Public interest disclosure legislation in Australia: Towards the next generation?

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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.[1]

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. While other legislation also often contains provisions relevant to whistleblower protection,[2] the instruments listed in Table 1 are those intended to provide, or most often looked to as providing, a general public sector whistleblowing framework for their jurisdiction.

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]	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	Northern Territory
11	*Public Interest Disclosure Bill* 2006	Australian Capital Territory (2)

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 the performance of these regimes. 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 paper presents—and suggests answers to—ten fundamental questions about the current tapestry of Australian whistleblower protection laws. The questions are:

[1] This is a version of a longer paper given at a Commonwealth Parliamentary Library 'Vital Issues' Seminar, *'Do I Dare? Whistleblowing Laws in Australia'*, Parliament House, Canberra 16 August 2006. It is based on research conducted for the'Whistling While They Work' project, supported by the ARC. The full length paper will be available from the project website, http://www.griffith.edu.au/centre/slrc/whistleblowing/.

[2] 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).

1. **How should whistleblowing be defined (and what should be the title and objectives of public interest disclosure 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 and 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 – the rest enable not just 'organisation members' but 'any person' to make disclosures as if they were a public official. This causes problems and 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 Tasmania's.

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

   No. Unlike sector-blind laws such as in the UK, for the foreseeable future Australian private sector whistleblower protection is 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. Only one law (WA) clearly permits disclosures about public contractors. Three laws (Vic, Tas, NT) contain an extremely high threshold allowing only the most serious e.g. criminal wrongdoing to be reported, apparently due to drafting error.

5. **How do we guard against abuse 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. Three laws (Vic, Tas, NT) have a confusing and unnecessary two-stage process for identifying applicable disclosures.

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, but that a coordinated approach to investigations is taken, with review of decisions not to investigate disclosures. Two

jurisdictions (SA, NSW) lack any system of public reporting of activity under the Act, so its implementation is 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 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, in order to enable this glaring deficiency to be rectified in all jurisdictions.

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.

While having noted the difficulties, a detailed comparative analysis of existing whistleblowing protection has nonetheless been undertaken. Table 2 summarises the results of the analysis, ranking existing provisions according to those which are most clearly problematic, or missing, or appear closest to legislative best practice. While this produces overall rankings, the overall lesson 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. Comments are welcome on the nature and importance of the legislative problems reviewed here, which will be fed back into the research and the deliberations of the participating governments.

A key conclusion from this analysis is that rather than tinkering with any existing law as a model, 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 whistleblower protection laws should be more uniform across Australia. The key issues are fundamentally common. Public integrity and public sector standards would also benefit nationally from a clearer, legislatively supported consensus on the responses to these questions.

It is open to any jurisdiction to attempt the first law in this ‘second generation’. The most obvious candidate is the Commonwealth, whose current provisions are the most limited and problematic. The Commonwealth would serve the nation well by moving towards such a law. Time spent first in discussion of its fundamental principles, and developing a new and clearer consensus, would also be time extremely well spent.

Table 2. A ranking of Australian public interest disclosure provisions

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

		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	2	2	2
	d. Wrongdoing by contractors	2	2	0	2	0	2	2	0	3	2	2
5. How do we guard against abuse?	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. Mere policy disputes	1	3	0	1	1	1	1	1	1	1	1
	d. Mere personal grievances	1	2	2	2	0	2	2	2	2	2	0
	e. Frivolous or vexatious	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 2 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	1	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	81	63	61	37	59	65	67	72	71	47
		%	39.7	64.3	50.0	48.4	29.4	46.8	51.6	53.2	57.1	56.3	37.3