

 **Weeding out WikiLeaks (and why it won't work): legislative recognition of public whistleblowing in Australia**

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**Abstract**<sup>1</sup>

Even in midsummer, the historic Ellingham Hall, Norfolk, is a grey place. For Australians used to brighter sunshine year round, it would retain that slight English dinginess even if its most famous resident was not under house arrest. Yet, among the legal problems facing the Australian citizen Julian Assange, the most important challenges are not especially well known. Assange founded WikiLeaks in 2006 as a website dedicated to the secure receipt and anonymous publication of inside information too sensitive or risky for information-holders to release any other way. The bulk if not the entirety of disclosures of public importance since that time were not authorised by the institutions concerned. In other words, as intended, they constitute 'leaks.' Questions of when unauthorised disclosure of information is warranted, and by whom and how such judgments are to be made, are not new in democracies that have long wrestled with the public interest value of whistleblowing.<sup>2</sup> However, the entry of new media into this territory, spearheaded by WikiLeaks, has brought public whistleblowing to the forefront of international debate as never before. This article reviews key political responses to WikiLeaks, internationally but especially in Assange's home state of Australia, for their lessons for current and future directions in law reform with respect to public whistleblowing.

**Introduction**

Public whistleblowing involves disclosure outside the organisation concerned or other official channels, typically to or in the wider media. Not all leaking is necessarily whistleblowing (for example, it may involve information which is politically sensitive, but does not necessarily evidence wrongdoing). Similarly, not all whistleblowing necessarily involves leaking (for example, when it involves internal or regulatory disclosures, as discussed below). Nevertheless, public whistleblowing does typically constitute leaking, since it places unauthorised disclosures into the public domain, and often sees a whistleblower remain an anonymous or confidential source, at least initially. Public whistleblowing has long provided the quintessential example of what whistleblowing is about, to the extent that some researchers question whether disclosures which do *not* reach the public domain should be categorised as whistleblowing at all.<sup>3</sup>

The first part of the article discusses the rise and impacts of WikiLeaks as a media organisation catering especially to whistleblowers. It shows the importance of these and other definitional issues to a full understanding of the regulatory and legal context in which WikiLeaks and like organisations now sit. The second part of the article explains, however, that this regulatory context is not new. In the integrity and accountability systems of some liberal democracies, the process of statutory recognition of the role of public whistleblowing has been underway for more than 20 years. In Australia and the UK, legislative design has come to focus squarely on practical questions about how the public interest in 'unauthorised' disclosure should be recognised, as well as by whom – including a new provision in Queensland, Australia, that appears to represent the simplest legal test of its kind in the world today.

Against this grain, the third part of the article reviews current attempts to single out WikiLeaks and new media publishers for special treatment, simply because they have developed new specialties in the recruitment of confidential sources. The knee-jerk reactions of some US and Australian authorities to this new manifestation of an old phenomenon, including their inconsistent treatment of more traditional publishers using identical tactics of source recruitment, highlights the need for a more considered approach. Finally, some elements of that approach are previewed. Key among these are a more practical response to the management of public whistleblowing, including not only further Australian commitments to effective public interest disclosure legislation, but lessons from Australia's new federal media "shield law", which strengthens journalists' ability to protect the identity of confidential sources.

In conclusion, challenges continue to confront the process of whistleblowing law reform as a whole. Equally, questions remain about the obligations of all media publishers, in terms of how they access and publish confidential information, irrespective of whether they are characterised as part of the 'new' or 'traditional' sectors. The answers do not lie, however, in blanket rejections of unauthorised disclosure as inherently contrary to the public interest – but rather in recognising the value of the type of 'sunshine' for which Australian climates are famous, and which in the new media era is only a more powerful force. Faced with this era, the conflicted responses of some Australian leaders, under the shadow of an unsustainable US government position, have reinforced the need for a long-term vision about the role of public whistleblowing in ensuring integrity in government. Fortunately, such a vision offers benefits for government, the media, whistleblowers and the broader public alike.

### **Whistleblowing and leaking**

Aimed at exposing abuse of power among institutions anywhere in the world, WikiLeaks was launched in December 2006 as a website specialising in the untraceable receipt and publication of documentary evidence from whistleblowers and other leakers. Since 2009, combined with controversy surrounding Julian Assange's relations with traditional or 'old' media, the strategy has made the organisation a game-changer in debates over public whistleblowing. WikiLeaks has been described as "a byword for debate about the very nature of journalism and the role of journalists."<sup>4</sup>

At least two effects have been especially fundamental: WikiLeaks' convincing promises of a new level of technological anonymity and untraceability to those whistleblowers and other sources who seek it (that is, who do not otherwise do anything to identify themselves), and its commitment to publish more source material or primary evidence than was ever possible, and possibly desirable, in the pre-internet media age. This second innovation has been the source of some defining criticisms. Australian author John Birmingham described WikiLeaks as "not so much a reporting outlet as a stateless, digital hive-mind with revolutionary pretensions."<sup>5</sup> This assessment focused on signs that one idea may have been to facilitate the indiscriminate leaking of vast volumes of information simply because it was confidential, and therefore likely to de-stabilise whatever powerful institutions or regimes it concerned, irrespective of actual content. In fact, the site's stated and operating philosophies have always been more traditional – even if ill-defined and problematic in other ways. From inception, the site has been aimed at whistleblowers, or others in custody of information which they believe should be in the public domain for reasons of public interest, however contested and contestable. WikiLeaks continues to describe its own *raison d'être* as "principled leaking."<sup>6</sup> Critics have been quick to observe the extent to which it, too, has been forced to be selective in how it chooses and presents those disclosures that its personnel consider of greatest public importance.<sup>7</sup>

It is questionable whether the objective of publishing newsworthy confidential information for the purpose of promoting political transparency and accountability can be properly described as 'revolutionary.' Even if so, this objective as much reinforces as differentiates WikiLeaks' place among the traditional media – at least in respect of the core values ascribed to leaked information. According to the investigative journalist Andrew Fowler, WikiLeaks and Assange have done no more than deliver "an old-fashioned idea reborn: real journalism is simply the disclosure of whatever powerful interests want kept secret."<sup>8</sup> Whether revolutionary or not, this reality is central to the behaviour of the free media and its role in any democracy. Even when classed as leaking – i.e. unauthorised disclosure irrespective of subject or motive – the veteran political journalist Laurie Oakes describes such disclosure as no less than

the difference between a democracy and an authoritarian society ... The risk of being found out via leaks makes those in authority think twice about telling porkies [lies], performing their duties sloppily, behaving badly, or rorting the system."<sup>9</sup>

Despite assessing this to be "probably not the generally held community view", Oakes argues that "leakers, whatever their motivation, serve the public interest' simply because of their importance to free journalism (being first with important news is, in essence, what being a reporter is all about)."<sup>10</sup> Assange's tensions with traditional media organisations are owed in part to the fact, according to Fowler, that "journalists, too, will have to be more demanding of governments if they are to be believed or trusted."<sup>11</sup>

Like other media, WikiLeaks' target sources have been those who would release inside information which they know or believe to provide evidence of wrongdoing within, or by, organisations, institutions or governments and which needs to be addressed in ways that as yet, it has not been. In other words, it is the sources themselves who are called upon, by virtue of their position and judgment, to provide the first stage of editorial discretion. There are other logical target sources, including individuals who may not be insiders (and therefore not whistleblowers), but who are privy to important information for which no effective official or media avenue exists. However, whistleblowers remain the primary targets, and it is whistleblower-sourced material that has given WikiLeaks such impact.

In established liberal democracies, there is no reason to believe that whistleblowers attracted by WikiLeaks differ from those that have gone before – although this remains a key question for study. To date, US and Australian research suggests that the majority of organisational citizens choose and prefer to reveal their concerns about wrongdoing within their own organisation first, or via other official channels, and are only inspired to "go public" in very limited circumstances.<sup>12</sup> These are mainly when internal or regulatory disclosures are not actioned to a whistleblower's satisfaction, when whistleblowers begin to suffer detrimental outcomes as a result of the disclosure(s), and when public disclosure comes to be perceived as an avenue of last resort or defence. Theories as to when whistleblowers are likely to go to the media *in the first instance* – especially with desires for the type of anonymity assumed in the original WikiLeaks model – are only now being empirically tested.<sup>13</sup>

What is known from the longer history is that whistleblowing often has a recognisable public value, even though naturally, and

commonly, conflict-ridden. Accordingly, its role is increasingly recognised in the integrity and accountability systems of modern societies, as symbolised in the United States by the US *Whistleblower Protection Act 1989*. From research, policy and existing legislation, it is already established that key tests of the validity of disclosure revolve not around interests and motivations as perceived by either the source or the recipient, but around a more objective idea of 'the public interest' served by a given disclosure, based on its subject matter and implications. Given that perceptions of personal and official wrongdoing come in all shapes and sizes, one threshold for identifying 'public interest' whistleblowing is that the possible wrongdoing affects more than simply the personal or private interests of the person making the disclosure.<sup>14</sup> This is just the first of a number of definitional challenges, with the key questions becoming how, when, and by whom, it is to be decided that a disclosure meets definitions which attract different legal consequences to those that otherwise apply. However, these challenges are not new, and have been the focus of legislative change in a number of jurisdictions.<sup>15</sup> Within this process, the need for legislative recognition of the role of *public* whistleblowing has become increasingly axiomatic, at least in principle.<sup>16</sup>

### **Statutory recognition of public whistleblowing**

Despite not being a new issue, the recognition of public whistleblowing has posed special problems in those jurisdictions trying to deal with the matter – for many of the same reasons that WikiLeaks has now brought these questions to a head. Given that the impetus for recognising whistleblowing at all tends to flow from disclosures that reach the public domain, the citizens of functioning democracies are left in little doubt as to the value of public whistleblowing. Even if only a small proportion of all whistleblowing, seminal events such as the US Pentagon Papers (1971), Watergate (1973), and the unraveling of systemic corruption in Australia through the Fitzgerald Inquiry (1987-1989)<sup>17</sup> show the significance that attaches to public as opposed to simply internal or regulatory whistleblowing. Nevertheless, statutory recognition of this ultimate form of whistleblowing is progressing down a long and very unfinished road.

Even when generalised commitment to protection of whistleblowing has been strong, there are three reasons why statutory recognition of public whistleblowing has been slow. First, in common law countries, it has sometimes been presumed that public whistleblowers might not need explicit legal protection, given the principle that a person may always assert a public interest defence to a criminal or civil breach of confidentiality.<sup>18</sup> As long ago as 1994, an Australian Senate Select Committee on Public Interest Whistleblowing concluded that this principle no longer provided "any degree of certainty in the law",<sup>19</sup> with similar acknowledgement underway within the UK itself. Nevertheless, Australia's first permanent whistleblowing law – the *Whistleblowers Protection Act 1993* (South Australia) – chose to preserve, rather than codify, this ill-defined principle. This legislation applied to disclosures made to any "person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure" – a provision which did not necessarily disturb the common law position, and theoretically included the media, but without being at all clear on the point.

The second obstacle to reform was an assumption that, if an effective public integrity system was built which protected internal and regulatory whistleblowing, then public whistleblowing should no longer ever be required. Despite recommendations that public whistleblowing should be protected at least where a disclosure concerned a serious, specific and immediate danger to public health or safety,<sup>20</sup> Australia's next law – the *Whistleblower Protection Act 1993* (Queensland) – neutralised the common law principle by excluding the media as a valid avenue for public interest disclosures. Most of Australia's State whistleblowing laws, and many international ones, followed suit.

A third, related, but even more naive, assumption was that it remained best to leave government with the final say as to when public disclosure of official information was or was not in the public interest. The *Whistleblower Protection Act 1989* (US) extended legal protection to disclosures outside official channels, only 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 defence or the conduct of foreign affairs."<sup>21</sup> Recent laws, such as Canada's federal *Public Servants Disclosure Protection Act 2005*, have provided similarly – protecting a public disclosure "if there is not sufficient time" to disclose through official channels; but only in respect of imminent, substantial and specific dangers to life, health, safety or the environment, or a "serious offence" under law;<sup>22</sup> and not in respect of any information "the disclosure of which is subject to any restriction created by or under any Act of Parliament."<sup>23</sup> In many instances, this becomes self-neutralising legislation.

Over any of these approaches, the more logical step was to explicitly recognise and codify public whistleblowing, and instead provide workable rules. The first known law to attempt this was Australia's *Protected Disclosures Act 1994* (New South Wales). Contrary to other Australian approaches, this was, until recently, the only law to expressly include a 'journalist' among the persons to whom public officials can blow the whistle – as a last resort, and provided the disclosure is "substantially true."<sup>24</sup> This reform was followed, four years later, by the more influential *Public Interest Disclosure Act 1998* (UK), which extended employment protection and compensation rights to employees who make 'further' disclosures beyond the employer and regulators, provided the disclosure is reasonable in all the circumstances, not made for personal gain, and either has already been raised with the employer or a regulator, or involves (a) reasonable fears of victimisation, (b) reasonable belief that evidence was likely to be concealed or destroyed, or (c) an exceptionally serious concern.<sup>25</sup>

This "three-tiered model" of (1) internal, (2) regulatory and (3) public whistleblowing is now recognised internationally as the logical approach. Nevertheless, in practice it continues to be viewed with 'unease' by some policymakers.<sup>26</sup> Among the countries that have legislated for public sector whistleblower protection of any kind, very few have expressly protected disclosures at the third tier, with Romania emerging in recent analyses as the only European country to do so apart from the UK.<sup>27</sup> Australia, however, can again claim to be providing leadership in the field. In Queensland, major, tragic, criminal

medical negligence in a public hospital led to fresh recommendations in 2005 that concerned insiders should be able to 'escalate' their complaints to central agencies and then to the media.<sup>28</sup> While this recommendation was initially rejected, in 2007 the three-tiered model was endorsed at Australia's national (federal) level by the incoming Rudd Labor government. Committed to reversing its predecessor's draconian approach to the treatment of whistleblowers and journalists alike,<sup>29</sup> the government undertook to match NSW and at least protect disclosures where a "whistleblower has gone through the available official channels, but has not had success within a reasonable timeframe and ... where the whistleblower is clearly vindicated by their disclosure."<sup>30</sup>

At the same time, an audit of government secrecy by Irene Moss AO, commissioned by a national coalition of media organisations (*Right To Know*), recommended that 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";<sup>31</sup> as did *Whistleblowing in the Australian Public Sector*, launched by the federal Special Minister of State, Senator John Faulkner in September 2008.<sup>32</sup> As a result, in 2009 a House of Representatives Committee chaired by Mark Dreyfus QC MHR, reported that public whistleblowing must be part of the scheme. According to its report, experience had shown that internal processes "can sometimes fail", that "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", and that any other approach would simply "lack credibility."<sup>33</sup>

While the committee's recommendation was narrow,<sup>34</sup> the Rudd Government's response confirmed that all types of wrongdoing covered by its proposed Public Interest Disclosure Bill could be the subject of further, public disclosure, provided a number of tests were met. Confirming the complexity of the problem, no public disclosures were to be protected where they related to 'intelligence-related information' or were to a foreign government.<sup>35</sup> The commitment to legislative reform was renewed in September 2010, after the August federal election, when a minority Labor government was formed with the support of the Independent MP, Andrew Wilkie, a former military officer and national security analyst who publicly blew the whistle on the lack of evidence to support Australia's imminent participation in the war in Iraq. The agreements underpinning the government included commitments to open and transparent governance, and to have "legislation to protect whistleblowers" passed by June 30, 2011.<sup>36</sup> When this deadline loomed without any Bill, nor any further consultation between the government and key stakeholders, the Government altered the deadline for finalisation of the legislation to "the end of 2011."<sup>37</sup>

In the meantime, Queensland also moved to review its legislation, and set a new bar in its *Public Interest Disclosure Act* of September 2010.<sup>38</sup> In an act of leadership, and using a simplified form of the NSW formulation from 16 years earlier, the Bligh Labor government expanded the scheme onto the three-tiered model. The Act provides that public officials will continue to receive legal protections if they take a public interest disclosure to a journalist – provided they have first taken it to an official authority, and that authority has (i) "decided not to investigate or deal with the disclosure"; (ii) investigated but not recommended "the taking of any action"; or (iii) not notified the person, within six months of the disclosure, whether or not the disclosure was to be investigated or dealt with.<sup>39</sup> While the reform presupposes that a whistleblower must first attempt to make their disclosure within "official channels", it compares favourably with existing precedents. Given the flexibility of the internal and regulatory disclosure regime provided by the Act, and recognition in the parliamentary debates that internal or regulatory decisions "not to investigate or deal with" a disclosure would include a "deemed refusal" to act,<sup>40</sup> the provision appears workable within the integrity system in which it sits.

In context, this element of the new Queensland legislation arguably provides the simplest and clearest provision to date for public servants to be able to go public with serious concerns about wrongdoing. While other elements of the reformed regime may not yet accord with international best practice, on the issue of public whistleblowing it has set a new standard. Crucially for present purposes, there is also no attempt to exclude new media in general, or WikiLeaks in particular, from the definition of media to which such disclosures might be made. The definition of a 'journalist' is simply "a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media."<sup>41</sup> While this is a somewhat traditional definition, and presupposes some degree of full-time, part-time or past professional experience in the field of news publication, there is no real question that it would include the staff or volunteers of an at least semi-professional, web-based publisher such as WikiLeaks. The significance of this fact will now be further discussed.

### **Weeding out WikiLeaks?**

By contrast, with the developments outlined above, the predominant response to WikiLeaks as a publisher who specialises in attracting whistleblowers has been one of knee-jerk quasi-hysteria. While some of the US official reaction may be overblown as suggested by *Time Magazine* correspondents<sup>42</sup>, its underlying presumption against the legitimacy of any unauthorised disclosure of official information is consistent with the longer history of conflicted policy over the role of public whistleblowing. It is also primarily traditional media organisations in the US who have been embarrassed by WikiLeaks' publications. At the US government's request, *The New York Times* – who was later on publisher of material shared by WikiLeaks – had previously sat on the story for over a year, that the US Government was conducting illegal electronic surveillance of its own citizens, before eventually publishing it in December 2005.<sup>43</sup>

The US Congress has proved incapable of reforming whistleblowing regimes such as its own 1989 legislation, but protection of public whistleblowing has continued to receive some support from the "reporter's privilege" flowing to investigative journalists

from the US Constitution's First Amendment protection of free speech. Here, it has become clear that, far from seeing whistleblowing in historical context, the US and other governments have reacted to WikiLeaks as if both this particular publisher, and its sources, are somehow entirely different from the other media to whom such protection flows. Political disapproval has seen a concerted effort to re-categorise WikiLeaks as something other than a publisher of news or journalism, specifically to ensure that it cannot claim the "reporter's privilege."<sup>44</sup> US legislators have also made clear that they are not prepared to countenance the inclusion of any organisation like WikiLeaks in the definition of journalism for the purpose of a federal journalism "shield law." Such laws entitle journalists, if called to give evidence in legal proceedings, to make a case to withhold the identity of their confidential sources. Reform of evidence laws to create an adequate journalists' privilege has been debated for as long as whistleblowing legislation itself. However, the reaction to WikiLeaks is credited as having sealed the fate of federal US reform of this kind, with two reform Bills dying after four years of effort with the end of the 111th Congress in January 2011.<sup>45</sup> By contrast with the definition of journalism provided in Queensland's *Public Interest Disclosure Act*, volunteer, part-time or recreational web publishers were to be excluded from the US reform, in favour of persons who 'regularly' participate in news publishing "for a substantial portion of the person's livelihood or for substantial financial gain."

Although a range of US journalism interests including the Society of Professional Journalists (SPJ) distanced themselves from WikiLeaks, the dangers of such restrictive legislative categorisations of journalism was well-stated by the SPJ prior to the WikiLeaks controversy: "if you have too narrow of a definition... it is the first step to have the government defining what a journalist is. The next step would be the licensing of journalists, and we would be opposed to that."<sup>46</sup> In the end, to make sure, US congressmen reportedly prepared an amendment to exclude WikiLeaks from any protection, if the Bills had passed.<sup>47</sup>

An equivalent reaction is evident in the significant legal woes confronting Julian Assange. While including the personal Swedish charges which gave rise to his British house arrest, the most grave is a US grand jury investigation based in Alexandria, Virginia. Since at least December 2010, this has been assessing whether charges can be laid not only against alleged whistleblowers; but against WikiLeaks personnel for receiving and communicating the information. The investigation's *subpoenas* reportedly indicate it is investigating offences involving, but not necessarily limited to: "conspiracy to communicate or transmit national defence information" in violation of the US *Espionage Act*; "knowingly accessing a computer without authorisation or exceeding authorised access" in violation of the *Computer Abuse and Fraud Act*; and "knowingly stealing or converting any record or thing of value of the United States."<sup>48</sup>

If WikiLeaks personnel can be prosecuted for gaining information by direct hacking or theft, there is no question that US authorities will do so – for the same reason that the lawless behaviour of News International Ltd staff in hacking the phone records of numerous public figures, for publication in the London-based *News of the World*, has attracted widespread opprobrium. However the notion of prosecuting a media organisation for simply communicating or converting confidential information flies in the face of any recognition of the political and cultural realities of the importance of public whistleblowing. Apart from the emergence of any evidence of hacking or theft, the only basis on which the US might prosecute WikiLeaks personnel is if shown to have participated directly in the illegal release of information itself – i.e., not the act of publishing, but the act of whistleblowing. Here the attempt to impose a new and different standard on the conduct of WikiLeaks as a new media player has reached almost farcical proportions. In August 2010, the Pentagon labelled WikiLeaks' activities as a "brazen solicitation to US government officials to break the law", and called on WikiLeaks to "do the right thing", return confidential information and desist from encouraging further leaks.<sup>49</sup> In fact, for all the reasons pointed out in the first part of the article, this rationale for trying to weed out WikiLeaks as different from the traditional media relied on the abandonment of any sustainable legal standard. At time of writing, the WikiLeaks site complied at least partly with the Pentagon demand, stating that "like other media outlets conducting investigative journalism, we accept (but do not solicit) anonymous sources of information ... We do not ask for material."<sup>50</sup> However the Pentagon demand was close to absurd, and the WikiLeaks response was too compliant, because it is quite clear that other media outlets *do* actively solicit anonymous and confidential information – just as they always have.

For example, the *Wall Street Journal* provides a 'safehouse' online drop-box for confidential information, which its site promotes in these terms:

We want your help

Documents and databases:

They're key to modern journalism. But they're almost always hidden behind locked doors, especially when they detail wrongdoing such as fraud, abuse, pollution, insider trading, and other harms. That's why we need your help. If you have newsworthy contracts, correspondence, emails, financial records or databases from companies, government agencies or non-profits, you can send them to us using the SafeHouse service.

What to send us:

SafeHouse's interests are as broad as the world The Wall Street Journal covers – including politics, government, banking, Wall Street, deals and finance, corporations, labor, law, national security and foreign affairs. We're open to receiving information in nearly any format, from text files to audio recordings and photos. ...<sup>51</sup>

In Australia, the Australian Broadcasting Corporation (ABC) News website acknowledges explicitly this kind of solicitation is aimed at inside sources:

If you have a news tip or you are a whistleblower who would like the lid lifted on a story of public interest, you can contact the ABC News Online Investigations Unit.

The ABC News Online Investigative Unit encourages whistleblowers, and others with access to information they believe should be revealed for the public good, to contact us.

To leak a story, please fill out the form below and click the "Send" button.

Please click here if you wish to send information anonymously.<sup>52</sup>

The US government does not appear to have demanded that News Corporation or the ABC desist from soliciting confidential information in an identical way. This is because the standard now imposed on WikiLeaks is not one which has been, or realistically can be, imposed on any media organisation – at least, not in any nation claiming to have free media and a commitment to liberal democracy. Even *The New York Times*, which has taken particular steps to help isolate WikiLeaks from itself and other media organisations,<sup>52</sup> appears to have more recently recognised the risk of this action. Noting the Obama administration's "unprecedented crackdown" on official leaking using the *Espionage Act*, at least one *The New York Times* correspondent is now prepared to describe WikiLeaks as a publisher of information rather than simply a source, noting that the US government is now engaged in a rare effort to prosecute "those who publish secrets, rather than those who leak them."<sup>54</sup>

### Lessons from, and for, law reform

In Australia, against the trend of positive developments noted earlier, authorities have danced on the edge of the same, blind anti-WikiLeaks line. US official thinking resonated in Australia in December 2010, when within days of WikiLeaks' publication of a large volume of US diplomatic cables, Prime Minister Julia Gillard agreed publicly with US leaders that Assange had "broken the law."<sup>55</sup> However, not only was the law which Assange had allegedly broken not identified, but even upon searching, the Australian Federal Police could not find one. Similarly, the Attorney-General, Robert McClelland promised assistance to any US investigation and canvassed cancellation of Assange's Australian passport. However, this threat was countermanded by the Foreign Minister, Kevin Rudd – responsible for passports and consular assistance to Australians – who pointed out that the government had no basis for treating Assange differently to other Australian citizens or media.<sup>56</sup> Ultimately, the Prime Minister's claims rested simply on the premise that WikiLeaks' acts must be illegal because the "foundation stone" of its publishing lay in an "illegal act" – the unauthorised disclosure by the leaker or whistleblower.

This position was consistent with some other actions of the Australian government, which somewhat like the Obama administration, has been credited with commencing twice as many criminal investigations into official leaks as the predecessor it criticised.<sup>57</sup> Nevertheless, the blanket assumption that any release of unauthorised information must be treated as unlawful, irrespective of the public interest, stands in sharp contrast with other more positive Australian and international trends. Just as Queensland legislators adopted a definition of journalism into which WikiLeaks would fit, Australia's own federal journalism "shield law" – taking the form of amendments to the *Evidence Act 1995 (Cth)* – adopted an even more inclusive definition. Unlike the US legislative effort, these reforms bore fruit in March 2011, after a number of false starts.<sup>58</sup> The reform was spearheaded by the Opposition Senator George Brandis, and independent Andrew Wilkie.<sup>59</sup> Both their Bills proposed to define 'journalist' to mean a person "who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium." In the end, the government also accepted an amendment proposed by the Australian Greens, to extend the privilege to any person "engaged and active in the publication of news", with the definition of "news medium" expanded to "any medium."<sup>60</sup> Either definition, but certainly that which passed, would include a web publisher such as WikiLeaks – a fact that was obvious, given that the amendments were made directly under the shadow of the WikiLeaks storm, even if WikiLeaks itself was not mentioned in parliamentary debate.

The passage of Australia's federal journalism "shield law" does not replace the need for whistleblowing law reform. It shields journalists from automatic prosecution for contempt of court, and even when it applies, does nothing to protect whistleblowers from prosecution for releasing information. Indeed, the movement towards a "shield law" led Opposition Senators to twice call on the government to progress the "complementary legislation designed to protect whistleblowers who make confidential disclosures in the public interest ... these pieces of legislation should be concurrently introduced for comprehensive consideration."<sup>61</sup> Nevertheless, both lines of reform reject the absolutist position that just because disclosure has not been specifically authorised, it should be treated as incapable of reflecting sufficient public interest to mean that it should not also be treated as unlawful.

Controversy over WikiLeaks has reinforced the rationale for frameworks in which unworkable presumptions against any disclosure are removed, and contestation over the competing public interests made more manageable. Faced with the challenges of the new media age, present responses reinforce the need to maintain a clear, long-term vision about the role of public whistleblowing in public life. Definitions of what is, or is not, of sufficient public interest to justify unauthorised disclosure require newly negotiated reference points. Just as whistleblowing is recognised as legitimate by reference to agreed concepts of the wrongdoing that should be disclosed, secrecy requires re-legitimation with reference to the actual harm that disclosure would occasion.<sup>62</sup>

The key questions are those with which the design of public whistleblowing provisions have already been grappling. The special challenge posed by WikiLeaks is the reminder that not all disclosures might be identifiable in advance as dealing with subjects with clear public interest contest (such as agreed categories of wrongdoing). As well, new capacity for disclosure and publication of large volumes of information may reveal a new picture of how institutions behave, which in itself may identify

types of wrongdoing which have not previously been discernable or identifiable, or which contribute to changes in standards of integrity. However, these are challenges to which policy solutions can be found. Within the Australian government's current proposals, any blanket assumptions that particular categories of information are incapable of warranting public disclosure (whether because they are "intelligence-related", or involve "protection of international relations" or "Cabinet confidentiality"<sup>62</sup>) are destined for more problems. But against this, the acceptance of the principle of public whistleblowing as an element of a three-tiered model, and the relative simplicity of a test such as that in the new Queensland public interest disclosure legislation, auger well for a more visionary approach.

The second key question reinforced by the advent of the new media is by whom the calculation of sufficient public interest is to be made. WikiLeaks has re-energised this question by making it more conceivable that it might be answered in a new and more democratic fashion, if also chaotic and destabilising – by the people themselves, including whistleblowers. The new information age has brought an explosion in the proportion of people who can make decisions for themselves about the value of information, and indeed to help spread it, irrespective of traditional assumptions regarding merit, capacity or skill. The logic of statutory recognition of public whistleblowing has been reinforced by the need for new principles and rules. Without these, as Australia's House of Representatives Committee reported in early 2009, more insiders will simply resort to leaking in ways that are more difficult to control and address, including "anonymous disclosure of official information on [internet] sites such as WikiLeaks."<sup>64</sup>

At the other extreme, government might theoretically answer the challenge by simply making all information transparent. Another senior Australian politician, Malcolm Turnbull, has responded to WikiLeaks by observing that the real solution for governments who wish to avoid the embarrassment of unauthorised disclosures, is to conduct all business in a way that can stand up to scrutiny, if or when its details become publicly known.<sup>65</sup> As typified by the *Spycatcher* case in which Turnbull successfully fought the Thatcher government's attempts to suppress the memoirs of a former British intelligence officer, the answer lies in clearer principles for when and how disclosure serves the public interest, and some independent adjudication of when those principles are satisfied. Finally, as stated by Justice Michael Kirby, one of the judges in that case, "it cannot be left to individual employees to be the final arbiters of the public interest that would obscure disclosure", but "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."<sup>66</sup>

The WikiLeaks controversy thus reinforces the rationale for a new whistleblowing framework, so that current unworkable presumptions against any disclosure are removed, and such conflicts made more manageable. Whether or not new rules are needed to regulate how and by whom confidential information is published, it is well established that new rules are needed to govern when it may be disclosed without liability to the officials who disclose. Faced with the challenges of the new media age, present responses reinforce the need to maintain a clear vision of the role of public whistleblowing. In turn, this reinforces why Australian leaders, and perhaps others, need to hold their nerve and put in place the type of public interest disclosure legislation to which they have committed.

### **Conclusion: WikiLeaks in context**

This article has reviewed key political responses to WikiLeaks, placing these in the context of a longer process of statutory recognition of public whistleblowing, for the purpose of identifying future directions in law reform. Some of the responses to WikiLeaks are, in fact, not reactions against whistleblowing nor publication of confidential information in itself, but to particular conflicts over methods and standards of publication. They are also arguments over the responsibility of the media towards their own confidential sources and other innocent parties – all topics deserving of ongoing research and debate. Serious questions continue to confront the duties and obligations of all media publishers, in terms of how they access and publish confidential information, irrespective of whether they are characterised as part of the 'new' or 'traditional' sectors. However none of these questions change the reality that web-based publishers such as WikiLeaks are involved in the collection and creation of news; nor that as an avenue for whistleblowing, they have vividly confirmed much that we already knew.

This article has dealt only with the recognition of *public* whistleblowing. We know that for whistleblowing to play its role in allowing or forcing improvement in the integrity of institutions, the risk of the 'front page' test provided by traditional and new media alike is just one of three main legal drivers for change in institutional culture, practices and leadership.<sup>67</sup> Also imperative are better systems for more productive management of internal and regulatory whistleblowing, especially through strong lead agency support and oversight, and practical remedies for public officials whose lives and careers suffer as the result of having made a public interest disclosure – especially the awarding of compensation for damage flowing from organisational failures to act, support, and protect. In the Australian context, this last imperative is currently the most neglected, although it is the area in which British precedents have been most promising. Also, the article has touched simply on the recognition of whistleblowing as it applies to the government sector. By contrast, with some jurisdictions, only marginal progress has been made in Australia towards whistleblower protection in the business and non-government sectors.<sup>68</sup>

Nevertheless, the contrast between Australian, British and US responses reinforces the need for leaders to hold their nerve in enacting effective public interest disclosure legislation. In the case of federal legislative reform in Australia, there is ground for concern that if the reform timetable continues to slip, institutional inertia and resistance may mean that many years pass before the opportunity is regained. Plainly, there continue to be answers in our own experience, consistently with past recognition of the power of 'sunshine' as an integrity mechanism in Australia, which in the new media era is only becoming a more powerful force. Faced with the challenges of this era, conflicting responses have reinforced the need to maintain a long-term vision about the role of public whistleblowing in ensuring integrity in government. Fortunately, such a vision offers benefits for government, the media, whistleblowers and the public alike.

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#### Footnotes

- 1 This article draws on the paper "Flying Foxes, WikiLeaks and Freedom of Speech" presented to the International Whistleblowing Research Network Conference, Middlesex University, London, June 24, 2011. It also draws on work-in-progress under the Australian Research Council funded project, *Blowing Boldly: The Changing Roles, Avenues and Impacts of Public Interest Whistleblowing in the Era of Secure Online Technologies* (ARC DP1095696). The author thanks his colleague Dr Suelette Dreyfus, and colleagues Simon Milton, Rachelle Bosua and Reeva Lederman from the University of Melbourne for assistance and contributions to the thinking in this article; the two anonymous reviewers; and Julian Assange for a discussion about whistleblowing at Ellingham Hall, Norfolk, UK (June 17, 2011).
- 2 Whistleblowing is taken to mean the "disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices" under the control of that organisation, "to persons or organisations that may be able to effect action" (Miceli & Near 1984: 689). For good reason, this well accepted definition focuses on wrongdoing "under the control of their [the whistleblower's] employer", but it should be noted that organisation members who are not necessarily employees can or should also often be seen as falling within the definition.
- 3 See discussion reviewed by Miceli et al 2008: 7-10, 85.
- 4 Gunnell (2011).
- 5 Birmingham (2010:24)
- 6 <http://wikileaks.org/About.html> (viewed June 16, 2011).
- 7 Including Birmingham (2010), op cit.
- 8 Fowler (2011:236)
- 9 Oakes (2005); Oakes (2010:295)
- 10 Oakes (2010:296)
- 11 Fowler (2011:234)
- 12 For Australian research, conducted by the author and colleagues in 2005-2009 under the Australian Research Council-funded project *Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector*

*Organisations* (ARC LP0560303). See Brown (2008); Annakin (2011); Roberts, Brown & Olsen (2011), forthcoming. This research included survey and interview data drawn from 8,800 public servants across 118 federal, state and local government agencies, along with analysis of the practices and procedures of a further 186 agencies (total 304 agencies).

13 Under the project described at n.1, above.

14 See Senate Select Committee (1994:par 22); and Brown (2008:8-13) and associated discussion.

15 See Calland & Dehn (2004); Lewis (2010).

16 See e.g. Lewis (1996); Brown, Latimer, McMillan & Wheeler (2008); Banisar (2009/2011); Osterhaus & Fagan (2009).

17 On the role of whistleblowing at the inception of Australia's Fitzgerald Inquiry, see Brown (2009a).

18 This principle is descended from the English principle that 'there is no confidence as to the disclosure of iniquity': 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 166-170.

19 Senate (1994: par 8.27).

20 EARC (1991:138). See Brown (2009a).

21 *Whistleblower Protection Act 1989* (Title 5 US Code), Sec. 1213(a). Subsection 1.

22 *Public Servants Disclosure Protection Act 2005*, S.C. 2005, c. 46. Section 16(1).

23 Section 16(1.1).

24 *Protection Disclosures Act 1994* (NSW), s 19. Now *Public Interest Disclosures Act 1994* (NSW), s 19. 'Journalist' was and is defined to mean "a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media" (s 4).

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

26 As described by Vandekerckhove (2010:16-17).

27 See Vandekerckhove (2010); Osterhaus & Fagan (2009).

28 Davies (2005: 472, par 6.512); for a general account, see Thomas (2007).

29 For background, see Media Entertainment and Arts Alliance (2007), *Official Spin: Censorship and Control of the Australian Press 2007* (8-10); Brown (2007).

30 ALP (2007).

31 Moss (2007:73).

32 Brown (2008).

33 House of Representatives (2009:162-4).

34 where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety': House of Representatives (2009), Recommendation 21.

35 Commonwealth Government (2010).

36 *Agreement between Hon Julia Gillard, Prime Minister and Andrew Wilkie MHR*, 2 September 2010, clause 3.4. See similarly, *Agreement between Hon Julia Gillard, Prime Minister et al and Tony Windsor MHR and Rob Oakeshott MHR*, 7 September 2010, clause 3.1(e).

37 Hon Gary Gray AO, Special Minister of State, 'Public Interest Disclosure Bill', Media Release GG 24/11, June 27, 2011 at [http://www.smos.gov.au/media/2011/mr\\_242011.html](http://www.smos.gov.au/media/2011/mr_242011.html).

38 For background to this reform, see Brown (2009a, 2009b, 2010).

39 Section 20, *Public Interest Disclosure Act 2010 (Qld)*. "Journalist' is defined to mean 'a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media': s 20(4).

40 Queensland Parliamentary Debates (Hansard), Brisbane Australia, September 16, 2010: 3413, per the Hon Anna Bligh, Premier of Queensland.

41 *Public Interest Disclosure Act 2010 (Qld)*, s 20(4).

42 See Calabresi (2010); Zakaria (2010).

43 Mayer (2011:54).

44 See e.g. Peters (2011). Cf the view of the counsel for the *New York Times* in the 1971 Pentagon Papers case: J Goodale, 'WikiLeaks Probe: Pentagon Papers Injustice Déjà vu', *The Daily Beast*, 12 June 2011 at <http://www.thedailybeast.com/articles/2011/06/13/wikileaks-probe-spoils-pentagon-papers-anniversary.html>.

45 *Free Flow of Information Bills*, originating in 2007: H.R. 985 and S. 448. See Peters (2011: 688).

46 As quoted by W. Casey, 'Even As Media Evolves, Lawmakers Try To Define It', *National Journal*, 19 March 2009 (updated January 2, 2011) at <http://www.nationaljournal.com/njonline/even-as-media-evolves-lawmakers-try-to-define-it-20090319> (viewed June 19, 2011).

47 Peters (2011: 693-4).

48 E Pilkington, "WikiLeaks: US opens grand jury hearing: First session of process of deciding whether to prosecute website and founder Julian Assange for espionage" (*The Guardian* May 11, 2011).

49 "Pentagon demands WikiLeaks return files", United Press International, August 5, 2010 at [http://www.upi.com/Top\\_News/US/2010/08/05/Pentagon-demands-WikiLeaks-return-files/UPI-81571281043446](http://www.upi.com/Top_News/US/2010/08/05/Pentagon-demands-WikiLeaks-return-files/UPI-81571281043446); V Gienger & A Capaccio, "Pentagon Demands WikiLeaks Return All Documents", *Bloomberg Businessweek*, August 5, 2010 at <http://www.businessweek.com/news/2010-08-05/pentagon-demands-wikileaks-return-all-documents.html>.

50 "About WikiLeaks", at <http://www.wikileaks.org/about> (viewed August 1, 2011).

51 *Wall Street Journal* at <https://www.wsjsafehouse.com> (viewed June 18, 2011).

52 *Australian Broadcasting Corporation (ABC) News Online* at <http://www.abc.net.au/news/contact/>; <http://www.abc.net.au/news/investigations/contact.htm> (viewed June 16, 2011).

53 See Fowler (2011:158-163).

54 S. Shane, "US Pressing Its Crackdown Against Leaks", *New York Times*, June 17, 2011. At [http://www.nytimes.com/2011/06/18/us/politics/18leak.html?\\_r=1&hp](http://www.nytimes.com/2011/06/18/us/politics/18leak.html?_r=1&hp).

55 "PM can't say what law WikiLeaks has broken", *The Sydney Morning Herald*, December 7, 2010, at <http://www.smh.com.au/national/pm-cant-say-what-law-wikileaks-has-broken-20101207-18nfn.html>.

56 See Fowler (2011: 215-217).

57 D. Welch, "Rudd witch-hunts cost police, money", *The Age*, January 11, 2011 at <http://www.theage.com.au/national/rudd-witchhunts-cost-police-money-20110110-1914a.html>;

58 See C. Merritt, "Whistleblowers shun new laws", *The Australian*, April 17, 2009; "Coalition promise to introduce shield laws prompts labor to re-examine its position", *The Australian*, August 20, 2010; Tracey (2010).

59 The *Evidence Amendment (Journalists' Privilege) Bills 2010* (Cth) was led by the Brandis Bill, although it was an almost identical Bill introduced by Andrew Wilkie which was supported by the government. See Brandis Bill 29 September 2010; Wilkie Bill 18 October 2010;

60 *Evidence Act 1995* (Cth), s. 126G. Amendments (Senator Ludlam, Australian Greens) March 3, 2011.

61 Senate (2010), dissenting report, p.20. See previously, Senate Legal and Constitutional Affairs Legislation Committee, *Evidence Amendment (Journalists' Privilege) Bill 2009 [Provisions]*, May 2009: 29.

62 See ALRC (2009: 143-182 ).

63 Commonwealth Government (2010).

64 House of Representatives (2009: 146).

65 Turnbull (2011).

66 Kirby (1988: 3).

67 See Brown et al (2008).

68 See Attorney-General's Department (2009). This review of Part 9.4AAA of the *Corporations Act 2001* (Cth) was limited to compliance and enforcement of the corporations law, rather than any comprehensive approach to whistleblowing concerning all major types of potential wrongdoing within or by non-government employers, and has not been finalised or publicly reported on.

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