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# Towards “Ideal” Whistleblowing Legislation? Some Lessons from Recent Australian Experience

A. J. Brown \*

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## 1. Introduction

Whistleblower protection is increasingly recognised as important for the detection and rectification of wrongdoing in and by organisations, as well as for enforcement of citizen and worker rights<sup>1</sup>. However the form of the legal protections and regimes needed to achieve these objectives remains contentious. On one hand, international recognition of the importance of whistleblowing through multi-lateral agreements such as the United Nations Convention Against Corruption (UNCAC) and G20 Anti-Corruption Action Plan has created a demand for best-practice legislative models. There has been a new focus on comparative analysis of existing laws and the extraction of key principles to guide such legislation<sup>2</sup>. On the

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<sup>1</sup> Whistleblowing is used throughout this paper to mean 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”: M. P. Miceli, J. P. Near, *The Relationships among Beliefs, Organisational Position, and Whistleblowing Status: A Discriminant Analysis*, in *Academy of Management Journal*, 1984, vol. 27, n. 4, 687-705 at 689. However it must be noted that the term is also often used to mean other forms of witness or complainant, as discussed in part 2.

<sup>2</sup> For statements of such principles, see e.g. D. Lewis, *Employment Protection For Whistleblowers: On What Principles Should Australian Legislation Be Based*, in *Australian Journal of Labour Law*, 1996, vol. 9, 1-27; P. Latimer, *Whistleblowing in the Financial Services Sector*, in *Univ. of Tasmania L. Rev.*, 2002, vol. 21, 39; D. Banisar, *Whistleblowing – International*

other hand, the search for “ideal” or “model” laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose legislation (sometimes inaccurately called “stand-alone”); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation<sup>3</sup>.

This article seeks to aid understanding of the ways in which different policy purposes, conceptual approaches and legal options can be combined in the design of better whistleblowing legislation. It takes as a starting point, and seeks to demonstrate, that notwithstanding international interest, there is no single “ideal” or “model” law that can be readily developed or applied for most, let alone all countries. This is due to the diverse and intricate ways in which such mechanisms must rely on, and integrate with, a range of other regimes in any given jurisdiction. Nevertheless, recent scholarship makes it more feasible to recognise the different purposes and dimensions of whistleblowing laws, and to make more informed legislative choices in accordance with international principles.

This article examines this process through a study of Australia’s recently passed *Public Interest Disclosure Act 2013 (Cth)* [henceforward *PID Act*] governing whistleblowing in Australia’s federal (Commonwealth) public sector. At state level, Australia has a long history of special purpose legislation of this kind, dating back to the 1990s (Table No. 1).

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*Standards and Developments*, Background paper written for Transparency International, 2009, also in I. E. Sandoval (ed), *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, World Bank Institute for Social Research, UNAM, Washington DC, 2011. <http://ssrn.com/abstract=1753180> (accessed August 20, 2013); A. J. Brown, P. Latimer, J. McMillan, C. Wheeler, *Towards Best Practice Whistleblowing Legislation for the Public Sector: the Key Principles*, in A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, ANU E Press, Canberra, 2008, 261-288; A. Osterhaus, C. Fagan, *Alternative to Silence: Whistleblower Protection in 10 European Countries*, Transparency International, Berlin, 2009.

<sup>3</sup> See B. FASTERLING, *Comparative legislative research*, in A. J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Whistleblowing Research Handbook*, Edward Elgar, Cheltenham, forthcoming 2014.

Table No. 1. Australian Whistleblowing / Public Interest Disclosure Acts, in order of most Recent Reform (Public Sector Only).

No.	Jurisdiction	Current Act	Original Act
1	Commonwealth (Federal)	<i>Public Interest Disclosure Act 2013</i>	<i>Public Service Act 1999 (s. 16) (continuing)</i>
2	Victoria (State)	<i>Protected Disclosures Act 2012</i>	<i>Whistleblowers Protection Act 2001</i> [replaced]
3	Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i>	<i>Public Interest Disclosure Act 1994</i> [replaced]
4	Western Australia (State)	<i>Public Interest Disclosure Act 2003</i> [amended 2012]	<i>Public Interest Disclosure Act 2003</i>
5	New South Wales (State)	<i>Public Interest Disclosures Act 1994</i> [reformed 2010, 2012]	<i>Protected Disclosures Act 1994</i>
6	Queensland (State)	<i>Public Interest Disclosure Act 2010</i>	<i>Whistleblowers Protection Act 1994</i> [replaced]
7	Northern Territory	<i>Public Interest Disclosure Act 2008</i>	<i>Public Interest Disclosure Act 2008</i>
8	Tasmania (State)	<i>Public Interest Disclosures Act 2002</i> [amended 2009]	<i>Public Interest Disclosures Act 2002</i>
9	South Australia (State)	<i>Whistleblowers Protection Act 1993</i>	<i>Whistleblowers Protection Act 1993</i>

Source: Author's Own Elaboration



However, despite recommendations by federal parliamentary committees since at least 1994<sup>4</sup>, it took almost 20 years for this first, comprehensive national-level whistleblowing law to be passed. Legislative design commenced with policy commitments by the incoming Labor government in 2007, leading to a bipartisan 2009 parliamentary inquiry chaired by the Attorney-General who later saw the Bill through (Hon Mark Dreyfus QC)<sup>5</sup>. Design was thus able to draw on experience with existing regimes, as well as comprehensive empirical research by the author and others<sup>6</sup>. The process was nevertheless protracted, requiring introduction of a private member’s Bill in 2012 – the fourth in a decade – to put pressure on the Government to complete the task<sup>7</sup>, along with critical review of its Bill (March 2013) by stakeholders and two further parliamentary committees<sup>8</sup>. This led to substantial amendments in the

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<sup>4</sup> Senate Select Committee on Public Interest Whistleblowing, *In the public interest: Report of the Senate Select Committee on Public Interest Whistleblowing*, Commonwealth of Australia, 1994 (hereafter SSC 1994).

<sup>5</sup> House of Representatives Standing Committee on Legal And Constitutional Affairs, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*. Canberra: Commonwealth of Australia, 2009 (hereafter LACA 2009).

<sup>6</sup> A. J. Brown, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation*, Commonwealth, NSW and Queensland Ombudsman, Canberra, 2006; A. J. Brown, (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness management in public sector organisations*, ANU E Press, Canberra, 2008; P. Roberts, A. J. Brown and J. Olsen, *Whistling While They Work: A Good Practice Guide for Managing Internal Reporting of Wrongdoing in Public Sector Organisations*, ANU E-Press, Canberra, 2011. For evidence of the impact of the research, see LACA, op cit, p.x and seriatim; Queensland Parliamentary Debates (Hansard), 16 September 2010, Government Printer, Brisbane; Commonwealth Parliamentary Debates (Hansard), Canberra, 26 June 2013, 4110; Hon Mark Dreyfus QC MHR, Attorney-General, Media Release, 26 June 2013, <http://www.attorneygeneral.gov.au/MediaReleases/Pages/2013/SecondQuarter/26June2013-Whistleblowerlawspassed.aspx> (accessed August 20, 2013).

<sup>7</sup> *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth), drafted by the author and introduced by Independent MP Andrew Wilkie, a former national intelligence whistleblower, in October 2012: See A. Wilkie, *Axis of Deceit: The Extraordinary Story of an Australian Whistleblower*, Black Inc, Collingwood Vic, 2004.

<sup>8</sup> See submissions and reports, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Public Interest Disclosure Bill 2013*, Canberra, 28 May 2013, [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=spla/bill\\_2013\\_public\\_interest\\_disclosure/index.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill_2013_public_interest_disclosure/index.htm) (accessed August 20, 2013); Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013*, Canberra, 13 June 2013.

final instrument, which was passed with strong multi-party support on 26 June 2013<sup>9</sup>.

The result is a body of extrinsic material throwing light on the choices made, influenced by debates over the effectiveness of different approaches. Recently, Vaughn has suggested four main different “perspectives” at work, influencing the legal standards and protections evident in whistleblowing laws: (1) an employment perspective; (2) an open-government perspective; (3) a market or regulatory perspective; and (4) a human rights perspective<sup>10</sup>. As shown in Figure 1<sup>11</sup>, these perspectives also relate to one another in a variety of ways: some embody greater concern with individual rights, and others with a greater concern for institutional reform; while some are likely to address the public sector, and others the private sector. These perspectives do not simply label aspects of whistleblower laws, but emphasize differing justifications, and distinct bodies of law containing their own theories and assumptions, as well as different criteria for success and failure.

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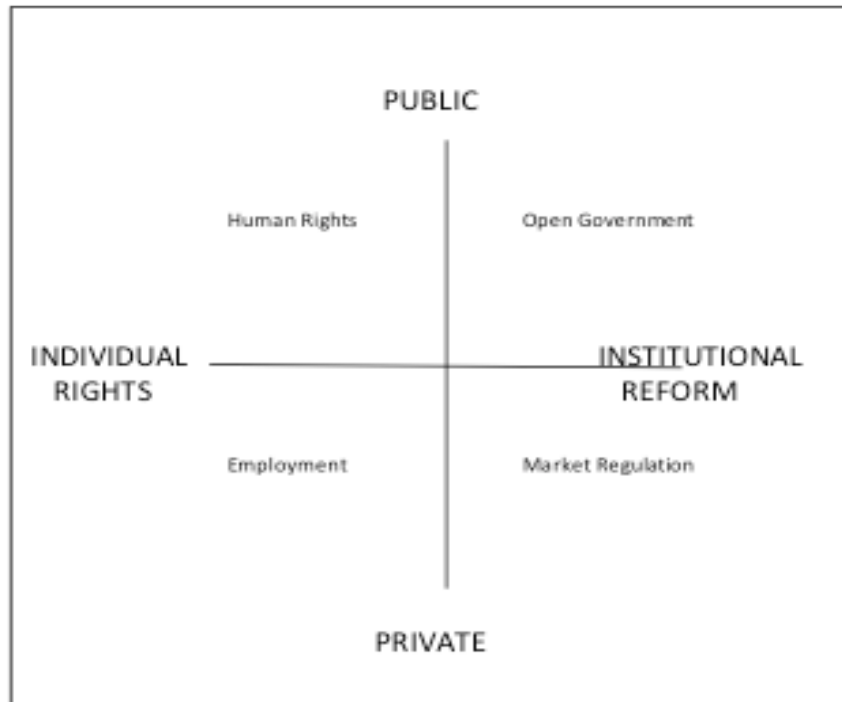
<sup>9</sup> See Commonwealth Parliamentary Debates (Hansard), 26 June 2013, Canberra, 4106-4117.

<sup>10</sup> R. G. Vaughn, *The Successes and Failures of Whistleblower Laws*, Edward Elgar, Cheltenham, 2013, at chapter 15.

<sup>11</sup> *Ibid.*



Figure No. 1. *A Matrix of Perspectives on the Nature of Whistleblowing Provisions*



Source: Vaughn 2013, chapter 15.

Elsewhere, the path to the new Australian law is discussed in terms of four different approaches which largely confirm Vaughn’s picture: an “anti-retaliation”, remedial or organizational justice approach (focussed on creating and protection individual rights, especially employment rights); an “institutional” or structural approach (focussed on the role of whistleblowing in organisational behaviour and regulation); a “public” or media-based approach (focused on recognising the value of free speech and open government); and a “reward” or bounty approach (focused on incentivising, by compensating, whistleblowers and the private legal market to make whistleblowing work)<sup>12</sup>.

<sup>12</sup> T. Dworkin, A. J. Brown, *The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws*, in *Seattle Journal for Social Justice*, 2013, vol. 11, n. 2, 653-713.

This article reviews the final outcome in terms of the first three of these approaches – the fourth being one which Australia is only just beginning to seriously consider.<sup>13</sup> It should also be noted that the new law deals only with reporting of wrongdoing within federal public sector organisations and programs, and not the private or civil society sectors, with law reform in the latter sectors also seen as long overdue.<sup>14</sup> The first part of the article examines basic questions of the coverage given by the legislation – in particular, which individuals are able to gain its benefits, or, who is a “whistleblower”, in legal terms? This includes an indicative new schema of how whistleblower protection can be defined relative to other forms of complainant, witness or citizen protection. Continuing the search for a clearer understanding of the interface between different areas of law bearing upon whistleblowing, the article then deals in turn with how the new Act incorporates each of the “anti-retaliation” or remedial approach; “institutional” or structural approach; and “public” or media-based approach. History suggests that unless these disparate strategies are recognized and reconciled, effective whistleblowing regimes may remain elusive, with no individual approach providing a solution.<sup>15</sup> In particular, it seems important that the approaches not be viewed as alternative or competing, in a lurch for better solutions, without evaluating why the previous effort did not work, or whether the strategies might be brought together. The key question is thus whether, or how, these different strands can be woven together in a more complementary fashion – and whether this integration itself can point the way to an “ideal” method of designing effective whistleblowing laws.

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<sup>13</sup> For evidence of the growing sympathy toward incorporation of the “bounty” or reward approach, see LACA 2009, *op cit*, 82-84; Dworkin and Brown, 2013, *op. cit.*, 701-703. At the time of writing, an Independent federal Senator (Nick Xenophon) has also announced his intention to introduce a further private member’s Bill that may in part introduce this model: see R. Williams, *The price of speaking out: Laws governing private sector whistleblowers are full of gaps*, in *Sydney Morning Herald*, 10 August 2013, <http://www.smh.com.au/business/the-price-of-speaking-out-20130809-2rngk.html> (accessed August 10, 2013).

<sup>14</sup> Australia’s limited corporate whistleblowing provisions are currently contained in Part 9.4 AAA of the *Corporations Act 2001* (Cth). A review of these provisions by the federal Treasury and Attorney-General’s Department in 2009-2010 was never completed: see Attorney-General’s Department, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, October 2009.

<sup>15</sup> Dworkin and Brown, 2013, *op. cit.*

## 2. The Basics: Who is a Whistleblower?

### 2.1. Context

Before examining each of the three approaches, the basic comprehensiveness of a whistleblowing law in any particular jurisdiction or sector is determined by three issues: the range of reportable wrongdoing; the range of institutions about whom the whistle can be blown; and the range of individuals who can benefit from the processes and protections in the Act. This third issue is especially basic, and also often the most complex. On one hand, the thrust of the social science definition of “whistleblowing”, of this article, and of most whistleblowing legislation, is based on the whistleblower as someone with an “insider’s knowledge”<sup>16</sup>: “the whistleblower is presumptively an insider who acquires knowledge that the community does not have”<sup>17</sup>. History and research show that it is the internal position of the individual in the organisation that is most likely to make them aware of internal wrongdoing, but can also place them under pressure to stay silent, or expose them to unfair outcomes if they speak up<sup>18</sup>. The modernisation and codification of whistleblower protections, in most jurisdictions, is thus predicated on the special value of information held by employees and other organisational insiders about wrongdoing; and the challenges of overcoming organisational disincentives to, and negative consequences of, revealing that information – whether internally, to regulatory agencies, or publicly. The question of who should benefit from the law, thus goes to the heart of the intersection between employment law and other legal dimensions, including open government and protection of citizen rights more generally. While employees may lie at the heart of the whistleblowing definition, what of organisational or industry members or workers who are not employees? What of employees in other organisations or sectors, beyond those to which the whistleblowing regime applies? What of individuals in no employment or work relationship, but who might be considered “insiders” in other ways, including by virtue of their vulnerability – such as clients or customers who are medical patients, aged care residents or prisoners? Further removed again, but nevertheless

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<sup>16</sup> Evidence of the then Commonwealth Ombudsman, John McMillan: LACA 2009, *op. cit.*, 25.

<sup>17</sup> Evidence of Professor Tom Faunce, LACA 2009, *op. cit.*, 37.

<sup>18</sup> A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector*, 2008, *op. cit.*, 9-10; see LACA 2009, *op. cit.*, 36-37.

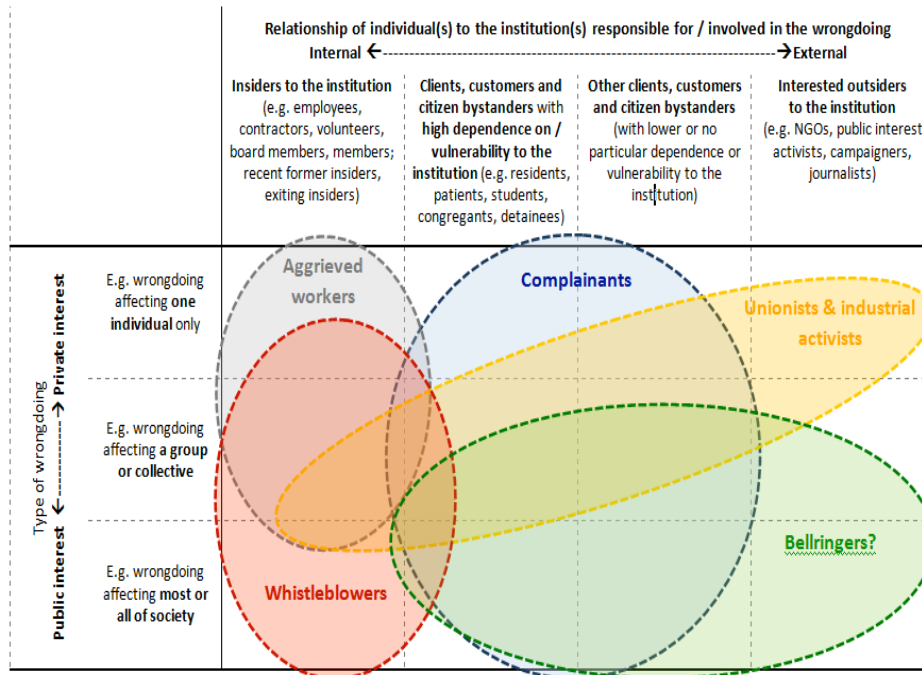
*potentially* deserving legal protections from reprisals, are customers, clients or independent citizens who become aware of wrongdoing but have no such internal relationship – especially in countries unlike Australia, where basic citizens’ rights to complain, and other forms of public interest activism, are generally separately supported by the rule of law.

To clarify this, Figure 2 sets out some of the range of persons who may disclose wrongdoing by or within an institution, and should be entitled to protections *of some kind* – whether whistleblowing or otherwise. Any such diagram can be indicative only, and is likely to be contentious, depending on who may be seeking to include or exclude themselves from a particular label. In particular, the term “whistleblower” is often associated with a range of people with special or privileged information regarding the operations of agencies, who then campaign for justice or change in respect of that organisation, who are not “insiders” in an employment, official or organisational sense. Elsewhere<sup>19</sup>, the term “bellringers” is suggested as one which could be used to describe these important categories, in a manner that relates but differentiates them from “whistleblowers” – as suggested in Figure 2. As shown, there are also always likely to be individuals who fit into more than one, or even all of these groups. There are also likely differences between one culture or nation and the next. Nevertheless, a clearer conception of the range of persons involved can help focus attention on the different legal mechanisms that might best be used to achieve protections – and protections of different kinds – rather than assuming that any one law should be used to protect all.

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<sup>19</sup> M. Miceli, S. Dreyfus, J. Near, *Outsider “Whistleblowers”: Conceptualising and Distinguishing “Bell-ringing” Behaviour*, in A. J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Whistleblowing Research Handbook*, Edward Elgar, Cheltenham, forthcoming 2014.

Figure No. 2. An Indicative Guide to Classifying Whistleblowers, Complainants, Witnesses and Victims of Organisational Wrongdoing



Source: Brown, Lewis, Moberly, Vandekerckhove (forthcoming).

## 2.2. PID Act

How comprehensive is Australia’s *Public Interest Disclosure Act 2013* (Cth) on these three basic issues? First, the range of wrongdoing covered makes the Act very comprehensive by comparison with equivalent legislation elsewhere. The definitions of “disclosable conduct” whose disclosure triggers the Act are broad to the point of all-encompassing<sup>20</sup>. Second, the range of federal public sector institutions and programs covered are also comprehensive – with three significant exceptions. On one hand, the

<sup>20</sup> *PID Act 2013 (Cth)*, s 29. NB s 31 also provides that conduct is not *disclosable conduct* if it “relates only to” a policy of the Government, or amounts, purposes or priorities of expenditure relating to such a policy, “with which a person disagrees”; however this exception is to be found in other legislation, and is, in fact, more narrowly worded than most (i.e. “relates only to”, cf “relates entirely or in substance to a disagreement in relation to a policy”: *PID Act 2012 (ACT)*, s. 7(2)(b)).

categories of public officials and agencies about whom disclosures may be made extend well beyond federal departments, to include all federal companies, authorities and entities; federal contractors and sub-contractors; and the employees of federal contractors and sub-contractors, in respect of those contracts<sup>21</sup>. The exceptions are judicial officers, in respect of judicial as against administrative functions<sup>22</sup>; and more problematically, elected members of the federal Parliament<sup>23</sup>. Further, wrongdoing relating to “intelligence agencies” can only be subject to a public disclosure under the scheme in extremely limited circumstances, as will be discussed below. These are gaps for which solutions are yet to be found.

The Act is also comprehensive in terms of who may seek protection, but with interesting new implications for how a “whistleblower” is defined. Previously in Australia, it is important to note that no less than five different approaches have been taken; the PID Act adds a sixth (in a federal country with only nine legal jurisdictions). These approaches include: (1) a relatively narrow, traditional definition of public officials and officeholders; (2) a wider range of officials plus contractors, employees and even volunteers; (3) “any person” or “any natural person”, including all of the above but also any client or citizen; and (4) combinations of these, depending on what wrongdoing is involved<sup>24</sup>. The fifth approach, recently developed in the Australian Capital Territory, is a two-track one in which “any person” is entitled to the general legal protections, but specific procedural requirements and protections are only triggered for disclosers who are “public officials”<sup>25</sup>.

The sixth approach provided by the PID Act is a new “deeming” provision. In the main, the Act follows the second of the previous approaches, being triggered by disclosures by a very broad definition of “public official”, including not only employees and other officeholders of agencies and entities, but “contracted service providers” (including sub-contractors), and their employees or officers in so far as they provide

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<sup>21</sup> *PID Act 2013 (Cth)*, ss 29 and 30.

<sup>22</sup> *PID Act 2013 (Cth)*, s 32.

<sup>23</sup> *PID Act 2013 (Cth)*, ss 29, 30, and 31(b).

<sup>24</sup> For (1), see NSW; (2) Tasmania; (3) SA s.5(1); Vic s.5; WA s.5; NT s.7; (4) Qld ss.19, 20.

<sup>25</sup> *PID Act 2012 (ACT)*, s.10; with “public official” defined very broadly to mean public employees, contractors, employees of contractors, or volunteers “exercising a function of the public sector entity”, as well as any person prescribed by regulation. See s.15 for one such differentiation.



services “for the purposes (whether direct or indirect) of the Commonwealth contract”; together with any individual who “exercises powers, or performs functions, conferred on the individual by or under a law of the Commonwealth”<sup>26</sup>. This decision reflected evidence to the 2009 parliamentary inquiry that to be effective, the legal regime should be “focussed and structured” on whistleblowers as insiders: “tailored to the problem and the challenge” of whistleblower protection, while “bearing in mind that it is not the whole picture”<sup>27</sup>.

However, the parliamentary inquiry also received evidence that any member of the public should be able to make a public interest disclosure<sup>28</sup>. Accordingly, it recommended an ability to “deem” other persons to be a public official, so triggering the protections<sup>29</sup>. Consequently, any person may be determined by an authorised officer to be a public official for the purposes of the Act, irrespective of whether they are actually one<sup>30</sup>. Importantly, this ability to expand the scope of the Act is not referable to particular classes of people, or dependent upon regulation, but exercisable in the individual case by officers at agency level. The parliamentary committee’s intent was not to expand the legal focus nor the definition of whistleblower beyond “insiders”, to all citizens – rather it recommended this provision as means of making doubly sure that all those with an “insider’s knowledge” of disclosable conduct could be covered, including current or former volunteers to an agency, or “others in receipt of official information or funding from the Australian Government”<sup>31</sup>. In the Act itself, however, the reasons for such a determination are not explicit, beyond a criterion that the individual “has information that concerns disclosable conduct” – and implicitly, either requires or deserves protection in exchange for that information<sup>32</sup>.

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<sup>26</sup> *PID Act 2013 (Cth)*, 69.

<sup>27</sup> McMillan in evidence at LACA 2009, op. cit., 37.

<sup>28</sup> LACA 2009, op. cit., 34-36. As early as 1994, the Senate Select Committee recommended that whistleblowing should be given “as broad a definition as possible to include disclosures by people from within or outside the organization”: see SSC 1994, op. cit., par 2.12.

<sup>29</sup> LACA 2009, op cit, Rec 5, 55.

<sup>30</sup> *PID Act 2013 (Cth)*, 70.

<sup>31</sup> LACA 2009, op. cit., 55.

<sup>32</sup> *PID Act 2013 (Cth)*, subs 70(1), par (a).

### *2.3. Looking Forward*

How many individuals will need the benefit of this “deeming” provision, and its implications for the evolution of whistleblower and wider complainant or “source” protection, will only be known with time. The larger issue confirmed by these choices is that as reinforced by Figure No. 2, all witnesses, informants and complainants in respect of wrongdoing – whether directed at themselves or others – require a base level of protection from victimisation that would prevent them from exercising their rights of complaint, or prevent the proper investigation of the wrongdoing. The second, different issue is how those protections are actually delivered, especially in countries in which basic civil liberties are in question. The variegated approaches in Australia, and diversity of complainant types indicated by Figure 2, reinforce the need for informed debate as to which legal mechanisms are used to secure which protections, for whom. Can any single law provide comprehensive, tailored protections and systems for all these categories – or does the attempt to do so, risk watering down the purposes and effectiveness of such reforms, to the point where none may be effective? The answer lies – as it did in Figure 1 – in recognising that different bodies of law are needed to work towards effective protection across all these categories. Whistleblower protection, or the encouragement and protection of speaking up by organisational “insiders”, is just one part of this matrix, overlapping with others. How this is achieved, legally speaking, is also determined by a range different approaches.

## **3. Anti-Retaliation and Remedies**

### *3.1. Context*

The first of the legal approaches introduced earlier, which has been a focus of previous legislative efforts, is the encouragement and protection of whistleblowing using an “anti-retaliation” or remedial model. Most Australian states followed the US in basing their whistleblowing legislation, in part, on this approach. Moreover, for reasons difficult to fathom in hindsight, they typically did so by following the US approach of creating general rights of compensation in the civil courts, even though – unlike the USA – Australia has long had comprehensive systems of tribunal-based employment rights protection. Civil remedies are based on

the creation of a tort of victimization, which provides a right to sue for damages in the general courts, for detrimental action taken in retaliation for having made a disclosure under the Act<sup>33</sup>. The only state not to have initially provided this remedy, New South Wales (NSW), did so in 2010<sup>34</sup>. The limits of these remedial avenues have become clear, however. Even the most recent addition, in NSW, provides that recoverable civil damages “do not include exemplary or punitive damages or damages in the nature of aggravated damages”<sup>35</sup>. General problems of cost and risk of adverse outcomes mean there have never been more than a handful of claims, and no known successes<sup>36</sup>. Australian legal firms and services have little specialized experience or expertise in such actions. By contrast, the general law of employment has provided a more convincing basis for compensation for retaliation. Employers have a common law duty, arising from express or implied terms in contracts of employment, to take reasonable steps to ensure that employees in their organization who blow the whistle are not bullied or victimised. As a result, one of the few significant compensation awards was in favour of a NSW police officer whose employer failed to sufficiently support him after he reported suspected internal misconduct<sup>37</sup>. Similarly, rights of compensation for work-based injury, which, while ill-matched to whistleblowing situations, have proven to be a more recognizable part of the legal landscape. The confidential settlement achieved in 2012 by a prominent whistleblower, nursing manager Toni Hoffman, was achieved in response to a claim under the *Workers’ Compensation and Rehabilitation Act 2003*(Qld)<sup>38</sup>.

<sup>33</sup> See, e.g., *Whistleblowers Protection Act 1993* (SA) s 9(2)(a); *PID Act 2010* (Qld) ss 42-43; *PID Act 2003* (WA), s 15(1); *PID Act 2002* (Tas), s 20(2); *Whistleblowers Protection Act 2001* (Vic), s 19(1); *PID Act 2012* (ACT) s 41.

<sup>34</sup> See *PID Act 1994* (NSW) s 20(A). In addition, over time, three states have provided an alternative right to seek restitution or damages for victimization through anti-discrimination tribunals: *Whistleblowers Protection Act 1993* (SA) s 9(2)(b); *PID Act 2003* (WA), s 15(4); *PID Act 2010* (Qld), s 44.

<sup>35</sup> *PID Act 1994* (NSW), s 20(A)(3).

<sup>36</sup> See Brown et al., *Best Practice Whistleblowing Legislation...*, 2008, op cit., 271–77.

<sup>37</sup> See *Wheadon v New South Wales* (Unreported, District Court of NSW, 2 Feb 2001) (ordering the NSW Police Service to pay AUD\$664,270 for having breached its duty of care to the officer); see Brown et al 2008, op cit, at 274.

<sup>38</sup> See *Toni Hoffman Settles Claim for Compensation*, Maurice Blackburn Lawyers (8 March 2012), <http://www.mauriceblackburn.com.au/news/press-releases—announcements/2012/toni-hoffman-settles-claim-for-compensation.aspx> (accessed March 12, 2013); *Dr Jayant Patel Nurse Toni Hoffman and Queensland Health Settle Claim*, COURIERMAIL.COM.AU (8 March 2012), <http://www.couriermail.com.au/news/queensland/patel-nurse-queensland-health-settle->

The lack of coordination with relevant existing legal systems is confirmed by the difficulties experienced by some courts, in identifying how these different compensation avenues fit together, as well as how they co-exist with the criminal offence of reprisal, for which Australian legislation is also notable. One State court determined that no action for civil damages could be taken against an employer because it could not be held vicariously liable for actions amounting to a criminal offence by its own staff, since these must be presumed to have been taken outside the employer's authorisation<sup>39</sup>; while others have wrestled with the relationship with procedural requirements under workplace health and safety legislation.

### 3.2. PID Act

For federal government whistleblowers, the only provision prior to the recent reform was a prohibition in the *Public Service Act 1999* (Cth) of victimization against many, but not all public servants, if they reported misconduct, with no remedies beyond general grievance rights<sup>40</sup>. On the road to new legislation, it was initially unclear how the anti-retaliation approach would be embedded and enforced. In line with recommendations that Australian laws needed to be better tailored to Australia's own conditions, the 2009 parliamentary inquiry recommended that compensation for federal employees be embedded in the new federal *Fair Work Act* then under design<sup>41</sup>. This was informed by the adoption of employment-based remedies, in some respects stronger than but delivered through the existing workplace relations system, as the basis of the United Kingdom's *Public Interest Disclosure Act 1998* (UK)<sup>42</sup>. By 2012, restructuring of Australia's workplace relations system made it clearer how whistleblowing remedies might be embedded<sup>43</sup>. Under the general protections in Part 3-1 of the *Fair Work Act 2009*, employees (including

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[claim/story-e6freoof-1226294131009](#) (accessed March 12, 2013).

<sup>39</sup> See *Howard v Queensland* [2000] Qd R 223; Brown et al 2008, *op. cit.*

<sup>40</sup> *Public Service Act 1999* (Cth), 16.

<sup>41</sup> See Brown et al., 2008, *op. cit.*; LACA 2009, *op. cit.*, at 104.

<sup>42</sup> See, e.g., Hon. J. McMullen, *Ten Years of Employment Protection for Whistleblowers in the UK: A View from the Employment Appeal Tribunal*, in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research*, Edward Elgar, Cheltenham, 2010, 7-14.

<sup>43</sup> See *Workplace Relations (Work Choices) Act 2005* (Cth); *New South Wales v Commonwealth* [2006] 231 ALR 1; *Fair Work Act 2009* (Cth); *Work Health and Safety Act 2011* (Cth).

federal government employees) are protected from any unlawful “adverse action” based upon their workplace rights, including initiation of any process or complaint under a work-related law. “Adverse action” is widely defined and includes dismissal, injuring a person in their employment, prejudicially altering the employee’s position and any other conduct that may have an adverse impact upon an employee, either directly or indirectly. Remedies include civil penalty orders and compensation awards, in addition to injunctive relief, restorative orders and criminal penalties. These are enforced by complaint to a Fair Work Ombudsman, and an informal specialist industrial relations tribunal, Fair Work Australia, in addition to the workplace division of the Federal Court. Arguably, the protections already extended to many employee disclosures of wrongdoing – but this was, and is untested in the courts.

The PID Act, influenced by the private member’s Bill which preceded it<sup>44</sup>, establishes a dual system in which remedies for reprisal or detrimental action are obtainable by application either through (a) the Fair Work system above, or (b) the Federal Court in its general civil jurisdiction<sup>45</sup>. Sections 22 and 22A of the *PID Act* confirming that public interest disclosures are workplace rights. Damages for unfair dismissal and other adverse actions remain capped in this system, while there are no limits upon damages that can be sought in a general civil claim.

As a key element of this dual system, the civil claim is also accompanied by a “public interest” costs rule – the first of its kind in Australia, and possibly anywhere. As a result of one late amendment, initiated by the author and supported by the Community and Public Sector Union<sup>46</sup>, a whistleblower who sues for civil damages in the Federal Court cannot be held liable for the respondent’s costs, provided their claim is not legally vexatious and they conduct the litigation reasonably; even though, if they make out their claim, the respondent may be obliged to pay the whistleblower’s costs<sup>47</sup>. In part, this matches the *Fair Work Act* system, where each side must bear its own costs; but goes beyond this in recognizing that the making of a public interest disclosure is more than a

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<sup>44</sup> See *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth), 41; *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012* (Cth), Schedule Items 1-4.

<sup>45</sup> See *PID Act 2013* (Cth), ss 13-18 and 22-22A.

<sup>46</sup> See submissions 14 and 19 respectively, at <[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representative\\_s\\_committees?url=spla/bill/2013/public\\_interest\\_disclosure/subs.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representative_s_committees?url=spla/bill/2013/public_interest_disclosure/subs.htm)>.

<sup>47</sup> *PID Act 2013* (Cth), 18.

private right, and also constitutes a public good. In practice, costs impediments and risks have likely been the single most significant barrier to civil remedies to date. Unlike most employment legislation, none of the state whistleblowing compensation schemes provide any protection for workers from exposure to the legal costs of their employer, should they lose.

### *3.3. Looking Forward*

Taken together the provisions represent the most comprehensive protection regime yet put in place for Australian public sector whistleblowers, not least due to the way in which they more intelligently intersect with and combine different areas of law. The emergence of dual compensation paths in the PID Act can be regarded as a simple consequence of history – a combination of replicating existing State approaches *and* reverting to a UK-style employment based approach. However, such a dual approach emerges as potentially advantageous given ongoing development in the categories of those intended to benefit from the law – as discussed above. Employment law remedies are available only where someone meets the definition of an employee, worker or related person within that body of law; whereas a range of individuals whom whistleblowing legislation is intended to encourage, may have relationships with the relevant institutions which stretch or exceed a workplace relationship. Where this is the case, alternative, non-employment based remedies are clearly still needed. Time will tell whether reforms such as the costs rule above are sufficient to make them effective. The PID Act also criminalises reprisals, with an increase in penalties to a maximum of two years' imprisonment, consistently with state laws, also a late amendment<sup>48</sup>. Problematically, as with other Australian laws, the definition of criminal reprisals and civilly-actionable reprisals are the same – raising the problem of whether only reprisals of sufficient seriousness to sustain criminal action can also give rise to civil remedies. Overall, the criminalization of reprisals in Australia has proven more symbolic than substantive, with few prosecutions, and no known successes<sup>49</sup>. The priority given to such offences may have made *real* whistleblower protection more difficult by distracting from, or masking, the reality that

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<sup>48</sup> *PID Act 2013* (Cth), s 19.

<sup>49</sup> Brown et al. 2008, op cit.



the vast bulk of adverse outcomes unjustly suffered by whistleblowers are plainly non-criminal<sup>50</sup>. In partial response, the Act provides that civil remedies are available even if a prosecution for criminal reprisal “has not been brought, or cannot be brought”<sup>51</sup>. A better approach, however, would be to create civil remedies for detrimental action that are entirely distinct from the criminal offence, to make clear that investigations which are unable to find evidence of deliberate, criminal reprisal do not obviate the different question of whether civil and employment duties of care towards a whistleblower have been breached.

This issue also points to the likely battlegrounds now that civil and employment actions may prove more feasible. Section 13 of the PID Act requires that in the case of either criminal or civil case, the “reason, or part of the reason” for the detrimental act or omission must be a “belief or suspicion” that someone had made, might have made or proposes to make a public interest disclosure. The continuing presumption that the act or omission must have been undertaken with the intention of punishing a person for the disclosure is likely to raise questions regarding the burden of proof that should apply<sup>52</sup>. However, it also misses the more fundamental point that such a requirement is not consistent with a more general duty of care to take reasonable steps to provide a safe and supportive workplace. Failures of this duty, not necessarily involving any intention to punish, are the more likely cause of most unfair detriment; and may be systemic or institutional, more than reflect intention on the part of managers, individually or collectively, to actually cause detriment. In Australia, this issue points to a further way in which different legal approaches might be better integrated, made possible by the institutional or structural approach, described next.

These issues also point to tensions within the anti-retaliation approach. One objective is to encourage whistleblowing and discourage reprisals, by making reprisals legally actionable – but it is only if reprisals can be caught, that any remedies flow, after the damage has been done. This approach may therefore do little to address the root causes of detriment, unless such actions are made so easy that the risk of organizational and managerial liability is very high. If the underlying objective is to ensure organizational justice for whistleblowers, and minimize or prevent

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<sup>50</sup> R. Smith, A.J. Brown, *The Good, The Bad and the Ugly: Whistleblowing Outcomes*, in A. J. Brown (ed.), 2008, *op. cit.*, 129–30.

<sup>51</sup> *PID Act 2013* (Cth), s 19A; following *PID Act 2010* (Qld), sub-s 42(5).

<sup>52</sup> On which, see article by Devine, this issue.

detrimental acts and omissions before they occur, then in addition, a more systemic approach is needed.

## 4. Institutionalising Whistleblowing

### 4.1. Context

The second, “institutional” or “structural” approach, seeks to normalise whistleblowing in organisational and regulatory behaviour by establishing legal requirements for internal and external reporting avenues, and ensuring that investigative obligations are met. It also mandates systems and procedures for the support and protection of whistleblowers from the time of disclosure, rather than waiting for remedies to be pursued after retaliation has occurred. This approach has been prominent in Australia, where it differs from structural approaches in the US and elsewhere by focusing strongly on internal whistleblowing procedures and management obligations, including preventative support, as opposed to creation of whistleblowing channels to independent agencies. From an early stage, Australian regimes have thus been criticized if they failed to detail requirements for internal disclosure procedures, investigative responsibilities, or whistleblower support – and most have done so, in increasing detail<sup>53</sup>.

Where some laws originally provided simply that every public agency “must establish reasonable procedures to protect its officers from reprisals that are, or may be, taken against them”, reformed legislation tends to detail the obligations on organizations to recognize and manage disclosures, and requires a lead oversight agency to set standards for organizations’ internal disclosure procedures, and monitor compliance<sup>54</sup>. These frameworks have been informed by the research mentioned earlier, which, based on data from 118 federal, state and local government agencies, showed that agencies who take their responsibilities seriously achieve better outcomes in the management of whistleblowing than

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<sup>53</sup> Electoral and Administrative Review Commission (EARC), *Report on protection of whistleblowers*, Queensland Government, Brisbane, October 1991, at A11-12; SSC 1994, op cit, pars 4.46, 9.31.

<sup>54</sup> *Whistleblowers Protection Act 1994* (Qld) s 44; by contrast, see now *PID Act 2010* (Qld) 28, 49, 60; *PID Act 2012* (ACT), 28, 33.

agencies that do not<sup>55</sup>. The Australian Standard for organisation-level whistleblower protection programs was incorporated in this research<sup>56</sup>. Thus, in Australia, there are some signs of success from the implementation of structural or institutional approaches, at least in the public sector.

#### 4.2. *PID Act*

The new PID Act is also based strongly on this approach, albeit in slightly different ways. It requires federal agencies to have “procedures for facilitating and dealing with public interest disclosures relating to the agency”, which must comply with standards set by the principal oversight agency, the Commonwealth Ombudsman<sup>57</sup>. The approach is reinforced by a range of direct requirements as to how disclosures must be handled. First among these is that protection obligations commence with an internal disclosure to any manager who directly supervises the whistleblower, in addition to designated “disclosure officers” or external agencies<sup>58</sup>. Again a product of late amendment, this approach follows that established by two State laws<sup>59</sup>, and requires the regime – if it is to be effective – to be fully institutionalised in the management systems of the organisation. In addition, the PID Act follows these States in establishing a dual subjective and objective test for identification of disclosures. The Act is triggered not only when a whistleblower “[honestly] believes on reasonable grounds that the information tends to show” disclosable conduct, but where information *does* “tend to show” such conduct, irrespective of belief<sup>60</sup>. This increases the responsibility on agencies, from junior managers up, to recognise what public employees are reporting even when this occurs only informally, accidentally, or is mixed with other matters or grievances.

Second, agency heads have a statutory responsibility to take “reasonable steps... to protect public officials who belong to the agency from

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<sup>55</sup> See P. Roberts, *Evaluating Agency Responses: Comprehensiveness and the Impact of Whistleblowing Procedures*, in A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector...*, 2008, *op. cit.*, 233; Roberts, Brown & Olsen, *Whistling While They Work...*, 2011, *op. cit.*

<sup>56</sup> See Australian Standard, *Whistleblower Protection Programs for Entities*, 2003.

<sup>57</sup> *PID Act 2013* (Cth), 59(1) and 74.

<sup>58</sup> *PID Act 2013* (Cth), 26, 34, 60A.

<sup>59</sup> *PID Act 2010* (Qld) 17; see also *PID Act 2012* (ACT) 15.

<sup>60</sup> *PID Act 2013* (Cth), 26.

detriment, or threats of detriment” relating to disclosures<sup>61</sup>. This is reinforced by a requirement for agency procedures to include processes for “assessing risks that reprisals may be taken against the persons who make those disclosures”<sup>62</sup>. This requirement follows a precedent set by Australian Capital Territory legislation<sup>63</sup>, and embeds the policy expectation that agencies will put in place pro-active systems for supporting whistleblowers, to prevent or minimise detrimental acts or omissions. Whistleblowers must also be kept informed of the progress of any investigation at least every 90 days; and their consent must be obtained before their identity can be included in any referral of the disclosure within or between agencies<sup>64</sup>. The inclusion of such requirements in the statute, as opposed to standards or procedures, addresses key points at which trust relationships between whistleblowers and their agencies often break down, as indicated by research<sup>65</sup>.

Finally, the system is supported by two independent oversight agencies: the Ombudsman and, in respect of intelligence agencies, the Inspector-General of Intelligence and Security (IGIS), with provision for some coordination between them. This reflects similar strengthening of oversight agency roles at State level<sup>66</sup>. A range of internal agency decisions must be notified to these oversight agencies, including exercises of discretions not to investigate disclosures, to ensure that disclosure systems are working and not being subverted or abused<sup>67</sup>. The Ombudsman is given a back-up jurisdiction to investigate or reinvestigate any disclosure if required, even if it would otherwise lie outside its conventional jurisdiction; and any whistleblower may complain to Ombudsman or IGIS about any breakdown in the process, including failures in support<sup>68</sup>.

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<sup>61</sup> *PID Act 2013* (Cth), 59(3)(a).

<sup>62</sup> *PID Act 2013* (Cth), 59(1).

<sup>63</sup> *PID Act 2012* (ACT), 33(2); and *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth), 34(b), 35(2)(e) and (f).

<sup>64</sup> Sections 52(5) and 44(1), respectively.

<sup>65</sup> See generally Roberts *et al.* 2011, *op cit.*

<sup>66</sup> See *PID Act 1994* (NSW), 20(A)(3) and *PID Act 2010* (Qld), noting that the new oversight role, initially allocated to the Public Service Commission, has been transferred to the Ombudsman: *Public Service and Other Legislation Amendment Act 2012* (Qld).

<sup>67</sup> *PID Act 2013* (Cth), 44(1A), 48(1), 50A.

<sup>68</sup> See Consequential Amendments 2013, *Ombudsman Act 1976* (Cth), 5A; *PID Act 2013* (Cth), Notes at 42, 46 and 58.

### 4.3. *Looking Forward*

The success of the institutional approach at the federal government level is likely to hinge on the adequacy of these oversight arrangements. While the Act’s provisions are consistent with a strengthening of such roles across Australian jurisdictions, the oversight roles are configured firstly as coordination and monitoring roles, and only secondarily as roles that may require active intervention, by way of investigation, in agency affairs. Whether or when the oversight agencies choose to intervene to protect whistleblowers, and how well they do so, given expertise and resources, will be pivotal to agency implementation and broader confidence in the system. Research shows that while public agencies can be good at implementing procedures to encourage whistleblowing and act on the disclosures, they are less proficient in implementing procedures to protect and support their staff<sup>69</sup>. Given frequent calls for a specialist whistleblower protection agency, on the model of the U.S. Office of Special Counsel, implementation poses a significant test for the Ombudsman and IGIS – especially given evidence of past undercapacity and underperformance by oversight agencies, in terms of their readiness to assist whistleblowers<sup>70</sup>.

As a potential part of the solution, the entrenchment of the institutional approach reinforces questions noted in the previous section, about how the anti-retaliation approach might be made more effective – and how the approaches might be better aligned. Previously, as discussed, the anti-retaliation model was contingent on identifying acts or omissions taken “in reprisal” for a disclosure. Now, delineation of agency systems for preventing and minimising detrimental outcomes could be more easily supported by extending compensation rights to any detriment suffered as a result of the failure of, or failure to follow, such systems. The requirement for direct *intent or awareness* on the part of individual managers that their acts or omissions would negatively impact can now be seen as a less crucial element. Many, if not most chains of events leading to allegations of reprisal stem from negligent, accidental or even unwitting

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<sup>69</sup> See A.J. Brown, J. Olsen, *Internal Witness Support: The Unmet Challenge*, in Brown (ed.), 2008, op cit, 203; Roberts, 2008, op cit., 233.

<sup>70</sup> See L. Annakin, *In the Public Interest or Out of Desperation? The Experience of Australian Whistleblowers Reporting to Accountability Agencies*, Ph.D. thesis, University of Sydney, March 2011, available at [http://ses.library.usyd.edu.au/bitstream/2123/7904/1/1\\_annakin\\_2011\\_thesis.pdf](http://ses.library.usyd.edu.au/bitstream/2123/7904/1/1_annakin_2011_thesis.pdf) (accessed August 20, 2013).

failures in the proper management of disclosures, including collateral impacts such as the failure to take into account the stress impacts of a disclosure process in other management decisions. Extension of the same civil and employment remedies to these circumstances becomes the next, potentially most effective step<sup>71</sup>. It would also strengthen the ability of oversight agencies to implement the scheme, by bolstering the incentives on agencies to take their protection obligations seriously. Moreover, it would lower and simplify the evidentiary threshold that an oversight agency must meet when called upon to review whether or not a whistleblower has suffered unfairly.

## 5. Next Steps for Public Whistleblowing

### 5.1. Context

As outlined elsewhere, efforts to strengthen and clarify the role of whistleblowing to the media have been the single most dramatic area of recent Australian reform<sup>72</sup>. The criteria that should govern whistleblowing to the media have been a central concern of law reform since circumstances for “further disclosure” were defined by the *Public Interest Disclosure Act 1998* (UK)<sup>73</sup>. While this has become the archetype of a “three-tiered model” of internal, regulatory, and public whistleblowing<sup>74</sup>,

<sup>71</sup> Such an outcome might be achieved by an additional sub-section 13(4): “Notwithstanding subsection (1), a person (including an agency) takes a reprisal against another person for the purposes of section 14, 15 or 16 if the act or omission causing detriment to the other person is the result of: (a) a failure to fulfil an obligation under this Act; or (b) a failure to follow procedures established under this Act; irrespective of whether any particular person knows, believes or suspects that the other person made, may have made or proposes to make a public interest disclosure.” However other formulations might also better achieve the intent.

<sup>72</sup> A. J. Brown, *Flying Foxes, WikiLeaks and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, in D. Lewis, W. Vandekerckhove (eds.), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, London, 2011, at 86; A. J. Brown, *Weeding Out WikiLeaks (And Why It Won't Work): Legislative Recognition of Public Whistleblowing in Australia*, in *Global Media Journal (Australian Edition)*, 2011. vol. 5. n. 1, [http://www.commart.uws.edu.au/gmjau/v5\\_2011\\_1/brown\\_ra.html](http://www.commart.uws.edu.au/gmjau/v5_2011_1/brown_ra.html) (accessed September 24, 2013); Dworkin and Brown, 2013, *op. cit.*

<sup>73</sup> See *Employment Rights Act 1996* (UK), 43G, 43H.

<sup>74</sup> W. Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in D. Lewis, (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing*



the first legislation to reflect such a model was the *Protected Disclosures Act 1994* (NSW)<sup>75</sup>. Simplified versions of this approach were introduced in Queensland and Western Australia, in 2010 and 2012 respectively<sup>76</sup>.

In Australian debates, it has thus slowly become clear that protection of public whistleblowing is not only necessary from a free speech and open government perspective, but can serve to reinforce the approaches above. In particular, the NSW, Queensland and WA provisions have supported the institutional approach, by providing incentives for agencies and regulators to provide disclosure channels and investigate competently, so as to minimize the number of whistleblowers needing to go to the media. The provisions apply where agencies fail to receive or act on disclosures, fail to keep the whistleblower informed as to the action being taken, or conclude the matter with no action. From these laws, however, it has been less clear how public whistleblowing provisions might support the anti-retaliation approach, for example by legitimizing public disclosure where reprisals occur or insufficient safe disclosure avenues exist<sup>77</sup>. Moreover, the criteria for insufficiency of action have remained undefined.

In Australia’s most recent innovations, prior to the PID Act, the Australian Capital Territory legislated in 2012 to incorporate both objectives, and in more detail. A whistleblower is entitled to go directly to the media if following the normal institutional pathways would involve a “significant risk of detrimental action” and be “unreasonable in all the circumstances”; or may go to the media if an official authority has “refused or failed to investigate” the disclosure, given no response or progress report in three months, or investigated but proposed no action, notwithstanding the continued existence of “clear evidence” of the disclosed conduct. In either case, to retain protection, the whistleblower also only disclose to journalists what is “reasonably necessary” to achieve action<sup>78</sup>. These ACT provisions thus provided the benchmark for such provisions; along with the alternative private member’s Bill, itself based on the ACT provisions<sup>79</sup>.

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*Legislation and Research*, Edward Elgar, Cheltenham, 2010, 15-35.

<sup>75</sup> *PID Act 1994* (NSW) 19.

<sup>76</sup> *PID Act 2010* (Qld), 20(4); *PID Act 2003* (WA), 7A, as inserted by *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA).

<sup>77</sup> This is notwithstanding long term recognition of the validity of such criteria, including support for public disclosure where “to make a disclosure along other channels might be futile or result in the whistleblower being victimised”: SSC 1994, op cit, at par 9.130.

<sup>78</sup> See *PID Act 2012* (ACT), s 27.

<sup>79</sup> See *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth) 31-33 (Austl.).

### 5.2. PID Act

The PID Act is notable for adopting and entrenching the public whistleblowing approach, or “three-tiered” model<sup>80</sup>. Indeed, it is one of the first national laws to do so, comprehensively, given that unlike other laws such as those applying in the United Kingdom, the Act extends to an attempt to deal with the sensitive area of whistleblowing affecting national security and intelligence interests. While its provisions fail to meet the ACT benchmark in some respects, this aspect of the Act nevertheless represents a significant international development – for three reasons.

First, the Act follows its predecessors in supporting the institutional approach, providing that a public or “external” disclosure will retain protection where the whistleblower “believes on reasonable grounds” that a prior investigation is “inadequate”<sup>81</sup>. This mixed subjective-objective test provides more useful guidance than the equivalent Queensland or WA provisions, while being a lower threshold for whistleblowers to meet than the NSW or ACT provisions. It was substantially amended at the Bill stage, after the government’s original Bill proposed a more stringent, objective threshold (that “no reasonable person” could accept that the response was adequate)<sup>82</sup>. As in the ACT, protection for an external disclosure will also only flow in respect of information that is “reasonably necessary” to identify disclosable conduct. However, the PID Act also requires an additional test that the further disclosure must not, on balance, be “contrary to the public interest”, with a range of criteria specified to guide this judgment, including a repetition of the basic public interest objectives of the Act<sup>83</sup>. Whether this test is necessary, or proves to be unreasonable impediment to disclosures, remains to be seen.

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<sup>80</sup> This was an objective of the 2007 policy commitments: see Australian Labor Party (ALP), *Government Information: Restoring trust and integrity*, Australian Labor Party Election 2007 Policy Document, Canberra, October 2007. For further background, see I. Moss, *Report on the Independent Audit into the State of Free Speech in Australia*, Australia’s Right to Know Committee, Sydney, 31 October 2007; A. J. Brown, *Privacy and Public Interest Disclosures – When is it Reasonable to Protect Whistleblowing to the Media?*, in *Privacy Law Bulletin*, 2007, vol. 4, n. 2, 19-28; Brown et al., 2008, *op. cit.* The 2009 parliamentary inquiry gave broad support to the principles of public disclosure, recognizing that anything short of a three-tiered approach would simply “lack credibility”, but only arrived at a narrow and complex compromise recommendation: LACA 2009, *op. cit.*, at 162–65.

<sup>81</sup> *PID Act 2013* (Cth), s 26(1), Table, Item 2, par (c).

<sup>82</sup> See *PID Bill 2013* (Cth) (March), cl. 37, 38, 39 (deleted from final Act); and cl. 26 “designated publication restrictions” (see section 11A of the final Act).

<sup>83</sup> *PID Act 2013* (Cth), sub-s 26(1), Table, Item 2, pars (e), (f); sub-s 26(3).

Second, the Act provides some support to the anti-retaliation approach, but only in a more limited and indirect way. The only circumstances in which a direct disclosure to the media is protected, without prior internal disclosure, is an “emergency disclosure” concerning a “substantial and imminent danger to the health or safety of one or more persons or to the environment”, where there are “exceptional circumstances” justifying the failure to make a prior disclosure<sup>84</sup>. Such circumstances might include the lack of a reasonably safe disclosure avenue, but this is left to interpretation. For an external disclosure *after* a prior internal disclosure, one element of the public interest test is the extent to which the further disclosure “would assist in protecting the discloser from adverse consequences relating to the disclosure”<sup>85</sup> – providing some indirect recognition that an agency’s failure to support and protect a whistleblower may make public disclosure more justifiable.

Third, the Act takes a first, albeit limited and compromised step towards recognition that public whistleblowing should be protected even in respect of some national security and intelligence matters. From the outset, the Government policy was to ensure that whistleblowing to the media would only be protected where the public interest in disclosure outweighed “countervailing public interest factors”, including protection of international relations and national security, and provided that no “intelligence-related information” was publicly released<sup>86</sup>. Consequently, no public disclosure will be protected if it contains “intelligence information” as defined by the Act; and any public disclosure relating to any conduct involving intelligence agencies will only be protected, if it meets the above definition of an “emergency disclosure”<sup>87</sup>. This means that unless an emergency arises (and perhaps even if it does), intelligence agency whistleblowers are treated differently from those in all other agencies; if they make an internal disclosure, then irrespective of its subject matter, they cannot take that disclosure public even if the investigation is patently inadequate. In practice, the definition of “intelligence information” is also so broad, that even an emergency disclosure by an intelligence agency whistleblower is probably unprotected. This is because the definition includes *any* information “that

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<sup>84</sup> *PID Act 2013* (Cth), sub-s 26(1), Table, Item 3.

<sup>85</sup> *PID Act 2013* (Cth), sub-s 26(3), par (ac).

<sup>86</sup> Commonwealth Government, *Government Response: Whistleblower protection: A comprehensive scheme for the Commonwealth public sector*, Tabled by Senator J Ludwig, Special Minister of State, 17 March 2010. Canberra: Commonwealth of Australia.

<sup>87</sup> *PID Act 2013* (Cth), s 26(1), Table, Item 2, pars (h) and (i).

has originated with, or has been received from, an intelligence agency”, which would appear to include any information relating to such an agency<sup>88</sup>. On one hand, therefore, a protected emergency disclosure relating to conduct by or within an intelligence agency is technically possible, making the Act one of the first internationally to recognize this possibility. On the other hand, technicalities in the Act also make it difficult to see when these circumstances might realistically apply.

### *5.3. Looking Forward*

How well the new provisions will work, in respect of the bulk of disclosure activity, remains to be seen. They reinforce the international problem that a workable solution in respect of the coverage of intelligence agencies is yet to be found – given that in principle and practice, there is no justification for a total carve-out of these agencies from this element of the regime. The practical effect of the provisions is that corruption in an intelligence agency could never be the subject of a protected public disclosure, even though identical corruption in any other agency would be, even where the disclosure raises no issues of operational sensitivity or genuine national security interest. Such inconsistencies have the effect of undermining the credibility of the scheme as a whole, both in intelligence agencies and the wider public sector.

Nevertheless, the form of the legislation is such that even in this difficult area, a more effective balance can be envisaged. With the exception of one paragraph, the definition of “intelligence information” is confined to classes of information whose release could indeed be logically argued to have sufficient, real sensitivity to warrant a presumption in favour of retention<sup>89</sup>. This brings the legislation within a hair’s breadth of compliance with the most comprehensive policy principles to date in this area, the Tshwane Principles (2013), developed by the Open Society Justice Initiative<sup>90</sup>. These principles affirm that governments may legitimately withhold information in defined areas of genuine sensitivity,

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<sup>88</sup> *PID Act 2013* (Cth), s 26(1), Table, Item 3, par (f); s 41, in particular, par (a) of subsection 41(1).

<sup>89</sup> See *PID Act 2013* (Cth), s 41, with the exception of par 41(1)(a).

<sup>90</sup> Open Society Justice Initiative, *Global Principles on National Security and Freedom of Information*, June 2013, <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles> (accessed July 2013).

such as defence plans, weapons development, the operations and sources used by intelligence services, and confidential information supplied by foreign governments that is linked to national security matters; but that non-sensitive information should be subject to the same disclosure systems and tests as other official information. Little amendment would be required, therefore, to make the PID Act “Tshwane compliant”.

More broadly, the issues again point to the advantages of developing a more integrated understanding of the relationship between areas of law. Far from simply representing an exercise of freedom of speech, the statutory recognition of public whistleblowing can reinforce the institutional approach, and help fulfill a more effective anti-retaliation approach. Policy resistance to more effective treatment of sensitive information in the context of whistleblowing appears to stem from a failure to distinguish between general rights of public access to information, and the fact that whistleblowing legislation does not concern information in general, but rather, information about reasonably suspected wrongdoing. Given the underlying public interest in the disclosure of such information, it is questionable whether the less rational forms of blanket carve-out legislated for in respect of intelligence agencies would meet constitutional tests of proportionality, if challenged on constitutional or rights-protection grounds. Again, the legislative choices made in the PID Act demonstrate both the advantages of, and need for, a more integrated approach to the intersections between these bodies of law.

## 6. Conclusion

This article has used Australia’s new *Public Interest Disclosure Act 2013 (Cth)*, governing whistleblowing in Australia’s federal public sector, as a case study in how different policy purposes, conceptual approaches and legal options can be combined in the design of better whistleblowing legislation. The new legislation is not perfect, and whistleblowing law reform in Australia is far from complete. On the contrary, law reform in the private sector is long overdue; while serious consideration is only beginning to be given to legislation which uses a “bounty” or reward approach. Some state whistleblowing laws have been recently reformed, but others have not, and none can be regarded as reflecting every element of known best practice. Further, even the new federal public sector legislation reviewed here, contains significant gaps and problems – particularly when public officials disclose wrongdoing by elected members

of Parliament or Ministers, or by intelligence agencies in the event that this needs to go public.

Nevertheless, the long gestation and otherwise comprehensive nature of the new Australian law provides insights into the way in which different legal approaches to whistleblowing can, and should, be integrated. In particular, it is one of the first national laws to seek to integrate divergent approaches to the “anti-retaliation” model of whistleblower protection, including its place in the nation’s employment law system; as well as setting new standards for the role of “public whistleblowing” in such a regime. The law thus provides new departure points, internationally, for efforts to align and reconcile the “anti-retaliation”, “institutional” and “public” approaches to whistleblowing, in a mutually-reinforcing fashion. As seen through innovations in respect of each, legislative pressures have seen the bringing together of approaches which may have previously been seen as disparate or even competing; or which had previously developed more by accident, than design.

The study also reinforces that notwithstanding international interest, there is no single “ideal” or “model” law that can be readily developed and imported into a jurisdiction such as Australia’s federal public sector. The diverse and often intricate ways in which such legal mechanisms must rely on, and integrate with, a range of other legal regimes in any given jurisdiction, mitigate against such attempts, even when the basic objectives and principles of whistleblowing law reform may be clear. Nevertheless, the experience demonstrates that a more ideal *approach* to law reform is feasible – one which recognises the different purposes and dimensions of whistleblowing laws, and thus makes informed legislative choices in particular contexts. This includes the need for continuing, more informed debate about how legal regimes should be developed to protect the disclosure of wrongdoing not only by whistleblowers, or “insiders”, but other categories of informants, complainants and citizens. Overall, the study shows that better integration can be achieved in most, if not all settings between the different legal dimensions or models of whistleblowing to date. As a result, the new Australian law can be regarded as a significant step in the effort towards achieving not only the rhetoric, but reality of whistleblower protection.





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