CRIMINAL JUSTICE COMMISSION

WHISTLEBLOWERS – CONCERNED CITIZENS OR DISLOYAL MATES?

Papers presented at a conference held in Brisbane on 23 November 1993

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The Whistleblowers – Concerned Citizens or Disloyal Mates? Conference was an initiative of the Corruption Prevention Division

In addition to the papers presented by Mr Marshall Irwin, General Counsel to the CJC and Mr Andrew Marjason, Principal Complaints Officer, Complaints Section, Official Misconduct Division, CJC, there are papers by a number of independent experts in the field.

The views expressed by those independent experts do not necessarily reflect the views of the Commission.

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FOREWORD

The Whistleblowers' Conference 'Concerned Citizens or Disloyal Mates' was jointly organised by the Criminal Justice Commission (CJC) and the Royal Institute of Public Administration Queensland. It was an initiative of the CJC's Corruption Prevention Division.

Corrupt behaviour in the public service is unfair. It wastes public money and resources and leads to inefficiency, eventually destroying the public's trust in the government. It is in everyone's interest to ensure that the standing and reputation of the public sector are maintained by ensuring an honest and impartial public administration.

Whistleblowing is seen as crucial to the work of the CJC in our mission of ensuring the integrity of the Queensland public service. We depend on the general public, and the vast majority of public servants who are honest, to speak out if they see wrongdoing and to inform us about it.

Although much useful information comes from the general public, the best people to blow the whistle on public sector corruption are those close to the events, those with direct knowledge, in other words the public servants themselves.

To quote the Fitzgerald Report: "*Honest public officials are the major source of information needed to reduce public maladministration and corruption. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.*"

Whistleblowers should therefore be encouraged and supported in the implementation of any anti-corruption strategy. We should not then expect them to be martyrs. They should be supported in their efforts to shed light on hitherto hidden events, and most importantly they should be given the personal protection they need and the assurance that their careers will not be adversely affected by their actions.

Establishing an environment that is conducive to whistleblowing is a management responsibility. For that reason this conference was aimed at managers, supervisors and personnel professionals. It is their responsibility to ensure that potential whistleblowers in their organisations feel able to speak out without fear of retribution.

I would like to thank the speakers at the conference, and the participants for their contributions. The conference was attended by a number of people from the Whistleblowers Action Group, a support group for those who have dared to put their heads up above the parapet and taken the consequences. I hope that the running of a conference such as this will encourage others to come forward and assist the Commission in its work.

R S O'REGAN QC
Chairperson

PROGRAM

8.30 - 9.00 REGISTRATION

9.00 - 9.15 WELCOME AND INTRODUCTION

Marshall Irwin, General Counsel to the CJC.

9.15 - 9.45 THE QUEENSLAND WHISTLEBLOWERS PROJECT

Tony Keyes, Lawyer and Senior Research Assistant, University of Queensland, will discuss:

- the preliminary findings of his study into the profile of whistleblowers and the outcomes and impacts of their actions.

9.45 - 10.15 THE SOCIOLOGICAL AND PSYCHOLOGICAL IMPACTS

Dr Jean Lennane is a Psychiatrist practicing in Sydney. She will discuss her research on:

- the effect on the health of individuals and their families, and
- Whistleblowers Australia, a national support group and network.

10.15 - 10.30 THE CJC EXPERIENCE

Andrew Marjason, Principal Complaints Officer, Complaints Section, Official Misconduct Division at the CJC, will talk about:

- the *Criminal Justice Act (1989)*, whistleblowers and the CJC.

10.30 - 11.00 MORNING TEA

11.00 - 11.30 IMPLEMENTING WHISTLEBLOWING LEGISLATION: LESSONS FROM SOUTH AUSTRALIA AND ELSEWHERE

David Clark, Associate Professor of Law, Flinders University, South Australia will discuss:

- overcoming informal resistance to the idea of whistleblowing in a culture of loyalty to those in authority, and
- the difficulties of implementing whistleblowing legislation illustrated by the recent experience of agencies in South Australia.

11.30 - 12.00 WHISTLEBLOWING AND QUALITY MANAGEMENT

Dr Mary Barrett is a lecturer in Human Resource Management at QUT. She will consider:

- the paradox that whistleblowing is both a threat and an invaluable aid to management, and
- how it may find a theoretical home in the present movement towards Total Quality Management.

12.00 - 12.30 CONCLUSIONS

with Barrie Ffrench, CJC Commissioner.

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WELCOME AND INTRODUCTION

Marshall Irwin, General Counsel, Criminal Justice Commission

You could be forgiven for thinking that the only thing the Criminal Justice Commission does is investigate police and organised crime.

We are conscious of the fact that the picture that is being painted is disjointed.

This is understandable because the Commission is a complex organisation. It has many responsibilities, roles, and functions.

The Commission is not just interested in investigating corruption after it has occurred, but in minimising opportunities for corruption to occur. As a nation, we have come to realise that it is impossible to treat ethics as an optional extra to the conduct of public life.

Unfortunately, corruption tends to grow in the dark, and it spreads when management does not recognise the warning signs. Public Servants are the best people to prevent fraud, waste, and abuse of power in the public sector. This is why whistleblowing is an important issue.

The Commission has received in excess of 10,000 complaints in the three and a half years of its existence. Each involves whistleblowing of one kind or another. These complaints have ranged in seriousness and complexity right across the spectrum.

Whistleblowers should not be expected to be martyrs. They must be supported in their efforts and given the necessary protection for their safety and their careers.

Therefore, the issue of the protection of the "whistleblower" is extremely important. This was recognised by the Fitzgerald Report and, in 1990, the Electoral and Administrative Review Commission (EARC) commenced an inquiry into the need for Whistleblowers legislation in Queensland.

To enable EARC, and ultimately the Parliament, to have the opportunity to undertake a thorough analysis of this issue, some interim legislative measures were introduced, in 1990, to protect people who wanted to pass information to the Commission or EARC.

The skeletal legislative framework that still exists in the *Criminal Justice Act* not only creates an offence of victimisation, it also enables the Commission to seek an injunction to restrain victimisation of people who assist us in "good faith".

Like everyone else in Queensland, the Commission has undergone a learning experience in protection of whistleblowers, and I am pleased to be able to report that the Commission has recently obtained an injunction to preserve the employment of a person who has assisted the Commission.

It is also an offence to harm, or threaten to harm, a witness or a potential witness, or anyone who has produced documents before the Commission. The offence carries a maximum penalty of three years.

In addition, there are a number of other ways in which the *Criminal Justice Act* provides encouragement and a measure of protection for the whistleblower.

The Act requires the Police Commissioner to refer all complaints of suspected misconduct by police officers to the Complaints Section. It also requires principal officers of all other public sector organisations to report suspicion of official misconduct to the Commission.

There is no breach of confidence when a principal officer, or any other person, discloses information to the Commission so it can discharge its functions. This protects people who volunteer information or documents to the Commission.

If it appears to us that, because a person has assisted the Commission, their safety or their career may be prejudiced – and this includes any intimidation or harassment – then the Commission may do what is necessary and open to us to avoid this.

In addition, anyone who threatens or insults a witness or anyone summoned before the Commission, or interferes with our proceedings in any way, is guilty of contempt.

We are also able to receive complaints from anonymous sources and can go a long way towards guaranteeing confidentiality to complainants.

The Witness Protection Division provides protection to people who assist the Commission and who are assessed as vulnerable to threat. Several different levels of protection can be provided. These range from regular phone contact to 24-hour protection. Some witnesses may be relocated.

This is an essential part of any whistleblowers protection scheme because, if potential whistleblowers are deterred from coming forward, the integrity of public administration is at risk.

This conference is held at a time when there is a great interest in whistleblowers' protection, not only in Queensland, but throughout Australia.

The Queensland initiative to explore legislation in this area has been taken up in other states. A Whistleblowers Protection Act became law in South Australia this year. I am sure that we will hear more about that from Professor Clark.

A Protected Disclosures Bill is under consideration in New South Wales Parliament. The WA Inc Royal Commission recommended such legislation, and the Western Australian Parliament is to consider amending existing legislation to provide greater protection to whistleblowers.

In Queensland, the EARC report has been taken up by the Parliamentary Committee and a draft Bill has been recommended. I understand that this is under consideration by the Office of the Cabinet. At Commonwealth level there is a Senate Select Committee on Public Interest Whistleblowing.

Returning to Queensland, there is university research being undertaken by Dr De Maria. We shall hear about this shortly from Mr Tony Keyes, who is his research assistant. In addition, a Whistleblower's Action Group has been formed to act on behalf of whistleblowers.

I also wish to observe that, although I have focused on the legislative protection for whistleblowing, I recognise that legislation alone is not sufficient to promote and preserve public sector integrity.

What is required is attitude change and cultural change. An appropriate code of conduct will be part of this.

As Ian Temby, Chairman of the ICAC, pointed out at the EARC Public Seminar on Whistleblower Protection in 1991, it is also crucial to instill "an attitude on the part of all of trust, openness, integrity and shared values..... Managers should make it their responsibility to render it unnecessary for staff to blow the whistle".

Therefore, the topic with which this conference is concerned comes back to an issue of management responsibility.

This is the responsibility to create an environment which, on the one hand achieves Mr Temby's ideal, but on the other is conducive to a staff member genuinely blowing the whistle without fear of retribution if this actually becomes necessary. In particular, employees must know that they will not be victimised for alerting management to a problem.

This is as good a note as any to hand the debate over to our experts in this field.

QUEENSLAND WHISTLEBLOWING

DEMOCRATIC DISSENT IN PUBLIC EMPLOYMENT[1]

Tony Keyes[2], Lawyer and Senior Research Assistant, University of Queensland

Abstract

Whistleblowing policy and practice are at a critical point in Queensland. The Queensland Whistleblower Study confirms that whistleblowing issues require urgent attention. Managers and administrators already have existing legal obligations to whistleblowers; these must be fulfilled. The government also has a role: it must affirm (by legislation and by the creation of a climate of free and open exchange of views and information) the right and duty to dissent by those whose disclosures are critical to the effective prevention of corruption and other wrongdoing. If it does not, there is a danger that other Fitzgerald reform mechanisms will amount to a waste of public resources. To be effective, that affirmation must take place not only at a policy level in the Cabinet, but also in the culture and practice of all units of public administration.

1 Introduction

Whistleblowing is now firmly on the public agenda in Queensland. That is due to its popularisation by the Fitzgerald Inquiry and Report,[3] and the changes which followed it in all facets of public life.[4] The matter has received and continues to receive attention from various policy makers.[5]

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[1] Paper presented to Criminal Justice Commission,Royal Institute of Public Administration Australia (Queensland Division) Seminar, "Whistleblowers: Concerned Citizens or Disloyal Mates?", Brisbane, 23 November 1993. I am indebted to Cyrelle Jan, Tracie Peil-Story, Bill De Maria, Chris Richards, Tania Douglas, Peter Gorman and the whistleblowers described in the section 3 cases for their comments on this paper.

[2] BA, LLB (*Qld*), Solicitor; Senior Research Assistant, Queensland Whistleblower Study, Department of Social Work and Social Policy, University of Queensland; Lecturer in Justice Studies, Queensland University of Technology.

[3] Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (G.E. Fitzgerald QC, Chair), *Report of a Commission of Inquiry Pursuant to Orders in Council*, 1989, pp.133-134, 144-145, 370.

[4] Electoral and Administrative Review Commission (hereafter "EARC"), *Report on Protection of Whistleblowers*, 1991 (hereafter the "EARC Report"); Parliamentary Committee for Electoral and Administrative Review (hereafter "PEARC"), *Report on Whistleblowers Protection*, 1992 (hereafter the "PEARC Report").

[5] The Cabinet Office is presently considering the PEARC Report. See also in other jurisdictions Commonwealth Criminal Law Review Committee (H.T. Gibbs, Chair), *Final Report*, 1991, pp.335-355; Royal Commission into Commercial Activities of Government and Other Matters (WA) (Justice G.A. Kennedy, Chair), *Report*, 1992, Part 2 (hereafter the "WA Inc Report"), pp.4.15-4.20; Senate Standing Committee on Finance and Public Administration (Sen. John Coates, Chair), *Report on the Management*

The Queensland Whistleblower Study (QWS)[6] conducted during 1993 has gained some insights at a local level. The research indicates that post-Fitzgerald reforms are in danger of degenerating (if they have not already) into empty, politically correct platitudes of open, honest and accountable government. In Queensland today, whistleblowing is a dangerous occupation and should not be glamorised.

This paper will present a definition of whistleblowing. Some case material from the research will illustrate the malaise in which Queensland whistleblowers find themselves today. The paper will then ask whether whistleblowing is worth the trouble to organisations, and to society itself. Lastly it will ask whether whistleblowing is worth the trouble to whistleblowers, both at present and under the proposed reforms.[7]

2 What is whistleblowing?

Whistleblowing may be considered as the intersection of two phenomena: *principled organisational dissent*, and *public interest disclosure*. Whistleblowing is often conceptualised in terms of the latter but not of the former.

Organisational dissent is the disagreement with or refusal to acquiesce in an organisation's policy or practice. Where such dissent is as to an issue of "principle", it may be referred to as *principled organisational dissent*.[8] Most whistleblowers do not set out on a disclosure process thinking "I am a dissident". We shall see, however, that they are so treated. If whistleblowing is to fulfil a useful social purpose, it needs to be recognised as dissent, and dissent needs to be recognised not as an irritation but as a democratic right and duty.

A *public interest disclosure*, on the other hand, is a disclosure about wrongdoing made in the public interest. Whistleblowing is one form of such disclosures. It is this (outwardly) non-controversial aspect on which many discussions tend to focus.

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and Operations of the Department of Foreign Affairs and Trade, 1992, pp.53-60; NSW Legislative Assembly Legislation Committee on the Whistleblowers Protection Bill (No.2) 1992, *Report*, 1993; House of Representatives Standing Committee on Banking, Finance and Public Administration (Paul Elliott MP, Fraud Sub-Committee Chair), *Fraud on the Commonwealth*, November 1993, which will consider the desirability of whistleblower protection legislation. The Senate, by resolution on 2 September 1993 has appointed a Select Committee on Public Interest Whistleblowing (Sen. Jocelyn Newman, Chair) which is due to report in March 1994.

[6] Dr. William De Maria, University of Queensland, Department of Social Work & Social Policy (research continuing at time of writing).

[7] Draft Whistleblowers Protection Bill (EARC Report, Appendix A; hereafter the "EARC proposal"). For comparative measures see *Whistleblowers Protection Act* 1993 (SA); Whistleblowers Protection Bill 1993 (Cth) tabled in the Senate by Sen. Christabel Chamarette, 25 May 1993; the Crimes Amendment Bill (No.2) 1991 (Cth) (Gibbs Report Part 6); and the Whistleblowers Protection Bill (No.2) 1992 (NSW).

[8] For a full theoretical treatment of principled organisational dissent, see Jill W. Graham, "Principled Organisational Dissent: A Theoretical Essay", *Research in Organisational Behaviour*, 1986, Vol.8, pp.1-52.

The two phenomena are drawn together (implicitly if not explicitly) in most attempts at defining whistleblowing. Near & Miceli's definition is as handy as any:

> *... 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]

The elements of an act of whistleblowing, then are:-

(a) a disclosure;

(b) by an insider;

(c) of wrongdoing;

(d) under the employer's control;

(e) to an action-oriented person or organisation.

One element which is outwardly absent from that definition is subjective public interest motivation. Many commentators and policy makers simply designate certain types of wrongdoing, and call disclosures about those types of wrongdoing "public interest disclosures".[10]

The feature which distinguishes whistleblowing from other forms of principled organisational dissent is the disclosure, or the making of a (more or less public) stand. The feature which distinguishes whistleblowing from other forms of public interest disclosures (like informing and tipping off) is that the whistleblower is a dissident within their employing organisation. Particularly in Australia, notions of loyalty to fellow employees (and to the employer), and dislike of dissenters and "dobbers" are strong.[11] The conflict between loyalty to the employer on one hand and loyalty to the relevant ethical principle on the other is often insoluble. When does the principle requiring the disclosure of wrongdoing (with a view to its detection and prevention) outweigh either one's loyalty to the employer or at least one's duty to support one's family? The perception by employers and fellow employees that a person has resolved that dilemma against them, whether in the wider public interest or not, often leads

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[9] Janet P. Near & Marcia P. Miceli, "Organisational Dissidence: The Case of Whistle-Blowing", *Journal of Business Ethics*, Vol.4, 1985, p.1 at p.4, cited and expanded in Miceli & Near, *Blowing the Whistle: Organisational and Legal Implications for Companies and Employees*, Lexington Books, 1992, at pp.15-21.

[10] E.g. EARC Report, p.14; Graham, op.cit. (n.6), p.2. The *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act* 1990, however, casts a requirement on whistleblowers that they be proven to have acted in good faith.

[11] McMillan disagrees: "Legal Protection of Whistleblowers", in S. Prasser, R. Wear & J. Nethercote (eds.), *Corruption and Reform: The Fitzgerald Vision*, UQP, 1990, pp.203-211 at p.208.

to harsh consequences for the whistleblower. These are described in detail elsewhere,[12] and in the case studies which follow.

The reason for the harshness of the consequences is obvious: for a whistleblower, one's job is on the line. The range of organisational sanctions available against a person who makes a disclosure is much wider than against many other dissenters and disclosers. In the QWS, respondents have reported a range of sanctions broadly in keeping with the overseas experience. These include assigning meaningless work, no work or excessive work; physical isolation; deprivation of resources; retrenchment, dismissal or forced resignation; punitive transfers; legal action designed to exhaust the employee's resources before justice can be had; blacklisting and denial of promotional opportunities; verbal and physical abuse; malicious and fictitious counter-allegations of wrongdoing; alleged insanity or other unsuitability for work; social sanctions such as ostracism; and "stakeouts" by private detectives.

Some case studies may bring this discussion down to earth.

3 Queensland whistleblowers tell their stories

The cases in this section are drawn from reports to the QWS. Some of the material is on the public record; where this is used, it is attributed accordingly. These cases depict actual experiences, but some have been recast to protect the identities of respondents. The cases do not pretend to be an exhaustive examination of the facts; they are the whistleblowers' stories. While there is always more than one side to these stories, the research has not heard those. The Study is an investigation of personal impacts on whistleblowers. Its sources are not free of bias.

Case A

A, an employee of a Queensland government department, observed that his boss was turning a blind eye to timesheet irregularities in their office which, he calculated, were costing taxpayers some thousands of dollars per year. He considered going external, but wanted to avoid embarrassment for the department. In the hope that by confronting his boss corrective action might result, he mentioned the problem.

A was told that he was to be subject to an unscheduled performance review. He noticed that people wouldn't speak to him in the corridor or the lift. His exemplary work record was ignored when he applied for a promotion. He got nuisance phone calls at work and at home. The stress started to tell on his family. He saw a doctor for stress symptoms and was put on prescribed drugs. His marriage deteriorated. Eventually he had a nervous breakdown, and took two months off the job. During that time, the telephone harassment continued at home. Eventually his wife gave him an ultimatum: "the job or the marriage". He resigned and is now unemployed.

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[12] E.g. Y. Cripps, "Protection from Adverse Treatment by Employers: A Review of the Position of Employees Who Disclose in the Belief that Disclosure is in the Public Interest", *Law Quarterly Review* Vol.101, October 1985, pp.506-539; M.P. Glazer & P.M. Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry*, Basic Books, 1989; A. Kippen, "GAP's in Your Defense", *Washington Monthly*, February 1990, pp.28-36; Miceli & Near, supra n.7; Jean Lennane, "'Whistleblowing': A Health Issue", *British Medical Journal*, Vol.307, 14 September 1993, pp.667-670.

Case B

B was an employee in a government heavy industrial unit. He observed that environmental regulations were being flaunted. As a result, the unit was polluting a nearby waterway. Local residents raised their concerns with government. The unit made a public statement to the effect that the problem was being addressed. In fact, the effluent was simply channelled into the same waterway via a secret underground pipeline.

When B raised his concerns over this deception of taxpayers with the unit management, an internal "investigation" took place, but the unit cleared itself of any impropriety. He went to a local (opposition) Member of Parliament who raised some questions, but got nowhere. Finally, B went to the responsible Minister. The Minister's staff investigated the matter (unbeknown to the unit). A copy of the report from the Minister's office was sent to B and the opposition MP. It said that his concerns were "unfounded". The official version, however, indicated that his concerns were well founded, and that action should be taken. B never officially saw that version: it "fell off the back of a truck".

While no action took place on the pollution problem, the unit lost no time on its whistleblower problem. B was involved in an unrelated workplace accident. The management confounded his worker's compensation claim from the very start. He has now been on compensation for 3 years. Meanwhile the unit has been trying its level best to dismiss him on the basis that he will never be fit to return to work. Even if he ever does regain physical fitness, however, further employment in his trade is out of the question because he is known in the industry as a trouble maker.

Case C

C was a clerical assistant in a government office in a small rural Queensland town. She noticed that statutory payments from members of the public, receipted by her, were going missing overnight. She knew that her boss was the only one with access to the safe. She wanted to do the right thing but felt unable to approach her boss.

She documented the anomalies she was aware of, and sent the material to the department's internal auditors. They called the Criminal Justice Commission, who referred the matter to local police. The police, being unfamiliar with fraud detection techniques, handled the investigation in such a way that the wrongdoer was tipped off. He took steps to cover the money trail. A later investigation by the internal auditors revealed "something fishy", but there was insufficient evidence to take action against the boss.

The boss knew where the leak came from, however. Subtle pressures built up. Meetings between C, the boss and his cronies became the forum for nasty remarks about C's sanity, her loyalty, and her family. She started smoking. She suffered migraines and insomnia from the stress of the work situation. Eventually, despite the state of the job market, she decided to resign. She is now unemployed.

She points out that she cannot be compensated under any existing legal mechanism. She feels entitled to be compensated by a government which has made a point of encouraging its employees to help it beat corruption, but which she feels has left her high and dry for her trouble.

Case D

D was an accountant at a statutory authority. His immediate superior discovered that the Chief Executive Officer had fraudulently altered documents of the authority to enable the purchase by the CEO of a personal use asset so as improperly to obtain government concessions (including sales tax exemption) worth $1004. The immediate superior told D about it, but decided not to pursue it himself because the CEO was the culprit.

D knew of a previous episode where the authority board's chairman had received a whistleblowing disclosure and had immediately alerted the alleged wrongdoer. All internal avenues (chairman of the board, CEO and immediate superior) were closed off, so he therefore took it to the Auditor-General's office. They conducted a prompt and efficient investigation. After some cajoling from an ex-officio member of the authority's board, the board asked for and received the CEO's resignation.

This did not represent a happy ending, however. An external management review found that D and his co-whistleblower's positions should be "rationalised" into one position. In a show of mutual solidarity, and in the face of continuing hostility from some board members who were on the selection panel, they both decided not to apply for the new position.

When D entered the job market, however, he discovered that somehow his reputation had preceded him. He has been unemployed for two and a half years. He has applied for approximately 200 jobs, been interviewed for about 10, and got none of them. He cannot establish a definite connection, but he finds it difficult to avoid the conclusion that his boat-rocking activity has ended his career.

Case E

E was a Shire Clerk in a rural area. He observed official misconduct on the part of certain Shire councillors and, pursuant to the *Criminal Justice Act* 1989 section 2.28, reported the matters to the Criminal Justice Commission. Following an extensive investigation, his working relationship with Council became untenable and he ended up resigning, his lengthy career in local government coming to an untimely end. The alleged wrongdoer in one of the cases involved was charged by local police on the instructions of a CJC investigator, but when he appeared in court, no evidence was offered by police and the matter did not proceed.

In a paper given shortly after these events, E made some comments on this investigation. While I cannot endorse the comments, they are an honest reflection of his experience.

> *The CJC does not have a system of checks and controls to ensure that certain predesigned standards are met or, if [it does], they are not working ... some of the CJC investigators engage in tactics during*

investigations ... [which suggest that] they have never heard of that essential common law principle [that one is] 'innocent until proven guilty'.[13]

Case F

F was a public sector union organiser who acted on behalf of a member in relation to an inquiry in which the member claimed the rules of procedural fairness has not been observed and which resulted in the member's career being seriously affected. To cut a long story short, F discovered that documents and tapes critical to foreshadowed litigation were destroyed by virtue of a decision taken at a very senior executive level. Admissions were made in Parliament to that effect.

In the meantime, F discovered what he believed to constitute irregularities in a ballot for the union's associated credit union executive. He took these matters up with the union's General Secretary but ultimately went to the Fraud Squad to secure the ballot papers. A short time later he was dismissed without warning on what he claimed were contrived charges, including his handling of the shredding case. Since that time he has taken the various matters up with the Electoral and Administrative Review Commission, the Criminal Justice Commission, the Ombudsman, the Information Commissioner and the Senate Select Committee on Superannuation.[14] The Cooke Inquiry partially intervened but could not complete its investigation before closure.[15] In addition the opposition has raised questions in Parliament.[16]

F alleged that serious offences under the *Criminal Code* and the *Criminal Justice Act* 1989 and other public administration legislation had occurred. Some of the investigative bodies declined to take action on the basis that they had no jurisdiction.

F's industrial relations career is over. His wife is now the major bread winner in the family, while F is attempting to build a career in cartooning from home while still attempting to clear his name.[17]

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[13] E. Thorne, "The Criminal Justice Commission and Local Government", paper presented to Institute of Municipal Management Central Queensland Conference, Gladstone, February 1992 (unpublished), pp.3–4.

[14] Senate Select Committee on Superannuation (Sen. Nick Sherry, Chair), *Eighth Report*, August 1993.

[15] Commission of Inquiry into Activities of Particular Queensland Unions (N.M. Cooke QC, Commissioner), *Fourth Report of the Commissioner Appointed to Inquire into the Activities of Certain Queensland Unions*, June 1991, Vol.1, pp.225–298.

[16] Queensland Parliamentary Debates, 18 May 1993, pp.2869–2871 and 21 May 1993, p.3309.

[17] For more details, see Greg Roberts, "Shreds of Evidence", *The Bulletin*, 7 September 1993, pp.16–17.

Case G

G was one of the police whistleblowers at the Fitzgerald Inquiry. He knew of systematic corruption in the Licensing Branch where he served in the early 1980s, and told the Fitzgerald Inquiry what he knew. It is no exaggeration to say that without his disclosures, the Inquiry would have failed.

The unusual aspect of G's case is his high public profile. A most apt tribute was paid to him by the now Minister for Employment, Training and Industrial Relations at an EARC seminar in 1991:

> *It's four years ago now that [G] ... produced that bottle of scotch at the Fitzgerald Inquiry; the first police officer to have the guts to blow the whistle on corruption in Queensland. Without that act of courage, the dam might never have been broken. Yes, I'd like to congratulate him ...*
>
> *Let us hope that whatever be the outcome of this that never, ever, ever again in Queensland will people with the guts and courage like [G] and Nigel Powell find themselves in the situation where they know that something corrupt is going on and there's no-one to whom they can go ...*
>
> *We're not talking about the seventeenth century. We're talking about what it was like four years ago. We're talking about the loneliness and terror of many police officers who wanted to be whistleblowers, but who had very good reason to remain silent ...let us hope that we have a structure of law and administration that will never, ever, ever allow that to happen again.*[18]

What Mr Foley's words only partially recognise is the enormous personal cost of G's courageous disclosures. Few people know about the victimisation and intimidation he suffered after his disclosures, and the damage to his career and his health.

He applied for a large number of promotions which were Gazetted post-Fitzgerald for which he was well qualified, but was never given any indication that he would be shortlisted or considered for promotion to commissioned rank. Interestingly most of those promoted to these positions were quite junior to G not only in length of service but also in terms of operational experience.

He recently suffered a third heart attack as a result of the stress under which he still labours. That stress is due entirely to the cowardly victimisation he has suffered.

4 Is it worth it? The organisation's view

In the next two sections, the worth of whistleblowing, both to the organisation and to the whistleblower, will be considered.

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[18] Matt Foley MLA, closing remarks to EARC Whistleblowers Protection seminar, Brisbane, 19 April 1991, quoted in the EARC Report, p.9.

Against whistleblowing: Why they do it

The cases above indicate that organisations do not always approve of dissenting behaviour in their ranks. The ferocity with which units of public administration silence their dissidents is at odds with the democratic right to dissent, and with official encouragement to report wrongdoing. While whistleblowing is officially encouraged, in today's Queensland public sector culture it is clearly unacceptable. This is not reflective of a subordinates/managers dichotomy; rather it betrays the two sides of the culture which permeates the public sector from top to bottom.

Some of the reasons for the cultural unacceptability of public interest disclosures are not difficult to guess at. Whistleblowing usually involves an allegation of impropriety of some sort against another, as well as disruption to the alleged wrongdoer, the organisation, and possibly others.[19] Whistleblowers are usually seen as disloyal. Whistleblowing episodes often assume a "political" character. Vindication and protection of individuals' positions tend to override considerations of the correction of wrongdoing, public benefit and justice. Whistleblowing, according to Davis, is bad news for the organisation as well as for the whistleblower.[20] But reasons for retaliation go further than this.

Near attributes organisational antipathy to whistleblowing to the imperatives of Weberian bureaucracy, in which "managers possess the legitimate authority to make policy or technical decisions and to expect them to be obeyed by subordinates".[21] The EARC Report also points to the employer's common law right to employee loyalty and confidentiality,[22] but considers that such a value cannot be absolute. That right is to be tempered by considerations of "public interest", so that an employee can breach her/his duties of loyalty and confidentiality if to do so is in the public interest.[23] The tempering effect of public interest is even greater where the employer is government.[24]

So if a disclosure is in the public interest, the law sometimes resolves the tension between loyalty and dissent in favour of disclosure. That does not always clear a reprisal-free path for the whistleblower, however: the organisation may disagree with the law. When this occurs, the whistleblower is often without the resources to vindicate their legal rights, and even if they are, the organisation, the wrongdoer/s and their allies know that the remedial reach of the law into the complex human

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[19] EARC Report, pp.18-19. See also Tom Devine, "A Whistleblower's Checklist", *Chemical Engineering*, Vol.98 No.11, November 1991, pp.207-213 at p.207.

[20] Michael Davis, "Avoiding the Tragedy of Whistleblowing", *Business and Professional Ethics Journal*, Vol.8 No.4, 1989, pp.3-20.

[21] Janet Near, "Whistleblowing: Encourage It!", *Business Horizons*, Vol.32, Jan-Feb 1989, pp.2-6 at p.4.

[22] *Robb v Green* [1895] 2 QB 315.

[23] EARC Report, p.19; *Gartside v Outram* (1856) 26 LJ Ch.113. For a further discussion of the moral dilemma, see Near, op.cit. (n.19).

[24] EARC Report, pp.33-34.

matrices of the workplace is limited at best and non-existent at worst. The protection of the wrongdoer's self-interest is a stronger imperative than either the vindication of legal rights or the public support and protection of the "right-doer".

How do organisations tend to discourage dissent? In response, the tactic is:

> *to obfuscate dissent by attacking the source's motives, professional competence, economic credibility, sexuality, or virtually anything else that will cloud the issue ... the point is to overwhelm the whistleblower in a struggle for self-preservation ... until the point of dissent is forgotten or put behind weightier survival priorities.*[25]

In favour of whistleblowing

So there are many and complex reasons for organisation antipathy towards and reprisals against dissent. But despite these, Near says that whistleblowing is good for the organisation. Whistleblowers are "one of the least expensive and most efficient sources of feedback about mistakes" the organisation may be making.[26] She summarises the rationales for encourage whistleblowing as "expediency" and "ethics". That is, most wrongdoing reported by whistleblowers will, if not rectified, impair the organisation's performance.

The expediency point is borne out in the QWS. For example, one whistleblower from a department which deals in large quantities of materials drew the audit authorities' attention to frauds on taxpayers in the form of pilfering of goods to the value of several hundreds of thousands of dollars. Could any department that is seriously committed to managerial efficiency, or any concerned taxpayer, question the value of that disclosure to the department, the government and the public? Whistleblowers *can* do what they want and intend to do: help their employers!

If public sector managers and society want to avoid repeating mistakes of the past, public sector managers and society need to hear about mistakes of the past. We will only hear about those mistakes of the past which take place in our organisations if those who know about them can and will come forward.

The ethical rationale is a second reason to encourage whistleblowing. Even if whistle-blower-detected wrongdoing does not impair the organisation's performance, an ethical stand taken by managers will itself discourage wrongdoing, according to Near:

> *If [chief executive officers] wish to create a moral corporate culture, their actions are more persuasive than statements of intent; fair treatment of whistleblowers may be the most dramatic way to persuade employees to*

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[25] Julie Stewart, Tom Devine and Dina Rasor, *Courage Without Martyrdom: A Survival Guide for Whistleblowers*, Government Accountability Project/Project on Government Procurement, Washington DC, 1989, pp.5 & 7. See also Tom Devine and Donald Aplin, "Whistleblower Protection: The Gap between the Law and Reality", *Howard Law Journal*, Vol.31 No.2, 1988, pp.223-239 at pp. 224 & 227.

[26] op.cit. (n.19), p.5.

operate ethically.[27]

Barnett et al. agree, and add a third imperative for organisations to encourage internal whistleblowing: legal requirements.[28]

Legal imperatives in favour of whistleblowing

There are some very good legal reasons for managers and administrators to protect whistleblowers, even though permanent legislative protection is not yet in place. Some of these will now be considered briefly.[29]

The first is the possibility of the manager being sued for breach of confidence. At common law, a person who receives information in "confidence" is under a legal obligation to respect that confidence. A breach of that obligation entitles the plaintiff to a range of remedies.[30]

Confidences protected by the action for breach of confidence can arise in a number of circumstances. The circumstance of interest here is that of a manager who receives information in confidence from an employee that shows wrongdoing by or under the control of the employer. If the manager breaches or intends to breach that confidentiality by disclosing to any other person (including the alleged wrongdoer, a superior, or another agency), s/he may be liable for damages, or subject to an injunction to prevent a breach of the confidence.

The plaintiff in an action for breach of confidence must establish three things:-

(a) that the information had the necessary "quality of confidence";

(b) that the information was imparted to the defendant in circumstances importing a confidential obligation; and

(c) that the defendant made unauthorised use of the information to the plaintiff's detriment.[31]

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[27] ibid., p.6.

[28] Tim Barnett, Daniel S. Cochran and G. Stephen Taylor, "The Internal Disclosure Policies of Private-Sector Employers: An Initial Look at Their Relationship to Employee Whistleblowing", *Journal of Business Ethics*, 1993, Vol.12, pp.127-136 at p.128.

[29] These issues cannot be fully treated here. For an exhaustive consideration, see T. Keyes, *Whistleblower Victimisation: The Need for Legal Action*, Research Monograph, Department of Social Work and Social Policy, University of Queensland (forthcoming). The interim whistleblower protection laws are irrelevant in practice (see section 5 below) and will therefore not be considered here.

[30] An extremely useful and concise treatment of this action is James Kearney, *The Action for Breach of Confidence in Australia* Legal Books, 1985. See particularly pp.1-8.

[31] See *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41 per Megarry J. at 47, quoted in Kearney, op.cit. (n.28) at p.9.

A breach of confidence is actionable in itself and does not rely on any prior relationship between the parties, but on the communication of information to another on the basis of secrecy.[32] As such its reach in the hands of a whistleblower goes beyond the employer and its managers, and may include other agencies to whom a disclosure is made such as the Ombudsman, the Criminal Justice Commission and elected representatives. Importantly, its legal doctrinal basis is the unconscionability of the breach. That is, the courts will not, in good conscience, allow persons to breach confidence.

This principle is directly applicable to the situation of a whistleblower who confidentially gives information concerning organisational wrongdoing to a superior. Despite popular belief, the requirements of procedural fairness (or natural justice) are not absolute, and do not displace the requirement of confidentiality. Therefore, if the superior discloses to the alleged wrongdoer, or to another superior, or to the cleaner that the whistleblower is the source of the information, the superior will be liable to the whistleblower for breach of confidence. The organisational tactic of focussing attention on the messenger rather than the message is wrong, and these legal rules reinforce that.

In the struggle against wrongdoing in all organisations, including public sector organisations, confidentiality of whistleblower sources must be protected. That is so from a pragmatic as well as a legal viewpoint. The act of blowing the whistle is itself a placing of confidence in the organisation. To breach that confidence, whether intentionally or not, will send a clear but unwanted message to would-be whistleblowers.

A second bracket of legal reasons not to victimise whistleblowers consists of various lesser known torts under which victimisers may be liable to whistleblowers for damages. These include misfeasance in public office,[33] loss of dignity,[34] intimidation[35] and abuse of process.[36]

Thirdly, industrial law provides for reinstatement, re-employment and compensation for employees who have been wrongfully dismissed.[37] The Industrial Relations Commission recently ordered the reinstatement of a QWS respondent who had been victimised as a result of blowing the whistle on serious wrongdoing in his public sector organisation. If, as might often be the case, the whistleblower cannot return to work,

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[32] *Stephens v Avery* [1988] 2 All ER 477 at 482.

[33] *Farrington v Thomson* [1959] VR 286.

[34] *Kumar v Minister for Immigration* (1991) 100 ALR 439 per Lockhart J.; *Wright v Court* (1825) 6 GD & R 623; R. Munday, (1990) 140 *New LJ* 6429, p.47; *Murray v Flack* (1983) 6 A Crim R 394 per Rogers J.; Flick, *Civil Liberties in Australia*, 1981, p.42.

[35] *Latham v Singleton and Others* [1981] 2 NSWLR 843; G. Bean, "Intimidation: An Obscure, Unfamiliar and Peculiar Course of Action", *Australian Bar Review*, Vol.3, 1987, pp.154-169.

[36] *QIW Retailers Ltd v Felview Pty Ltd* [1989] 2 QdR 245.

[37] *Industrial Relations Act* 1990 Part 11 Division 4.

compensation can be awarded.

Fourthly, various aspects of Queensland's new administrative law afford potential legal remedies to whistleblowers where before there were none. For example, documents which might substantiate a legal claim may be accessible under the *Freedom of Information Act* 1992. One of the cases mentioned in section 3 of this paper has already utilised this mechanism to good effect. Decision makers can now be required to give statement of reasons under the *Judicial Review Act* 1991 Part 4. Administrative decisions can be reviewed on questions of law under Part 3 and 5 of that Act, using a simplified procedure. All these should give pause to would-be retaliators, and to responsible managers.

Finally, many whistleblowers have statutory protection, (albeit in many cases of dubious value to the whistleblower). Many acts contain provisions making it an offence to victimise a person because of his or her giving evidence or assistance to investigative bodies.[38] Disclosures to Parliament or its committees attract Parliamentary privilege, breach of which is punishable by contempt.[39]

5 Is it worth it? The whistleblower's view

I am aware that one purpose of this seminar is to encourage whistleblowing in the Queensland public sector. What follows is not intended to frustrate that purpose, but to ensure that, before we lead the uninitiated frolicking through the minefield, the issues are thoroughly canvassed.

As indicated above, we will only hear about mistakes of the past if those who know about them can and will come forward. As a society, and as public sector managers, however, we are on unsafe ground in trusting that enough ethical employees will do the hard work for us. Individual burn-out is a major feature of Queensland's whistleblowing scene; these people cannot be expected to keep up their good work under the enormously adverse circumstances which presently confront them. One member of the Whistleblowers Action Group said:

> *After this government was elected, we climbed out of the trenches. Once we were in the open, they picked us off, one by one.*[40]

This is a poignant description of the (perhaps unwitting) trap we set for whistleblowers by convincing them that their democratic right of dissent is sacrosanct. If we are going to *say* democratic dissent is acceptable, we must accept it. If we do not, the inevitable conclusion is that they would be safer staying in the trenches, convinced by their employers that only unquestioning loyalty is sacred.

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[38] *Commissions of Inquiry Act* 1950 (Qld) s.23; *Criminal Justice Act* 1989 (Qld) s.6.6.1; *Electoral and Administrative Review Act* 1989 s.6.5; *Health Rights Commission Act* 1991 (Qld) s.139; *Police Service Administration Act* 1990 s.7.3. Compare *Anti-Discrimination Act* 1991 ss.223 & 224.

[39] *Constitution Act* 1867 s.40A.

[40] Conversation with the author, 9 November 1993.

Even if whistleblowers are prepared to risk losing livelihood, family and career, it is unacceptable that as a society we continue to exact such a horrendous price from them for their defence of the public interest. The price paid by each of the cases recounted above was too high. The price is not paid in a lump sum either; whistleblowers get a mortgage on isolation, illness, family tension, and career termination which is paid off very slowly.

It might be argued that the answer to the question posed by this seminar's title can be answered by saying that whistleblowers are disloyal, disgruntled axe-grinders. Such people may be out there, but they are not among the cases recounted above, nor in the QWS sample. These people are accidental victims. They see something that is wrong and, out of a sense of responsibility to their organisation (and ultimately their "shareholders", i.e. the public), they do the right thing.

The respondents to the QWS have identified a large number of systematic disincentives to whistleblowing in Queensland in 1993. A selection follows.

Mandatory reporting requirements

There are now a number of important statutory mandatory reporting requirements in Queensland legislation.[41] The Nursing Bill 1992 (Qld) contained a mandatory reporting requirement.[42] The Queensland Nurses Union of Employees (QNU) lobbied to have the mandatory requirement amended to constitute a non-mandatory "encouragement" provision. Clause 101 was omitted and not replaced in the Second Reading debate.[43]

Whistleblowers report extreme dissatisfaction with the deleterious effect of the various current mandatory reporting requirements. The difficulties with such requirements are not lost on others. For example, in its submission to the Health Minister on the subject, the QNU said:

> *If nurses know that their colleagues must report certain types of conduct, they may feel restricted in discussing their actions or decisions with their colleagues ... Mandatory reporting ... may lead to over-reporting ... the requirement can generate a climate in which trust and open co-operation between colleagues is lacking.*[44]

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[41] For example, see the *Criminal Justice Act* 1989 (Qld) s.2.28; *Public Service Management and Employment Regulation* 1988 (Qld) s.7; *Police Service Administration Act* 1990 (Qld) s. 7.2.

[42] Clause 101.

[43] 2 versions of the Nursing Bill 1992, one with the proposed clause 101 and one without, appear in the annual series of Bills Presented to Parliament (Qld).

[44] Queensland Nurses Union of Employees submission to the Minister for Health on the Mandatory Reporting Requirement Contained in the Nursing Bill 1992, 26 June 1992, p.2.

And later:

> *People do report offensive conduct without being compelled to do so. At present, approximately 90% of criminal offences detected in Australia are reported by members of the public to the police. Police detect about 10% of crime. The detection and prosecution of offenders relies upon members of the public voluntarily reporting to the police offensive conduct.*[45]

There is no mandatory reporting requirement with respect to criminal offences generally. Should not that tried and tested policy be applied across the board?

Secrecy provisions

The statutory and other obligations on employees (and particularly public employees) to observe secrecy constitute a major disincentive to whistleblowing. These matters have received extensive treatment elsewhere.[46] A public employee who speaks out is liable to penalties which range up to imprisonment.[47]

This is a matter which received attention in the WA Inc Report:-

> *Secrecy in the conduct of government and public administration provides the veil behind which waste and impropriety can occur ... a significant impediment to the disclosure of misconduct and maladministration is created by the secrecy obligations imposed on public officials by statute and regulation.*[48]

The question must be asked in the present climate of public distrust of government, whether the public interests served by such shackles on disclosure dissent are not outweighed by the public interest in hearing about iniquities of which public employees are aware. As Justice Mason said in 1983:

> *It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.*[49]

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[45] Ibid., p.4.

[46] Ontario Law Reform Commission (J.R. Breithaupt QC, Chair), *Report on Political Activity, Public Comment and Disclosure by Crown Employees*, 1986, pp.87-103 (position in Ontario) and Chapter 4 (comparative perspectives including the Australian position at pp.244-254); Cripps op.cit. (n.10); EARC, *Report on the Review of Codes of Conduct for Public Officials*, 1992, pp.126-131.

[47] E.g. *Criminal Code* s.86; *Public Service Management and Employment Act* 1988 s.29(1)(f); *Public Service Management and Employment Regulation* 1988 s.6(1) and Code of Conduct 1988 ss.4.1 and 4.2; *Police Service Administration Act* 1990 s.10.1; *Corrective Services (Administration) Act* 1988 s.61; *Health Services Act* 1991 s.5.1; *Health Rights Commission Act* 1991 s.138; *Criminal Justice Act* 1990 s.6.7; *Freedom of Information Act* 1992 s.93

[48] WA Inc. Report (supra n.3), p.4.17.

[49] *Commonwealth v John Fairfax & Sons Ltd* (1981) 147 CLR 39 at p.52; 32 ALR 485 at p.493.

Legal protections: The black hole

The general law does not recognise whistleblowing as an activity to be protected in any way.[50] Even where legal rights under general law are available, many are reluctant to take up the cudgels. There is the danger (however slight) of an adverse costs order. Their capacity to resource legal services is much more limited than their employer's. In any case, a win in court would often be a pyrrhic victory in the workplace.

The *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act* 1990 created an offence of victimising persons by reason of their giving information to the Criminal Justice Commission. The CJC or EARC (but not the whistleblower!) may apply to the Supreme Court for an injunction to restrain such victimisation.[51] This interim protection then is available only to persons who blow the whistle to EARC or the CJC, and then only if the relevant Commission wishes to apply for the injunction: in other words, only if you blow the whistle in the officially sanctioned way. This is a prime example of whistleblower policy makers' refusal to acknowledge and treat whistleblowing as democratic dissent.

The CJC made the breathtaking submission both to EARC[52] and to PEARC[53] that the existing scheme was, subject to some fine tuning, adequate as a permanent protection scheme. It then criticised the EARC proposal as "not based on the practical experience of the protective provisions currently in existence."[54] I understand from CJC staff[55] that only one injunction has been obtained under that scheme, and that was only two weeks ago!

There are other scattered provisions in various statutes making it an offence to take reprisals against a person by reason of their co-operation with investigative bodies[56] but they usually go no further.

EARC reported to Parliament on Whistleblowers Protection in October 1991. PEARC reported in April 1992. The Office of Cabinet has had the matter under consideration since that time. It is no comfort to the unhappily large number of Queensland whistleblowers who have been and are today being victimised to know that "something is in the pipeline".

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[50] See EARC Report chapters 3 & 4.

[51] See the *Criminal Justice Act* 1989 ss.3.32.1 and 6.6.1; see also *Electoral and Administrative Review Act* 1989 ss.2.25.1 and 6.5.

[52] EARC Report p.43.

[53] PEARC Report p.8.

[54] Ibid.

[55] Conversation with the author, 18 November 1993.

[56] See those cited above (n.36).

While it is to be expected that the Government's proposal, like those of EARC and PEARC, will exhibit strong dissent control imperatives,[57] it is likely to afford a great deal more protection than is currently available. Even so, the Queensland whistleblowing experience 1990–1993 should alert us to the danger that such "protection" will just be a bait. Once in the open, the whistleblower is an easy target. One whistleblower used this apt metaphor:

> *Whistleblower protection legislation is window dressing which suggests the shop is well stocked. But once inside you discover (at best) that the shelves are empty, or (at worst) you get mugged out of the public view. Meanwhile, to the public, the shop window appears as attractive as ever. We'd be better off with an openly empty shop.*[58]

Lack of independent whistleblower protection authority

The only official organisations to whom Queensland whistleblowers can go for protection at present are EARC (which has wound up) and the CJC. Many whistleblowers say it is inappropriate for the CJC to have the two functions of investigator and protector. That situation would be exacerbated by the implementation of the Whistleblowers Advice Unit within the CJC under the EARC proposal Part 3 Division 7.[59] Such a Unit would have a brief to provide "counselling" and "assistance" to whistleblowers.[60] Window dressing notwithstanding, "counselling" in such a scheme looks suspiciously like dissent regulation: "friendly advice" from the State about what forms and paths of dissent are acceptable, and what are not.

Would be whistleblowers could not (and experienced whistleblowers certainly would not) be confident in the CJC's ability to properly discharge such functions, which is also the principal recipient of disclosures under the scheme.[61] As PEARC noted in this context:–

> *It is important that there be seen to be independence between the counselling and investigative stages of the whistleblowing process ... the Committee does not necessarily regard the Criminal Justice Commission as the desirable location for [a whistleblowers counselling unit].*[62]

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[57] By strictly defining avenues of dissent, and protecting only disclosures which follow those. Arguably, the right to freedom of expression under the *International Covenant on Civil and Political Rights* Art.19(2) would be breached by the combined (lack of) effect of clauses 10–13 and 39 of the EARC proposal if implemented.

[58] Conversation with the author, 2 November 1993.

[59] As modified by PEARC's suggestion that the Unit be so called, rather than "Whistleblowers Counselling Unit" as recommended by EARC. See PEARC Report pp.11–12.

[60] EARC proposal cl.37.

[61] ibid., cll.33 & 35.

[62] PEARC Report p.12.

Many whistleblowers will not be dealing with the CJC in the first place. A large proportion of QWS respondents did not make any disclosure outside their department, let alone to the CJC. In fact many are so disillusioned with the ethical state of the public sector that they would not be prepared to go to *any* statutory authority, existing or imagined. Whatever position is finally decided on, it is fervently to be hoped that any advice unit is kept as far away from executive government as possible.

If we really want whistleblowers to come forward, serious thought needs to be given, notwithstanding economic rationalist arguments to the contrary, to a genuinely independent Whistleblower Protection Agency along the lines of that proposed in the Whistleblowers Protection Bill 1993 (Cth).[63] The United States experience with the Office of Special Counsel and the Merit Systems Protection Board bear closer study in this regard. There are valuable lessons from which we can learn.[64]

Lack of support

Most QWS respondents referred to a lack of support for whistleblowers before, during and after the disclosure. They asked for advice, counselling, and "moral" support from other whistleblowers, co-workers, the organisation, and the community at large. This calls for cultural change (addressed below). It also calls for government to "put its money where its mouth is", in terms of official rhetoric about the desirability of whistleblowing. The need for solidarity between whistleblowers has, to date, effectively been denied by the isolation tactics employed by organisations as described in section 4 above.

One important by-product of the QWS has been the Whistleblowers Action Group (WAG). This organisation, in operation for three months, now provides support for whistleblowers, and those who have not yet disclosed. It is also an invaluable pool of experience which can provide advice which has been tested in practice. It is an ideal agency to advocate whistleblowers causes, collectively and individually.

But it has no financial or administrative support other than its (often unemployed) members' pockets. If the government is serious about encouraging whistleblowers, it will support WAG. That support can take the form of liaison on policy development, public statements in support of the WAG's objectives, and financial and other assistance. Then WAG will be able to broaden its activities to fortify the ethic of democratic dissent. The U.S. experience shows that the role of non-government organisations is vital in promoting these goals. WAG is not going to disappear: it is in the interests of government, the CJC and all employers to build bridges with it.

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[63] Referred to above (n.3).

[64] Devine and Aplin, op.cit. (n.23), pp.229-236.

Cultural Cringe

There is an assumption in EARC's Codes of Conduct Review that ethical matters in the public sector can be regulated.[65] Despite the promulgation and proposal of Codes of Conduct and like-minded statements of good intention, it is unlikely that the ethical state of the public sector, or society at large, will change without a shift in "the culture" by way of education and training.[66]

Legislative obligation to report wrongdoing, the whistleblower protection legislation, removal of gags on rights to freedom of speech, even the best human resource management practices, will never on their own make blowing the whistle a safe activity so long as the informal social sanctions against dissent remain in place. When asked how the system could be improved for whistleblowers, many respondents to the QWS pointed to the futility of legislation alone, and were quite clear that nothing would change for whistleblowers until the anti-"dobber" ethos on the ground was reversed.

The potential role of legislative and policy shifts in these matters should not be discarded, however. According to CJC staff,[67] the post-Fitzgerald legislation requiring or encouraging the reporting of workplace wrongdoing has started to impact markedly, particularly in the Police Service.

The clear message from the QWS is that change of that sort has yet to happen for most whistleblowers. The "loneliness and terror" to which Mr Foley referred[68] did not stop four years ago; for scores of Queensland public sector whistleblowers it continues today.

6 Conclusion

Whistleblowing policy and practice are at a critical point in Queensland. Will the Ministers and Chief Executives deal with it as an irritation, or will they live up to the official rhetoric of openness, honesty and accountability? Will they perpetuate the traditional intolerance of dissenters in Queensland political life, or help create a healthy environment where debate and dissent are not just tolerated but welcomed?

If the latter, an independent Whistleblower Protection Agency is required. More than official agencies, community groups which actually represent past and future dissenters, like the Whistleblowers Action Group (WAG), need support if officialdom is to regain any esteem amongst its victims.

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[65] EARC, *Report on the Review of Codes of Conduct for Public Officials*, 1992, p.176-178. See also Noel Preston, "Can Virtue Be Regulated? An Examination of the EARC Proposals for a Code of Conduct for Public Officials in Queensland", *Australian Journal of Public Administration*, Vol.51 No.4, December 1992, pp.410-415; Davis, op.cit. (n.18), pp.4-5.

[66] PEARC, *Codes of Conduct for Public Officials*, 1993, p.15.

[67] Conversation with the author, 4 November 1993.

[68] Cited above (n.16).

If the Queensland government does not quickly affirm and act on its commitment to protecting those whose disclosures are critical to the effective prevention of corruption and other wrongdoing, there is a real danger not only that Fitzgerald reform mechanisms will have amounted to nothing but a waste of public resources, but also that the corruption they were aimed at will only regenerate in more insidious and sophisticated forms. To be effective, action must take place at the legislative level in Parliament, at a policy level in the Cabinet, and most importantly at the management level in all units of public administration. The role of the public sector manager in this process is critical.

It may seem that I have concluded that one should not blow the whistle, nor encourage others to do so. But many Queensland public sector employees have decided that exposing wrongdoing is important enough to stick their necks out, and no doubt will continue to do so. The onus is on individuals and society, not to wait for government to put formal protections in place, but to start immediately effecting cultural change on the ground.

WHAT HAPPENS TO WHISTLEBLOWERS AND WHY

by Dr Jean Lennane, Psychiatrist

Whistleblowing is defined in the U.S. *Whistleblowers Protection Act* 1989, as occurring when a present or former employee discloses information "which the employee reasonably believes evidences 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". An alternative, shorter definition is of **principled organisational dissent**. This is a clear and convenient way of looking at the issue, and also points up parallels between whistleblowing and older versions of what is basically the same problem.

The whistleblower is acting on **principle**. Conflict occurs within that individual between obedience, on principle, to the immediate authority (usually the employer), and what the whistleblower regards as a higher authority – concepts such as "truth", "justice", "the public interest", or God.

The reaction is **organisational** – it arises from what is seen as a challenge to the organisation's authority from someone who, being within the organisation, is regarded as a traitor.

The whistleblower **dissents** from the accepted culture, internal principles and practices of the organisation. (This culture and practice may not be, and usually is not, what is said to be the case – few, if any, organisations will admit to tolerating corruption, for example – and the whistleblower is almost always following the principles that society and the organisation *claim* are their norm.)

Major problems have occurred and continue to occur for us in society because of our failure to deal appropriately with the **principled organisational dissenter**, who is usually blowing the whistle on what we may call the **unprincipled organisational deviant**.

Effects on the public of failure to nurture and encourage whistleblowing are widespread and serious. Examples are:

- the current economic recession, which can be seen as the victory of unprincipled deviance in the finance and banking industry over would-be and victimised whistleblowers who tried during the eighties to alert us, and the industry, to what was going on;

- environmental contamination, which is a major problem here, but, as is now becoming clear was rampant behind the Iron Curtain. Chernobyl is one well-known example of the inevitable results of ruthless suppression of any disagreement with current practices, no matter how unsafe. Some horrifying generic and other medical consequence for the people of Kaxakhastan of Soviet nuclear tests conducted nearby are only now being publicised, although they have been painfully obvious to locals for many years (Easterman, 1993);

- disasters that could have been avoided, e.g. Challenger – a whistleblower tried to prevent it from taking off, but did not go public until after it had crashed. NASA took no notice of the criticism while it remained internal, and tried to discredit him subsequently; and

- cuts in public services, such as health and transport, which are made necessary by having to fund corruption and mismanagement within those areas.

Effects on the whistleblower are also serious. It should be noted that many people who are treated by the organisation as if they have blown the whistle (i.e. have gone outside the organisation, to some other authority, or to the media) have not in fact done so. They may have for example, written a report in the course of their duties, whose contents the employer doesn't like, or which is then leaked by someone else; or they simply may be known to be aware and unsympathetic to the corruption/mismanagement. As one such person said, he hadn't blown the whistle at all – he was suspected of loitering with intent near a whistle!

The following is from a survey of some 233 whistleblowers in the USA. (MacMillan, 1990):

- 90% lost their jobs or were demoted
- 27% faced lawsuits
- 25% got into difficulties with alcohol
- 17% lost their home
- 15% were divorced
- 10% attempted suicide
- 8% went bankrupt.

A more detailed survey in 1993 under the auspices for Whistleblowers Australia found similar results. Thirty–five subjects had blown the whistle on corruption and/or danger to the public, from less than two years to over 20 years ago. They came from a range of occupations – banking/finance, health, law enforcement, local government, transport, teaching and miscellaneous public service, State and Federal. Their estimate of the cost of the corruption to the taxpayer was from thousands of dollars (14%), hundreds of thousands (17%), 1–30 million (26%), and hundreds of millions (9%) – in the banking/finance cases.

Dangers to the public included disease, contamination, unsafe hospital equipment, unsafe aircraft, unsafe railways, licensing of incompetent drivers, child sexual abuse, arson/sabotage and unsafe working conditions. Other items also classified under danger to the public were wrongful eviction from homes, insider trading, and immigration rackets.

On similar measures to the U.S. study:

- 90% lost their jobs or were demoted
- 20% got into difficulties with alcohol
- 20% had long term relationship break up
- 20% were threatened with a defamation action

- 6% attempted suicide
- 9% went bankrupt.

The similarity to the U.S. figures is striking.

The organisation's response to the whistleblower is very powerful, and follows a readily recognisable pattern. It is crushing in its intensity, as the organisation can use as many staff as it takes, for as long as it takes, to wear the lone whistleblower down. There is almost always some kind of *disciplinary action*, often on 'unrelated' matters, up to and including dismissal. (The employer's ability to take action on allegedly unrelated matters is a major barrier to effective whistleblowers protection legislation.) In the WBA study, 20% had been dismissed and 14% were demoted; 14% were transferred (to another town not just within the department); 43% were pressured to resign; and 9% had their position abolished.

There is often some kind of *legal action*, e.g. defamation suits, or use of the *Official Secrets Act* if it applies. The main legal action in Australia seems to be threatened defamation action – this occurred in 20%.

While the person remains in the job, *informal tactics* are used almost invariably. In the WBA study, these included:

- isolation – from usual channels of information and consultation (49%); or it may be physical, (23%) e.g. being put in a room with a desk and chair, no telephone, and not allowed to leave it without permission; or in one case, in a separate building with no-one else in it;
- removal of normal work (43%);
- abuse and denigration, formal and informal, usually by supervisors, who may also encourage other employees to give the whistleblower a hard time (43%);
- minute scrutiny of time-sheets and work records, inspections, adverse reports sought from previous employer (34%);
- demanding or impossible orders (26%);
- referral for psychiatric assessment/treatment (37%), plus an attempt to do so in another 9%; and
- repeated threats of disciplinary action (20%).

Other items reported less frequently in the WBA survey were other types of harassment, such as menial duties, denial of benefits, barred from site, files removed, death threats, fines, internal inquiries, falsification of records and unrelated charges.

This victimisation usually continues until the whistleblower is dismissed, resigns or retires early. At the time of the WBA survey, only 10% of those who had been working for the organisation they blew the whistle on were still working in the same position. A common outcome was to resign or retire because of ill health related to the victimisation (29%). Only 29% were now working full-time for any employer, 29% were unemployed, 6% working part-time, 11% had retired and 6% were on the invalid pension.

Features of the organisational response

It is orchestrated as well as powerful. In most cases it is also very fast. All the subjects in the WBA survey had started by making a complaint internally, through what they believed were the proper channels. In three cases (9%), it had never gone further than that. Thirty-two (91%) complained to some outside body after the internal complaint failed, e.g. local MP, Union, Ombudsman. They went public, to the media, only after that too failed. Only 49% had ever been to the media. But in 83% of cases, the victimisation occurred immediately the first internal complaint was made. In some cases it had started before, e.g. when the whistleblower had refused a bribe. This is in sharp contrast to the usual authority's view of whistleblowers – they are publicity seeking ratbags who rush off to wash dirty linen in the media on very slight provocation. (Parker, 1992)

The organisation's response may involve the whistleblower's trade union, because other members on that site are actively involved in the original malpractice, or in persecution of the whistleblower; or the hierarchy of the union may have connections with management who are corrupt, or have an interest in keeping the matter quiet. In the WBA survey, while 6% of subjects found their union 'helpful', 17% found them 'harmful' and 23% 'neither helpful nor harmful' or 'useless'.

The response may also involve other potential supports for the whistleblower, including Members of Parliament and their church, if that is the subject of the allegations. If the organisation is, or includes, organised crime, potential supports may be too scared to become involved in any way, no matter how small.

The aims of the responses are:

1. To isolate the whistleblower by removal from the accepted 'in-group' (one of us) to 'out group' status, by being labelled:

    - incompetent,
    - disloyal,
    - a ratbag, or
    - mentally unbalanced/ill.

2. To frighten others who might otherwise support the whistleblower.

3. To avoid examining or remedying the issue the whistleblower is complaining about.

This had largely been achieved in the cases in the WBA survey. The wrongdoing continued unchanged or increased in 71% of cases; 26% of the wrongdoers were promoted and 60% had nothing happen to them. Minor disciplinary action against wrongdoers occurred in 14% of cases but there was only one case of any disciplinary action against a wrongdoer without others involved in the same activity being promoted. In contrast, the whistleblowers were left to struggle with massive financial loss – 40% had a reduction of 75% or more of their income, and 49% estimated their personal financial loss (including legal and medical costs, loss of income, superannuation etc) in the $100,000 to $1 million range. Their physical and mental health was now poor and their careers in ruins.

Their families suffered with them: in the sample of 35 whistleblowers 30 had a total of 77 children between them. Of those 60 (78%) were said to have been adversely affected – by divorce and forced separations, poverty and financial stress, disrupted education, anxiety, insecurity, and stress; anger and loss of faith; in one case being unable to go out because of the risk (father having a contract on his life, and being under police protection); a death threat letter addressed to a six-year old by name; pets killed as reinforcement to a death threat; public attacks on the parent's image; and the parent being preoccupied, absent, unable to relate, having no time or interest for the children's activities and being ill.

Whistleblowers and statutory authorities

The WBA survey included a question on the response of authorities the whistleblower appealed to for help. These had generally been remarkably unhelpful. A total of 50 authorities were mentioned, covering several States and the Federal jurisdiction. The Administrative Appeals Tribunal did best, with three 'helpful' mentions, one 'neither helpful nor harmful', and no 'harmful'. Industrial Relations scored only one 'helpful' (NSW), two 'harmful, 14 'neither' and one useless. The Independent Commission Against Corruption scored one 'harmful' and eight 'neither'. Human Rights Commission and Anti-Discrimination bodies scored two 'harmful' and four 'neither'. Police scored two 'harmful' and five 'neither'. Local MPs scored one 'helpful', two 'harmful' and six 'neither'. The Merit Protection and Review Agency scored one 'helpful', two 'harmful' and two 'neither'.

In total, there were only ten 'helpful' mentions, compared with 22 'harmful' and 52 'neither helpful nor harmful'.

Whistleblowers and workmates

One of the most distressing aspects for most whistleblowers is the lack of support and sometimes active victimisation from workmates. Particularly distressing are acts of betrayal by people who previously were close to them.

There is usually some support, but this is often covert. It is not uncommon for workmates to express support and approval if they are alone and unobserved, e.g. if they meet the whistleblower in a lift, but to walk past without acknowledgment if they meet in an open corridor. In the WBA survey, open or even secret support from most or some workmates occurred in less than half the cases. Ostracism, active victimisation and betrayal occurred to some degree in about three quarters of the cases. Overall, it seems most workmates play it safe.

Whistleblowers and psychiatrists

Whistleblowers are often forced by the employer to see a psychiatrist chosen by the employer. The aim is to make a finding sufficient to discredit the whistleblower as having a personality disorder or pre-existing psychiatric illness, or a neurotic reaction. All too often, the psychiatrist selected by the employer will cooperate in this, relying perhaps on uncorroborated information/allegations supplied by the employer without the whistleblower's knowledge or consent. If, however, the psychiatrist reports that there is no pre-existing problem and a person's complaints of malpractice within the organisation should be taken at face value and properly investigated, the employer will usually insist on referral to another psychiatrist; and if that one's report