make this distinction explicit. Section 17(1) of the NSW Act provides that a disclosure that "principally involves questioning the merits of government policy" is not protected. However this is problematic wording, because 'government policy' is left undefined. Accordingly many disclosures that do legitimately point to serious maladministration could be left unprotected, simply because they also necessarily challenge government policies, practices or procedures.

Better wording can be found in the Queensland Act, which provides that disclosures about negligent or improper management leading to a substantial waste of public funds "cannot be based on a mere disagreement over policy that may properly be adopted about amounts, purposes and priorities of expenditure" (s.17(2)). This makes it clear that a disclosure about negligent or improper management will remain protected even if it also contains a dispute over policy, provided it goes beyond being *simply* such a dispute and does involve something closer to objective wrongdoing.

### *(4) Entirely a personal grievance*

As outlined above, although public interest disclosures often involve personal grievances, it is well established that they must involve more than this to attract legal protection.

A matter is solely a personal grievance if, should the individual involved be satisfied that appropriate action has been taken, the whole matter is then automatically taken as resolved. Public interest matters are ones that, even if they also involve personal grievances, are not necessarily resolved just because the personal interests are satisfied. The exclusion of matters that are purely personal grievances from public interest disclosure legislation is necessary to ensure that matters of public interest receive priority, facilitate disclosures by removing the serious legal and cultural barriers to the reporting of public interest matters, and prevent the significant legal protections under the Act from being used as weapons in personal conflicts.

Curiously, there is little in existing legislation to support active exclusion of matters that can be objectively assessed as entirely private grievances, for which alternative processes exist. This is an area that could legitimately be strengthened, in a manner that better achieves current objectives without unnecessarily deterring potential whistleblowers.

The only way in which several instruments currently warn officials that these processes are for more than personal grievances, is by providing that "a person's liability for the person's own conduct is not affected" by its inclusion in a public interest disclosure (Qld s.40; ACT(1) s.36; Cth(2) cl.33; Vic s.17; Tas s.18; WA s.6; NT cl.17). The NSW Act provides bluntly that any disclosure "made solely or substantially with the motive of avoiding dismissal or other disciplinary action", not being action taken in reprisal for a protected disclosure, will not be protected (s.18). These provisions make clear that the Act is not open to officials whose disclosures are only intended to provide a legal defence against other actions for which they are liable. Again, the Queensland formulation is preferable to NSW, given that some 'genuine' whistleblowers might be deterred by the difficulty of proving that self-protection was not a "substantial" motive.

On the other hand, some instruments err on the wrong side of this line. At Commonwealth level, because the current procedures for whistleblower protection are based on reported breaches of the APS Code of Conduct, there is no 'in principle' dividing line between public interest matters and personal grievances. The APS Code and its underlying APS Values are explicitly concerned with personal welfare and employment matters, as well as public interest ones (see Cth(1) ss.13(3) & (11), 10(1)(b),(c),(i),(j),(l) and (o)). Accordingly, far from providing a framework for separating public interest and personal matters, the Commonwealth framework collapses them. In these circumstances it is no surprise that a majority of individuals seeking protection as whistleblowers under s.16 of the Act probably do so in respect of personal grievances.

A similar result is likely under the new ACT Bill. Clause 13(1) of the Bill makes it clear that public interest disclosures may involve information "about employment" directed or referred to the commissioner for public administration. Given disclosures may be made about any "conduct contrary to the public interest", a large number of personal employment grievances could be expected, and may well be even more difficult to filter out than under the current Act.

Best practice would be for legislation to also explicitly provide that protection does not attach to information that is solely about personal, personnel or employment-related matters, unless included in and related to information which is reasonably believed to show, or which does tend to show, public interest information under the Act. This provision could be accommodated by a requirement on the assessing officer to advise the complainant of the alternative processes that are more appropriate for their complaint.

### *(5) Vexatious complaints (abuses of process)*

Currently the main mechanism for deterring inappropriate disclosures is the provision that authorities may decline to investigate disclosures made "frivolously or vexatiously". Six jurisdictions have this provision (NSW s.16(1); ACT(1) s.17(a); Cth(1) *Public Service Regulation* 2.4(2)(d)&(e), etc; Vic s.40(1)(a)(ii); Tas ss.40(1)(a), 64; WA s.8(2)(b)). Two of these Acts also provide that investigation may be declined where a disclosure is "misconceived" (ACT(1) s.17(b); Tas ss.40(1)(a), 64).

Terms such as 'frivolous' or 'misconceived', used in close proximity to the term 'vexatious', highlight considerable confusion as to the type of statutory filter that can feasibly operate to deter inappropriate disclosures, while still encouraging appropriate ones. Such ambiguous terms such as are of dubious utility, and can invite heated contest from complainants, because they require adverse judgements about the intentions and motivations that appear to lie behind complaints. 'Misconceived' is a particularly problematic term to use as a filter, because many agencies may naturally react to disclosures as 'misconceived' simply because they challenge authority and existing practices, even though they also allege serious wrongdoing.

Similar problems attach to the idea that disclosures must be made in 'good faith'. Fortunately this term is not used in any Australian public sector whistleblowing legislation. However the term can inform its operation and implementation in practice, and is used in Britain,[16] and since 2004, in other Australian whistleblowing legislation.[17]

[16] *Employment Rights Act* UK, s.43C(1) provides that a protected disclosure must be one where "the worker makes the disclosure in good faith". See analysis by the whistleblowing charity Public Concern At Work (UK): http://www.pcaw.co.uk.

'Good faith' is usually interpreted to mean that a disclosure must be not only honest (as discussed above) but made without malice. The problem is that, in practice, much whistleblowing is at least partly malicious, wherever the conflict is such that the whistleblower knows and intends that the consequences of disclosure will hurt either individuals (e.g. by getting the alleged wrongdoer sacked) or the organisation (e.g. by damaging its reputation). Such disclosures may still be true, honestly made, and disclose very serious wrongdoing; and those who make them may still also need protection from reprisals (indeed, even more so). The presence of malice is therefore a very poor criterion for excluding a disclosure from the operations of the Act.

The remaining term 'vexatious' can serve as a useful and valid filter, provided it is understood to mean more than simply that a disclosure should not be frivolous, misconceived, malicious, made in 'bad faith', or otherwise 'not well intentioned'. A clear meaning is important because 'vexatious' can be assumed to mean 'vexing' or intended to make trouble, which again is a poor basis for excluding what may be a difficult, but nevertheless legitimate and serious allegation.

Best practice would involve reliance on the term 'vexatious' alone as a general barrier to other inappropriate complaints, with suitable definition of 'vexatious' to make clear that this means an 'abuse of process' – i.e. a disclosure that is made for reasons outside the scope or purpose of the Act *and* which raises no substantive or significant point to be answered. However once this definition is supplied, the identification of a disclosure as vexatious should not simply relieve authorities from an obligation to investigate, as is currently usual, but should mean that the disclosure does not attract protection and is left outside the Act. Currently only the NSW Act (s.16(2)) provides that vexatious disclosures are not protected. Elsewhere, the 'vexatious' filter does not currently operate as any effective bar, because even though vexatious complaints may not be investigated, the complainant appears to retain other legal benefits under the Act.

### *(6) Incorrect or unintentionally misleading information*

Currently, as discussed above, two jurisdictions make it an offence to disclose information with "recklessness" about its truth (SA, WA). In reality it is difficult for a whistleblower to know what duty this places on them to self-investigate their own disclosure prior to making it, or safeguard against the possibility that whatever they believe, their information may turn out to be incorrect.

In the event that a whistleblower is shown to have unintentionally supplied incorrect information, the appropriate filter is not a criminal offence, nor a loss of protection under Act – especially given that even a person who makes an incorrect disclosure can still be subjected to reprisals. Best practice would be to simply make this the first basis on which a discretion may be exercised to cease investigation of the disclosure.

### *(7) Trivial disclosures*

Five instruments currently provide a discretion that a disclosure need not be investigated if "trivial", "lacking in substance" or "insubstantial" (ACT (1) s.17(1)(b)&(c); Vic s.40(1)(a)(i); Tas ss.40(1)(a) & 64; WA s.8(2)(a); ACT (2) cl.25). This filter provides a more dispassionate basis for declining to deal with matters that are insufficiently serious, than by declaring them 'frivolous' as discussed above. However the meaning of 'trivial' could also be further defined.

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[17] See *Corporations Act 2001* (Cth) s.1317AA(1)(e); *Workplace Relations Act 1996* (Cth) Sch 1, s.337A(e).

### *(8) Old information*

Four instruments currently provide a discretion that a disclosure need not be investigated if the person making the disclosure had knowledge of the matter for more than 12 months prior to the disclosure, and could not satisfactorily explain their delay (Vic s.40(1)(b); Tas ss.40(1)(d) & 64) and/or there is no reasonable prospect of investigating the matter due to the elapse of time (WA s.8(2)(c); NT cl.39). These are obviously reasonable filters.

### *(9) Already investigated, litigated or more appropriate for litigation*

Three instruments currently provide a discretion that a disclosure need not be investigated if the matter could be dealt with by a more appropriate method, or has already been investigated or otherwise dealt with, including by a court or tribunal (ACT (1) ss.17(1)(d),(e); Tas ss.40(1)(b),(c) & 64; WA s.8(2)(d). These are reasonable filters.

### *Investigation not warranted in all the circumstances?*

Often the enabling legislation of integrity agencies also empowers them with a general discretion not to investigate complaints where they determine this to be 'not warranted in all the circumstances'. One instrument also proposes this for public interest disclosures, providing that a disclosure need not be investigated if it is determined that "investigation, or further investigation, of the public interest disclosure is not warranted having regard to all the circumstances" (ACT(2) cl. 25(f)).

The problem is that this legislation also applies to the investigative responsibilities of frontline agencies, for whom such a discretion is probably too broad and open to abuse, unless always subject to independent review. For this reason, it would not be best practice to provide frontline agencies with such a general discretion. Indeed, given their importance and the risks of mistakes, it is important that most if not all initial decisions by public agencies that disclosures do not fall under the Act are subject to some form of routine review. This issue is discussed in the next part of the paper.

## 6. How should disclosures be received, handled and investigated?

This part of the paper deals with the practical requirements that should guide organisations' primary responses to whistleblower disclosures. One of the main objectives of current legislation is to ensure disclosures are properly investigated. This is not only so that wrongdoing can be identified and rectified, but because unless organisation members have confidence that their information will be taken seriously and contribute to an outcome, many are never likely to make a disclosure.

Some of the most basic practical questions for the handling of disclosures concern to whom they should be able to be made, who should determine how they are investigated, what investigative processes should apply, and what obligations should exist for public reporting of the results.

### *Who should be able to receive?*

The first question is to whom organisation members should be able to make a disclosure, with confidence it will be appropriately dealt with. Current legislation varies, depending on the extent to which the investigation of disclosures is treated as an existing responsibility of agencies under other legislation, or treated as an entirely new issue. Generally every instrument supplies a list of "appropriate" or "proper" authorities to receive disclosures. These typically include any public agency in respect of its own officials and operations; and any public agency (such as investigative or integrity agencies) in respect of matters "falling within [their] sphere of responsibility" (SA s.5(3)-(5); WA s.5(3)(h)) or "that the agency has a function or power to investigate" (ACT (1) s.9). Often particular integrity agencies are spelt out (see also Qld s.26(1); NSW s.8(1); Vic s.6; Tas s.7; NT cl.8).

Beyond this general approach, current laws then take three different approaches:

- Three instruments contemplate, without requiring, the making of agency procedures which specify individuals who can receive disclosures (NSW s8(1)(c)(ii); Cth (1) ss.15-16). The ACT Bill allows the agency's CEO to identify a "a declared contact person", in the absence of which the default contact person remains the CEO (ACT (2) cll. 11(1)(a)(i), 11(2)).
- Western Australia is the only jurisdiction in which the Act provides that someone *must* be designated in every agency as "the person responsible for receiving disclosures" (WA s.23(1)(a)). Although superficially this appears limited to one person per agency, in practice more than one person may be designated.
- In Queensland, a range of individuals within all agencies are identified by the legislation – rather than simply by internal procedures or delegations – as always able to receive disclosures:

> **27(3)** …a public interest disclosure made to an appropriate entity may always be made to—
> (a) its chief executive officer; or
> (b) if the appropriate entity has a governing body—a member of its governing body; or
> (c) if an officer of the entity is making the disclosure—a person who, directly or indirectly, supervises or manages the officer; or
> (d) an officer of the entity who has the task of receiving or taking action on the type of information being disclosed.

Best practice lies in a blend of the Queensland and Western Australian provisions. The Queensland provision guarantees a whistleblower has multiple reporting avenues within organisations, enabling them to seek out an official in whom they have confidence. This is a better approach than dictating that all disclosures can only be made to a limited number of specified persons, and recognises that all managers should have the knowledge and capacity to recognise public interest disclosures. However, there should always also be a formally designated coordinator, as required in WA.

Overall, the largest gap is to be found in the Commonwealth. Under the *Public Service Act 1999*, agency heads may authorise persons and must put in place procedures for the receipt and investigation of whistleblower disclosures; but because the scheme is based around breaches of the APS Code of Conduct, the only independent agencies authorised to receive reports are the Public Service Commissioner and Merit Protection Commissioner. Consequently there is no provision for disclosures to be made directly to many relevant authorities, such as the Ombudsman, Auditor-General, Australian Federal Police (who handle most Commonwealth corruption matters), or the new Australian Commissioner for Law Enforcement Integrity.

Two jurisdictions also provide that if a whistleblower "honestly believes" (Qld s.26(1)(c)) or "believes" (ACT (1) s.9(a)(iv)) that an agency is an appropriate authority to receive the disclosure, then it must receive the disclosure. This provision is intended to ensure that agencies act responsibly by not ignoring disclosures that do not strictly relate to them, and instead refer them. However the provision is also to abuse, given it could enable a whistleblower to make multiple disclosures to agencies that he or she believes (or hopes) may be able to act even when this is unreasonable. A provision of this kind should be standard, but should include a further qualifier of 'reasonableness'.

A gap across all jurisdictions is the inability of agencies to 'contract out' the receipt of disclosures to non-public sector third parties. If it is in the public interest for employees to be able to make disclosures confidentially, one of the most effective means of encouraging this is the use of an independent 'hotline' to whom employees can disclose detailed information with extra reassurance that their identity will be protected. While many agencies seek to provide this facility internally, others may prefer the option of an independent contractor. Currently there is no clear provision for disclosures to be received by such contractors.

Another well-known gap is the fact that only one jurisdiction (NSW) makes any provision for protected disclosures to anyone other than existing government authorities – for example, to backbench or non-government parliamentarians, or to the media. This important issue is dealt with in part 8 of the paper.

### *Who should determine whether investigation is warranted?*

A second major question is how to guarantee that those disclosures that should be investigated, are actually investigated, and investigated in an appropriate way.

There is currently a substantial difference between Australia's first three laws and the remainder. In South Australia and NSW, there is no general obligation on authorities to investigate the disclosures they receive, unless it can be found in other legislation. Queensland is the same, although all agencies are obliged to report how many disclosures were verified each year (Qld s.30(2)), which presumes some investigation.

Best practice is found in the later instruments, which include a general requirement that public interest disclosures meeting the tests outlined in the previous part of the paper

must be investigated (ACT(1) s.19; Cth Reg 2.4; Cth(2); Vic ss.39,72; Tas ss.39,63; WA ss.8; NT ss.38,67; ACT(2) cl.23). Under the Victorian, Tasmanian and NT approach, however, disclosures about parliamentarians are an exception – the ombudsman must investigate but only if the matter is referred by the presiding parliamentary officer, which is discretionary (Vic ss.96, 99; Tas ss.78, 79; NT cll.78, 81).

If investigation is mandatory, then a range of appropriate discretions must also be available to detail when investigate may not be needed – as outlined in the previous section. The question is, who should be entitled to exercise these discretions.

Three different approaches are taken under existing laws. In most circumstances (SA, Qld, NSW, Cth, WA) the general position is that the discretion lies with whoever receives the disclosure. However experience shows this to pose challenges for normal frontline agencies, where the internal pressures to dismiss whistleblower complaints can be very significant. The results can also be messy. Some whistleblowers do not take the matter further, even though their disclosure is correct, consequently leaving wrongdoing to fester. Others repeat their complaints to external agencies, but sometimes only after the matter is old and much more difficult to resolve. Sometimes matters can only be properly investigated by external agencies, or by internal investigators with close external oversight. Disputes also arise about whether complainants are covered by the Act, which again may end up with a review body, but not in time to avoid conflict.

For exactly these reasons, a number of variations exist on this general approach, whereby agencies are under separate obligations to notify or refer some types of misconduct to external agencies. In Queensland, for example, s.38 of the *Crime and Misconduct Act* 2001 requires all public officials (including agency heads) to notify the Crime and Misconduct Commission of all instances of suspected official misconduct. Under such 'mandatory reporting' obligations, the practical effect is a degree of external oversight over internal decisions as to whether or how some types of matters will be investigated (irrespective of whether they are identified as public interest disclosures).

The third approach establishes a more general mandatory reporting regime for all public interest disclosures, and is found in Victoria (also copied in Tasmania and the Northern Territory Bill). As outlined earlier, a disclosure of improper conduct made in accordance with the Act is "protected" (Vic s.12; Tas s.14; NT cl.13), but is not deemed to also be a "public interest disclosure" unless the public body or the Ombudsman confirms that it "shows or tends to show" misconduct (Vic ss. 24(2), 39, 97; Tas ss. 30(2), 33, 79; NT cll.28(2), 32, 79). If so, it must then be investigated either by the Ombudsman, or by referral by the Ombudsman back to the public body.

While confusing, this system forces a coordinated approach to the management of disclosures, and places a positive obligation on a central agency (in this case the Ombudsman) to act as a clearinghouse for decisions about their handling, and for monitoring or oversight of investigations. It does this through two mechanisms:

- The system provides for review by the Ombudsman of decisions by public bodies that a disclosure does not tend to show misconduct and/or is not a public interest disclosure (and hence will not be investigated) (Vic ss.30-32); and
- All public interest disclosures must be referred to the Ombudsman for assessment as to how they are best investigated – whether by the Ombudsman, referral to another investigation agency, or back to the agency (Vic ss.29, 39, 41, 42; see also ss.73-83 on when and how the Ombudsman may take over agency investigations). This

coordination role is also vital for decisions as to the best means of protecting the whistleblower and managing workplace conflict, as will be discussed later.

However there are also problems with the current formulation of the system:

(1) The discretion as to what constitutes a 'public interest disclosure' is unclear, on the part of both the Ombudsman and public agencies. While a disclosure that "shows or tend to show" misconduct *can* be deemed a public interest disclosure, there is nothing to say it *must* be deemed a public interest disclosure. This leaves a grey area of discretion, in which it seems the Ombudsman or agencies could determine that it is somehow not 'in the public interest' for the matter to be investigated – defeating the principle that such disclosures should be investigated.

(2) As already identified, the splitting of 'protected' and 'public interest' disclosures into two separate classifications is confusing. The only real difference is that 'protected' disclosures attract legal protections under the Act, irrespective of whether they are then investigated; whereas to be investigated, they must also be a 'public interest' disclosure. A less confusing approach would be to delete the term 'protected disclosure' and adopt the combined test, discussed previously, that a public interest disclosure is one *either* that its maker believes on reasonable grounds tends to show misconduct, *or* which does show or tend to show misconduct. In either case it is effectively a public interest disclosure, and warrants protection, with questions as to whether it can or should be investigated being a separate matter.

(3) At present, if an agency deems a matter to be a public interest disclosure, it must automatically be referred to the Ombudsman to confirm this decision. However, if an agency deems a matter *not* to be a public interest disclosure, it is only referred to the Ombudsman for review if the whistleblower requests.

    This is a reversal of what, objectively, is the most sensible procedure. It is more important that automatic review take place of agency assessments that a matter is *not* to be investigated. Best practice would be for automatic referral to take place for different purposes. If an agency determines that a matter is not a public interest disclosure or should not be investigated, that should automatically be reviewed by a central agency. When an agency determines that a matter *is* a public interest disclosure, it should notify a central agency of the proposed method of investigation, so the central agency can monitor the matter or advise on a different method.

(4) The presumption that the Ombudsman must investigate all disclosures, unless referred back to agencies, places a heavy burden on the Ombudsman while reducing the responsibility on agencies to assess how to best deal with such matters. Best practice would be a more flexible arrangement in which agencies must notify the central agency of disclosures, with advice on the proposed investigation as just outlined – along with advice on associated issues such as whistleblower protection.

Taking all issues together, the principles of the coordinated system attempted under the Victorian, Tasmanian and NT approach are worthwhile. Best practice would be to institute these principles in all jurisdictions, irrespective of which central agency or agencies have the coordinating roles implied. In practice however, the approach also needs reconfiguration to properly achieve these principles. This requires a significant redrafting effort, from which all jurisdictions can benefit.

***What investigation powers and processes should apply?***

The investigative processes that apply to public interest disclosures are many and varied. In most instances authorities' powers of investigation are very strong. Where powers are not strong, this is usually because public interest disclosure legislation does not take adequate advantage of – or is not properly integrated with – the other investigation processes that already exist in the integrity system of the jurisdiction concerned.

This issue highlights three different approaches in current laws.

The first approach, in South Australia, Queensland, NSW, the ACT and the Commonwealth, is for the law to provide little detail about how investigations are to be conducted, because it is assumed that existing investigation processes will apply – for example, those in place under the Ombudsman Acts, Audit Acts, the *Crime & Misconduct Act 2001* (Qld), *Independent Commission Against Corruption Act 1988* (NSW), and under the Commonwealth APS Code of Conduct. In Queensland, the Act also provides that the Act "does not affect a procedure required under another Act for disclosing the type of information being disclosed" (s.27(4)).

This approach is simple, but requires considerable coordination in practice, does not ensure that investigative issues unique to whistleblower disclosures are dealt with, and does not necessarily ensure there is clarity or consistency in the internal investigation processes of frontline agencies. At the Commonwealth level, since only breaches of the APS Code of Conduct provide a basis for disclosure, there is no coordination with the investigative roles of agencies such as the Ombudsman, Auditor-General or AFP.

The second approach, in Victoria, Tasmania and the NT and ACT Bills, is for public interest disclosure legislation to operate in a more 'stand alone' fashion, containing all the detailed provisions deemed necessary for investigations. In Victoria, for example, there are detailed provisions for investigation by the Ombudsman (Part 5, Div 3), Director of Police Integrity (Part 5, Div 3A), public bodies (Part 6, div 2) and the police (Part 7), from notices of intention to investigate (e.g. s.50), to the taking of evidence (s.54), to the provision of natural justice (ss.59 & 60), and reporting on investigations (Part 5, Div 4). Indeed the Victorian Act includes some procedures, such as for oversight of the Director of Police Integrity by the Special Investigations Monitor (Part 9A), which have no relevance at all to whistleblowing.

There are major problems with this approach. The main problem is high potential for conflict between the investigation processes detailed in the Act and those in other legislation, in ways that unnecessarily hamper the investigation of whistleblower disclosures relative to other complaints. For example:

- Some laws provide that information subject to legal professional privilege is either not protected if disclosed, or need not – or must not – be investigated (ACT(1) s.8; Cth(2) s.8; Vic s.10(2); Tas s.11; WA s.5(6); NT cl. 98(2); and ACT(2) s.24(a)). Such restrictions do not normally apply to agencies' own internal investigation powers (e.g. in relation to their own internal legal advice) nor those of integrity agencies. The restrictions mean the scope for investigation of a public interest disclosure may be narrower than if the same matter was investigated another way.
- The Victorian and Tasmanian Acts contain a blanket restriction on the Ombudsman or a public body including in any final report, any "particulars likely to lead to the identification of a person against whom a protected disclosure is made" (Vic s.22(3); Tas s.23(3); cf NT cl.22). This restriction can operate to defeat the purpose of

investigative authorities' roles and responsibilities, and is not found in these jurisdictions' other legislation such as the Ombudsman Act.

- The Victorian and Tasmanian Acts provide that information gained from a disclosure or investigation cannot be used in evidence in any legal proceedings (except in Victoria against police officers)(Vic s.108(1); Tas s.89). This prevents agencies from using the results of investigations to discipline, dismiss or prosecute guilty officers – which is especially strange when the legislation only permits the investigation of criminal and dismissable behaviour.
- The investigative requirements under the ACT(2) Bill also conflict with normal investigation processes under existing legislation (cll.31-34), especially in relation to requirements for providing natural justice (cl.33).
- The NT Bill departs from the Victorian precedent in relation to some of these issues – e.g. by providing that evidence *can* be used in "any criminal or disciplinary proceedings taken against a public officer as a result of an investigation" (NT cl. 96(2)(b)). However it includes a different inconsistency with existing investigation powers, giving the police commissioner a right to review any report by the Ombudsman under the Act and request removal of any "sensitive material", with a further final power of veto by the Director of Public Prosecutions, irrespective of whether the material relates to law enforcement, the police or public prosecutions (NT cll.58 & 90). This is a quite strange provision.

The third, best practice approach is one that does not duplicate (let alone weaken) the investigation processes that apply to public interest disclosures, but rather seeks to ensure that existing powers are adequate, integrated and coordinated for their new or additional purpose. Only when existing powers or procedures are lacking, or issues arise which are uniquely important for the handling of whistleblower disclosures, need the legislation then supplement these existing processes.

This hybrid approach is taken in Western Australia, where the Act provides little detail on investigation powers, but does detail select issues important to the handling of public interest disclosures, such as the general obligation to investigate, and progress and final reporting. To integrate these details into other existing processes, the WA Act provides that key requirements do not apply to the Corruption and Crime Commission, Ombudsman or any other declared person for whom it is already "a function… to investigate, inquire into, deal with, or take any other step with respect to" the matter, "under another written law" (WA s.12) – in these instances the existing processes are to be taken as sufficient. However where the existing law provides no guidance, for example in relation to internal investigation procedures of agencies, the Act requires such procedures and provides a framework to ensure these are consistent and externally monitored (WA ss.21, 23(1)(e), 23(2)).

### *What should be the public reporting obligations?*

As discussed above, the final reporting powers of agencies and investigatory bodies should remain defined by other legislation and procedures. However it is important that whistleblowing legislation requires agencies to report publicly on the numbers of matters they are handling under the Act, and their general outcomes, if coordinating agencies and the general public are to know that the scheme is working.

Currently there are four approaches:

- In South Australia and NSW, no agency is obliged to publicly report what, if anything, is occurring under the Act, whether by publishing it in their annual report or reporting it to any central agency. This is plainly problematic as it provides no ongoing mechanism for ensuring that the legislation is being implemented.
- Under some instruments, all agencies are required to report details of the number of disclosures received, and their outcomes, to a central coordinating agency, who then publishes an annual report on the overall operations of the Act (Cth (1) s.44; WA ss.22, 23; ACT (2) ss.18, 66, 68). In some jurisdictions (e.g. WA) there may also be other guidelines encouraging or requiring agencies to report relevant information in their own annual report.
- In the ACT and under the 2001-2002 Commonwealth Bill, all agencies are required by the legislation to publish details of the number of disclosures received, and their outcomes, in their annual reports (ACT (1) s.11; Cth (2) s.11).
- In Queensland, Victoria, Tasmania and under the NT Bill, *both* a central coordinating agency is required to provide an annual report on the overall operations of the Act, *and* all agencies are required to report key details in their annual reports (Qld ss.29(3), 30(2); 31; Vic s.102, 104, 105; Tas s.84, 86; NT cll.88, 91).

This last approach represents the clearest way of ensuring a consistent and coordinated approach to implementation of the legislation.

## 7. How can legal protection of whistleblowers be made more effective?

The legal protections that flow to whistleblowers as a result of disclosures provide the single most important reason for this legislation. Current legislation deals with several issues relevant to legal protection:

- Relieving whistleblowers of the potential legal liabilities they face for making disclosures, such as disciplinary or criminal prosecution for unauthorised disclosure of information, or civil action such as defamation;
- Creating anti-reprisal offences, so that those who deliberately undertake detrimental action against those who make disclosures can be prosecuted;
- Providing whistleblowers with civil, industrial or other remedies, so that those who do suffer as a result of making a disclosure can seek redress or be compensated;
- Providing courts and tribunals with powers of injunction, to prevent employers or others from taking any or further detrimental action; and
- Dealing with circumstances when whistleblowers should lose these protections.

This part reviews each of these issues in turn. It should be noted that whistleblowers also need more than legal protection if they are to survive the experience in a way which would encourage others to make disclosures. Legal protection can make disclosures legally possible and provide legal remedies if damage occurs – but *practical* protection is also needed if reprisals and other disclosure-related damage are to be prevented in the first place. This kind of protection is discussed in part 9.

### *Relief from legal liability*

Table 8 below sets out how current legislation protects whistleblowers from the main known sources of potential legal liability for having made their disclosure. The detail of the provisions is set out in Appendix 7. While the protections are generally similar, the table again reveals considerable variation.

Best practice is to be found in Queensland, NSW, Victoria and the NT Bill, which provide comprehensive protection including an absolute (as opposed to qualified) privilege in defence to an action for defamation. In addition, the Victorian, Tasmanian and NT instruments provide that disclosures made in relation to a member of Parliament are "not to be taken to be a contempt of Parliament" (Vic s.6(7); Tas s.7(7); NT s.16).

More problematic are WA, Tasmania and the ACT Bill, which rather than providing either an absolute or qualified privilege, are silent on whether the general statement of protection extends to a defence against defamation action.

The largest gap is again at the Commonwealth level, where there is no explicit relief from legal or disciplinary consequences that might attach to an APS employee who reports a breach of the APS Code of Conduct. At best s.16 of the Act can be taken as relieving a whistleblower from liability to disciplinary action if the action could be shown to constitute victimisation or discrimination for the reporting of a breach. However even this may be difficult. There is no relief from other legal liability.

The need for a more comprehensive Commonwealth approach is demonstrated by the type of duties of confidentiality placed on APS employees by s.13, *Public Service Regulation* 2.1, and s.70 of the *Crimes Act 1914*. The current regulations bar APS

employees from giving or disclosing "to any person any information about public business or anything of which the employee has official knowledge", unless in the course of their duties or with the agency head's express authority. It currently seems that in many circumstances a typical APS employee would need to breach these regulations in order to report fraud directly to the AFP, or defective administration to the Ombudsman – even in circumstances where they could not reasonably be expected to first report the conduct within their own agency. Alternative provisions such as subss.8(2A)-(2E) of the *Ombudsman Act 1976* do not appear to relieve the situation, because while they give wide legal protection to Commonwealth officers who provide information, they must still have the authorisation of their agency head, unless they obtained the information "lawfully but not in the course of [their] duties as an officer" (s.8(2A)(b)(iv)) – i.e. in a private capacity. Consequently, in the absence of the type of provisions found in other Australian jurisdictions, there are few if any avenues by which Commonwealth officers can make confidential disclosures to outside authorities without facing legal risks.

***Table 8. Relief from legal liability***

| **Legislation** | **Defamation** | | **Breach of confidence** | | |
|---|---|---|---|---|---|
| | **Absolute privilege** | **Qualified privilege** | **Criminal** | **Civil** | **Disciplinary** |
| **1. SA 1993** | **5 (1).** no civil or criminal liability | | | | |
| **2. Qld 1994** | **39 (1).** not liable, civilly, criminally or under an administrative process | | | | |
| | **(2)(a)** | | **(2)(b) (i)** | | **(2)(b) (ii)**. |
| **3. NSW 1994** | **21 (1).** not subject to any liability… no action, claim or demand may be taken or made…. **(2)** | | | | |
| | **(3)** | | **(3)** | **(3)** | **(3)** |
| **4. ACT(1) 1994** | **35 (1).** not subject to any liability… no action, claim or demand may be taken or made…. | | | | |
| | | **(3)** | **(2)(a)** | **(2)(b)** | |
| **5. Cth(1) 1999** | [**16.**] | | | | |
| **6. Cth(2) Bill 2001-2** | **32 (1).** [as for ACT(1)] | | | | |
| | | **(3)** | **(2)(a)** | **(2)(b)** | |
| **7. Vic 2001** | **14.** not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) | | | | |
| | **16.** | | **15(a)** | **15(b)** | **14** |
| **8. Tas 2002** | **16.** [as for Vic] | | | | |
| | | | **17(a)** | **17(b)** | **16** |
| **9. WA 2003** | **13.** incurs no civil or criminal liability | | | | |
| | | | **(b) (iv)** | | **(b) (i) (ii) (iii)** |
| **10. NT Bill 2005** | **13.** [as for Vic] | | | | |
| | **15.** | | **14(1)(a), (2)** | **14(1)(b)** | **13** |
| **11. ACT(2) Bill 2006** | **49 (1)(b).** does not incur civil or criminal liability | | | | |
| | | | | **(a)** | **(c)** |

### *Anti-reprisal offences*

The criminalisation of reprisals against whistleblowers has long been a cornerstone of whistleblower protection. All but two jurisdictions – South Australia and the Commonwealth – have made it a criminal offence to threaten or undertake a reprisal because of the fact that a whistleblower has made, or might make, a public interest disclosure. Part 2 of the paper outlined why these provisions also need to protect internal witnesses more broadly, as well as third parties (see Table 4).

Table 9 below outlines the provisions creating these offences, including definitions of 'detrimental action', who can be prosecuted, what grounds must be made out (or whether a statutory defence is available to the defendant), and the two instruments where some onus of proof reverts to the defendant rather than lying entirely on the prosecution.

Except for the new ACT proposal, the basic elements of the offences are very similar, hinging on whether "detriment" has been caused to a person as a result of someone making, or possibly making, a disclosure. Detriment is typically defined to include (a) personal injury or prejudice to safety, (b) property damage or loss; (c) intimidation or harassment; (d) adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; (e) threats of detriment; and (f) financial loss from detriment (Qld sch. 6). The only significant omission in the definition of 'detriment' for these purposes is in NSW, which omits to provide that to 'threaten' detriment is equally an offence.

All instruments provide that any person may be prosecuted for the offence – save Queensland, which provides that only "a public officer" may be prosecuted. This is a significant deficiency given that it may conceivably be friends or associates of impugned officers that undertake detrimental action, rather than the officers themselves.

The two most important issues relate to the evidentiary burden facing any prosecution, given that it is notoriously difficult to prove that detrimental action has been taken because of a disclosure, rather than for some other reason. For example, has a whistleblower been harassed at work because of a disclosure, or because colleagues simply don't like him? Has he been dismissed by management because of a disclosure, or because he was incompetent? The lack of any known successful reprisal prosecution to date, is often assumed to relate at least partly to this difficult burden.

To level the playing field, current best practice is that such an offence should explicitly provide that the whistleblowing issue need not be the only ground or reason for the reprisal action, provided it is a "substantial" ground or reason (Qld, NSW, Vic, Tas, NT). In fact, even better practice would probably be to follow either the US precedent that the whistleblowing issue need simply be identified as a "contributing factor" in the detrimental action,[18] or as previously recommended by both Queensland's Electoral & Administrative Review Commission and the Commonwealth Ombudsman, "a ground of any significance" in the taking of the action.[19] It remains easy for the current approach – "a substantial reason" – to be misinterpreted as meaning 'the' substantial reason, or the major or dominant reason for the detrimental action.

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[18] US *Whistleblower Protection Act 1989*, see Caiden, G E, Truelson, J A (1994), 'An update on strengthening the protection of whistleblowers', *Australian Journal of Public Administration*, 53(4): 575.

[19] Electoral and Administrative Review Commission (1991), *Report on protection of whistleblowers*, Queensland Government Printer, paragraphs 9.1-9.42; Commonwealth Ombudsman (1997), *Professional Reporting and Internal Witness Protection in the Australian Federal Police: A Review of Practices and Procedures*, Canberra, pp. 65-66.

***Table 9. Criminal anti-reprisal offences***

| Legislation | | Detriment Definition | Who can commit | Required extent of ground / defence | Reverse onus of proof |
|---|---|---|---|---|---|
| **1. SA 1993** | | Nil | | | |
| **2. Qld 1994** | **41, 42** | **Sch 6** | **42(1).** A public officer | **41(5).** … a substantial ground … , even if there is another ground | Nil |
| **3. NSW 1994** | **20** | **20(2)** Not 'threat' | **20(1).** any person | **20(1).** … substantially in reprisal | **20(1A).** …, it lies on the defendant to prove that detrimental action … was not substantially in reprisal for the person making a protected disclosure. |
| **4. ACT (1) 1994** | **25** | **4** | **25(1).** any person | **25(2).** It is a defence … if it is established that the accused person—<br>(a) had just and reasonable grounds for engaging in the conduct…; and<br>(b) was engaging, or had engaged, in the conduct… before forming the belief that a person had made or may make a public interest disclosure. | Nil |
| **5. Cth (1) 1999** | | Nil | | | |
| **6. Cth (2) Bill 2001-2** | **22** | **3(1)** | **22(1).** any person | **22(2).** As for ACT (1) | Nil |
| **7. Vic 2001** | **18** | **3(1)** | **18(1).** any person | **18(3).** In determining whether a person takes detrimental action in reprisal it is irrelevant whether or not a reason referred to in sub-section (2) is the only or dominant reason as long as it is a substantial reason | Nil |
| **8. Tas 2002** | **19** | **3(1)** | **19(1).** any person | **19(3).** As for Vic | Nil |
| **9. WA 2003** | **14** | **3(1)** | **14(1).** any person | Nil | Nil |
| **10. NT Bill 2005** | **18** | **4(1)** | **18(1).** any person | **18(3).** A reason referred to in subsection (2)(a) must be a substantial reason, but need not be the only or dominant reason for taking the reprisal. | **18(4).** The defendant has the onus of proving –<br>(a) the reprisal was not taken for a reason referred to in subsection (2)(a); or<br>(b) if the reprisal was taken for a reason referred to in subsection (2)(a) – the reason was not a substantial reason for taking the reprisal. |
| **11. ACT (2) Bill 2006** | **51 52** | **50** | **51(1), 52(1).** any person | **51(1)(b), 51(2)(b).** intention of deterring.<br>**52(1)(b), 52(2)(b).** intention of punishing | Nil |

Rather than trying to make prosecution easier, the ACT(2) Bill proposes an opposite step, requiring the prosecution to demonstrate beyond reasonable doubt that the defendant intended to "punish" the whistleblower for the disclosure. This is likely to be difficult.

The partial reverse onus of proof is a further way in which the evidentiary playing field can be levelled. Under this approach, in NSW and the NT Bill, once detrimental action is established to have occurred, a conviction will follow unless the defendant can prove that the action was *not* a substantial reason for the reprisal. While this constitutes current best practice, there is reason to believe it too could be further liberalised. Currently the accepted approach is for the defendant to prove the matters listed in the defence stated in the ACT Act, i.e. that they (a) had other just and reasonable grounds for taking the action, and (b) had commenced taking the action before the whistleblowing issue arose. A preferable approach, again from the US, may be to require the defendant to provide "clear and convincing evidence" that the action would have been taken regardless.

A major problem is a shortage of attempted prosecutions to help identify the strengths and weaknesses of the current provisions. There are a number of possible reasons for this. In no jurisdiction is there a clear prosecuting authority for reprisal offences. In particular, because the offence is not contained in the Crimes Act or Criminal Code, it is one where police may assume that the relevant agency will commence any necessary prosecutions – when this may be unrealistic, or those involved in the administration of the Act are similarly assuming it is a matter for the police.

While a limited number of prosecutions have been considered in Queensland, and mounted in NSW, they have been aborted or dismissed – usually due to technicalities such as delay, or failure to caution the suspect. There is also a problem that since reprisals are now a criminal offence, it is more difficult for authorities to take disciplinary action against perpetrators using a lower standard of proof. Legislative best practice may therefore now call for a specific provision to the effect that within the public sector, the taking of a reprisal may still constitute a disciplinary offence, provable on a balance of probabilities and capable of justifying dismissal, notwithstanding that if proved beyond reasonable doubt it could also support a criminal penalty.

In some cases, authorities have been slow to prosecute because the nature of the conduct appeared fairly minor – e.g. a common assault – absent the fact it was a reprisal. This points to a cultural problem in the way in which the offence is perceived, i.e. that it is not being recognised as serious, in the way that perversion of the course of justice, or witness intimidation, is regarded as serious even when the behaviour is otherwise minor. More research and more test cases are needed to decide the future of these provisions.

### *Civil, industrial and equitable remedies*

Similar dilemmas surround the use of civil remedies in current legislation. It is equally established that a whistleblower who suffers detriment as a result, should be entitled to seek damages or other non-criminal remedies, including rectification of their employment prospects and reinstatement if terminated. These remedies are particularly important because whistleblowers can easily suffer detriment that is inflicted negligently or carelessly, if organisations react unwisely to whistleblowing-related conflicts – for example by finding it easiest to remove the whistleblower from the conflict, accidentally allowing a confidential whistleblower to be identified, or failing to discourage other employees from seeing a whistleblower as a target.

Table 10 sets out the major non-criminal avenues by which whistleblowers may avoid or remedy detrimental action. In most jurisdictions, these rely on an aggrieved whistleblower suing for damages in the state Supreme Court – an avenue which no known whistleblower has taken up. The current ACT Bill is even more problematic, requiring intentional wrongdoing rather than mere negligence.

Importantly, some jurisdictions also provide alternatives to suing in court, by recognising reprisals as also giving rise to action for discrimination or unfair treatment in other, more flexible tribunals (SA, Qld, WA). While South Australia established this precedent in 1993, current best practice is in Queensland which is the only jurisdiction to provide some integration of remedial avenues into its industrial relations system (at least in respect of unfair dismissal).

This precedent is significant, because it compares favourably with international developments, including the employment law-based system under the *Public Interest Disclosure Act 1998* (UK). It also provides a reminder that the most notable example of damages for an Australian whistleblower was a common law claim that the NSW Police Service had breached its duty of care to its employee. In 2001, the NSW District Court awarded a whistleblower $664,270 in damages for, among other things, failing to provide a proactive system of protection, give support and guidance, or prevent the conduct of colleagues who ostracised him.[20]

The extent to which the Queensland Industrial Commission has been used as an alternative forum is not known. Nor is the level of use of the SA Equal Opportunity Tribunal or, more recently, the WA Equal Opportunity Tribunal. Given the greater flexibility and reduced costs of such tribunals, their advantages over the expensive and procedurally difficult challenge of a torts case are obvious. The attempted use of different forums to seek compensation for detriment suffered requires further research.

### *Injunctions and intervention*

Finally, several Acts provide for whistleblowers to seek injunctions against the taking of reprisals, most notably by their employers, as also shown in Table 10. Best practice is again in Queensland, where the first right of injunction is to the Industrial Commission, supported by a right of application to the Supreme Court where that is not available. These powers are known to have been used successfully, at least once.

These powers of injunction are important because they provide a mechanism for stopping or limiting some forms of reprisal before too much damage occurs. As such they provide an important reminder that real, as opposed to legal, protection lies in the ability of whistleblower protection legislation to provoke public agencies into managing whistleblowing incidents so as to avoid or minimise conflicts in the first place.

Particularly important is the fact that injunctions in Queensland and the ACT do not depend solely on the whistleblower to assert their own case, but can also be sought by public integrity agencies on their behalf (as occurred in Queensland). This provides a reminder that a major reason why current remedies have a poor track record may be that there is no specific lead agency for ensuring they are taken up, in circumstances where it is unrealistic to expect 'genuine' whistleblowers to persist with the cost and stress of pursuing remedies on their own. This question is revisited in the final part of the paper.

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[20] *Wheadon v State of NSW*, NSW District Court, No. 7322 of 1998; see NSW Ombudsman (2004), *Protected Disclosure Guidelines*, 5th Edition, Sydney, pp.E5-6.

***Table 10. Civil, industrial and equitable remedies***

| Legislation | Civil action | Equal opportunity / anti-discrimination | Industrial | Injunction |
|---|---|---|---|---|
| **1. SA 1993** | **9(1), (2).** An act of victimisation under this Act may be dealt with— **9(2)(a)** as a tort | **9(2)(b)** *Equal Opportunity Act 1984* | Nil | Nil |
| **2. Qld 1994** | **43.** tort in District Court or Supreme Court | **45 (1).** under an Act, may appeal against, or apply for a review of— (a) disciplinary action taken against the officer; (b) the appointment or transfer of the officer or another public officer…; (c) unfair treatment of the officer. | *Industrial Relations Act 1998*, **73(2)(f)(i).** invalid reason for unfair dismissal includes: the making by anyone, or a belief that anyone has made or may make a public interest disclosure | **47.** Industrial Commission, on application from employee, industrial organisation, or CMC.<br>**48.** Supreme Court, on application of complainant or CMC, if no right of application to Industrial Commission.<br>Also **49, 50, 53, 54** |
| **3. NSW 1994** | Nil | | | |
| **4. ACT (1) 1994** | **29.** tort in court of competent jurisdiction | Nil | Nil | **30, 31.** Court, on application of complainant or Ombudsman |
| **5. Cth (1) 1999** | Nil | **16.** [victimisation or discrimination provides extra ground for grievance] | Nil | Nil |
| **6. Cth (2) Bill 2001-2** | **26.** tort in court of competent jurisdiction | Nil | Nil | **27, 28.** Court, on application of complainant or APSC |
| **7. Vic 2001** | **19.** tort in court of competent jurisdiction | Nil | Nil | **20, 21.** Supreme Court, on application of complainant |
| **8. Tas 2002** | **20.** tort in court of competent jurisdiction | Nil | Nil | **21, 22.** As for Vic |
| **9. WA 2003** | **15.** tort in court of competent jurisdiction | **15(4).** *Equal Opportunity Act 1984* | Nil | Nil |
| **10. NT Bill 2005** | **19.** tort in court of competent jurisdiction | Nil | Nil | **20.** As for Vic |
| **11. ACT (2) Bill 2006** | **53(3)(4**). [intentional] tort in court of competent jurisdiction | **53(5). [1.2]** *Discrimination Act 1991* | Nil | Nil |

### *Loss of protection*

The legal protections described above are not absolute – to ensure against abuse of process, they can be lost in certain circumstances, such as where a whistleblower is found to have knowingly supplied false information or makes a vexatious allegation. Six instruments also provide other instances where protection is lost, for any of three reasons:

- *If it is determined that a matter does not tend to show the misconduct alleged*

  (Vic ss.13 & 23; Tas ss.15 & 24; NT cll.23 & 24)

  Under these provisions, the whistleblower will not be protected in relation to further information provided about a protected disclosure, if under the two-phase assessment discussed earlier, the original disclosure is assessed not to be a public interest disclosure. It seems that the original disclosure remains protected, but the subsequent information is not, apparently with the intention of dissuading whistleblowers from persisting with the matter.

- *If the whistleblower fails to assist with the investigation*

  (SA s.6; WA s.17(1)(a); ACT (2) cl.49(2))

  These provisions provide for a loss of protection where the whistleblower fails to assist with investigation of the disclosure, particular by supplying requested information. The SA and WA provisions are workable, because they contemplate that a whistleblower may in some circumstances have a reasonable excuse for being unable or unwilling to assist. However the ACT proposal is quite severe and inflexible, contemplating loss of protection for all information, including the original disclosure, if the whistleblower fails to comply a very specific prescription (all requests for further information must be met within 14 days, irrespective of the nature of the request, and without limit on the number of requests that might be made).

- *If the whistleblower reveals information about the disclosure or investigation to people or in manner outside the Act*

  (Tas s.17(2); WA s.17(1)(b); ACT (2) cl.49(3)(b))

  These provisions result in a loss of protection if a person repeats or talks about the disclosure to any "person other than the person to whom the disclosure was originally made" (Tas), or makes any further disclosure "otherwise than under this Act" (WA s.17(1)(b); ACT (2) cl.49(3)(b)). These provisions equate to a 'confidentiality agreement' about the disclosure. They are simply unrealistic, given it may be necessary for a whistleblower to officially repeat their evidence to more than one person, or in forums outside the Act, or for their own self-protection to discuss the matter with others privately, after the matter's resolution, or in the public domain.

These further provisions are problematic, mainly because the serious consequence that attaches to these events (loss of protection) is not necessarily proportionate with the issue at hand. Accordingly the risk of losing protection may easily appear high enough to discourage potential whistleblowers from regarding the Act as providing much security. Best practice would limit the effects of any loss of protection to, at most, the same outcome that any other person could suffer (e.g. if disciplined for unreasonably failing to assist an investigation, or breaching a direction to maintain confidentiality). As it stands, the above provisions mean a whistleblower who commits a minor breach could end up worse off than if they had never made the disclosure at all, being left entirely unprotected from reprisals and open not just to disciplinary action, but larger criminal or civil action.

## 8. The public interest 'leak': when should whistleblowing to non-government actors be protected?

The normal definition of whistleblowing, reviewed earlier, recognises that organisation members sometimes disclose illegal, immoral, or illegitimate practices to a range of persons or organisations that "may be able to effect action". However as mentioned in part 6, only one Australian public sector whistleblowing law currently includes anyone other than agencies of executive government as recognized points for the receipt of disclosures. This is in NSW, where s.8(1)(d) provides that a protected disclosure may sometimes be made to "a member of Parliament or to a journalist" (i.e. "a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media": s.4).

Only the South Australian and Queensland Acts provide any other limited mention of disclosures directly to parliamentarians. In SA, disclosures may be made to any Minister of the Crown. In Queensland, a disclosure may be made to any person "who, directly or indirectly, supervises or manages the officer" (s.27(3)), which must also ultimately include the Minister; or to a relevant parliamentary committee about anything it has a power to investigate (s.26(1)(b) and Sch 5, s.2(1)(a)). In all other circumstances, the instruments provide only for disclosures to be made internally to the agency, or to designated public integrity agencies.

This legislative gap is one of the most glaring. Across Australian society, the best-known whistleblowing is by definition not internal but 'public' – i.e. made to the media, or at least reported and discussed in the media. For most people, this is the definitive example of whistleblowing since it is the loudest way of drawing attention to wrongdoing. Indeed, many of the legal protections outlined in part 7 are framed primarily to defend public whistleblowers, e.g. from actions for defamation or breach of confidence once allegations are publicised in the media. Some commentators argue that unless they have this public quality, public interest disclosures should not be defined as whistleblowing at all.[21]

In political practice, parliamentarians and the media are clearly among those institutions whose attention – if or when required – is widely regarded as likely to lead to official action on disclosures. There is widespread acceptance that "leaks, and whistleblowers, are essential to a proper democratic system".[22] Nevertheless, this legislative gap is difficult to resolve. Given that public whistleblowing involves dramatic conflict between individuals and organisations, and the highest risk to reputations, governments are naturally apprehensive about providing legal protection to public whistleblowers. Wherever there are no provisions to distinguish between the two, public whistleblowing can be easily confused with simple 'leaking' – which includes unauthorised disclosure of official information for a wider range of reasons – and can be met with vigorous investigation and prosecution.[23] Such prosecutions generally attract public criticism, and can lead to embarrassing moments for governments, especially in circumstances where a

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[21] E.g. Grace, D & Cohen, S (1998), 'Whistleblowing' in *Business Ethics: Australian problems and cases*, Oxford University Press, Melbourne, p.150.

[22] Oakes, L (2005), 'Pillars of democracy depend on leaks', *The Bulletin / National Nine News*, 24 August 2005, http://news.ninemsn.com.au.

[23] See Ester, H (2006), 'Corruption and the Media: Political Journalists, 'Leaks' and Freedom of Information', in *Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies*, NSW Parliament House, Sydney, 22-23 February 2006, Report 7/53, p.83.

disclosure is motivated to correct wrongdoing irrespective of current politics or policy, or only becomes public after 'official' mechanisms have failed to produce results.

The question becomes, when does public whistleblowing become sufficiently reasonable to justify the extension of legal protection? The current NSW provisions indicate two key circumstances: (a) when the whistleblower has first tried to get action through official channels, without success; and (b) when the whistleblower is clearly vindicated in their pursuit of the matter, i.e. they have achieved a level of public recognition of the legitimacy of their further disclosure.

The first circumstance is reflected in ss.19(1)-(3) of the NSW Act, which provides that before a disclosure to a parliamentarian or journalist can attract protection:

> **19 (3)** The investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred:
>
> (a) must have decided not to investigate the matter, or
>
> (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or
>
> (c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or
>
> (d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.

A variation was recently recommended by Queensland's Bundaberg Hospital Commission of Inquiry. This was triggered when a senior nurse disclosed concerns to her local parliamentarian (a member of the Opposition) about the pace of the internal response to evidence of medical negligence. The Commission endorsed the principle that "a whistleblower ought to be able to escalate his or her complaint" in the event that no satisfactory action is taken, recommending that there should be mandatory notification of disclosures to a central agency (the Ombudsman), and that if an agency does not resolve a disclosure within 30 days, the whistleblower ought to be able to make the disclosure to a member of Parliament, and then, after a further 30 days, to the media.[24]

There are at least two problems with this recommendation, however. Although it contemplates reporting to the Ombudsman, it does not provide time for an investigation by the Ombudsman or other independent integrity agency as an intermediary step before the whistleblower is entitled to go public. The imposition of such time limits is also arbitrary. In most instances, such periods would not reasonably be long enough to resolve a matter; but in some, such periods could still be too long – for example, where there is a "serious, specific and immediate danger" to public health or safety.[25]

The second circumstance in which it is widely accepted that a public whistleblower should be protected, is when they have achieved some level of vindication – i.e. that they are correct in their belief that the matter requires action which will not be taken unless further public disclosure occurs. The Queensland recommendation does not explicitly address this expectation, but it is reflected in subss.19(4) and (5) of the NSW Act, which provide that the whistleblower must have reasonable grounds for believing the disclosure is "substantially true", and that it must indeed *be* substantially true.

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[24] Davies G, Hon (2005), *Report of Queensland Public Hospitals Commission of Inquiry*, p.472, par 6.512.
[25] See Solomon, D (2006), 'Whistleblowers and Governments Need More Protection', in *Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies*, NSW Parliament House, Sydney, 22-23 February 2006, Report 7/53, p.157, 163.

However this requirement is a blunt and difficult method for gauging the degree of justification for public whistleblowing. The requirement for *belief* in the truth of the disclosure merely restates other threshold requirements. More objectively, if official investigations did not substantiate the disclosure, then whose judgement will determine it was nevertheless 'true'? The answer is probably the court or tribunal in which the whistleblower is seeking to defend him/herself against defamation or criminal prosecution – but these are not forums suited to reinvestigate the matter, and most whistleblowers would struggle to conclusively prove the 'truth' of their disclosure in these forums, in the face of opposing arguments and evidence.

Consequently a new checklist is needed of the circumstances in which public whistleblowing is reasonable, using tests more appropriate to the tribunals likely to be making this judgement. A suggested checklist is as follows:

1. Disclosures to parliamentarians or the media should only be protected if the official first made the disclosure internally to the agency, and/or to an appropriate independent agency – unless neither of these courses is reasonably open to the official. Circumstances in which official channels are not reasonably open might include a specific, reasonably held risk that they or someone else will suffer a reprisal if the matter is disclosed.

2. Disclosures to parliamentarians or the media should also only be protected if the official has reasonable grounds for believing that no appropriate action has been or will be taken on their internal disclosure(s) within a reasonable period, by either the agency or the independent agency.

   Rather than imposing arbitrary timeframes, the legislation should provide for a 'reasonable period' to be determined having regard to the nature of the matter, the time and resources required to properly investigate, its urgency, and guidelines on the timeframes and level of communication to which investigating agencies should normally adhere depending on the circumstances. The legislation should provide for these guidelines to be published by a coordinating agency, and provided to officials who make public interest disclosures, who will be presumed to be aware of them.

3. Finally, for the further disclosure to be protected, the court, tribunal or officer determining the matter must be generally satisfied that it was in the public interest that the matter be further disclosed. For this, they should be satisfied that:
   (a) the person making the disclosure believed that appropriate action had not been and would not be taken on an issue of significant public interest as a result of previous disclosures; and
   (b) the person making the disclosure was reasonably justified in their belief that appropriate action had not been or would not be taken; and
   (c) the person's primary reason for making the further disclosure, at the time of the disclosure, was a reasonably held intention that it would result in appropriate action being taken on the issue; and
   (d) the further disclosure did result, should result, should have resulted, or could yet result in appropriate action being taken on the issue.

## 9. How should whistleblowers and internal witnesses be managed?

Legal protection for whistleblowers can only ever help make disclosures possible, and provide remedies in the event that whistleblowers suffer detriment for having done so. Also needed is practical protection, which requires public agencies to take responsibility for the workplace environment in which disclosures arise, and actively manage the individuals concerned in order to prevent allegations of reprisals from arising.

Even where legislatively required, 'practical' protection has always been difficult for public agencies to implement, due to the conflicting human resource management principles that surround such cases. Whereas issues of legal protection arise in response to specific triggers – such as disciplinary, civil or criminal action – options for practical protection are much more intangible. Overt actions to 'protect' a person in the workplace can increase rather than decrease workplace conflict. For example:

- It is difficult to single out someone who should *not* be harassed, without identifying and exposing them to reprisals they might not otherwise have suffered;
- Where a whistleblower has mixed motives for a public interest disclosure, many managers and staff may feel uncomfortable with actions that treat the officer as having 'done the right thing', even if the matter was serious; and
- Perceived 'favouritism' of a whistleblower by management may trigger polarisation in colleagues' attitudes towards the people involved, contributing to existing workplace conflict and to the potential for harassment or victimisation.

Effective strategies for managing whistleblowing cases are a major focus for further research. An increasing number of larger public sector organisations are investing in such strategies, with standard elements in these strategies beginning to be identified.[26] Their objectives differ from legal protection, because 'practical' protection can only be achieved by removing the focus on individuals, containing the degree of conflict and sensitively managing the workplace as a whole. The aims of 'practical' protection can be stated to be:

1. To devise the best path by which workplaces can remain, or re-establish themselves as, positive and harmonious working environments, despite the inevitable tensions and potential conflicts raised by whistleblowing matters;
2. To support the integrity of agency investigation and review processes, by promoting the fairest possible outcomes for all individuals involved (i.e. internal complainants and witnesses as well as those subject to investigation); and
3. To promote staff and public confidence in the agency's ability to handle such matters professionally in the future.[27]

Current whistleblower protection legislation sets out few requirements for how this 'practical' protection is to be pursued by agencies. The primary requirements relate to the need for agency procedures, confidentiality, and keeping the whistleblower informed about the investigation.

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[26] Brown AJ, 'Concluding Remarks' to *Managing Internal Witnesses in the Australian Public Sector: Meeting the Challenge, Charting the Way Forward,* Australian National University, 12 July 2005; see www.griffith.edu.au/whistleblowing.

[27] Brown AJ et al (2004), *Speaking up: creating positive reporting climates in the Queensland public sector*, Crime & Misconduct Commission, Brisbane, Building Capacity 6, p.9. See also Brown, AJ (2001), 'Internal witness management: an art or a science?', *Ethics & Justice* 3(2), pp. 45–61.

### *Internal disclosure procedures*

The main mechanism for ensuring implementation of many Acts is a statutory requirement for public agencies to develop procedures for what is to occur in response to internal disclosures (internal disclosure procedures).

Table 11 below sets out these requirements. In all but two cases, the legislation either contemplates or requires procedures dealing with how disclosures are to be made and investigated. However, only six of the instruments explicitly require agencies to develop procedures about how whistleblowers are to be protected, and none of them specify any particular guidance or minimum content for these procedures. Given the importance of this issue, this is a major area for further legislative development

***Table 11. Requirements for internal disclosure procedures***

| **Legislation** | **Agency procedures for** | | | **Agency procedures must follow model code / guidelines** |
|---|---|---|---|---|
| | **How disclosures can and should be made** | **Investigation and action on disclosures** | **Protection of persons as a result of disclosures** | |
| **1. SA 1993** | Nil | | | |
| **2. Qld 1994** | **27 (2).** [contemplated, not required] | Nil | **44.** [required] | Nil |
| **3. NSW 1994** | **8 (1)(c)(ii)** [contemplated, not required] | Nil | Nil | Nil |
| **4. ACT (1) 1994** | **10 (1)(a)** **10 (3)(a)**, **(b)** [required] | **10 (1)(b)**; **10 (3)(d)** [required] | **10 (3)(c)** [required] | Nil |
| **5. Cth (1) 1999** | **Commissioner's Directions 1999:** **2.5 (1)** [required]… | **15 (3).** **Regulation 2.4** [required] | Nil | Nil |
| **6. Cth (2) Bill 2001-2** | **10 (1)(a)** **10 (3)(a)**,**(b)** [required] | **10 (1)(b)**; **10(3)(d)** [required] | **10 (3)(c)** [required] | Nil |
| **7. Vic 2001** | **6 (6)(b)**. **68 (1)(a).** [required] | **68 (1)(b)** [required] | **68 (1)(c)** [required] | **68 (3).** **69 (1).** Ombudsman guidelines |
| **8. Tas 2002** | **7 (6)** A disclosure – **(b)** is to be made in accordance with prescribed procedure. | Nil | Nil | Nil |
| **9. WA 2003** | **20 (1).** The Commissioner must establish a code…. **23 (1)(d)(e)** [Agency procedures required] | | **23 (1)(b)** [required] | **21.** Commissioner guidelines. **23 (2).** |
| **10. NT Bill 2005** | **8 (4)(b).** **63 (1)(a)** [required] | **63 (1)(b)** [required] | **63 (1)(c)** [required] | **63 (3)** **64.** Ombudsman guidelines |
| **11. ACT (2) Bill 2006** | Nil | | | |

Best practice is found in Western Australia, where s.23(1)(b) of the Act not only requires the development of procedures, but places a positive obligation on the principal executive officer of all public authorities to "provide protection from detrimental action or the threat of detrimental action for any employee… who makes an appropriate disclosure of public interest information".

The Western Australian, Victorian and NT instruments are also strong in requiring a central integrity agency to develop model guidelines, with which agency procedures must be consistent. They also enable external review and evaluation of agency procedures.

The weakest are the South Australian, ACT(2) and Tasmanian instruments, the latter providing that a disclosure is to be "made in accordance with prescribed procedure" (Tas s.**7**(6)(b)) even though the Act contains no specific guidance on such procedures.

***Table 12. Confidentiality requirements***

| **Legislation** | **Obligation on agency / officials** | **Exceptions to confidentiality obligation** | | | | | **Offence** |
|---|---|---|---|---|---|---|---|
| | | **Consent** | **Function / investigate** | **Natural justice** | **Public interest** | **Other** | |
| **1. SA 1993** | **7 (1)** | | **Y** | | | | |
| **2. Qld 1994** | **55 (1)** | | **55(3)(a), (b)** | **53(4),(5)** | | **55(3)(c)** court or tribunal; | Yes |
| **3. NSW 1994** | **22** | **22 (a)** | **22 (c)** | **22 (b)** | **22** | | |
| **4. ACT (1) 1994** | **33 (1)** | | | | | reasonable excuse | Yes |
| **5. Cth (1) 1999** | Nil | | | | | | |
| **6. Cth (2) Bill 2001-2** | **30 (1)** | | | | | reasonable excuse | Yes |
| **7. Vic 2001** | **22(1)** | | (except not identifying info) | | | | Yes |
| **8. Tas 2002** | **23(1)** | | (except not identifying info) | | | | Yes |
| **9. WA 2003** | **16(1)** | **16 (1)(a)** | **16(1)(c)** | **16(1)(b)** | | **16(1)(f)** | Yes |
| **10. NT Bill 2005** | **21(2)** | **22 (2)(a)** | **21 (3) 22(1)(a)-(e) 22(2)(c)(i)** | **22 (2)(b)** | **22 (2)(ii)** | **22(1)(f)** | Yes |
| **11. ACT (2) Bill 2006** | **61** | **64** | **62** | | | **65** | Yes |

### *Confidentiality*

Some of the major requirements in many Acts which work to help protect whistleblowers are the confidentiality requirements set out above in Table 12. These requirements also work in favour of other interested persons, including those subject to disclosures, by enabling investigators and management to restrict knowledge of public interest disclosures to those who need to know. In most jurisdictions the importance of these requirements is emphasised by the fact that breach of them is a criminal offence.

However confidentiality is not an absolute. It is intended to enable information to be treated with discretion, not on the basis of absolute secrecy. Best practice is found in Queensland, NSW, Western Australia and the NT Bill, where a number of clear exceptions are provided which enable information to be used on a need-to-know basis.

The weakest situation is found in the Commonwealth where no explicit guidance on confidentiality is provided.

Other poor practice can be found in Victoria and Tasmania, where the legislation precludes the Ombudsman or a public body from including in a report or recommendation any particulars likely to lead to the identification of a person who made a protected disclosure (Vic s.22(2); Tas s.23(2)). This inflexible provision is a secrecy provision, rather than a confidentiality one. It interferes with the ability of authorities to properly investigate and resolve disclosures, even in circumstances where the identity of the whistleblower is already well-known to the agency, or already in the public domain, or the whistleblower has given informed consent to being identified.

### *Keeping internal witnesses informed*

Current legislation often recognises the need to keep those who make public interest disclosures adequately informed about the progress and outcomes of investigations. If not kept informed, whistleblowers and other internal witnesses may easily question whether any action is being taken. They may be more difficult to manage and more likely to take their disclosures outside the organisation. This is because many whistleblowers, already under stress, will fear the worst if they do not know what action is being taken – and act accordingly.

Table 13 below sets out most requirements in the legislation on this issue.

Best practice is to be found in Tasmania, where the provisions guarantee that all whistleblowers must be notified of all critical decisions, as well as providing the option of progress reports, and requiring procedures to be made available.

Particular problems exist in the ACT Bill, which requires the person receiving a disclosure to give detailed information at the outset on how the legislation works – but with a strong focus on the legal risks faced by the whistleblower, including the consequences of false or misleading information, and warnings as to how protection may be lost. The problem with this approach is that if this is the primary or only information imparted, then many people considering making a public interest disclosure might reasonably decide it is not worth proceeding (ACT(2) cl.16).

***Table 13. Requirements to keep whistleblowers informed***

| Legislation | Advice on procedures & protections | Decision as to whether public interest disclosure | Decision to investigate (or not) | Progress report(s) | Outcome | Exceptions |
|---|---|---|---|---|---|---|
| **1. SA 1993** | | | | | **8** [all cases] | Impractical, unlawful |
| **2. Qld 1994** | | **32(1),(2)** [on request] | | | | Impractical, already given, vexatious, adversely affect safety, investigation, necessary confidentiality |
| **3. NSW 1994** | | **27** [action taken or proposed to be taken in respect of the disclosure – within 6 months] | | | | |
| **4. ACT (1) 1994** | **10(4), 26** [all cases] | | **23(1), (2)** [on request – once in every 90 days] | | | |
| **5. Cth (1) 1999** | **Reg 2.4 (2)(f)** [all cases] | | | | | |
| **6. Cth (2) Bill 2001-2** | **10(4), 26** [all cases] | | **23 (1), (2)** [on request – once in every 90 days] | | | |
| **7. Vic 2001** | | **25, 27(1), 29, 30, 34, 35** [all cases] | **40 (2)** [all cases] | **80** [on request – 28 days] | **67** [all cases] | **80(3)** – already given, endanger safety, investigation |
| **8. Tas 2002** | **61** [proced-ures] | **31, 34(1), 35** [all cases] | **40 (2)** [all cases] | **74** [on request – 28 days] | **59, 77** [all cases] | **74(3)** – already given, endanger safety, investigation |
| **9. WA 2003** | | | **8(3), 10(1)** [all cases – 3 months] | **10(2),(3)** [on request] | **10(4)** [on request] | **11 –** safety, investigation, necessary confidentiality |
| **10. NT Bill 2005** | **65** [proced-ures] | **29** [all cases, 14 days] | **39(3)** [all cases, 14 days] | | **59, 77** [all cases] | |
| **11. ACT (2) Bill 2006** | **16, 22** [all cases] | | **26** [all cases] | **30(1)** [all cases – once every 3 months] | | **30(2)** – Investigation, informant identifying |

### *Reprisal risk assessment and prevention*

One of the primary goals of whistleblower protection is to prevent reprisals or alleged reprisals from occurring. The prevention of reprisals relies in large part on the ability of whistleblowers, investigators and managers to assess the risk of different potential reprisals in a given case, and to take agreed steps towards minimising those risks, by detecting early signs of detrimental action and planning early responses.

Readiness to assess reprisal risks and act against them requires an active management approach – in contrast, for example, to a passive hope that confidentiality alone will protect a whistleblower. In reality, confidentiality is often difficult to maintain, and practical alternative approaches to protecting whistleblowers are needed.[28] Requirements for reprisal risk assessment should now be considered standard in good internal witness management, without which other management responses often cannot be taken with the necessary timeliness or effectiveness.

Currently only five instruments make any mention of when or how it might be useful to consider the risk of reprisals:

- Three instruments provide that no public agency may refer a disclosure to another – for example, an integrity may not refer a disclosure back to the agency from which the disclosure arose – without first considering "whether there is an unacceptable risk that a reprisal would be taken against any person because of the reference", and doing so in consultation with the whistleblower (Qld s.28; ACT (1) s.21; Cth (2) cl.18);
- Four instruments provide for a whistleblower to seek relocation where "it is likely a reprisal will be taken" against them if they continue in their existing work location, and the only practical way to remove or substantially remove the danger is to relocate them (Qld s.46; ACT (1) s.27; Cth (2) cl.24; NT cl.25);
- The Queensland Act provides that information disclosing, or likely to disclose, the identity of a whistleblower may only be given for reasons of natural justice where it is both "essential to do so under the law" and "unlikely a reprisal will be taken" against the whistleblower as a result (Qld s.55(5));
- The current ACT Bill requires the CEO of a public agency to consider, on completion of an investigation, whether to take "action to prevent, or reduce the likelihood of, detrimental action being taken against the discloser" (ACT(2) cl.46(2)(b)(iii));

These requirements highlight the lack of a general responsibility on the part of those handling disclosures to actively consider the risk of reprisal as a matter of routine, in all cases, as a primary means of implementing the Act. The final provision above, in the ACT Bill, particularly highlights this deficiency – there is little value in only having a requirement to assess reprisal risks *after* the investigation is completed, given this may be many months after the disclosure was made and reprisal risks first arose.

Best practice would be for a statutory requirement for active assessment of reprisal risks to be built into the process for receiving disclosures, in order to determine the best means for managing the potential conflicts around them. This is one example of potential new minimum content for agency whistleblower protection procedures, which can and should be required by law.

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[28] See NSW Ombudsman (2005), 'Protecting whistleblowers: practical alternatives to confidentiality', Information Sheet, http://www.ombo.nsw.gov.au.

## 10. How can public integrity agencies play more effective roles in the management of whistleblowers and internal witnesses?

Many central agencies of government have special roles in the implementation of whistleblower protection laws. These range from investigations, on the part of integrity agencies, to the human resource management responsibilities of public sector management agencies needed to resolve conflicts and grievances resulting from alleged reprisals.

Table 14 below sets out the different types of roles played by central and integrity agencies in some Australian jurisdictions.

***Table 14. Roles of central and integrity agencies in implementing whistleblower legislation***

| Agency / Role(s) | | 1 Ombuds-man | 2 Auditor-General | 3 Corrup-tion body | 4 Specialist agencies (e.g. PIC) | 5 Public employ-ment agency | 6 Police & DPP | 7 Lead policy agency |
|---|---|---|---|---|---|---|---|---|
| **1** | Advice | **X** | | **X** | **X** | **X** | | |
| **2** | Internal witness support | **?** | | **?** | | | | |
| **3** | Clearinghouse / coordination | **some** | | **some** | | | | |
| **4** | Investigate wrongdoing | **X** | **some** | **X** | **X** | **X** | | |
| **5** | Investigate reprisals | **some** | | **X** | | | **X** | |
| **6** | Resolve reprisal outcomes / compensate | | | | | **X?** | **X** | |
| **7** | Training & education | **X** | | **X** | | **X** | | |
| **8** | Monitoring & evaluation | | | **X** | | | | **X** |
| **9** | Policy development & coordination | | | | | | | **X** |

With so many agencies involved, it is important that their roles are coordinated. It is also important that they fulfil those responsibilities that can only be properly fulfilled by agencies with independence from frontline agencies.

In the past, these needs have led to calls for new central agencies such as a Public Interest Disclosures Agency, to provide a 'one stop shop' approach to whistleblowing by receiving, investigating and managing all such matters. A fully independent specialist agency of this kind is unlikely in the foreseeable future, if only because the concentration of statutory powers, resources, and expertise needed to investigate all the different possible types of disclosures in any jurisdiction would be extremely difficult to locate in one body. Its powers would also duplicate all the arrangements already in place for the

investigation of matters not originating from whistleblowers, adding to the type of complications reviewed in part 6.

However, there is a clear need in all jurisdictions for coordination functions to be located *somewhere* among the existing integrity agencies with responsibility for the system. As seen earlier, whistleblower protection legislation does not 'stand alone', but rather intersects with other legislation and the roles of other bodies in the integrity system. This makes it all the more important that particular central agencies have clear leadership roles and responsibilities on all key issues of practical implementation, even if there are also other agencies with major responsibilities including formal responsibility for reviews, evaluations and amendments to legislation.

There are four main areas where legislation could provide for greater coordination and oversight by existing integrity agencies, to ensure that major issues do not fall through the cracks of the current dispersed arrangements.

### *Investigations and oversight of investigations*

This issue was discussed earlier in part 6. In most jurisdictions, a number of integrity agencies are involved in the primary investigations into disclosures, and the review and oversight of investigations undertaken by frontline agencies. Only in the Commonwealth is the scheme limited in a way that directly involves only one central agency (the Australian Public Service Commission) in its administration – and this is itself problematic where the investigations go beyond equity, merit and human resource management matters.

Earlier the paper discussed the need for routine independent review of agency discretions not to investige whistleblowing matters, and the benefits of a clearinghouse role for an appropriate investigation agency. This type of coordination cannot be undertaken by a policy agency, but only an investigation agency, in collaboration with other investigation agencies and the internal investigation areas of frontline agencies. The legislative trend is toward having these roles allocated clearly to an appropriately-resourced central investigative agency – logically one already dealing with a significant number of disclosures, but with sufficient generalist expertise to also intelligently coordinate the investigation activities of many agencies.

### *Internal witness support & management*

Responsibility for the welfare of all public employees, including whistleblowers and other internal witnesses, lies first and foremost with the heads of frontline agencies. They are supported in the discharge of this responsibility by central public sector management agencies (at least, in most places other than NSW). Meanwhile, internal and external investigators have different roles in respect of internal witness welfare. Although they have considerable direct contact with internal witnesses, their main responsibility is the investigation of the substantive matter – sometimes including reaching outcomes with which individual whistleblowers may not agree.

Given the different players, there is need for a coordinated approach to internal witness management, including a strong external element involving investigation agencies. Even though larger line agencies should be able to adopt well-adapted internal witness management procedures, many agencies cannot easily develop this expertise or justify these resources. At any time, in any agency, there is the risk that any whistleblower could lose trust in the support services offered by the agency and suspect that

management is instead primarily looking after its own interests. Often by the time external support or oversight is sought, breakdowns in trust have already occurred, followed by allegations of reprisal.

Currently no jurisdiction provides for a central agency to administer an organised case management or support service tailored to managing the stresses of whistleblowers. Just as no legislation provides minimum standards or content for agency whistleblower protection procedures, no central agencies are tasked with a clearinghouse role for decisions regarding the most effective support strategies for whistleblowers, or for providing specialised back-up support for those agencies with no internal witness management system of their own.

Debate is needed on how this gap is most effectively to be filled, and an appropriate clearinghouse role provided for in legislation. While monitoring and coordination of welfare decisions might appear to go hand-in-hand with an investigations clearinghouse, in fact there needs to be separation of these roles, so that support services can continue to command the trust of individuals irrespective of the outcome of investigations. It is thus an open question whether leadership in internal witness management and support is better handled – legislatively and in practical terms – by a separate dedicated unit in the coordinating investigation agency, or by an agency with existing responsibility for the welfare of public employees, working closely with the coordinating agency.

### *Reprisal investigations, prosecutions and compensation*

Earlier section 7 of this paper referred to the need for a more strategic approach to the investigation and prosecution of reprisals, and the apparent need for official support for processes to deliver remedies for aggrieved whistleblowers. Currently only three instruments (Queensland, ACT, Cth(2)) grant special roles to an integrity agency to assist in dealing with reprisals, in the form of standing to seek injunctions. There are no designated prosecuting agencies for reprisal offences, meaning that if the frontline agency is not automatically prepared to investigate and prosecute – which in many instances is unlikely – then any prosecution is a distant prospect.

Currently no legislation contains specific requirements for how or by whom allegations of reprisals are to be handled. Consequently the assumption is that such allegations should be investigated in the same way as any other matter, even though such investigations inherently involve more complex issues. For example, in circumstances where it is difficult for agencies to easily acknowledge the internal deficiencies that might permit or constitute reprisals, there is a strong need for early independent oversight of reprisal investigations, if not independent investigation from the outset. In the absence of such special procedures, the usual scenario is that central investigation agencies only become involved in secondary reviews of reprisal allegations, long after the relationship between management and the whistleblower has deteriorated, and it is more difficult to get to the bottom of the escalating conflict.

As discussed earlier, there also appears to be no clear lead agency with sufficient interest and expertise to assess the legitimate compensation needs of aggrieved whistleblowers, as an alternative to the cumbersome process of civil action. In the three cases above, the only agencies which currently possess any mandate to seek a constructive resolution of whistleblower grievances are investigation agencies, not the public sector management agencies with whom this responsibility should normally lie. Debate is needed on who should discharge the responsibility for actively pursuing the resolution of these matters in the public interest, and how this responsibility is best embedded in the legislation.

### *Monitoring, research and policy coordination*

Four recent instruments provide a central agency with clear responsibility for overall monitoring and evaluation of the implementation of the Act – the Ombudsman in Victoria, Tasmania and the NT (Vic s.38; Tas s.38; NT cl.3(2)) and the Commissioner for Public Sector Standards in Western Australia (WA s.19).

While these research and policy coordination roles are important, the granting of them to investigative agencies such as the Ombudsman remains fairly innovative. Meanwhile the official lead agency with responsibility for the legislation in these and other jurisdictions (e.g. Department of Justice) appears to play a limited role in monitoring or evaluation, even when it possesses considerably more resources.

Best legislative practice now acknowledges the importance of these monitoring and evaluation roles, but debate is needed on who is best placed to discharge them and how they should be resourced. Distinctions need to be drawn between operational monitoring and coordination, which is best done by a central investigation agency with practical experience in investigations and casehandling; the coordination of internal witness support and human resource management issues; and longer term policy coordination and evaluation of the scheme as a whole. All these roles need to be covered, but not necessarily by the same agency.

## Conclusions

This paper has reviewed, and where possible suggested answers to, some of the fundamental questions that underpin Australia's public interest disclosure laws.

As summarised below in Table 15, it is possible to rank existing provisions according to those which are most clearly problematic, or missing, or appear closest to legislative best practice. 'Best practice' has been taken to mean the best provisions or drafting approach among existing Australian provisions, for the purpose of achieving the underlying objectives of the legislation outlined in part 1. In some areas there is no current best practice, because no legislation is grappling adequately with the issue.

While this summary does produce a final ranking, this necessarily remains contestable. The first general conclusion from this comparison is not that any particular jurisdiction possesses a current best practice model, but rather that none of them does. No single existing Australian whistleblowing law or Bill is entirely satisfactory, to an extent that could be described as overall 'best practice'. Not only do six of the 11 instruments fall at or below a 50% ranking – the fact is that nor do the remaining five rate very highly. This result reflects the fact that while every jurisdiction has managed to enact at least some elements of best practice, all have problems – sometimes unique, sometimes general or common problems.

The second general conclusion, therefore, is that it is time for a second generation of Australian whistleblower laws, drawing on all the lessons of the first generation of such legislation. There are also strong arguments why these laws should be far more uniform across Australia's nine federal, state and territory public sectors. This is not because uniformity is inherently valuable for its own sake – indeed, the diversity of the existing laws provide valuable lessons – but because the key issues are common, and because public integrity and standards would benefit nationally from a clearer, legislatively supported consensus on these questions.

In the absence of a national shift towards greater uniformity, it is still open to any existing jurisdiction to replace current provisions or proposals with the first of this 'second generation'. The current ACT and NT Bills provide an opportunity for this, as do amendments under discussion in Queensland. Formal reviews of the legislation are underway, or in the process of being established, at a Commonwealth level and in NSW, Victoria and Western Australia. An obvious candidate to initiate comprehensive reform is the Commonwealth Government, whose current provisions have been shown on this analysis to be the most limited and problematic.

While progress is needed towards more comprehensive reform, the most important need of all is care and deliberation over the nature of current legislative strengths and weaknesses. This legislation is of great public importance. By suggesting a new framework for comparison and evaluation of these laws, it is hoped that new steps can be taken towards ensuring its effectiveness, first through clearer discussion of its fundamental principles, and then a clearer consensus on what 'best practice' might represent.

## *Table 15. A ranking of Australian public interest disclosure provisions*

**3** = current best practice
**2** = provisions are adequate / conventional
**1 =** not applicable / law is silent or weak
**0** = current major problem or problematic omission

| | | *1* **SA 1993** | *2* **Qld 1994** | *3* **NSW 1994** | *4* **ACT 1994** | *5* **Cth 1996** | *6* **Cth Bill 2001** | *7* **Vic 2001** | *8* **Tas 2002** | *9* **WA 2003** | *10* **NT Bill 2005** | *11* **ACT Bill 2006** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **1. How should whistleblowing be defined, etc?** | a. Title | 0 | 0 | 2 | 3 | 1 | 3 | 0 | 3 | 3 | 3 | 3 |
| | b. Objectives / long title | 2 | 2 | 3 | 0 | 0 | 0 | 3 | 3 | 2 | 3 | 3 |
| **2. Who should be eligible for whistleblower protection?** | a. Internal information sources | 0 | 2 | 3 | 0 | 2 | 0 | 0 | 3 | 0 | 0 | 0 |
| | b. Any public official | 1 | 3 | 2 | 1 | 0 | 1 | 1 | 2 | 1 | 1 | 1 |
| | c. Public contractors & employees | 1 | 2 | 0 | 1 | 0 | 1 | 1 | 3 | 1 | 1 | 1 |
| | d. Anonymous disclosures | 1 | 2 | 1 | 0 | 1 | 0 | 3 | 3 | 1 | 3 | 0 |
| | e. Former organisation members | 1 | 1 | 2 | 1 | 1 | 1 | 1 | 3 | 1 | 1 | 1 |
| | f. Supplement/additional information | 1 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 1 | 2 | 0 |
| | g. Other internal witnesses | 1 | 2 | 0 | 1 | 0 | 1 | 3 | 1 | 1 | 3 | 2 |
| | h. Any reprisal target | 2 | 3 | 0 | 3 | 1 | 3 | 2 | 2 | 3 | 2 | 2 |
| **3. Public & private sector covered by same law(s)?** | | 0 | 0 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 |
| **4. What types of wrongdoing should be able to be disclosed?** | a. Comprehensive categories | 3 | 3 | 3 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 |
| | b. Criminal etc thresholds | 2 | 2 | 2 | 2 | 2 | 2 | 0 | 0 | 2 | 0 | 1 |
| | c. Wrongdoing by any / all officials | 3 | 3 | 2 | 2 | 0 | 2 | 2 | 2 | 3 | 2 | 2 |
| | d. Wrongdoing by contractors | 2 | 2 | 0 | 2 | 0 | 2 | 2 | 0 | 3 | 2 | 2 |
| **5. How do we guard against misuse?** | a. Offence for false / misleading | 0 | 3 | 2 | 1 | 1 | 1 | 2 | 2 | 0 | 2 | 1 |
| | b. Subjective / objective test | 2 | 2 | 2 | 2 | 1 | 2 | 0 | 0 | 2 | 0 | 2 |
| | c. Entirely policy disputes | 1 | 3 | 0 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| | d. Entirely personal grievances | 1 | 2 | 2 | 2 | 0 | 2 | 2 | 2 | 2 | 2 | 0 |
| | e. Vexatious (abuse of process) | 1 | 1 | 3 | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 1 |
| | f. Discretions not to investigate | 1 | 1 | 1 | 2 | 1 | 2 | 2 | 3 | 3 | 2 | 2 |

| *Table 15 continued* | | *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* | *11* |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | **SA 1993** | **Qld 1994** | **NSW 1994** | **ACT 1994** | **Cth 1996** | **Cth Bill 2001** | **Vic 2001** | **Tas 2002** | **WA 2003** | **NT Bill 2005** | **ACT Bill 2006** |
| **6. How should disclosures be received, handled & investigated?** | a. Receipt mechanisms | 2 | 3 | 2 | 2 | 0 | 0 | 2 | 2 | 3 | 2 | 2 |
| | b. Obligation to investigate | 1 | 2 | 1 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| | c. Independent review of discretions | 1 | 1 | 1 | 1 | 1 | 1 | 3 | 3 | 2 | 3 | 1 |
| | d. Clearinghouse for all investigations | 1 | 2 | 1 | 1 | 1 | 1 | 3 | 3 | 2 | 3 | 1 |
| | e. Coordinated investigation systems | 2 | 2 | 2 | 2 | 0 | 2 | 0 | 0 | 3 | 0 | 0 |
| | f. Public reporting requirements | 0 | 3 | 0 | 2 | 2 | 2 | 3 | 3 | 2 | 3 | 2 |
| **7. What legal protection should be provided?** | a. Relief from liability | 2 | 3 | 3 | 2 | 0 | 2 | 3 | 1 | 1 | 3 | 1 |
| | b. Loss of protection | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 0 | 1 | 1 | 0 |
| | c. Anti-reprisal offences | 0 | 1 | 2 | 1 | 0 | 1 | 1 | 1 | 1 | 2 | 1 |
| | d. Civil law remedies | 2 | 2 | 0 | 2 | 0 | 2 | 2 | 2 | 2 | 2 | 0 |
| | e. Industrial & equitable remedies | 2 | 3 | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 1 | 2 |
| | f. Injunctions & intervention | 1 | 3 | 1 | 2 | 1 | 2 | 2 | 2 | 1 | 2 | 1 |
| **8. Disclosures to non-government actors?** | a. Members of parliament | 1 | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | b. Media | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **9. How should whistleblowers & internal witnesses be managed?** | a. Internal disclosure procedures | 0 | 2 | 0 | 2 | 1 | 2 | 3 | 0 | 3 | 3 | 0 |
| | b. Confidentiality | 2 | 3 | 3 | 1 | 0 | 1 | 1 | 1 | 3 | 3 | 2 |
| | c. Information | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 3 | 2 | 2 | 0 |
| | d. Reprisal risk, prevention etc | 0 | 2 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 1 | 1 |
| **10. How can public integrity agencies play more effective roles?** | a. Internal witness management | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| | b. Reprisals and compensation | 1 | 2 | 1 | 2 | 1 | 2 | 1 | 1 | 1 | 1 | 1 |
| | c. Monitoring, research, policy | 1 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 2 | 2 | 1 |
| | 126 | 50 | 82 | 63 | 61 | 37 | 59 | 65 | 67 | 73 | 71 | 47 |
| | **%** | 39.7 | 65.1 | 50.0 | 48.4 | 29.4 | 46.8 | 51.6 | 53.2 | 57.9 | 56.3 | 37.3 |

## Appendix 1

### *Appendix 1. Long titles and objects of public interest disclosure laws*

| Legislation | Relevant provision(s) |
|---|---|
| **1. SA 1993** | *An Act to protect persons disclosing illegal, dangerous or improper conduct; and for other purposes.*<br>**3.** The object of this Act is to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally—<br>(a) by providing means by which such disclosures may be made; and<br>(b) by providing appropriate protections for those who make such disclosures. |
| **2. Qld 1994** | *An Act to protect whistleblowers and for other purposes.*<br>**3.** This Act's principal object is to promote the public interest by protecting persons who disclose—<br>• unlawful, negligent or improper conduct affecting the public sector<br>• danger to public health or safety<br>• danger to the environment. |
| **3. NSW 1994** | *An Act to provide protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector; and for related purposes.*<br>**3(1).** The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:<br>(a) enhancing and augmenting established procedures for making disclosures concerning such matters, and<br>(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and<br>(c) providing for those disclosures to be properly investigated and dealt with. |
| **4. ACT (1) 1994** | *An Act to encourage the disclosure of conduct adverse to the public interest in the public sector, and for related purposes.*<br>No objects clause. |
| **5. Cth (1) 1999** | *[An Act to provide for the establishment and management of the Australian Public Service, and for other purposes.]*<br>No directly relevant objects. |
| **6. Cth Bill (2) 2001-2** | *A Bill for an Act to encourage the disclosure of conduct adverse to the public interest in the public sector, and for related purposes.*<br>No objects clause |
| **7. Vic 2001** | *No long title*<br>**1.** The purposes of this Act are—<br>(a) to encourage and facilitate disclosures of improper conduct by public officers and public bodies; and<br>(b) to provide protection for—<br>(i) persons who make those disclosures; and<br>(ii) persons who may suffer reprisals in relation to those disclosures; and<br>(c) to provide for the matters disclosed to be properly investigated and dealt with. |

| | | |
|---|---|---|
| **8.** | **Tas 2002** | *An Act to encourage and facilitate disclosures of improper conduct by public officers and public bodies, to protect persons making those disclosures and others from reprisals, to provide for the matters disclosed to be properly investigated and dealt with and for other purposes.*<br>No objects clause. |
| **9.** | **WA 2003** | *An Act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures, and, in consequence, to amend various Acts, and for related purposes.*<br>No objects clause. |
| **10.** | **NT Bill 2005** | *A Bill for an Act about the disclosure of improper conduct of public officers and public bodies, and for related purposes*<br>**3.** (1) The purposes of this Act are –<br>(a) to encourage and facilitate disclosures about improper conduct of public officers and public bodies; and<br>(b) to provide protection for –<br>(i) persons who make such disclosures; and<br>(ii) persons who may suffer reprisals for such disclosures; and<br>(c) to provide for the matters disclosed to be properly investigated and dealt with. |
| **11.** | **ACT (2) Bill 2006** | *An Act to protect people who disclose certain conduct in the public sector that is contrary to the public interest, and for related purposes.*<br>**6.** The object of this Act is to improve the quality of public sector administration by—<br>(a) providing a way for people to confidentially disclose concerns about conduct in the public sector that is contrary to the public interest; and<br>(b) providing a way for people's concerns about conduct in the public sector that is contrary to the public interest to be investigated and reported; and<br>(c) protecting from reprisal people who disclose concerns about conduct in the public sector that is contrary to the public interest. |

# Appendix 2

***Appendix 2. Who may make a public interest disclosure, about which organisations***

| Legislation | Relevant provision(s) | |
|---|---|---|
| | **Who may make disclosure** | **About what** |
| **1. SA 1993** | **5 (1).** A person who makes an appropriate disclosure of public interest information …. | Specified conduct in the public or private sectors |
| **2. Qld 1994** | **15, 16, 17(1), 18.** A public officer may make a public interest disclosure… | Specified conduct in the public sector |
| | **19 (1).** … [I]f anybody has information about [specified matters]… **(2)** The person may make a public interest disclosure. | Specified conduct in the public or private sectors |
| | **20.** Anybody may make a public interest disclosure about… a reprisal. | Specified conduct in the public or private sectors |
| **3. NSW 1994** | **8 (1).** To be protected by this Act, a disclosure must be made by a public official … | Specified conduct in the public sector |
| **4. ACT (1) 1994** | **15 (1).** Any person may make a public interest disclosure to a proper authority. | Specified conduct in the public sector |
| **5. Cth (1) 1999** | **16.** …an [Australian Public Service] employee | Specified conduct in the public sector |
| **6. Cth (2) Bill 2001-2** | **12 (1).** Any person may make a public interest disclosure to a proper authority. | Specified conduct in the public sector |
| **7. Vic 2001** | **5.** A natural person … may disclose that improper conduct or detrimental action …. | Specified conduct in the public sector |
| **8. Tas 2002** | **6 (1).** A public officer … may disclose that improper conduct or detrimental action ….<br>**(2).** A contractor … may disclose that improper conduct or detrimental action …. | Specified conduct in the public sector |
| **9. WA 2003** | **5 (1).** Any person may make an appropriate disclosure of public interest information to a proper authority. | Specified conduct in the public sector |
| **10. NT Bill 2005** | **7.** A natural person may make a disclosure … | Specified conduct in the public sector |
| **11. ACT (2) Bill 2006** | **15 (1)**. A person (the *discloser*) may make a public interest disclosure…. | Specified conduct in the public sector |

# Appendix 3

***Appendix 3. What types of public officials may make a public interest disclosure?***

| Legislation | Relevant provision(s) |
|---|---|
| **2. Qld 1994** | **Sch 6 -"public officer"** is a person who is an officer of a public sector entity, and includes:<br>(a) a public sector entity that is a corporation; and<br>(b) only to allow a member of the Legislative Assembly to make a public interest disclosure—a member of the Legislative Assembly.<br>**Sch 5, 2 (1).** A **"public sector entity"** is any of the following:<br>(a) a committee of the Legislative Assembly;<br>(b) the Parliamentary Service;<br>(c) a court or tribunal;<br>(d) the administrative office of a court or tribunal;<br>(e) the Executive Council;<br>(f) a department;<br>(g) a local government;<br>(h) a university, university college, TAFE institute or agricultural college;<br>(i) a commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorisation for a public, State or local government purpose;<br>(j) a GOC, but only to the extent indicated … [see s. 37];<br>(k) an entity, prescribed by regulation, that is assisted by public funds;<br>(l) a corporatised corporation, but only to the extent indicated … [see s.37B]. |
| **3. NSW 1994** | **4. *public official*** means a person employed under the *Public Sector Management Act 1988*, an employee of a State owned corporation, a subsidiary of a State owned corporation or a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority |
| **5. Cth (1) 1999** | **7. *APS employee*** means:<br>(a) a person engaged under section 22 [by an Agency Head]; or<br>(b) a person who is engaged as an APS employee under section 72 [Machinery of govt].<br>***Agency*** means:<br>(a) a Department; or<br>(b) an Executive Agency; or<br>(c) a Statutory Agency. |
| **8. Tas 2002** | **3 (1). "public officer"** means –<br>(a) a member of Parliament; or<br>(b) a councillor; or<br>(c) a member, officer or employee of a public body; or<br>(d) a member of the governing body of a public body; or<br>(e) an employee of a council; or<br>(f) the holder of an office established by or under an Act to which the right to appoint is vested in the Governor or a Minister –<br>but does not include a person specified in section 4(2).<br>**4 (2).** The following persons are not public officers for the purposes of this Act:<br>(a) a judge of the Supreme Court;<br>(b) the Master of the Supreme Court;<br>(c) a magistrate;<br>(d) the Director of Public Prosecutions;<br>(e) the Auditor-General;<br>(f) the Ombudsman;<br>(g) the State Service Commissioner;<br>(h) an officer appointed under the *Parliamentary Privilege Act 1898*. |

# Appendix 4

***Appendix 4. Are other internal witnesses protected?***

| Legislation | Relevant provision(s) |
|---|---|
| **3. NSW 1994** | **9 (1).** To be protected by this Act, a disclosure must be made voluntarily.<br>**(2).** A disclosure is not made voluntarily for the purposes of this section if it is made by a public official in the exercise of a duty imposed on the public official by or under an Act.<br>**(3)**. A disclosure is made voluntarily for the purposes of this section if it is made by a public official in accordance with a code of conduct (however described) adopted by an investigating authority or public authority and setting out rules or guidelines to be observed by public officials for [making a protected disclosure].<br>**(4)**. A disclosure made by a member of the Police Service is made voluntarily … even if … made in performance of a duty imposed on the member by or under the *Police Service Act 1990* or any other Act.<br>**(5)**. A disclosure made by a correctional officer, within the meaning of the *Crimes (Administration of Sentences) Act 1999*, is made voluntarily … even if … made in the performance of a duty imposed on the officer by or under that Act or any other Act. |
| **7. Vic 2001** | **107A (2).** A person appearing as a witness in an investigation by the Ombudsman or the Director under Part 5 or 7 has the same protection and immunity as a witness has in proceedings in the Supreme Court. |
| **10. NT Bill 2005** | **60 (1).** An obligation to maintain secrecy or any other restriction on the disclosure of information obtained by or given to a person, whether imposed by a law of the Territory or otherwise, does not apply to the disclosure of information for an investigation. …<br>**(3).** A person has, for the giving of information and the production of documents or other things for an investigation, equivalent privileges to the privileges the person would have as a witness in any proceedings in a court. |
| **11. ACT (2) Bill 2006** | **32 (1).** If someone gives information honestly and without recklessness to an investigator under section 31—<br>(a) the giving of the information is not—<br>(i) a breach of confidence; or<br>(ii) a breach of professional etiquette or ethics; or<br>(iii) a breach of a rule of professional conduct; and<br>(b) the person does not incur civil or criminal liability only because of the giving of the information; and<br>(c) the person is not liable to disciplinary action, or dismissal, (however described) only because of the giving of the information.<br>**(2).** This section does not apply to a person who is a discloser. |

**Appendix 5**

## *Appendix 5. Types of disclosable wrongdoing*

| Legislation | | Relevant provision(s) | | | | | |
|---|---|---|---|---|---|---|---|
| | | **Illegal activity** | **Corrupt / official misconduct** | **Misuse / waste of public funds / resources** | **Maladministration** | **Danger to public health or safety** | **Danger to environment** |
| **1. SA 1993** **4** | | illegal activity | *See 'illegal activity', 'maladministration'* | irregular and unauthorised use of public money; substantial mismanagement of public resources | maladministration in or in relation to the performance… of official functions; [inc.] impropriety or negligence | conduct that causes a substantial risk to public health or safety, or to the environment | |
| Additional threshold? | | Nil | | | | | |
| **2. Qld 1994** | **15** **16** **17** **18** **19** | *See 'official misconduct' 'maladmin-istration'* | official misconduct [as defined by *Crime & Misconduct Act 2001* – see Appendix 2B] | negligent or improper management directly or indirectly resulting, or likely to result, in a substantial waste of public funds [not based on a mere disagreement over policy etc] | maladministration that adversely affects anybody's interests in a substantial and specific way; [administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose] | a substantial and specific danger to public health or safety or to the environment; a substantial and specific danger to the health or safety of a person with a disability | |
| Additional threshold? | **15** | | [Criminal, or disciplinary capable of leading to termination.] | Nil | | | |
| **3. NSW 1994** | **10** **11** **12** **12A** **12B** **12C** **14** | *See 'corrupt conduct', 'maladmin-istration'* | corrupt conduct [as defined by *ICAC Act 1988* – see Appendix 2B] | serious and substantial waste of public money | maladministration [that] involves action or inaction of a serious nature that is: (a) contrary to law, or (b) unreasonable, unjust, oppressive or improperly discriminatory, or (c) based wholly or partly on improper motives. | | |
| Additional threshold? | **10** | | [Criminal, disciplinary, or capable of leading to termination.] | Nil | | | |

| *Appendix 5 (continued)* | | **Illegal activity** | **Corrupt / official misconduct** | **Misuse / waste of public funds / resources** | **Maladministration** | **Danger to public health or safety** | **Danger to environment** |
|---|---|---|---|---|---|---|---|
| **4. ACT (1) 1994** | **3** | *See 'disclosable conduct'* | disclosable conduct [see appendix 2B] | public wastage… [negligent, incompetent or inefficient management within, or of, a government agency resulting, or likely to result, directly or indirectly, in a substantial waste of public funds …] | | a substantial and specific danger to the health or safety of the public | |
| Additional threshold? | **4(1)** | | [Criminal, disciplinary, or capable of leading to termination.] | Nil | | | |
| **5. Cth (1) 1999** | **13** | [Any breach of the APS Code of Conduct, including, in the course of APS employment, failure to:] | | | | | |
| | | (4) comply with all applicable Australian laws. … | (1) behave honestly and with integrity;<br>(7) disclose, and take reasonable steps to avoid, any conflict of interest …;<br>(10) must not make improper use of: (a) inside information; or (b) the employee's duties, status, power or authority; ... | (8) use Commonwealth resources in a proper manner | (2) act with care and diligence;<br>(3) treat everyone with respect and courtesy, and without harassment | | |
| Additional threshold? | | Nil | | | | | |
| **6. Cth (2) Bill 2001-2** | **4** | *See 'disclosable conduct'* | disclosable conduct [see appendix 2B] | public wastage… negligent, incompetent or inefficient management within, or of, a government agency resulting, or likely to result, directly or indirectly, in a substantial waste of public funds … | | a substantial and specific danger to the health or safety of the public | |
| Additional threshold? | | Nil | | | | | |

| *Appendix 5 (continued)* | | **Illegal activity** | **Corrupt / official misconduct** | **Misuse / waste of public funds / resources** | **Maladministration** | **Danger to public health or safety** | **Danger to environment** |
|---|---|---|---|---|---|---|---|
| **7. Vic 2001** | **3(1)** | ‘improper conduct’ meaning: | | | | | |
| | | *See ‘corrupt conduct’* | (a) corrupt conduct [see Appendix 6] | (b) a substantial mismanagement of public resources | | (c) substantial risk to public health or safety | (d) substantial risk to the environment |
| | Additional threshold? | that would, if proved, constitute—<br>(e) a criminal offence; or<br>(f) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public officer who was, or is, engaged in that conduct. | | | | | |
| **8. Tas 2002** | **3(1)** | As for Victoria (see Appendix 6) | | | | | |
| **9. WA 2003** | **3(1)** | (b) … an offence under a written law | (a) improper conduct<br>[undefined] | (c) a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources | (e) a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act 1971* | (d) a substantial and specific risk of<br>(i) injury to public health;<br>(ii) prejudice to public safety; or<br>(iii) harm to the environment. | |
| | Additional threshold? | Nil | | | | | |
| **10. NT Bill 2005** | **4(1)** | As for Victoria (see Appendix 6) | | | | | |
| **11. ACT (2) Bill 2006** | **8 (1)** | For this Act, *public interest information* implicating a government entity or government official is information that tends to show that the government entity or government official—<br>**(a)** has engaged in conduct contrary to the public interest; or<br>**(b)** is engaging in conduct contrary to the public interest; or<br>**(c)** is, in the foreseeable future, likely to engage in conduct contrary to the public interest. …<br>**Examples of conduct contrary to the public interest:** (1) systemic failure—failure to implement a system to give effect to a territory law; (2) policy failure—adoption of a policy that is inconsistent with a territory law; (3) pattern of noncompliance—repeated failure to comply with a territory law; (4) fraud—intentionally falsifying a document; (5) corruption—receiving a benefit for divulging confidential information. | | | | | |
| | Additional threshold? | Nil | | | | | |

**Appendix 6**

***Appendix 6. Additional statutory thresholds for disclosable wrongdoing***
***(Definitions of corrupt, official & disclosable misconduct)***

| **Legislation** | | **Relevant provision(s)** | | | |
|---|---|---|---|---|---|
| | | **Conducting affecting honest and impartial exercise of public functions** | **Dishonest or partial exercise of public functions** | **Breach of public trust** | **Misuse of official information or material** |
| **NSW**<br>*Independent Commission Against Corruption Act 1988*<br>'corrupt conduct' | **8(1)** | **(a)** any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority<br>[see also 8(2) for examples] | **(b)** any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions | **(c)** any conduct of a public official or former public official that constitutes or involves a breach of public trust | **(d)** any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person |
| **Additional threshold** | **9(1)** | Despite section 8, conduct does not amount to *corrupt conduct* unless it could constitute or involve:<br>**(a)** a criminal offence, or<br>**(b)** a disciplinary offence, or<br>**(c)** reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or<br>**(d)** in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct. | | | |
| **Qld**<br>*Crime & Misconduct Act 2001*<br>(formerly *Criminal Justice Act 1989)*<br>'official misconduct' | **16** | **(a)** for a person, regardless of whether the person holds an appointment [in a unit of public administration] —conduct, or a conspiracy or attempt to engage in conduct, of or by the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of — (i) a unit of public administration; or (ii)any person holding an appointment | **(b)** for a person who holds or held an appointment [in a unit of public administration] —conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves—<br>**(i)** the performance of the person's functions or the exercise of the person's powers, as the holder of the appointment, in a way that is not honest or is not impartial | **(ii)** a breach of the trust placed in the person as the holder of the appointment | **(iii)** a misuse of information or material acquired in or in connection with the performance of the person's functions as the holder of the appointment, whether the misuse is for the person's benefit or the benefit of someone else. |
| **Additional threshold** | **15** | *Official misconduct* is conduct that could, if proved, be—<br>**(a)** a criminal offence; or<br>**(b)** a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment. | | | |

| *Appendix 6 (continued)* | | **Conducting affecting honest and impartial exercise of public functions** | **Dishonest or partial exercise of public functions** | **Breach of public trust** | **Misuse of official information or material** |
|---|---|---|---|---|---|
| **ACT**<br>*Public Interest Disclosure Act 1994*<br>'disclosable conduct' | **4(2)** | **(a)** conduct of a person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by a public official or government agency | **(b)** conduct of a public official that amounts to the exercise of any of his or her official functions dishonestly or with partiality | **(c)** conduct of a public official, a former public official or a government agency that amounts to a breach of public trust | **(d)** conduct of a public official, a former public official or a government agency that amounts to the misuse of information or material acquired in the course of the exercise of official functions (whether for the benefit of that person or agency or otherwise) |
| | | **(e)** a conspiracy or attempt to engage in conduct referred to in paragraphs (a) to (d). | | | |
| **Additional threshold** | **4(1)** | For this Act, conduct is to be taken to be disclosable if— **(b)** it could constitute—<br>**(i)** a criminal offence; or<br>**(ii)** a disciplinary offence; or<br>**(iii)** reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public official who is engaged in it. | | | |
| **Vic**<br>*Whistleblowers Protection Act 2001*<br>'corrupt conduct' | **3(1)** | **(a)** conduct of a person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions | **(b)** conduct of a public officer that amounts to the performance of any of his or her functions as a public officer dishonestly or with inappropriate partiality | **(c)** conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust | **(d)** conduct of a public officer, a former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise) |
| | | **(e)** a conspiracy or attempt to engage in conduct referred to in paragraphs (a) to (d). | | | |
| **Additional threshold** | | a criminal offence; or reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public officer who was, or is, engaged in that conduct (see appendix 2A) | | | |
| **Tas**<br>*PID Act 2002*<br>'corrupt conduct' | **3(1)** | Substantially as for **Victoria** | | | |
| **NT**<br>*PID Bill 2005*<br>'corrupt conduct' | **4(1)** | Substantially as for **Victoria** | | | |

## *Appendix 7. Relief from legal liability*

| Legislation | Defamation | | Breach of confidence | | |
|---|---|---|---|---|---|
| | **Absolute privilege** | **Qualified privilege** | **Criminal** | **Civil** | **Disciplinary** |
| **1. SA 1993** | **5 (1).** A person who makes an appropriate disclosure of public interest information incurs no civil or criminal liability by doing so. | | | | |
| **2. Qld 1994** | **39 (1).** A person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure.<br>**(2).** Without limiting subsection (1)— | | | | |
| | **(a)** in a proceeding for defamation the person has a defence of absolute privilege for publishing the disclosed information; and | | **(b)** if the person would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice—the person— | | |
| | | | **(i)** does not contravene the Act, oath, rule of law or practice for making the disclosure; and | | **(ii)** is not liable to disciplinary action for making the disclosure. |
| **3. NSW 1994** | **21 (1).** A person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.<br>**(2).** This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) ….<br>**(3).** The following are examples of the ways in which this section protects persons who make protected disclosures. A person…: | | | | |
| | • has a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in proceedings for defamation | | • on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act | • who is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law relevant to the oath, rule or practice | • is not liable to disciplinary action because of the disclosure. |
| **4. ACT (1) 1994** | **35 (1).** A person is not subject to any liability for making a public interest disclosure or providing any further information in relation to the disclosure to a proper authority investigating it, and no action, claim or demand may be taken or made of or against the person for making the disclosure….<br>**(2).** Without limiting subsection (1), a person— [by reason only that the person has made a public interest disclosure with respect to that matter…] | | | | |
| | | **(3)** … in proceedings for defamation there is a defence of qualified privilege in respect of the making of a public interest disclosure, or the provision of further information… | **(a)** does not commit an offence against a provision of an Act that imposes a duty to maintain confidentiality with respect to a matter; and | **(b)** does not breach an obligation by way of oath or rule of law or practice requiring him or her to maintain confidentiality with respect to a matter; | |

| *Appendix 7 (continued)* | Defamation | | Breach of confidence | | |
|---|---|---|---|---|---|
| | **Absolute privilege** | **Qualified privilege** | **Criminal** | **Civil** | **Disciplinary** |
| **5. Cth (1) 1999** | [16. A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct…] | | | | |
| **6. Cth (2) Bill 2001-2** | **32 (1).** A person is not subject to any liability for making a public interest disclosure or providing any further information in relation to the disclosure to a proper authority investigating it, and no action, claim or demand may be taken or made of or against the person for making the disclosure….<br>**(2).** Without limiting subsection (1), a person— [by reason only that the person has made a public interest disclosure with respect to that matter …] | | | | |
| | | **(3)** … in proceedings for defamation there is a defence of qualified privilege in respect of the making of a public interest disclosure, or the provision of further information… | **(a)** does not commit an offence against a provision of an Act that imposes a duty to maintain confidentiality with respect to a matter; and | **(b)** does not breach an obligation by way of oath or rule of law or practice requiring him or her to maintain confidentiality with respect to a matter; | |
| **7. Vic 2001** | **14.** A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure.<br>**15.** Without limiting section 14, a person who makes a protected disclosure does not by doing so— | | | | |
| | **16.** Without limiting section 14, in proceedings for defamation there is a defence of absolute privilege in respect of the making of a protected disclosure. | | **(a)** commit an offence under section 95 of the Constitution Act 1975 or a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction …; or | **(b)** breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information …. | [including disciplinary action, above] |
| **8. Tas 2002** | **16.** A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure.<br>**17.** Without limiting section 16, a person who makes a protected disclosure does not by doing so— | | | | |
| | | | **(a)** commit an offence under a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information; or | **(b)** breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information …. | [including disciplinary action, above] |

| *Appendix 7 (continued)* | Defamation | | Breach of confidence | | |
|---|---|---|---|---|---|
| | **Absolute privilege** | **Qualified privilege** | **Criminal** | **Civil** | **Disciplinary** |
| **9. WA 2003** | **13.** A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 — **(a)** incurs no civil or criminal liability for doing so; and **(b)** is not, for doing so, liable — | | | | |
| | | | **(iv)** for any breach of a duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by a written law) applicable to the person. | | **(i)** to any disciplinary action under a written law;<br>**(ii)** to be dismissed;<br>**(iii)** to have his or her services dispensed with or otherwise terminated … |
| **10. NT Bill 2005** | **13.** A person who makes a disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the disclosure.<br>**14 (1).** Without limiting section 13, a person who makes a disclosure does not by doing so – | | | | |
| | **15.** Without limiting section 13, in proceedings for defamation, there is a defence of absolute privilege in respect of the making of a disclosure. | | **(a)** commit an offence against a provision of an Act that imposes a duty to maintain confidentiality with respect to a matter or another restriction on the disclosure of information; or<br>[and **(2)** Subs (1) applies despite ss 76 and 222 of the Criminal Code.] | **(b)** breach an obligation by way of oath or rule of law or practice or under an agreement requiring the person to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter. | [including disciplinary action, above] |
| **11. ACT (2) Bill 2006** | **49 (1).** If a discloser makes a public interest disclosure honestly and without recklessness— …<br>**(b)** the discloser does not incur civil or criminal liability only because of the making of the public interest disclosure; and | | | | |
| | | | | **(a)** the making of the public interest disclosure is not—<br>(i) a breach of confidence; or<br>(ii) a breach of professional etiquette or ethics; or<br>(iii) a breach of a rule of professional conduct; and | **(c)** the person is not liable to disciplinary action, or dismissal, (however described) only because of the making of the public interest disclosure. |