

RESTORING THE SUNSHINE TO THE SUNSHINE STATE

Priorities for Whistleblowing Law Reform in Queensland

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It all began with a public-interest whistleblower. Yet within a few years of the Fitzgerald Inquiry, Queensland legislative efforts to encourage and protect whistleblowing — while historic in some respects — had fallen short of the types of measures identified as realistically needed to prevent the case for such an inquiry from arising again. This article examines the role of ‘whistleblowing’ or ‘public-interest disclosure’ legislation in modern integrity systems, and the priorities for law reform in Queensland, in light of 20 years of post-Fitzgerald experience as well as recent, comprehensive empirical research into the management of whistleblowing in the Australian public sector. While much has been achieved, this experience demonstrates the need to return to first principles in strengthening whistleblowing arrangements, on basic issues such as mechanisms for ensuring organisational justice for public officers who speak up about wrongdoing, and in recognising the role of the media as a whistleblowing avenue of last resort. The article also charts imperatives for further research and legislative reform to ensure best practice in the protection of whistleblowers in the non-government sectors, as well as non-whistleblower complainants and informants, if Queensland and Australian integrity systems are to return to a position of international leadership.

Introduction

It all began with a public-interest whistleblower. Arguably, the Fitzgerald Inquiry had a long genesis, made possible by a range of political triggers and social factors.

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However, the first that the ABC *Four Corners* journalist Chris Masters learned of the systemic nature of official corruption in Queensland was in 1986, from a Queensland police officer, Jim Slade. ‘Off the record’, Slade confirmed to Masters the correctness of a story afoot within the Australian Bureau of Criminal Intelligence, that Slade had been offered a bribe by one of his own Queensland Police superiors to suppress information about a protected crime syndicate.¹ Other journalists, including the *Courier-Mail*’s Phil Dickie, were also instrumental in exposing the systemic corruption,² but it was the role of whistleblowers, behind and in Masters’ ABC TV *Four Corners* program ‘The Moonlight State’,³ as well as in the inquiry that followed, that stood out as the single most pivotal trigger for this watershed in public life. The importance of whistleblowing for the future of public integrity systems was candidly acknowledged, including by Commissioner Fitzgerald:

Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced. ... There is an urgent need ... for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities.⁴

In 1991, a parliamentary champion of the subsequent reform process, Matt Foley MLA, also recognised the centrality of the issue:

We’re not talking about the seventeenth century. We’re talking about what it was like here four years ago. We’re talking about the loneliness and the terror of many police officers who wanted to be whistleblowers, but who had very good reason to remain silent. Whatever comes out of this process, let us hope that we have a structure of law and administration that will never, ever, ever allow that to happen again.⁵

This article examines the role of ‘whistleblowing’, or ‘public-interest disclosure’, legislation in modern integrity systems, and the priorities for law

¹ Masters (2008).

² See Dickie (1988, 1989).

³ ABC TV, *Four Corners*, ‘The Moonlight State’, aired on 11 May 1987. Interviewees included another Queensland police officer, Nigel Powell. The Fitzgerald Inquiry was established 15 days later. In September 1987, Sergeant Col Dillon also gave evidence to the inquiry of having refused to participate in the system of bribery, and called publicly for other officers to come forward with information. The corruption system collapsed — within four days, Police Commissioner Terence Lewis was stood down, and later jailed for corruption and abuse of office.

⁴ Fitzgerald (1989), p 134. See also Starke (1991), p 205; EARC (1991), p 2.

⁵ Matt Foley MLA, Chair, Parliamentary Committee for Electoral and Administrative Review, Public Seminar on Whistleblower Protection, Brisbane, 19 April 1991, as quoted in EARC (1991), p 9.

reform in Queensland in light of 20 years of post-Fitzgerald experience. It draws on recent empirical research into whistleblowing in the Australian public sector through the Australian Research Council project 'Whistling While They Work'. The complex legislative landscape that developed in Australia in the years after the Fitzgerald Inquiry has been described elsewhere,⁶ as have the key principles for achieving current best practice in legislative regimes for public sector whistleblowing, in light of comparative analysis⁷ and the empirical research.⁸ This article focuses on the lessons for reform in Queensland itself — the place where it all began — in the light of these analyses. It argues that while much has been achieved, experience demonstrates a need to return to first principles in strengthening whistleblowing arrangements. The article also charts the imperatives for further research and reform to ensure best practice in the protection of public-interest whistleblowers in the non-government sector, as well as non-whistleblower complainants and informants, if Queensland and Australian integrity systems are to return to a position of international leadership.

The first part of the article describes the research and key elements of the background to the present analysis, including an overview of the scope of reforms needed to convert the present *Whistleblowers Protection Act 1994* (Qld) into a more effective *Public Interest Disclosure Act*. The second, third and fourth parts focus in more detail on three complex but pivotal areas of reform, concerning effective oversight arrangements, recognition of the role of the media as a whistleblowing avenue of last resort, and mechanisms for ensuring organisational justice for public officers who speak up about wrongdoing. All these issues were demonstrated as central lessons of the Fitzgerald Inquiry, but continue to be signature issues for reform two decades later. Assuming that these lessons are finally to be fully heeded by at least some Australian governments, the fifth part of the article examines the next challenges for legal and policy reform: the resolution of public interest disclosure arrangements covering employees and citizens in the non-government sectors. Finally, the article draws some conclusions.

The Reform Context: Falling Behind Best Practice

The Fitzgerald Inquiry provided Australia's first systematic demonstration, and official vindication, of the value of whistleblowing. In the social sciences, whistleblowing has long been taken 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'.⁹ In this article and the underlying research, it is also taken to mean 'public-interest' whistleblowing, or disclosure about suspected or alleged wrongdoing that affects more than simply the personal or private interests of the person making the disclosure, while also possibly including such interests.

⁶ Brown (2006).

⁷ Brown and Latimer (2007).

⁸ Brown et al (2008).

⁹ Miceli and Near (1984), p 689; see Brown (2008), pp 8–13.

Within a year of the Fitzgerald Inquiry's report, Queensland was the first Australian jurisdiction to provide interim legislative protection to whistleblowers, in the form of explicit criminalisation of reprisals and injunctive powers on the part of public sector integrity agencies.¹⁰ An inquiry by the Queensland Electoral and Administrative Review Commission (EARC), which reported in 1991,¹¹ produced an authoritative guide to the major issues of legislative design, leading to the more permanent *Whistleblowers Protection Act 1994* (Qld) — the most detailed special-purpose whistleblowing legislation in Australia and the world. Such legislation can broadly be seen to be aimed at five major legal effects: the creation of obligations on organisations, employers and others to act on public-interest disclosures; obligations on organisations to provide and maintain a safe and non-discriminatory working environment for persons who make disclosures, especially employees; defences against liability for disciplinary, criminal or civil action that might be taken as a result of disclosure (eg breach of confidence, disclosure of secrets, defamation); the criminalisation of reprisals against persons as a result of a disclosure; and the creation of rights of compensation for persons who suffer damage or loss to themselves or their career for making a disclosure. Today, all Australian state and territory jurisdictions possess public-sector whistleblowing legislation touching on such rights and obligations.¹² While recommendations for Commonwealth legislation date from the same period,¹³ it was only in 2007 that the incoming Rudd federal Labor government committed explicitly to 'provide best-practice legislation to encourage and protect public interest disclosure'¹⁴ as part of its integrity policies. In 2009, pursuant to a Commonwealth government reference, the House of Representatives Standing Committee on Legal and Constitutional Affairs provided strong, updated recommendations as to how this commitment should be implemented.¹⁵

The novelty of the concept of whistleblower protection was clear in 1990, however. Cultural and political uncertainties as to its value explain some immediate legislative limitations, as well as two decades of Commonwealth government ambivalence. Introducing Queensland's interim legislation, Premier Wayne Goss described the term 'whistle-blowing' as 'new to Queensland and new to Australia', thereby requiring 'much research to be done and very careful consideration of the implications of enacting this type of legislation'.¹⁶ The then opposition leader, Russell Cooper, even more clearly displayed the early ambivalence, even when supporting the legislation: 'the last thing that we ... want to see is people in this

¹⁰ *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld).

¹¹ EARC (1991).

¹² Brown (2006).

¹³ See Senate (1994).

¹⁴ ALP (2007).

¹⁵ House of Representatives (2009).

¹⁶ Queensland Parliamentary Debates, Second Reading Speech, *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld), 2 October 1990, pp 3710–11.

State and this nation becoming doblers'.¹⁷ In fact, this was one of the core presumptions upon which the Fitzgerald recommendations and momentum for legislative reform were based. The complexity of encouraging whistleblowing, while also putting in place effective systems to channel and manage it in the public interest, was to prove an ongoing challenge. While sobering data were gathered in Queensland on the types of damage that whistleblowers could suffer,¹⁸ it was only a decade after passage of the *Whistleblowers Protection Act 1994* (Qld) that systematic empirical research commenced into the incidence, significance and outcomes of public sector whistleblowing. This took the form of the multi-jurisdictional study led by the author, involving at its peak 304 government agencies from the Queensland, New South Wales, Western Australian and Commonwealth governments.¹⁹ The most significant survey took place in 2006–07, involving random samples of public officials across 118 agencies, including 32 Queensland government agencies. It established a dataset on the whistleblowing perceptions and experiences of 7,663 respondents, including 1,729 Queensland officials.²⁰ Through its Crime and Misconduct Commission, Ombudsman and Office of the Public Service, the Queensland government played an instrumental part in this research, from inception to analysis.

The rationales for the study included evidence that whistleblowing regimes such as that in Queensland were having some desired effects, but also anecdotal evidence that they were not functioning as well as intended, and ongoing concerns about whether the original reforms were well targeted. Despite providing detailed provisions setting new benchmarks for best practice in some key respects,²¹ Queensland's 1994 legislation did not necessarily reflect best practice in *all* key respects. In the course of the study, this was confirmed by national and international comparative research, which indicated that the *Whistleblowers Protection Act 1994* (Qld) has now been surpassed nationally and internationally in relation to several important features of statutory whistleblowing regimes — as discussed below. The empirical evidence was consistent with these indications. Overall, the research confirmed the high incidence of whistleblowing — overwhelmingly as an internal-to-government process — in the sectors studied, as well as the importance of effective whistleblowing programs for their integrity and accountability. It also confirmed the importance of well-designed whistleblowing legislation as a framework to support those programs. However, it showed that Queensland's strategies had not led to best practice outcomes. Despite the history, relative sophistication and profile of Queensland's legislation, the jurisdiction recorded:

- lower overall confidence in the relevant legislation among public employees than in the other three jurisdictions studied;

¹⁷ Queensland Parliamentary Debates, Second Reading Debate, *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld), 23 October 1990, p.4210.

¹⁸ De Maria (1994); de Maria and Jan (1994).

¹⁹ See generally for results, Brown (2008); Roberts et al (2009).

²⁰ Brown (2008), p 16.

²¹ See Brown (2006), pp ii–iii.

- lower overall trust among public employees as to how they would expect the management of their agency to respond to an employee report of wrongdoing than in the other three jurisdictions studied;
- lower average outcomes in terms of the perceptions of whistleblowers as to how they were treated by the management of their agencies, than in New South Wales or Western Australia (but the same outcome as for Commonwealth employees, who had no comprehensive whistleblowing legislation at the time); and
- lower average comprehensiveness in agency whistleblowing procedures than in the other three jurisdictions studied.²²

The evidence showed that while not all whistleblowers suffer, there was significant variation in outcomes between agencies in all jurisdictions. Many agencies are clearly struggling to recognise the value of whistleblowing, either in principle or in response to existing legislative obligations — especially in Queensland. This indicates that both the content of the Act and its implementation have fallen short of original objectives.

Based on the broad national evidence, a fresh attempt was made to articulate the principles that should inform the design of legislation in an Australian context, by the legal members of the research team — including the Deputy New South Wales Ombudsman, Chris Wheeler, and the Commonwealth Ombudsman, John McMillan.²³ Thirteen key principles were identified. As discussed elsewhere, reforms of varying extent are needed to bring the *Whistleblowers Protection Act 1994* (Qld) into line with best practice as envisaged by these principles.²⁴ No major reform appears necessary in respect of two principles (the need for comprehensiveness in the subject-matter covered by disclosures, and statutory support for a multiplicity of disclosure avenues). However, reform is needed in a further seven areas (including the desirability of renaming the legislation as the *Public Interest Disclosure Act*; extension of the Act to public contractors and their employees; minimum duties and standards governing the assessment and investigation of disclosures by agencies; more flexible confidentiality requirements; and resolution of anomalies in respect of who may be prosecuted for undertaking a criminal reprisal against a whistleblower). In four further areas, to which we now turn, reform can be seen as not just necessary, but imperative.

Oversight and Compliance: Making It Real

The first of the four areas of reform concerns mechanical issues rather than those of high principle or substance. Many of the problems suggested by the empirical research findings, noted briefly above, raise questions about insufficiency and inconsistency of implementation at organisational levels within the public sector.

²² See Roberts (2008), pp 240, 249.

²³ ‘Best Practice Whistleblowing Legislation for the Public Sector: The Key Principles’: see Brown et al (2008). Professor McMillan had also served as a consultant to the EARC in the original 1991 Queensland inquiry into whistleblowing legislation: see n 11, p 8.

²⁴ Brown (2009).

The single most obvious explanation for this is that Queensland's whistleblowing regime was created without any agency being charged with the oversight and coordination of what was always guaranteed to be an inherently challenging scheme. Instead, as noted recently by the Queensland government, the scheme sought to make 'each public sector agency responsible for receiving public interest disclosures about the conduct of its officers, managing the disclosure process and taking steps to protect its officers from reprisals'²⁵ — a worthy and important goal, but one which under-estimated the likelihood that managers, and not simply the colleagues of whistleblowers, would continue to represent the most problematic source of reprisals and other problems.²⁶ In 1994, the decision *not* to institute any operational oversight or coordination was apparently seen as an alternative to a centralised system, with one agency responsible for protecting all whistleblowers.²⁷ In fact, this was a false dichotomy; it would always have been more logical to pursue a more effective path between these two extremes. In drafting the legislation, however, the government proceeded to dismiss the EARC's recommendation that, while no single agency should be the point of receipt, referral and coordination for all public interest disclosures,²⁸ the Criminal Justice Commission (now Crime and Misconduct Commission) should act as a general oversight agency, with power to oversight agency whistleblowing systems and procedures, and give standing or specific directions to agencies regarding modification of their procedures.²⁹

Without even these minimal requirements for coordination and standard-setting, it now seems unsurprising that implementation would be as patchy as has recently been revealed. The CJC did establish a small whistleblowing support unit, without statutory authority or roles, which was wound up by 1999. One apparent reason was the unit's inability to find out about, let alone intervene in, whistleblowing cases being handled by agencies at early stages when intervention might be more productive. Instead, apart from a requirement for agencies to annually report upon disclosures received under the Act, the only provisions for ensuring implementation were a requirement that every agency 'must establish reasonable procedures to protect its officers from reprisals that are, or may be, taken against them by the entity or other officers of the entity',³⁰ and a requirement that the responsible minister (the Premier) 'must prepare for each financial year an annual report to the Legislative Assembly on the administration of this Act'.³¹ These requirements can be seen to have failed substantially. As noted earlier, Queensland government agencies were revealed to have comparatively low-quality whistleblowing procedures — indeed, in many agencies they remained absent. Over the 15 years of the Act's operation, rarely — if ever — has the Premier or the

²⁵ Queensland Government (2009), pp 25–26.

²⁶ See Brown (2008), Ch 5.

²⁷ EARC (1991), pp 122–25, 149–54, 184–88.

²⁸ EARC (1991), pp 122–25.

²⁹ EARC (1991), pp A11–12, A16–17.

³⁰ *Whistleblowers Protection Act 1994* (Qld), s 44.

³¹ *Whistleblowers Protection Act 1994* (Qld), s 31.

Queensland Department of Premier and Cabinet published any comprehensive annual report on the administration of the Act, even as part of standard annual reporting.

The need for an appropriate agency to take an active operational role in overseeing the management of whistleblowing matters, if only as part of the duties of an existing integrity agency, is not a new revelation. In addition to the original EARC recommendation in Queensland, such arrangements are in place under more recent legislation in Victoria (2001), Western Australia (2003) and the Northern Territory (2009), and have recently been recommended in Tasmania, as well as by the House of Representatives Standing Committee in respect of the Commonwealth.³² There, any Commonwealth legislation is expected to confer new operational coordination roles on the Commonwealth Ombudsman. Queensland governments have nevertheless continued to be slow to detect this trend — even after inadequacies in Queensland Health's implementation of the Act were dramatically revealed by the Bundaberg Hospital Commission of Inquiry.³³ That inquiry again recommended that a central integrity agency, the Queensland Ombudsman, be given an oversight role with respect to the management of public-interest disclosures, at least in respect of those not already supervised through mandatory reporting of official misconduct to the Crime and Misconduct Commission.³⁴ This recommendation was supported by the Ombudsman and the Crime and Misconduct Commission, but the Queensland government again declined to implement it, based on advice from a management consultant examining Queensland Health and the then Office of the Public Service Commissioner.³⁵

With empirical research now highlighting the extent of difficulties in implementation in Queensland,³⁶ the case for reform has been reinforced. Fortunately, solutions remain relatively clear. Which public integrity agency should be tasked with these additional responsibilities is subject to a range of considerations, but no government can reasonably expect to achieve substantial improvement in the implementation of the Act unless it takes this step. The starting point is insertion of a new Part in the legislation, establishing a new framework for oversight and coordination, including a designated agency or unit with a clearinghouse and quality assurance role for individual investigations, and responsibility to promote, support and require best-practice agency whistleblowing programs.

While Queensland is in a strong position to rectify such a basic deficiency, and to move to regain its position as both a national and world leader in the quality of its whistleblower protection regime, three issues remain that are more complex to address.

³² House of Representatives (2009), pp 126–28, 132–37

³³ Davies (2005); see also generally Thomas (2007).

³⁴ Davies (2005), p 472, Rec 6.510.

³⁵ OPSC (2006), pp 12–21.

³⁶ Brown et al (2008), pp 269–71, 310–11.

Whatever Happened to the Media?

Remarkably, Queensland's *Whistleblowers Protection Act 1994*, and most legislation that followed in Australia, made no provision in respect of public-interest whistleblowers whose disclosures became known through contact with persons outside government, such as news and current affairs media. It is remarkable because this was how the Fitzgerald Inquiry was triggered, along with subsequent integrity issues including the Bundaberg Hospital Commission of Inquiry, noted above. Several of the legal protections advanced by the legislation, such as an absolute defence against any action for defamation, or breach of professional or commercial confidence³⁷ — key protections imported from the United States — are predicated on the notion that a whistleblower needs to be protected for making matters public. Yet the Queensland legislation only provided for these protections to flow in respect of disclosures made to 'proper authorities', namely the whistleblower's own agency or a relevant integrity agency.

The presumption that disclosures to the media did not need legislative protection rested on the risky, perhaps over-confident, presumption that Queensland's new integrity systems would be so strong as to mean that no public official would again be justified in taking a public interest disclosure into the public domain. The empirical research confirmed that very few public officials desire to make disclosures public.³⁸ Yet history has continued to confirm that, as a last resort, this may sometimes be necessary and justified.

It is also conspicuous that the US legislative approach, which predated the Fitzgerald Inquiry and was referred to in its report, was predicated on the need to protect public whistleblowers. The US approach began, federally, with the *Civil Service Reform Act 1978* (US), public disclosures having been recognised as fundamental due to the experience of the Watergate scandal in the period of the Nixon administration. It was followed by the *Whistleblower Protection Act 1989* (US), which provided legal protections to, and made it illegal to undertake reprisals against, public sector whistleblowers who disclose 'a violation of any law, rule, or regulation' or 'gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety'.³⁹ In addition to applying to a disclosure made 'to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information',⁴⁰ the protections also apply to any other such disclosure — including to the media — where 'not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs'.⁴¹ At time of writing, two Whistleblower Protection Enhancement Bills in the US Congress were expected to be consolidated, passed and signed into law by President Barack Obama, which will only strengthen the protection for whistleblowers who go public

³⁷ *Whistleblowers Protection Act 1994* (Qld), s 39.

³⁸ Brown (2008), Ch 4.

³⁹ *Whistleblower Protection Act 1989* (Title 5 US Code), s 1213(a).

⁴⁰ *Whistleblower Protection Act 1989* (Title 5 US Code), s 1213(a), sub-s 2.

⁴¹ *Whistleblower Protection Act 1989* (Title 5 US Code), s 1213(a), sub-s 1.

by removing the preclusion against public disclosures by ‘national security’ employees.⁴²

In 1998, four years after the Queensland Act, Britain also enacted whistleblowing legislation that presumed legal protection should extend to public whistleblowing. The British approach has since been followed in a range of countries, including South Africa and Japan. The *Public Interest Disclosure Act 1998* (UK) amended the *Employment Rights Act 1996* (UK) by providing legal immunity and rights to compensation for employees who make public interest disclosures across both the public and private sectors. In the United Kingdom, the tribunal may grant protection in respect of a public-interest disclosure to the media if satisfied that the disclosure is (a) reasonable in all the circumstances; (b) not made for personal gain; and (c) meets one of four preconditions — either that (i) the whistleblower reasonably believed he or she would be victimized; (ii) there was no prescribed regulator and he or she reasonably believed the evidence was likely to be concealed or destroyed; (iii) the concern had already been raised with the employer or a prescribed regulator; or (iv) the concern was of an exceptionally serious nature.⁴³

In Australia, the more tentative approach did not mean that official recognition of the significance of public whistleblowing had dropped entirely away. In Queensland, the EARC took a conservative view, describing the continuing legal risks surrounding public disclosures as simply ‘the *quid pro quo* that must be extracted in return for the ... softening of the usually rigorous standards which the law requires for substantiation of allegations of personal impropriety’.⁴⁴ In part, however, this approach was tied to the fact that the EARC also recommended that the Act protect disclosures by ‘any person’, including a wider range of complainants than simply whistleblowers.⁴⁵ The EARC’s reasoning made it clear that, were the Act to be limited to public sector whistleblowers — as largely occurred — then a less restrictive approach was justified. As it was, the EARC recommended that disclosures to the media should at least attract protection where the disclosure concerned a serious, specific and immediate danger to public health or safety. Despite having also narrowed the Act in other respects, in 1994 the Queensland government declined to proceed even on this limited recommendation.

Not long afterwards, however, the New South Wales parliament proceeded to enact a provision broadly recognising the need for protection for media disclosures in reasonable circumstances.⁴⁶ This was based on a proposal by Professor Paul Finn, which had been noted but rejected in Queensland.⁴⁷ While the relevant New South Wales provisions are far from best practice,⁴⁸ it is noteworthy that the empirical

⁴² See, for example, Merritt (2009).

⁴³ *Employment Rights Act 1996* (UK), ss 43G and 43H, as inserted by the *Public Interest Disclosure Act 1998* (UK); see explanatory guide by Public Concern at Work, www.pcaw.co.uk.

⁴⁴ EARC (1991), p 138.

⁴⁵ see Pt III.

⁴⁶ *Protection Disclosures Act 1994* (NSW), s 19.

⁴⁷ see n 10, p 139.

⁴⁸ see Brown (2006), pp 43–44; Brown (2007).

research results for that jurisdiction were more positive than might have been expected. On average, New South Wales government agencies had the most comprehensive procedures for managing whistleblowing, and average outcomes at least as good as any other jurisdiction and sometimes better.⁴⁹ While there may be several explanations for these results, one may be the fact that in New South Wales, at least in principle, it is recognised that it can be legitimate for a whistleblower to repeat their disclosure to the media. This recognition provides a strong motivation for agencies to avoid this, by dealing with internal disclosures more effectively in the first place.

In Queensland, the Bundaberg Hospital Commission of Inquiry also recommended in favour of the extension of protection to public whistleblowing as a last resort.⁵⁰ In 2006, the Queensland opposition even moved unsuccessfully to implement this recommendation.⁵¹ However, the Queensland government again declined to accept either the proposal or the principle behind the recommendation, based on continuing advice from the then Office of the Public Service Commissioner⁵² that ‘untested allegations’ aired in the media could ‘unjustly bring the person against whom the allegations are made into disrepute’, ‘prejudice the conduct of the investigation’ and ‘unnecessarily disrupt the workplace’.

The failure of Queensland policy-making — to date — to recognise the core lesson of the Fitzgerald Inquiry with respect to the role of public whistleblowing shows just how quickly and deeply it is possible to forget. However, it again stands in contrast to recent national trends. In addition to the different New South Wales course, other public inquiries have also concluded in favour of protection of whistleblowing to the media, at least as a last resort.⁵³ A recent audit of government secrecy laws by Irene Moss AO, conducted for Australia’s Right to Know, concluded that public interest disclosure legislation ‘should at least protect whistleblowers who disclose to the media after a reasonable attempt to have the matter dealt with internally or where such a course was impractical’.⁵⁴ Most significantly, at a Commonwealth level, the Rudd Labor government was elected with a commitment to extend legal protection in these areas:

In situations where there may be compelling reason requiring disclosure [to third parties such as journalists], a court will be able to weigh up all the relevant factors and balance the public interest in disclosure against any breach of confidentiality which may have occurred.

In these cases, there will be two key tests to determine when public interest disclosure will attract legal protection. Firstly, where the whistleblower has gone through the available official channels, but has not

⁴⁹ Roberts (2008).

⁵⁰ Davies (2005), p 472, Rec 6.512.

⁵¹ Whistleblowers Protection Amendment Bill 2006.

⁵² Office of the Public Service Commissioner (2006), p 18.

⁵³ For example, Gibbs (1991); Senate Select Committee (1994).

⁵⁴ Moss (2007), p 73.

had success within a reasonable timeframe and, secondly, where the whistleblower is clearly vindicated by their disclosure.⁵⁵

Further, the House of Representatives Standing Committee recently confirmed that protections should extend to public officials' disclosures to the media in at least limited circumstances, given that 'experience has shown that internal processes can sometimes fail' and that 'in some cases ... the disclosure framework within the public sector may not adequately handle an issue and that a subsequent disclosure to the media could serve the public interest'.⁵⁶ Indeed the committee concluded that some protection of disclosures to the media is needed, as 'an important check on procedure' and a 'safety valve' for the system — and that 'A public interest disclosure scheme that does not provide a means for such matters to be brought to light will lack credibility'.⁵⁷

Much of the rationale for ensuring that protections remain available for reasonably made disclosures to the media has been stated elsewhere.⁵⁸ These more recent developments, and the empirical research, confirm the importance of a holistic approach in which the risk of the 'front-page' test is brought directly to bear as a motivating influence for governments to facilitate and properly manage internal whistleblowing in the first instance. A key to resolving the conceptual blockages over how to recognise public whistleblowing lies in a return to first principles — in particular, the problem that, while the common law may have long contained a general principle that a person may assert a public interest defence to criminal or civil liability for a breach of confidentiality, that principle has clearly failed to keep up with the times. Australian common law does contain such a defence, flowing from the famous English principle that 'there is no confidence as to the disclosure of iniquity',⁵⁹ sometimes restated as 'there is no equity in iniquity'. In Australian courts, it has been said that 'the public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will always outweigh the public interest in the preservation of private and confidential information'.⁶⁰ However, it has also been stated that such a principle is 'too broad a statement unless "iniquity" is confined to mean serious crime',⁶¹ and that only disclosure of 'serious' wrongdoing might attract the defence, with little clarity as to when such a requirement might generally be satisfied.⁶² This was why the Senate Select Committee on Public Interest Whistleblowing concluded in 1994 that:

⁵⁵ ALP (2007).

⁵⁶ (2009), p 162–64.

⁵⁷ House of Representatives (2009), p 162.

⁵⁸ Brown (2006), pp 42–43; Brown (2007); Brown et al (2008), pp 278–82.

⁵⁹ Wood V-C in *Gartside v Outram* (1856) 26 LJ Ch 113 at 114. For an extended discussion, see *Attorney-General (UK) v Heinemann Publishers* (1987) 10 NSWLR 86, per Kirby P at 166–70.

⁶⁰ *Allied Mills Ltd v Trade Practices Commn* (1980) 55 FLR 125 per Sheppard J.

⁶¹ *A-G v Hayden (No 2)* (1984) 156 CLR 532, per Gibbs CJ.

⁶² See Lewis (1996).

although the High Court has indicated that the duty of confidentiality may, in particular cases, be modified by the concept of public interest, the category of cases has by no means been described exhaustively. Nor can it be said that the dicta have provided any degree of certainty in the law for whistleblowers.⁶³

The answer remains a clearer statutory defence, one that can be called in aid by whistleblowers who find themselves subject to criminal, civil or disciplinary action for having made a disclosure. In these circumstances, as in any circumstances where a case might be mounted that such a disclosure had led to reprisals or detrimental action, the protection is not automatic. Rather, it consists of a structured discretion to help an independent decision-maker, such as a judge or magistrate, assess whether the disclosure was reasonable, and in the public interest, in all the circumstances. As such, the idea remains far from radical. The basic principles for when a serving official should be entitled to such a defence are relatively simple. In the main, this will be where a matter has already been disclosed internally to the agency concerned and to an external integrity agency of government, or to an external integrity agency alone, and not been acted on in a reasonable time having regard to the nature of the matter; or where a matter is exceptionally serious, and special circumstances exist such as to make prior disclosure, internally or to an external integrity agency, either impossible, unreasonable or pointless. A serious and immediate threat to public health or safety might provide one example of such a circumstance,⁶⁴ but it is just one example. Another is where the authorities to whom a disclosure should normally be made, is reasonably suspected of itself being corrupt, or likely to undertake a reprisal — such as the circumstances that gave rise to the Fitzgerald Inquiry.

The answer to the question of whether a public disclosure has been justified is therefore not something to be made absolute by the legislation, but rather to be made the focus of an independent exercise of discretion using clarified principles. The rationale was succinctly put by Justice Michael Kirby in 1988, after the famous *Spycatcher* case:

Obviously, people in positions of trust should normally keep the secrets of that trust. Equally clearly, it cannot be left to individual employees to be the final arbiters of the public interest that would obscure disclosure. Likewise, it cannot be left entirely to the holders of the secrets. They may be blinded by self interest, tradition or the covering up of wrongdoing — so that they do not see where the true public interest lies. That is why, in the end, the responsibility of judging whether the ‘whistleblower’ was justified, lies with the courts.⁶⁵

⁶³ Senate (1994), para 8.27.

⁶⁴ See House of Representatives (2009).

⁶⁵ Kirby (1988), p 3.

Organisational Justice: The Missing Link

Two further imperatives for reform of the *Whistleblowers Protection Act 1994* (Qld) concern the responsibility of public employers to protect and support employees who report wrongdoing, and the facility with which employees who then suffer detriment can seek effective restitution or compensation. These issues go to the heart of the type of practical protection, as opposed to simply technical legal protection, recommended by the Fitzgerald Inquiry and promised by the original government responses.

As already noted, section 44 of the 1994 Act requires that every agency ‘must establish reasonable procedures to protect its officers from reprisals that are, or may be, taken against them by the entity or other officers of the entity’. However, even in 1994, this fell short of EARC’s original recommendation for detailed statutory guidance on agency systems and procedures, as well as for their oversight.⁶⁶ Even before the recent research, the Queensland provision fell short of practice emerging elsewhere in Australia — especially Victoria, Western Australia and the Northern Territory, where legislation requires agencies to develop detailed procedures dealing with (a) the facilitation of disclosures, (b) the investigation of disclosures and (c) the protection and support of those who make disclosures, all of which must be consistent with standards developed and monitored by the central oversight agency.⁶⁷ The same approach has now been recommended for the Commonwealth.⁶⁸

Nationally, agency whistleblowing programs still tend to lack practical strategies for, and often suggest a lack of management commitment to, the prevention and minimisation of the pressures, risks and conflicts that surround workplace-based reporting. Of 175 agencies whose procedures were assessed nationally, only five were rated as satisfying all the requirements set out in the current Australian Standard for Whistleblower Protection Programs for Entities.⁶⁹ The weakest elements in agency programs tended to be strategies for practical protection, including reprisal risk assessment, internal witness support, and support for managers in the exercise of often-difficult responsibilities. As noted earlier, the Queensland agencies studied had, on average, the least comprehensive procedures of any jurisdiction, making them something of the worst of a bad lot. Further research has resulted in a second report, setting out a basis for better practice whistleblowing programs for agencies, and contributing to the redesign of the Australian Standard.⁷⁰ The results confirm the imperative for reform of the Queensland Act, to bring it into line with better practice in other jurisdictions, for legislatively required minimum procedures, support and oversight in their quality and implementation, and clear recognition of the responsibility upon senior management for the welfare of employees who fulfil their duty to report wrongdoing.

⁶⁶ EARC (1991), pp A11–12

⁶⁷ See Brown (2006), pp 46–47.

⁶⁸ House of Representatives (2009).

⁶⁹ AS 8004-2003; Brown (2008), pp 206–32; Roberts (2008), p 249.

⁷⁰ Roberts et al (2009).

Despite all efforts, however, the research confirmed that it is always likely that some whistleblowers will suffer high levels of stress and adverse outcomes, that some reprisals will not be preventable, that the risk always remains that an agency may fail to adequately support an employee, or that mistakes will be made. The challenge remains: what forms of remedial action are sufficient to provide a measure of justice to those individuals who emerge from the whistleblowing experience with unfair temporary or permanent damage to their career prospects or personal well-being? Both the interim and permanent Queensland legislation provided for injunctive relief by the Crime and Misconduct Commission, as well as the criminalisation of reprisals. However, the only real mechanism for facilitating justice for the individual in the event of unjust adverse outcomes is a person's entitlement under section 43 to sue for damages in the District or Supreme Court, for a breach by any person of their duty under section 41 not to 'cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, anybody has made, or may make, a public interest disclosure'. Most comparable Australian legislation contains like provisions, New South Wales providing the main exception.

In 1991, the EARC intended this provision to operate generously to compensate mistreated whistleblowers for damage to lives and careers as a result of reasonable actions in blowing the whistle. This included recognition that, under normal employment law — such as in an action for wrongful dismissal — 'the amount of damages available may bear no relationship to the true extent of the damage suffered by a whistleblower'.⁷¹ However, it is now clear that the means chosen to make compensation available to whistleblowers have never worked as intended. In practice, this compensation avenue has proved difficult to access and of marginal, if any, utility in providing remedies for damage suffered — for three reasons.

First, the Queensland Court of Appeal has interpreted the *Whistleblowers Protection Act 1994* (Qld) in such a way as to restrict the civil liability that may fall on an employing agency for failing to properly support a whistleblower, due to the way in which the Act stipulates both remedies — criminal and civil — for what are effectively the same detrimental acts. Although sections 42 (criminal) and 43 (civil) were intended to create two parallel, independent avenues of redress, where detriment is caused to a whistleblower, in *Howard v State of Queensland*,⁷² it was decided that a whistleblower could not seek damages against their employing agency for detriment suffered in the workplace, because the actions leading to the detriment constituted an offence for which the employer could not be held vicariously liable:

⁷¹ EARC (1991), pp 180–82.

⁷² *Howard v State of Queensland* [2000] QCA 223 (9 June 2000), per Thomas JA (with whom the rest of court agreed).

Illegal acts committed by an employee which are inimical to the purposes of the employment are regarded as falling outside the course of employment and no vicarious liability falls upon the employer for them.⁷³

Ironically, the court also found this situation to have been reinforced by the agency's responsibility to establish reasonable procedures to protect its officers under section 44 — as if this tended to presume that the agency had actually done so, and therefore could not be held responsible for foreseeable detrimental action or inaction on the part of managers or staff. The net effect was to limit the availability of section 43 compensation to those circumstances where a criminal prosecution succeeded against a known defendant for having undertaken a reprisal. This largely nullified the potential use of section 43, especially for the bulk of types of detriment suffered, which the research revealed to be indirect, adverse workplace outcomes within the influence of management rather than direct, deliberate acts of reprisal.⁷⁴ Also, ironically — given the EARC's intention that section 43 should provide a more generous remedial measure than normal employment law — the result was sharply different to a parallel New South Wales case under general employment law in which the New South Wales Police Service was found liable for damages of \$664,270 for having breached its duty of care to support and protect an officer who reported suspected corrupt conduct.⁷⁵

A second reason why the compensation provision has proved to be of little or no utility is the lack of clarity in its relationship with other employee rights to compensation flowing from issues of workplace health and safety. In *Reeves-Board v Queensland University of Technology*, the Supreme Court found that, since the right to compensation under section 43 provides for 'damages for personal injury by an employee from an employer to which the employment was a significant contributing factor', any action for compensation must also comply with the requirements of the *WorkCover Queensland Act 1996*.⁷⁶ Consequently, the court struck out those parts of the whistleblower's claim seeking damages for personal injury for failing to comply with certain requirements.

Significantly, the opposite occurred in Victoria, where in *Owens v University of Melbourne & Anor*, the Supreme Court found that nothing in the *Accident Compensation Act 1985* (Vic) limited the right of a whistleblower to seek damages from her employer under section 19 of the *Whistleblowers Protection Act 2001* (Vic).⁷⁷ This was partly because in Victoria, the whistleblowing legislation came after the workers' compensation legislation. More importantly, the Victorian Court also recognised the different purposes and nature of the legislation, and the fact that the whistleblowing legislation was aimed at a broader conception of employers'

⁷³ *Howard v State of Queensland* [2000] QCA 223 (9 June 2000), per Thomas JA (with whom the rest of court agreed).

⁷⁴ See Brown (2008), p 129.

⁷⁵ *Wheaton v State of NSW*, unreported, District Court of NSW, No 7322 of 1998 (2 February 2001), per Cooper J; see NSW Ombudsman (2009), p 57.

⁷⁶ *Reeves-Board v Queensland University of Technology* [2001] QSC 314 (28 August 2001), [2002] 2 Qd R 85, per Mullins J.

⁷⁷ *Owens v University of Melbourne & Anor* [2008] VSC 174 (27 May 2008), per Judd J.

responsibilities to protect their employees than the definition of ‘serious injury’ in the workers’ compensation legislation.⁷⁸ The contrasting results highlight the imperative that, rather than being set up as a compensation avenue which tries to run entirely parallel to employment law, the right to compensation under section 43 needs to be made an explicit part of current employment law, even if also supported by a more general right to damages in tort for cases where the breached duty lies outside the employment relationship.

The third reason is the cost and risk involved in any action for tort in the general courts under section 43, given that the plaintiff must necessarily incur significant legal costs to bring the action in the first place while also facing normal risks of costs being imposed against them should they fail. The scope for both types of costs is increased by the ill-defined nature of the duty or duties that are alleged to have been breached, and the uncertainty of the evidentiary requirements needed to demonstrate any breach. It is little surprise that most public employees (or former employees) are likely to walk away, even when they have valid claims which it would be in the public interest to litigate, rather than take a compensation avenue that is likely to prolong or worsen their ordeal.

Significantly, the Queensland Act does point the way to solutions. Part of the answer lies in decoupling the right to compensation for employers’ breaches of duty of care from circumstances giving rise to direct criminal liability for reprisals, and part in making explicit that breaches of care may fall short of acts to directly ‘cause’ detriment, and instead also include omissions or neglect which fail to address foreseeable risks of general adverse workplace outcomes, in a manner more closely integrated with conventional workplace health and safety law. Other key issues relate simply to feasible access to a sufficiently low-cost, reasonably specialised court or tribunal to handle the substantive issues closer to their merits. In South Australia and Western Australia, such an avenue is contemplated through an alternative right for whistleblowers to seek compensation in the Equal Opportunity Tribunal for any victimisation,⁷⁹ although this too does not appear to have so far proved effective. Queensland is unique, however, in providing direct access to the state’s Industrial Relations Commission for redress, primarily through a direct link between whistleblower protection and workplace relations law by providing that an employee may challenge a dismissal as unfair where that action was taken as a result of their having made a public-interest disclosure.⁸⁰

In fact, this link returns the question of compensation to the very same issues examined by the EARC in 1991, highlighting that an independent employment tribunal was probably always the best forum to determine whether an employer has failed to properly protect and support its employee, and award compensation where necessary — provided this is not limited to actions for wrongful dismissal, and provided an appropriate statutory framework was provided for the special types of issues and orders involved. For Queensland government employees, this would appear to require a more effective and appropriate tribunal. At a national level, it is significant that the transformation of Australian employment law under the *Fair*

⁷⁸ *Owens v University of Melbourne & Anor* VSC 174 (27 May 2008), per Judd J.

⁷⁹ See Brown (2006), pp 39–40.

⁸⁰ *Industrial Relations Act 1998* (Qld), s 73(2)(f)(i)

Work Act 2009 (Cth) and complementary state legislation also creates new possibilities elsewhere. For example, the House of Representatives Standing Committee recommended that a federal public sector whistleblowing regime be supported by recognition of the right to make a public-interest disclosure as a protected workplace right within this regime, even before the new national framework became law.⁸¹ The significance of this is also discussed further in the next section.

The necessity for reform in this area is reinforced by the fact that, while no other Australian jurisdiction may yet have cracked this nut, the effectiveness of a low-cost compensation regime based in the employment tribunal system has been the cornerstone of an at least partially effective public interest disclosure regime in Britain. There, the regime applies equally to the public sector and the private sector, with the *Public Interest Disclosure Act 1998* (UK) having embedded whistleblower protection in the *Employment Rights Act 1996* (UK) rather than creating stand-alone legislation. Its focus is almost solely on driving better organisational responses and protection of employees, by providing an avenue for compensating mistreated whistleblowers through the national Employment Appeals Tribunal system (the equivalent of Fair Work Australia).⁸² Damages may be pursued for dismissal but also actions short of dismissal, are uncapped, and are assessed according to what is 'just and equitable in all the circumstances', having regard to the reprisals or failures complained of and the nature of the loss or damage suffered by the worker.⁸³

To achieve the whistleblower protection objectives originally set out following the Fitzgerald Inquiry, it is clear that a comparable, more flexible and targeted compensation avenue is needed. The solution includes amending section 43 of the Act to provide that damages may be sought in the Industrial Relations Commission against any person (namely an employing agency) who fails to discharge their duty to protect and support their employees from any such damage as a result of a whistleblowing incident. Given that those prepared to make the greatest effort to find justice may not necessarily always be those who most deserve it, legislative reform should also be directed to requiring agencies to prevent the need to defend compensation actions by volunteering compensation whenever a failure of protection is administratively identified, and to empowering a central oversight agency to take action on behalf of mistreated whistleblowers as needed.

Public-interest Whistleblowing in the Non-government Sector: The New Priority

The long, slow circle of history makes the above issues of whistleblowing policy as relevant to reform today as they were after the Fitzgerald Inquiry. In addition, this is further reinforced by two policy issues left to one side at that time, which have now come to the forefront of the law reform agenda. In part, the difficulty of grappling with some of these issues 20 years ago helps explain some of the decisions then

⁸¹ House of Representatives Standing Committee (2009), p 104.

⁸² Gobert and Punch (2000); Calland and Dehn (2004); generally www.pcaw.co.uk.

⁸³ *Employment Rights Act 1996* (UK), s 49(2).

made. Irrespective of this, the issues demonstrate the importance of resolving the reforms needed to public sector whistleblowing regimes in order to move on to these next, larger questions.

The first issue is the need to ensure that effective legal protections are available for all complainants or informants who supply information to authorities regarding corruption or maladministration in the public sector — not just whistleblowers. The definition of ‘whistleblowing’ used throughout this article is based on the extra significance and effort required to protect those who disclose wrongdoing by or within an organisation of which they are a member, or with which they have a privileged or special relationship such as to mean their disclosure comes ‘from within’ (eg former employees, contractors, employees of contractors, volunteers). However, persons who disclose suspected or alleged wrongdoing, and who are not members of the organisation about which they are disclosing, also have the right to remain free of reprisal or victimisation for so doing — even though they are not whistleblowers.

A key reason for directly addressing the adequacy of legal protections for public complainants or informants in general is that this issue has frequently come to confuse both the definition and nature of whistleblower protection. In Queensland, the confusion has been considerable, contributing to the poor implementation of the Act. It began in 1991, when the EARC assessed that ‘there is no compelling reason why greater protection should be available to persons who report crimes committed by their employer [whistleblowers] than is available to any person ... who reports illegal conduct of any nature’.⁸⁴ In other words, the EARC concluded that any person should be able to claim ‘whistleblower’ protection under the Act. From a policy perspective, this was an error — there are many reasons why special strategies are needed to protect persons who report wrongdoing by their own employer. When implementing the EARC report, the Queensland government fortunately avoided this approach in large part, narrowing the field of the Act back to whistleblowers for most types of wrongdoing (official misconduct, maladministration, waste of public funds).⁸⁵ However, the legislation still allowed a public-interest disclosure by ‘any person’, such as private sector employees and ordinary members of the public, in respect of dangers to the health or safety of a person with a disability, and dangers to the environment.⁸⁶ For these wrongdoing types, the Act is both a whistleblowing law, and a law to protect complainants or informants in general.

Where whistleblowing laws afford protection to ‘any person’ in this way, they run the risk of frustrating the core purpose of the legislation. This is because many, if not most, complaints of wrongdoing against public agencies by members of the public then technically become public-interest disclosures under the whistleblowing legislation — even when they are no more than general complaints. Jurisdictions taking this approach generally have been forced to try to regain control over the breadth of such matters by either erecting other legislative limits to the matters caught by the Act, erecting administrative barriers to the making of disclosures, or

⁸⁴ EARC (1991), p 14.

⁸⁵ *Electoral and Administrative Review Act 1989* (Qld), ss 15–18.

⁸⁶ *Electoral and Administrative Review Act 1989* (Qld), s 19.

not implementing the legislation at all. Further, many of the protections that are central to whistleblowing are rarely needed or appropriate for the protection of non-whistleblower complainants or witnesses. Table 1 seeks to highlight this by repeating the five basic legal effects achieved or intended by whistleblowing legislation, discussed at the outset of the article.

Table 1. Relevance of whistleblowing protections to other forms of disclosure

No.	Type of legal effect	Whistleblowers Protection Act 1994 (Qld)	General relevance for encouraging and protecting:	
			Whistleblowers (organisation members)	Other complainants (clients, public)
1.	Obligations on organisations/ employers, and others, to receive and act upon disclosure	ss 29, 30	High (many incentives not to deal will disclosures)	Medium (all complainants have a right to action on complaints)
2.	Obligations on organisations/ employers to provide and maintain a safe and non-discriminatory working environment for persons who make disclosures	s 44	High (crucial issue at the heart of the legislation)	Low (only relevant for non-whistleblower-complainants at high risk, eg in residential or custodial care)
3.	Defences against liability for disciplinary, criminal or civil actions that might be taken as a result of disclosure (eg breach of confidence, defamation)	s 39	High (crucial issue at the heart of the legislation)	Low (defences usually provided by other legal processes, eg court evidence, parl privilege)
4.	Criminalisation of reprisals against persons as a result of a disclosure	s 42	High	Medium (no complainant should suffer reprisal)
5.	Rights of compensation for persons who suffer damage or loss to themselves or their career for making a disclosure	s 43	High (crucial issue)	Low (should be available but is rarely required)

It poses the question of whether the main legal effects being attempted by whistleblowing legislation in respect of the employees or other members of the organisation concerned should be considered to be as routinely relevant to non-whistleblowing disclosures.

The answers suggested in Table 1, if accepted, demonstrate why it has proved neither appropriate nor effective to try to achieve the protection of non-whistleblower complainants in the same legislation. Instead, there is a valid case for

governments to review the adequacy and consistency of basic protections for any deserving citizen in the position of a complainant or witness. Much Queensland legislation relating to public integrity and accountability already contains relevant protections — for example, the criminalisation of reprisals — separately from the whistleblowing protection legislation. Examples include the *Ombudsman Act 2001*,⁸⁷ the *Crime and Misconduct Act 2001*,⁸⁸ the *Child Protection Act 1999*⁸⁹ and the *Guardianship and Administration Act 2000*.⁹⁰ These provisions also function as complementary protections for whistleblowers, but are designed for all categories of complainant or witness, including general members of the public. There is a strong case for a public review of their extent and adequacy, separately to reforms to the *Whistleblower Protection Act 1994*. Such review would have the additional advantage that, once amendments have been introduced to bring other relevant Queensland legislation into line with best practice in public complainant protection — including environmental protection, public health and safety and disability services legislation — protections for ‘any person’ who makes a public-interest disclosure on these matters should then also be able to transferred from the *Whistleblower Protection Act 1994* to more appropriate legislation.

A second, more important issue is the imperative for Australian governments to begin addressing whistleblower protection issues more comprehensively in the non-government sector. For many years, it has been clear that a more general framework for the protection of public-interest whistleblowers in the private sector is also needed.⁹¹ This is also important for Queensland, because the *Whistleblowers Protection Act 1994* is also one of the few legislative efforts to extend ‘general’ whistleblower protection to private sector wrongdoing in limited circumstances, with limited protections. The same is true in South Australia, where the *Whistleblowers Protection Act 1993* extends protection to any person (s 5) who discloses wrongdoing (principally, ‘illegal activity’) by any ‘adult person’ or ‘body corporate’, in addition to any government agency (s 3). In other words, in these jurisdictions, at least some of the legislation operates in a sector-blind fashion.

However, additional problems can be seen with what is again a confusing confluence of legislative purposes and policies. Neither of these approaches provides a model for extending private sector whistleblower protection — not least because they operate at a very general level, with legal effects and obligations again detached from any employment or ‘whistleblowing’ relationship. Instead, some of the tailored complainant protection provisions just mentioned, where they include employment protections, may well provide more effective protections for private sector whistleblowers.

Nevertheless, private sector whistleblower protection has become a real issue. It recognises state boundaries far less than public sector legislation, given that regulatory regimes governing the private sector tend to span state and territory

⁸⁷ *Ombudsman Act 2001*, ss 38, 39, 45, 47.

⁸⁸ *Crime and Misconduct Act 2001*, ss 203, 211, 212, 338, 344.

⁸⁹ *Child Protection Act 1999*, ss 22, 159Q.

⁹⁰ *Guardianship and Administration Act 2000*, s 247.

⁹¹ See, for example, Senate (1994).

boundaries and involve all levels of government, especially the Commonwealth. The chief problem is that while the Commonwealth has gradually been moving into the field of private sector whistleblower protection, this movement has tended to be *ad hoc*, not necessarily following consistent or best practice principles, nor learning from existing experience under public sector legislation.

Two examples will suffice. In 2007, the *Aged Care Act 1997* (Cth) was amended to increase the accountability of companies and organisations receiving Commonwealth funds for aged care assistance, especially residential care ('approved providers'). Such providers must now take 'reasonable measures' to require any staff member who suspects a physical or sexual assault to report their suspicion internally, to the police or to the department,⁹² and to ensure, 'as far as reasonably practicable', that such a staff member is not victimised. Staff members are also protected from legal, disciplinary or employment repercussions, and have a right to compensation if mistreated.⁹³ The second example is Australia's corporations law which, in 2004, was amended to include general whistleblowing provisions for Australian companies, with respect to suspected breaches of corporations law, under Part 9.4AAA of the *Corporations Act 2001* (Cth). This is the most extensive whistleblowing regime applying in the private sector to date. It provides protection for company officers, employees or contractors for any relevant disclosure made to the Australian Security and Investments Commission (ASIC), an internal or external auditor, a director, secretary or senior manager of the company, or a person authorised by the company to receive disclosures⁹⁴ — but not third parties or the media, even as a last resort. Protections include relief from civil or criminal liability, a right to seek reinstatement in the event of a termination of their contract of employment, and a criminal offence of victimisation with an associated right to compensation for damage.⁹⁵

The need for a more considered, less *ad hoc* approach to private sector whistleblower protection is demonstrated by two aspects of the latter provisions: their preclusion against protection flowing to anyone who does not give their name,⁹⁶ and their requirement for the disclosure to be made 'in good faith'.⁹⁷ Neither of these qualifications is consistent with best legislative practice as understood in the public sector, despite there being no obvious reason for any difference. The 'good faith' requirement, in particular, conflicts directly with state and international approaches, which generally recognise that public-interest disclosures may often be subject to 'mixed motives' — that is, often accompanied by other grievances or conflicts, which do not necessarily, if at all, reduce the significance of the

⁹² *Aged Care Act 1997* (Cth), s 63.1AA(5).

⁹³ *Aged Care Act 1997* (Cth), s 96.8.

⁹⁴ *Corporations Act 2001* (Cth), s 1317AA(1)(b).

⁹⁵ *Corporations Act 2001* (Cth), ss 1317AB–AD. Almost identical provisions are also contained in sections 337A–337D of the *Fair Work (Registered Organisations) Act 2009* (Cth).

⁹⁶ That is, no anonymous or initially anonymous disclosures: s 1317AA(1)(c).

⁹⁷ *Corporations Act 2001* (Cth), s 1317AA(1)(d).

information or the need for protection.⁹⁸ By contrast, ‘good faith’ is subject to widely differing interpretations in practice, and often means that a disclosure must be not just honest, but well intentioned and free of malice. This is the meaning accorded by ASIC, whose own public information repeats an opinion stated in the commentary on the exposure draft Bill:⁹⁹

This [good faith requirement] is considered appropriate given the need to discourage malicious or unfounded disclosures being made to ASIC. Where a person has a malicious or secondary purpose in making a disclosure, it is considered that the good faith requirement would not be met.

Apart from showing an unrealistic understanding of the nature of whistleblowing, these presumptions contain a direct disincentive to reporting, given that protection will not extend to any disclosure unless a whistleblower can be confident it will be universally regarded as ‘pure’. The regime has been criticised on this ground.¹⁰⁰ Perhaps most obviously, it is not consistent with legislative best practice as understood in the public sector.

As noted earlier, the advent of a national industrial relations regime provides a new opportunity to consider how whistleblower protection can be pursued across the private sector. Clearly, no state can go it alone. Under the *Fair Work Act 2009* (Cth), the issues of workplace relations central to the well-being of whistleblowers employed by trading or financial corporations in Queensland are no longer within the influence of the Queensland Industrial Relations Commission, but rather the federal system of National Employment Standards and workplace rights, overseen by Fair Work Australia and the Fair Work Ombudsman. The resolution of confusion regarding the content and reach of Queensland’s hybrid public sector whistleblowing law lies in part in a coordinated approach by which equivalent, upgraded provisions are pursued nationally for the remaining sectors. Pressure for the further extension of whistleblower protections for private sector employees is only likely to grow, as regulatory regimes become more sophisticated, especially in closely regulated industries and areas of publicly funded services. Ensuring organisational justice for these employees, alongside public sector employees, represents an important next challenge for Australian public policy and collaborative federalism — one that reinforces the importance of learning the full lessons of experience from state public sector regimes such as in Queensland.

Conclusions: Maintaining the Fitzgerald Vision

It all began with a public interest whistleblower. The fact that public employees remain willing to speak up about perceived wrongdoing, now most often through much-reformed official channels, continues to provide perhaps the greatest single cornerstone of public integrity, in Queensland and elsewhere. This article has nevertheless charted the somewhat troubled history of the legislative effort to

⁹⁸ See McCall (1989), p 15; EARC (1991); Fox (1993), p 144; Senate (1994), pp 170–72; House of Representatives (2009), pp 63, 72.

⁹⁹ See ASIC (2009).

¹⁰⁰ Latimer (2006).

realise the Fitzgerald vision, by identifying the extent to which, even within a few years of the Fitzgerald Inquiry, that historic effort had fallen short of the types of measures identified as realistically needed. Fortunately, in the light of new research, the imperatives and nature of reform needed to restore and maintain that vision are relatively clear.

The first part of the article described the research, and provided an overview of the scope of reforms needed to convert the present *Whistleblower Protection Act 1994* (Qld) into a more effective *Public Interest Disclosure Act*. The second, third and fourth parts focused in more detail on complex but pivotal areas of reform, in the areas of oversight, recognition of the role of the media as a whistleblowing avenue of last resort, and mechanisms for ensuring organisational justice for public officers who speak up about wrongdoing. These were all central lessons of the Fitzgerald Inquiry. Assuming that these lessons are finally now to be fully heeded, the last part of the article examined the next challenges for legal and policy reform in public-interest whistleblowing: the resolution of public-interest disclosure arrangements covering employees and citizens in the non-government sector.

While much has been achieved, 20 years of experience since the Fitzgerald Inquiry demonstrates starkly the need to return to first principles in strengthening whistleblowing arrangements. Alike, governments and citizens need to remember clearly the lessons of the past, while turning confidently to the future. With such reforms, Queensland's integrity system has the potential to return to a position of national and international leadership. As usual, the realisation of this potential now turns merely on political clarity, commitment and will.

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