

A comparative analysis of whistleblower protection

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Abstract

This paper compares the legislation and associated administrative practices that are designed to manage the whistleblowing processes within each of the states of Australia. It finds great variations among the Australian states but, in general, even the best of the legislation could be strengthened. Just as important, however, is that the administrative procedures of the ‘appropriate authorities’ responsible for implementing the legislation could equally be strengthened. Current procedures do not appear to respond to the objectives of the various whistleblower Acts. As a result, the overriding purposes of ensuring that revealing wrongdoing in organisations is used to correct and strengthen ethical behaviour in Australian organisations, and that the person who reveals the wrongdoing does not suffer as a consequence, seem to be lost. The paper then compares the rationale of the Australian legislation with that of the UK and the USA. These acts have a very different approach to each other and to the Australian legislation, particularly the UK *Public Information Disclosure Act*, but are, arguably, just as ineffective.

Introduction

Whistleblowers are regarded as heroes – people who place a very high value on honesty and ethical behaviour within their organisations. The women who exposed the criminal activities of the senior executives of Enron and WorldCom or Coleen Rowley of the FBI, who stated publicly that her agency’s testimony to a Senate hearing on the September 11 disaster was seriously flawed, were feted nationally, placed on the front cover of TIME magazine and proclaimed Persons of the Year.

Reality is far different. Country after country in the western world and every state in Australia has been forced to pass legislation that protects whistleblowers from reprisals from their colleagues or superiors. With very few exceptions, including the whistleblowers of Enron and WorldCom, whistleblowers will lose their jobs or be forced to resign. Study after study has demonstrated the victimisation that whistleblowers suffer, victimisation that can originate from otherwise quite honest and trustworthy work associates.¹ ‘Consistent case study evidence indicates that whistleblowing, even when acknowledged to be meritorious, typically results in victimisation of whistleblowers.’²

The legislation that has been brought in to stop these reprisals varies widely. This paper presents the results of an *a priori* examination of the legislation, within each of the states of Australia,³ and then in comparison with legislation in the UK and the USA.⁴ The various state Acts are termed Public Interest Disclosure Acts, Whistleblower Protection Acts or in NSW the Protected Disclosures Act.⁵

The comparison will be made against three objectives. These objectives are repeated in similar formats in the legislation of most states and will serve as one of the frameworks against which to make a state-by-state comparison. They are:

- to protect from reprisals persons who make disclosures
- to facilitate the making of disclosures
- to ensure disclosures are properly investigated and appropriately treated.

The sole objective of the Queensland and South Australia legislation is to protect the whistleblower, but in Queensland, at least by implication, the Act is also designed to facilitate investigations.

Definitions of whistleblowing

The definition of whistleblowing used in this analysis is:

Whistleblowing is the exposure by people within or from outside an organisation, of significant information on corruption and wrongdoing, that is in the public interest and would not otherwise be publicly available.

One major disagreement with this definition is whether the whistleblower needs to be internal to the organisation.⁶ Micali and Near believe that he or she does need to come from within the organisation.⁷ This paper argues that an internal location is immaterial – an external supplier who discovers a dishonest purchasing officer, for instance, should still blow the whistle. They can still be discriminated against, and could still need protection. Also the legislation should still require that the complaint be investigated, and any necessary corrective action be taken.

One other definitional difference relates to distinguishing between activists and whistleblowers.⁸ In the above definition, the whistleblower has to reveal information that would not otherwise be known. Activists are campaigning against an issue that is already public knowledge. There is no need to protect them from internal reprisals.

A third definitional issue relates to the motivations of the whistleblower. Fletcher, Sorrell and Silva, for instance, assert that the whistleblower must blow the whistle for the right moral reasons.⁹ Provided the whistleblower is acting in the public interest, however, this paper argues that it is of little importance if the informant's motivations are not entirely pure.¹⁰ That is, even if the whistleblower is driven by anger, spite or even dislike for the person against whom they are making the complaint, the more important issue is stopping illegal or corrupt activities.¹¹

Confusion also arises in distinguishing between a complaint about ill-treatment in the workplace or even illegal breaches of employment conditions and whistleblowing. Whistleblowers Australia estimates that between 50 and 60% of those who approach them for assistance raise personal workplace-related issues, such as bullying, harassment or other ill-treatment.¹² As noted below, this a definitional problem that surfaces in the British legislation. The definition used in this article requires wrongdoing against a wider, external public interest.

The benefits of whistleblowing

Whistleblowing can be a powerful mechanism for bringing about a more ethical climate in our public and private institutions. Effective whistleblowing has made a significant impact in many areas of our society: it has removed a President of the United States in the Deep Throat case, it has exposed huge deficiencies in the management of our public hospitals, some of which have caused dozens of patient deaths, and has stopped illegal activities in innumerable businesses. Whistleblowing is considered by some as the most effective of all possible methods for stopping illegal or corrupt activities within organisations.¹³

It is not a simple method, as the controversy surrounding most whistleblowing cases and the need for legislation to protect whistleblowers testifies. The ethical implications are in conflict – the denial of loyalty to the organisation, versus the revealing of wrongdoing in it.¹⁴ The inquiry into the deaths of twelve children at the Winnipeg Health Sciences Center in 1994 described whistleblowing as a ‘morally ambiguous action’.¹⁵ The ethical theory behind whistleblowing is also not clear. It is a utilitarian choice between two consequences, either of which can be harmful. The whistleblower has to see the greater good as revealing and stopping wrongdoing, not ensuring the continuation of their employment, or the survival of the organisation. However, whistleblowing can also be seen as a choice between two virtues, as well as between two duties – honesty and loyalty.¹⁶

Additional information sources

The principle methodology behind this paper lies in a comparison of the legislation in each of the states and territories in Australia and subsequently with that in the UK and the US. The purpose is to identify if a prima facie case can be established for strengthening the legislation. As will be noted, however, there are provisions in the legislation where the wording may be clear, but the priorities, associated administrative practices and the outcomes are not as clear. The paper therefore has sought additional information, to a limited extent, through outside studies and a survey of senior members of Whistleblowers Australia.¹⁷ The paper has also drawn on elements of a research program, still underway, that is tracking whistleblower cases and interviewing actual whistleblowers. No findings from this program have been used, but the interviews that have been conducted so far (over a dozen) have helped in understanding the difficulties that whistleblowers face and the reactions of their colleagues and superiors.

Overarching issues

In making the comparison, two overriding issues first need to be stated. They are that the comparison is necessarily limited to the public sector, for there is virtually no legislative coverage of private sector whistleblowing in Australia. The second is that there is no national whistleblower legislation, only legislation for the states and territories.

Little private sector legislation in Australia

With the exception of South Australia, no state legislation in Australia covers the private sector. Clauses providing some whistleblower protections have been tacked by one of the minor parties onto recent amendments to the *Corporations Act* and the *Workplace Relations Act*, but they cover infringements to those Acts only. There are also leniency provisions that have been introduced by the Australian Competition and Consumer Commission which provide for lesser punishment, and in some cases absolution, for a participant breaching the *Trades Practices Act* who subsequently provides information that could be used to prosecute former partners. These provisions, however, do not cover all illegal or corrupt activity in the private sector. Australia is near unique in this respect in the western world, in that it is the only country of the three covered by the paper that does not have full private sector coverage.

As a result, potential whistleblowers in Australian companies who are aware of wrongdoing will be disinclined to make this public, as they will have, generally, no protection in law.

No national legislation

A second area where Australia compares unfavourably with international legislation is in providing whistleblower protection for its central public servants. Australia has a clause in its *Public Service Act* (s 16) that prohibits reprisals, but it is widely regarded as a token provision.¹⁸ It has none of the specific protections provided under the state Acts, as set out in the paragraphs below.

The first draft bill on whistleblower protection at the national level was introduced to federal Parliament in 1996. The current bill, sponsored by one of the minor parties, is still waiting to be passed. Neither of the major political parties has been willing to see a Public Interest Disclosures Bill passed in the national parliament.

Protections for the whistleblower

Table 1 displays the similarities and differences between the state and territory protections. The Northern Territory, as the last jurisdiction to examine the issue, has a pending bill currently open for comments.

Table 1

Protection	Yes, is provided	No
Confidentiality for whistleblower's identity	All states and territories, on conditions	
Prohibition against reprisals	All states and territories	
Injunctions against reprisals under the Act	Vic, Q, ACT, Tas, NT	NSW, WA, SA
Proceedings for damages	All states except NSW	NSW
Right to relocate	Q, ACT (conditional)	Vic, Tas, NSW, WA, SA, NT
Indemnity against civil and criminal proceedings	All states	
Absolute privilege against defamation	Q, ACT, Vic, NSW, Tas, NT	SA, WA
Anonymous disclosures allowed	Q, Vic, Tas, NT, and NSW by implication	SA, ACT, WA
Protection if released to media	NSW (conditional)	No other states permit release to media

Confidentiality

All states provide confidentiality for the whistleblower's identity, and to some extent for the nature of the information that has been disclosed. All, however, also make a provision for natural justice in that the person accused of wrongdoing must be informed of the nature of the accusations made against them and be permitted to refute them.

An investigation of a whistleblower's complaint will cause the problem that is being investigated to become known and as a result may reveal the identity of the whistleblower. The confidentiality clause illustrates the gap that can arise between the legislation and its implementation. Preliminary investigation is usually possible without breaking confidentiality but a supervisor wishing to squash a whistleblower can do so by breaking confidentiality in the way permitted by the legislation.

Prohibition of reprisals

All states prohibit reprisals punishable by up to two years imprisonment or a \$24 000 fine. This is the maximum, for Western Australia (s 14). There is no provision under the Act in South Australia although it can be dealt with as a tort under the *Equal Opportunity Act*.

Injunctions against reprisals

Five states, the exceptions being NSW, WA and SA, allow for the whistleblower to take out an injunction against the making of a reprisal. It is uncertain whether this clause has ever been used, although incomplete evidence suggests that it has not.

Proceedings for damages

NSW is the only jurisdiction in which the legislation does not provide for an individual against whom reprisals have been made to seek damages through civil action. A reprisal is a wrong, however, and an individual could possibly sue.

Right to relocate

Such a right is of limited value, unless the employing agency is of such a size that another position requiring similar skills would be available for the complainant. It is nevertheless a useful protection but one that is permitted only in Queensland and the ACT.

Civil and criminal indemnity

Provided in all jurisdictions.

Absolute privilege against defamation

Provided in five of the eight Acts, including NSW.

Anonymous disclosures

Anonymous disclosure is allowed in five jurisdictions. Presumably the protection provisions would come into effect only if the whistleblower's identity became known. The provision, however, does raise the issue of leaking. Leaking is the unauthorised release of any type of organisational information that would only become a public interest disclosure if the information showed wrongdoing that was specified in the Act.

Release to the media

Permitted only in NSW and then under the condition that the whistleblower has made a formal complaint at least six months earlier that has complied with the prescribed methodology, but where no action has been taken. In any case, it would appear to be a method of whistleblowing that is only effective if the information that is released is newsworthy and can be independently verified. If used, however, it must be judged to be effective in protecting the whistleblower. The media exposure would ensure that the possibility of retribution is minimal. A number of high profile recent cases in NSW in which the retribution issue has been minimal would support this belief.¹⁹

The unwillingness of state legislatures to provide protection for those who go to the media is cited by Martin and De Maria as evidence of a political unwillingness to establish fully effective whistleblowing protection.²⁰

The comparison of whistleblower protections

The protections offered by the states do vary, with the more recent legislation, with minor exceptions, offering a greater number of protections to whistleblowers. No state, however, offers all of the protections that are listed above.²¹

The states that offer minimum protection, however, might consider themselves relatively advanced in comparison with the New Zealand legislation (and, it will be discovered, with the US legislation). The New Zealand act has noticeably fewer whistleblower protections than the more comprehensive of the Australian acts.²² There is no possibility to take out injunctions against a reprisal, no right to relocation, no civil and criminal indemnity, nor protection if disclosing to the media. And is it not clear whether there is a requirement to investigate anonymous disclosures. The whistleblower, however, does have a right to sue under the *Human Rights Act 1993*, which was amended to incorporate this Act.²³

It can be reasonably argued, therefore, that the states that offer fewer protections are, at least in principle, less able to meet the objective of protecting their whistleblowers. The obverse is that states with more protections have a greater ability. A first step, therefore, would be to bring in uniform legislation throughout the country, with the same protection available to all. This statement, however, also has to be conditional on the success with which any of the states use the legislation available to it. As will be seen, the extent of this success is uncertain, but would appear to be less than desirable.

Facilitating the making of public interest disclosures

Facilitating disclosures is one of the legislated objectives in most jurisdictions. Facilitation requires making the process as easy and as supportive for whistleblowers as is possible. The first issue, as stated above, is that the protections are not uniform and complete across all jurisdictions. Not one state or territory makes available all nine protections in the table. It is difficult to assess whether a whistleblower is deterred by the possible retributions that he or she will suffer, but the widespread knowledge that they do suffer is likely to be a deterrent. A report by the Independent Commission Against Corruption in NSW indicates that 74.1 per cent of people surveyed believe 'people who report corruption are likely to suffer for it'.²⁴ It is reasonable to assume, therefore, that the greater the assurance that whistleblowers have that they will not be damaged by revealing their information, the easier it will be for them to come forward. At a minimum, such an improvement requires that all states introduce the maximum number of protections listed above.

The above protections also identify several areas where the onus of the protection is placed on the whistleblower. The legislation, for the most part, requires the whistleblower to (a) initiate their own proceedings for damages, (b) request that they be relocated, and (c) defend themselves if they are taken to court for breaches of confidentiality or for damages. It also, at least indirectly, requires the whistleblower to gather evidence of sufficient quality and comprehensiveness to convince the whistleblower agency to investigate the complaint.

These are daunting demands even on people in highly qualified professional occupations. Whistleblowers Australia believes that whistleblowers are almost invariably the weaker party in any power relationship. They are frequently without the ability and often the financial means to launch court cases that protect them against retribution.²⁵ If the states see fit to pass legislation that permits injunctions and other legal actions to encourage public interest whistleblowing, it is not in the interests of that

legislation's objective to require individual citizens to bear the brunt of any retribution that such actions cause.

There are yet further possibilities in facilitating the making of public interest disclosures. If whistleblowers are in unequal power relationships then the provision of countervailing support and counselling to them would clearly be in the public interest. The Victorian Ombudsman's guidelines suggest that public agencies appoint a manager responsible for helping internal whistleblowers. The ACT Act and the proposed Commonwealth Bill also require that information be provided to whistleblowers on the protections that are available to them. No other jurisdiction advocates this support.²⁶

In summary, therefore, it seems highly likely that a more proactive stance by the whistleblower agencies, one that takes more of the initiative in supporting whistleblowers, with a full range of protective measures behind it, would lead to a more ethical organisational environment.

Ensuring that disclosures are properly investigated and appropriately treated

Only partial statistics are available on the number of complaints made to whistleblowing authorities and none at all on the number that have resulted in prosecutions. The incomplete statistics suggest the number ranges from less than five a year (ACT, 2001–2003) to about 150 (Queensland, 2001–2002). The same data sources indicate that no one was prosecuted as a result of this whistleblowing.²⁷ The surveys of the senior members of Whistleblowers Australia and the interviews with actual whistleblowers suggest that these indications are probably correct.

A survey by the NSW Ombudsman of Australian ombudsmen states that the disciplinary sanctions for detrimental reprisal/action are seldom if ever used.²⁸ The reasons include the absence of any official body in all jurisdictions to implement such sanctions, thus leaving the problem to the whistleblower's willingness to take legal action. No state Ombudsman, except for NSW, is aware of any criminal proceedings relating to detrimental action. The NSW actions, of which there were three (one private and two on behalf of the police force), were unsuccessful. There is no provision in the NSW Act for civil action for detrimental reprisals.

Injunctions against detrimental action that is being taken, or to order remedial action, are provided for in four States: Victoria, Tasmania, ACT and NT. No Ombudsman offices in these states were aware of any such injunctions being commenced.

Comparison with the UK

The public interest disclosures legislation in the United Kingdom and the United States differ significantly from each other and from the Australian legislation. The UK *Public Interest Disclosure Act 1998*, which became effective in July 1999, is very different to the legislation in other countries.²⁹ The legislation enables a worker to make a complaint to an employment tribunal that he/she has been subjected to a detriment in breach of s 2 of the *Public Interest Disclosure Act* and under s 47B of the *Employment Rights Act*.

The UK *Public Interest Disclosure Act*, which came about primarily through amendments to the *Employment Rights Act 1996*, protects most workers from retaliation by their employer, including dismissal, disciplinary action or a transfer that otherwise would not have happened. Unless the employer can show a valid reason for the dismissal or detriment, an employment tribunal may order the company to compensate the employee for the losses suffered and, in rare cases, mandate re-employment.

The Act applies to all workers, save the armed forces, intelligence officers, volunteers and the self-employed in the UK and in Northern Ireland, and covers breaches of civil, criminal, regulatory or administrative law, miscarriage of justice, dangers to health, safety and the environment. The original arguments for a whistleblower law were built on preventing accidents and disasters. Frequently quoted examples are the capsizing of the Zeebrugge ferry or the Clapham Junction rail disaster. Employees, although aware of the maintenance or operating problems, did not speak out beforehand.

Nevertheless, the Act in practice is better described as a whistleblower compensation Act, for it does not protect the complainant, nor does it legislate to investigate the complaint. It compensates the whistleblower for any reprisals. Whistleblowers may make their complaints to their employers or to a prescribed regulator, an industry regulating body.³⁰ Whistleblowers can also go to the police, the media, MPs and non-prescribed regulators if they are acting in good faith. On external disclosures, whistleblowers must show a factual basis for their beliefs.

The complaint about reprisals is examined by an Employment Tribunal. Tribunals comprise three members, the ‘chairman’ of which is legally qualified, and appointed by the Lord Chancellor, and the other two members are lay members. Located throughout the British Isles, the tribunals resolve disputes between employers and employees over employment rights.

In most cases, the wrongdoing has been a breach of an employment Act, which is at odds with the original intention of the *Public Interest Disclosures Act*. Typical cases taken from the website of the UK whistleblower advocacy group, Public Concern at Work, have been³¹

- failure to allow time off for trade union duties (*permitted under the Trade Union and Labour Relations Consolidation Act (TULRCA) 1992*)
- failure to allow time off for antenatal care (*Employment Rights Act (ERA) 1996*)
- failure to allow time off to seek work during a redundancy situation (*ERA 1996*)
- Failure to allow time off for trade union activities (*TULRCA 1992*)
- Suffering a detriment and/or dismissal because of exercising rights under the *Public Interest Disclosure Act (PIDA) 1999*
- Failure to allow time off for public duties (*ERA 1996*)
- Unfairly dismissed because of disability (*Disability Discrimination Act 1995*)
- Discrimination or victimisation on grounds of religion or belief (*Employment Equality (Sexual Orientation) Regulations 2003*).

These cases are primarily concerned with employment conditions. No equivalents to whistleblowing on shoddy maintenance or operation that has the potential to cause a loss of life, similar to those that were the arguments behind the initial legislation, have yet been reported. A non-government organisation concerned with whistleblowing, Freedom to Care, states: ‘Our view is that this law is much too weak. Its reason is that the Act puts all the onus on the whistleblower.’³² This criticism of the UK Act could be multiplied several times over for the US and Australian legislation, where whistleblowers have to take their own legal action to stop reprisals, as opposed to applying to a public tribunal. Freedom to Care also suggested alternatives that rest on a human rights and anti-discrimination legislation model. They also support a whistleblowing local government auditor.

The principle basis on which the UK Act could be criticised, however, is that, although the current legislation may have some deterrent effect against reprisals for whistleblowing, the above cases suggest that the Act’s greatest impact is on employers who transgress labour or employment regulations.

The United States

The US has dozens of whistleblower laws at the state and federal level, as well as separate clauses in legislation designed to achieve other health, safety or welfare objectives.³³ There are over fifty pieces of legislation at the federal level alone. The three principal acts, however, are the *Whistleblower Protection Act 1989*, the *Corporate and Criminal Accountability Act (Sarbanes-Oxley Act)*, and the *False Claims Act*. It is this legislation that will be examined in a comparison with the Australian Acts.

The Whistleblower Protection Act 1989

Initiated with the whistleblower protection provisions in the Civil Service Reform Act of 1978, this Act was revised in 1989, and again in 1994.³⁴ Initially, for most forms of retaliation, federal workers were to be supported by the Office of the Special Counsel (OSC), but this agency proved to be ineffective. Until passage of the *Whistleblower Protection Act* in 1989, OSC conducted only one hearing to restore a whistleblower’s job. Also created was a Merit Systems Protection Board, of which the OSC was part, designed to protect against retaliatory discrimination in promotion, but it was no more effective than the OSC. They were considered, however, largely symbolic. Thomas Devine, legal director of the not-for-profit Government Accountability Project (GAP) asserts: ‘Whistleblower protection is a policy that all government leaders support in public but few in power will tolerate in private.’³⁵

Since passage of the 1994 amendments, encouraging patterns started emerging, but the administration of the Act still needs strengthening according to GAP, and its related advocacy organisation, the National Whistleblowing Centre.³⁶

Public sector employees are required to disclose wrongdoing to their employer first. This is a weakness if the whistleblower believes that he or she will not get a fair hearing from the employer. They cannot go around an employer that they know will not be receptive to their complaints. It also has no confidentiality clauses. Its major weakness, in a similar vein to the Australian legislation, however, is that the principal initiative lies

with the whistleblower. Essentially, the whistleblower must sue whoever makes the threats or carries out the intimidation.

The Sarbanes-Oxley Act

The Sarbanes-Oxley Act was passed in 2002 to combat corporate criminal fraud and to strengthen corporate accountability. It was a legislative response to the fraudulent activities exemplified by World Com and Enron Corporation. The Act provides for enhanced financial disclosures and auditor independence of publicly held corporations.³⁷ Section 301 of the Act requires that audit committees of the boards of public corporations establish procedures for ‘the confidential, anonymous submission by employees’ of complaints regarding internal accounting controls or auditing matters.

The Act provides some protections and assistance for the whistleblower. Employees are not required to complain to their employers first, but may complain to a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee.

The Department of Labor is obliged to provide assistance and training. The Act, however, does not specify the possibility that the whistleblower could be relocated, nor does it give them indemnity if they break a confidentiality agreement that they may have signed on taking up employment. It does entertain the right of the whistleblower to take legal action if they suffer retaliation. Those found guilty of retaliation are liable to up to ten years in prison. The Sarbanes-Oxley Act is new, however, and it is possibly too soon to make any judgements. Its impact, however, is primarily limited to financial matters. Australia has no comparative legislation

The False Claims Act

Designed to stop fraud against the government, this act was passed during the US civil war under the administration of Abraham Lincoln. Regarded as the single most successful whistleblowing legislation in the country, the *False Claims Act* works by providing the whistleblower between 15 and 30 per cent of the government’s total recovery, the percentage depending on the extent to which the whistleblower took the action that enabled the recovery to take place. It was amended in 1986 to establish protections for whistleblowers, and to prevent harassing and retaliation against them.

The Bill, which permits an anonymous disclosure, has been copied by a number of states in the US. For an overview of the federal legislation and processes see the web site of the US non-government organisation, the National Whistleblower Center.³⁸

The US Department of Justice, in a 2002 press release, claimed that over \$10 billion had been recovered since 1986. In Australia, the private sector whistleblower management group, Your Call, state that \$5.8 billion per annum is lost to fraud. It also believes that 85 per cent of major frauds are committed by employees.³⁹ The Act requires the whistleblower to initiate the case. To this end, a number of legal firms advertise their services on a no-win, no-fee basis.⁴⁰

Conclusions

The UK legislation fully supports whistleblowers, using public funds to help compensate them if they suffer any reprisals or discrimination. It fails, however, to ensure that the whistleblower's complaint is investigated, and that action is taken to rectify any problems that emerge. The most significant aspect of the UK PIDA, however, is that the emphasis is on workplace grievances. This emphasis raises the issue of the distinction between personal workplace complaints and whistleblowing, mentioned above, that has also surfaced in Australia. The UK Act is applicable to the private and public sectors alike.

The US legislation, in its many versions, in contrast, expects the whistleblower to take the initiative. If he or she suffers discrimination then they have the right to sue for damages, with, in some cases, public support. The legislation in the Australian states (and in New Zealand) is similar but attempts to provide the whistleblower with protections that are intended to prevent reprisals in a wider number of ways than the overseas legislation. It attempts to stop reprisals by reducing the circumstances under which they can arise, by making them illegal, with the whistleblower agency able to seek both imprisonment and financial penalties, as well as by giving the whistleblower the right to seek damages.

Initially, therefore, it would appear that Australian whistleblowers would have a stronger chance of surviving the whistleblowing process than those overseas. Their complaints would also appear to have a stronger chance of being investigated, of any wrongdoing stopped and of sanctions being exercised against the perpetrator. However, it would appear whistleblower agencies do not employ the full range of protections that are available, nor do they use the deterrent clauses in the legislation to any extent at all.

Martin, a long term researcher on whistleblowing issues, claims that legal protection is not possible.⁴¹ The reasons are many: the legislation is a sincere but ineffectual attempt to help whistleblowers, that it is symbolic politics, showing a lack of political concern, or at the extreme it is a cynical attempt to entrap whistleblowers. Far more helpful to whistleblowers, Martin claims, are practical skills at understanding organisational dynamics, collecting data, writing coherent accounts, building alliances and liaising with the media.

It is certainly true that the analysis above would suggest that more effort and attention could go into whistleblower legislation. The preliminary data to date, and the opinion surveys, suggest that the legislation is extremely varied and so far has not been very effective. Considerably more data and analysis would be required before a firm conclusion on that issue could be drawn.

Nevertheless, the analysis does indicate that the Australian legislation may not be as effective as it appears to be, and is certainly so for those states that have minimal protection for a whistleblower. It also suggests that Martin's analysis may have some substance, and that whistleblowers need help in submitting their complaints, in gathering and providing evidence that supports those complaints, and in protecting themselves from reprisals. Martin implies these actions are the responsibility of the whistleblower. For many of them, however, it could be the task of the office of the Ombudsman. It is reasonable to assume that an agency of government would be more

effective at these tasks than an individual who is largely powerless, or even than voluntary whistleblower support agencies.

¹ Quentin Dempster, *Whistleblowers*, 1997, ABC Books, Australian Broadcasting Corporation, provides several examples. C Fred Alford, *Whistleblowers: broken lives and organizational power*, Cornell University Press, 2001, states: ‘They [can] pay a terrible price.’

² Peter B Jubb, ‘Whistleblowing: a restrictive definition and interpretation’, *Journal of Business Ethics*, 21, 1999, p 77, quoting several references.

³ Includes the Northern Territory and the Australian Capital Territory.

⁴ This research was funded through a grant through the Department of Philosophy at Sydney University.

⁵ The current legislation can be found at

South Australia: *Whistleblowers Protection Act 1993*,

http://www.austlii.edu.au/au/legis/sa/consol_act/wpa1993322

Queensland: *Whistleblowers Protection Act 1994*,

<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WhistleblowA94.pdf>

ACT: *Public Interest Disclosure Act 1994*, <http://www.legislation.act.gov.au/a/1994-108/default.asp>

NSW: *Protected Disclosures Act 1994*,

http://www.austlii.edu.au/au/legis/nsw/consol_act/pda1994251/

Victoria: *Whistleblowers Protection Act 2001*,

http://dms003.dpc.vic.gov.au/sb/2001_Act/A00945.html

Tasmania: *Public Interest Disclosures Act 2002*,

http://www.austlii.edu.au/au/legis/tas/consol_act/

(Click on ‘P’, then *Public Interest Disclosures Act 2002*, then the section of interest).

Western Australia: *Public Interest Disclosure Act 2003*,

<http://www.slp.wa.gov.au/statutes/swans.nsf/nfsearchcurrent>: Put the name of the act in the search box, and download a PDF version.

The Northern Territory: Has no legislation. A proposed bill, among the more advanced in Australia, can be found at <http://www.nt.gov.au/justice>

⁶ The requirement for whistleblowing to be internal was the theme of and definition used in a Griffith University and Australian National University conference Managing Internal Witnesses in the Australian Public Sector, Australian National University, 12 July 2005. The researchers in the project behind that conference, however, believe that external contractors can be whistleblowers.

⁷ Micali, MP and Near, JP, *Blowing the whistle*, New York, Lexington Books, 1992.

⁸ Quentin Dempster’s admirable book cites two cases as whistleblowing that might more readily be considered as activism. The first is John McLennan who took on Westpac Banking Corporation over the Swiss loans. He was not an internal whistleblower. The second was Elizabeth O’Brien’s anti-lead campaign. She again was not internal to any relevant organisation.

⁹ Fletcher, JJ, Sorrell, JM, and Silva, MC, ‘Whistleblowing as a failure in organisational politics’, *Online Journal of Issues in Nursing*, 31 Dec, 1998.

¹⁰ The NSW *Protected Disclosures Act*, for instance, does not provide whistleblower protection if the motivation is to avoid disciplinary action (s 18).

¹¹ A similar issue arises with breaches of the *Trade Practices Act*. Participants in a price fixing cartel who reveal that agreement are treated more leniently by the Australian Competition and Consumer Commission, the authority for administering the Act.

¹² Cynthia Kardell, convenor of the weekly support group meeting of the NSW branch of WBA, in a personal communication.

¹³ Derek Maitland, Media Officer, Whistleblowers Australia, in a personal communication, cites widespread opinion to this effect in his organisation. In addition, Lori Tansey Martens and Amber Crowell in ‘Whistleblowing: a global perspective’, *ethikos*, Vol 15, Issue 6, quote Ronald Berenbeim, Principal Researcher at the (US) Conference Board, noting that companies

regard the reporting of questionable practices to be critical to the success of their ethics and compliance initiatives.

¹⁴ Damian Grace and Stephen Cohen, *Business ethics: Australian problems and cases* (2nd ed), Melbourne, Oxford University Press, 1998, one of the major books on business ethics in Australia, states that whistleblowing ‘amounts to placing an individual judgement above that of the organisation, and forsaking the duty (sometimes the fiduciary duty) which an employee owes to the organisation’. They quote a former president of General Motors who has described it as ‘eroding ... the loyalty of the management team, with its unifying values and cooperative work’.

¹⁵ Report of the Review and Implementation Committee for the Report of the Manitoba Pediatric Cardiac Surgery Inquest, 1999.

¹⁶ Or between revealing dishonesty and the need to maintain security of work and income for oneself and one’s family.

¹⁷ A voluntary, non-profit support group for whistleblowers. Contributors were Jean Lennane, President, Peter Bennet, Vice-President, Cynthia Kardell, Secretary, Feliks Perera, Treasurer and Matilda Bawden, chair, AGM, 2005. Two are from NSW, one from Victoria, one Queensland and one from South Australia. The outside studies are referenced in the text as they arise.

¹⁸ The Deputy Ombudsman, Victoria, John Taylor, in an address to the Managing Internal Witnesses conference, Australian National University, July 2005, strongly decried the lack of effective Commonwealth whistleblower protection.

¹⁹ Although the ongoing interview program is suggesting that very subtle forms of retribution, insufficiently verifiable for media or legal attention, are possible.

²⁰ De Maria, William, ‘The Victorian Whistleblower Protection Act: patting the paws of corruption?’ Paper given to the Staff Seminar, Department of Business Law and Taxation, Monash University, 3 May 2002; Martin Brian, ‘Illusions of whistleblower protection’, *UTS Law Review*, No 5, 2003, pp 119–130.

²¹ John McMillan, Commonwealth Ombudsman, described the various state whistleblowing Acts as the most diverse of any Australian state legislation: Managing Internal Witnesses in the Australian Public Sector, Australian National University, 12 July 2005.

²² The NZ *Protected Disclosures Act 2000* may be found on the website of the Office of the Ombudsmen (there is a national office of three Ombudsmen) at <http://www.ombudsmen.govt.nz/>, under legislation.

²³ The strength of the NZ legislation is that it can accept disclosures against wrongdoing in the private sector (s 5). A second strength is that the Ombudsmen must inform the whistleblower of his/her rights and give guidance, but again only if the whistleblower approaches this office. On the reverse side, the employee must make the complaint to his employer but, if dissatisfied, can only appeal to the ombudsmen if a public sector employee.

²⁴ Kirsten Trott, ‘The Australasian perspective’ quotes the ICAC report in Richard Callan and Guy Dean (eds), *Whistleblowing around the world: law, culture and practice*, 2004, Public Concern at Work, p 119.

²⁵ Statements supported by the interviews with the senior members of Whistleblowers Australia, and borne out in all interviews to date with actual whistleblowers.

²⁶ Trott, op cit, p 129.

²⁷ Adequacy of the *Protected Disclosures Act* to achieve its objectives, April 2004, NSW Ombudsman, pp 47, 48.

²⁸ NSW Ombudsman, op cit, p 11. Trott, op cit, claims other support for these statements, including her own research (p 139).

²⁹ The Act can be found at <http://194.128.65.3/acts/acts1998/19980023.htm>

³⁰ Typical examples are the Civil Aviation Authority; Director General of Fair Trading; Comptroller and Auditor General of the National Audit Office; Commissioners of Customs and Excise; Director General of Telecommunications; Commissioners of the Inland Revenue; Social Care Council; Food Standards Agency; Criminal Cases Review Commission; Director General of Water Services; Director of the Serious Fraud; Office of the Environment Agency.

³¹ Available at <http://www.pcaw.co.uk/>

³² <http://www.freedomtocare.org/page69.htm>, accessed August 2005.

³³ A brief overview can be found in <http://www.whistleblowerlaws.com/protection.htm>

³⁴ The Act is available on http://uscode.house.gov/download/title_05.php in Section 5, Chapter 12. Or under <http://thomas.loc.gov/>, locating the Bill passed by both house and senate in 1989 and 1994. Commentary on the Act is available through the website of the Government Accountability Project (GAP), a not-for-profit organisation at <http://www.whistleblower.org/>

³⁵ *Administrative Law Review*, 531, 1999.

³⁶ According to Thomas Devine, op cit, www.governmentaccountability.org/ and <http://www.whistleblowers.org/>

³⁷ For the Act, go to <http://thomas.loc.gov/>, and locate the bill passed in 2002 by both House and Senate [H.R.3763]. Several privately run internet explanations and interpretations of the Act are available. See <http://www.legal-term.com/sarbanesoxleyact-definition.htm>

³⁸ <http://www.whistleblowers.org/html/fca.htm>

³⁹ <http://www.your-call.com.au/index.php>, accessed 23 August 2005. The figures are based on a Whistleblower Australia estimate prepared by Dr Kim Sawyer.

⁴⁰ One such firm, which operates primarily against Medicare and tax fraud, can be examined at <http://www.usawhistleblower.com/pages/1/index.htm>

⁴¹ 'Illusions of whistleblower protection', *UTS Law Review*, No 5, 2003, pp 119–130. A version presented at the Public Right to Know Conference, 13–15 September 2002, with some changes in the text, abstract and referencing style, is available on <http://www.uow.edu.au/arts/sts/bmartin/pubs/03utslr.html>