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

is no more helpful, to another ..... until the desired report is achieved. One whistleblower was sent to a total of eight psychiatrists!

In the WBA survey, 40% of the men, and 30% of the women, had been forced by their employer to see a psychiatrist. They saw between one and six each (average three). Thirty percent of them found the experience helpful or neutral; 70% found it unhelpful or distressing. In three more cases the employer tried, but was successfully resisted.

Whistleblowers often self-present to psychiatrists, and/or their local GP, with symptoms arising from the severe stress they are under. They commonly become extremely anxious, may have panic attacks, have trouble sleeping, lose confidence and self-esteem, become depressed and suicidal; may attempt suicide; and often become obsessed with the issue. They may also present because of a problem with alcohol and other drugs, if they start using them to try to cope with the stress. They may also present because of problems in the marriage, caused by the stress.

In the WBA survey, 93% of subjects experienced symptoms: those listed above, plus feelings of guilt and unworthiness, nervous diarrhoea, trouble breathing, loss of appetite, loss of weight, high blood pressure, palpitations, hair loss, grinding teeth, nightmares, headaches, tiredness, weeping, tremor, urinary frequency and loss of interest in sex. They had an average of 5.3 symptoms each at the time they blew the whistle, and still had an average of 3.6 at the time of the survey, between one and 20 years later. Forty-three percent were on medication they had not been on before they blew the whistle – for depression, high blood pressure, and stomach ulcers. Only 49% were originally drinkers; of those, plus two previous non-drinkers who started drinking to cope with the stress, 32% had developed a problem. (One had stopped drinking altogether because of this.) Seventeen per cent were smokers when they blew the whistle. All smokers had increased their consumption afterwards because of the stress; one had quit because of this. Eighteen (51%) still thought about the whistleblowing and its aftermath every day, for one or more hours. This was spread equally between the different time categories, i.e. this still applied even after twenty years.

Two subjects had attempted suicide, one of them twice; and 17 (49%) had considered suicide, 10 of then seriously.

Management of the problem

(Guidelines for doctors, lawyers, union representatives, family, friends and whistleblowers themselves)

1. Diagnosis – it is very reassuring to someone caught up in this mess, where they are essentially completely and painfully isolated, to know that what they are going through is a recognised phenomenon, and that they are not the only person this has happened to.

2. Reassurance and explanation of the phenomenon is helpful, to reinforce that it is occurring not because of some failure on their part, but because of the failure of the organisation to deal appropriately with the issues they have raised.

3. Advice on priorities. The whistleblower is commonly intensely preoccupied with the issue, and the injustice of the employer's reaction, to the point of obsession; is often significantly incapacitated by anxiety and depression, but expending all his/her energy in trying to get action on the malpractice. They have to understand that remedying the malpractice may take many years, and the priorities therefore must be:

   (i) look after their own physical and mental health. This has to be, and remain, their number one priority. They will be no use to anyone in a state of physical and mental collapse;
   (ii) organise support for their spouse and family. A marriage break-up won't help either;
   (ii) look at arranging the best possible exit from the situation, whether by ending the persecution so they can stay where they are (very seldom possible); being transferred to another department; or leaving – with the best possible financial or other settlement; and
   (iv) once the above are in place, look at what can be done about the underlying problem.

The process that occurs in response to whistleblowing is not new. The traditional treatment of mutineers has always been similarly very savage, as a challenge to authority that can never be allowed, whatever the provocation. Heretics received similar treatment in the days when the established Church had more authority than it does now; the political dissenter under a totalitarian regime is now treated in similar fashion – in the USSR, this included the systematic misuse of psychiatry, very reminiscent of the misuse with Australian whistleblowers described above, where dissent from Government policy was the sole and sufficient symptom of a disease not recognised in other countries – 'creeping schizophrenia' (Koryagin, 1989). On a similar scale, but reflecting essentially the same process, the incest victim challenges the system of family authority, and unless specifically supported, is likely to experience the same destructive response.

False/malicious whistleblowing

The possibility of false, malicious, petty or delusional whistleblowing has to be considered. In the current climate, only the last is at all likely to occur; but if/when effective protective legislation is in place, it would be conceivable that people who suspect they are likely to be accused of some wrongdoing they have in fact committed could get in first with an accusation against others, then claim the protection of the law. It is important to remember, though, even with a whistleblower who has been involved in criminal activity, especially with organised crime, their evidence is often all that is available. It is also often the best.

It is important not to get caught up in the process of minute inspection and analysis so typical of the whistleblowing situation, and described beautifully in evidence given to the Nagel Royal Commission into the prison system in NSW in 1976 by a psychologist, Len Evers, who had blown the whistle on bashings that occurred after a riot.

> *Well I suppose the main bone of contention (with a senior Corrective Services official) was whether I should give him the statement that I held*

at that point, and if I did give it to him, under what kinds of guarantees he could give me that the prisoners in question would not be discriminated against in any way; and the other thing, I suppose, was at that point I had become suspicious of the reason for the departmental interest – it seemed to me that they were not following the line that I expected them to take, that they were in fact examining me, and not the things I was trying to bring to their notice. (Nagel, 1976)

Despite what employers would like to believe about whistleblowers' personalities, they seemed in the WBA survey, at least on a rough assessment, to be unremarkable. On an adaptation of the Myer Briggs scale, 60% were introverted, and 40% extroverted, i.e. they are less extroverted than the general population, where these ratios are roughly reversed. On the remaining axes there was a preponderance of the STP combination (sensing-thinking-perceiving), which at 46% was much higher than the approximately 12% found in the general population. This personality type is considered particularly suited to occupations like accountancy and quality control. (Myer, B., 1981) and it is not perhaps surprising to find it present so often in whistleblowers. It is however the antithesis of the employer's perception of the impulsive publicity-seeking ratbag. Nor are they remarkably religious. Twenty-one (60%) said they were Christians (no other religion was mentioned); 14 (40%) had no formal belief. (In the 1992 census, 68% of Australians classified themselves as Christians.) Their motives, however, for blowing the whistle were predominantly ethical; duty, concern for others, justice, or to stop the wrongdoing. But even if they were in fact all publicity-seeking ratbags, criminals, or 'difficult', examining the whistleblower's sanity, personality, motives and morals is always irrelevant. What matter is whether what they are saying is true.

Corruption of protection agencies

A very important issue, which partly explains their ineffectiveness as described earlier, is the corrupting process that is likely – possibly inevitably – to affect investigators and whistleblower protection agencies. It is almost universal experience that bodies set up to redress injustice of this kind gradually become part of the authority system themselves, hence useless to the whistleblower. Most Royal Commissions turn into whitewashes. Sometimes they were set up to do just this, but often were not; they become corrupted by close contact over a long period with the culture in question.

Apart from the seductiveness and contagiousness of corruption, there is also the practical issue of career and personal advancement within the larger bureaucracy of which the protection agency is necessarily a part. A protection officer who makes life difficult for other bureaucrats is unlikely to achieve advancement in any other department, and prospects for promotion if confined to their own agency will be very limited.

Obedience to Authority

Apart from such personal and essentially selfish considerations; why do psychiatrsts, workmates and protection agencies so often support the authority and not the whistleblower? This, despite the fact that, in several States in Australia there is a legal obligation to report a felony; and "It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for

an offender to say that he acted under the orders of a superior officer." (Sir Harry Gibbs)

The basic problem and paradox is *that obedience to authority, a basic necessity for constructing and maintaining our society, becomes a powerfully destructive force when that authority is doing wrong.*

This issue was studied extensively after the last War, when it became clear that the Holocaust, which killed six million Jews and others, was organised not by abnormal sadists, but by very ordinary bureaucrats. An important series of studies was done by Stanley Milgram, at Yale, in the late 1960s. (Milgram, 1974) This involved an experiment, ostensibly on 'memory and learning', with a 'teacher', chosen by rigged ballot, who was the real subject of the experiment; and a 'learner', who was really an actor. The 'teacher' was asked to administer a series of shocks of increasing intensity to the 'learner' when he gave wrong answers. Despite clear warnings of protest from the learner and the possible illness/death of the 'learner', two out of three subjects went to the maximum 450 volt shock. The subjects of this experiment experienced a great deal of stress in the situation. Some of the compliant ones would offer some covert resistance, giving a lower shock if the experimenter wasn't present, or giving the 'learner' hints of the right answer; some however reduced their stress by blaming the 'learner' for stupidity and slowness.

Milgram and colleagues were horrified and distressed by the degree of compliance shown. He postulated that people in a situation where they are being told what to do by someone identified as an authority enter an 'agentic state', where they put aside issues of individual responsibility and morality. This state is reinforced by:

- ideas of duty, loyalty and discipline,
- becoming enmeshed in an incremental fashion,
- being able to see oneself as just a cog in an administrative machine, and
- simple fear of social embarrassment.

It is decreased by:

- increased proximity to the victim (compliance was halved if the 'learner' was seated next to the 'teacher', who had to force his hand into contact with the electric plate; as opposed to the base situation where the 'learner' was out of sight, but within earshot, in the next room),
- group support for disobedience, and
- lower prestige of the authority.

Milgram in his book *Obedience to the Authority* suggests that this issue is one that threatens the very survival of the human race; and indeed it seems a very fundamental and intrinsically insoluble paradox. This was expressed very succintly to me once by a rationalist friend who ran an underground printing press from his home in the best rationalist tradition. He said he also did a bit of work for the anarchists, and would have like to do more, because they had some very good ideas, but 'they're not very well organised!'

'Groupthink'

A related issue is the general behaviour of groups. Apart from obedience to an identifiable authority, people in groups tend to conform to what others in the group do or say, even when the group view is glaringly wrong (Asch, 1951). A form of conformity particularly relevant to whistleblowing is 'groupthink' described by Janis (1972) when a cohesive group often with a dynamic and influential leader, manages to insulate itself from the reality of a situation, by ignoring important aspects of it, excluding any member who questions the validity of their decisions. The classic example was the invasion of the Bay of Pigs under President Kennedy, where he and his advisers took on a project that to outsiders, and in the event, was politically and practically impossible, and very damaging.

It is clear that top management in many whistleblowing cases are in a state of 'groupthink'. The typical whistleblower accumulates a mass of significant documentary evidence, and has no difficulty convincing journalists and others outside the organisation of the truth of what they are saying; while the bureaucracy remains completely convinced that X is a troublemaker that no-one would listen to, and the Minister, even in this situation where the whistleblower is obviously in conflict with his Department, will continue in the face of a succession of damaging allegations to rely on evidence from that Department, without making any attempt to consult anyone else, and particularly not the whistleblower.

Bureaucracy is of itself, and by its nature, an integral part of the problem. This was very well expressed in a Royal Commission (Slattery, 1990) by a senior NSW Health Department bureaucrat who was asked to justify advice given to the Health Minister in response to a letter from the Attorney General asking what was being done about the abuses going on at Chelmsford Hospital.

Question: Do you now say it is misleading?

Answer: I think with a deal of hindsight maybe it did not tell the full story.

Question: You did not think it was important in answering (the Attorney General) to say, 'In response to your letter of 17 October 1978 investigation has been initiated but practically nothing has been done for two years'?

Answer: Any bureaucrat who wrote that would not be left alone. It is unbelievable to suggest anyone would write such a letter.

Bureaucracy, unless active steps are taken to prevent it, will always be in a state of combined groupthink and obedience of authority. Ideas and instructions flow from the top down; any conflicting or unpleasing information from the bottom is self-censored, as outlined above.

Advice to whistleblowers

So what should a potential whistleblower do, given the power, inflexibility and irrationality of the system they face? Advice from whistleblowers in the WBA survey

(apart from 20% saying 'don't') was along the lines of being prepared. Have everything documented, with tapes and videotapes if possible; learn the legal aspects before you start; trust very few people, particularly politicians, try to remain anonymous; get outside help; don't expose yourself to your employer, but go straight to an outside agency. Other things that became clear from the survey were that the outside agency would be unlikely to help, and might even by harmful; and while I would hesitate to advise people definitely at this stage on the basis of one relatively small survey, it may well be that in fact the best thing to do is what whistleblowers are so often unjustly accused of doing – go straight to the media, without trying the potentially extremely risky course of making the first complaint through the proper channels.

It is very important for the whistleblower, when considering making a complaint, internal or external, to line up support for themselves before they start. The most reliable support will come from outside the organisation – support from within is likely to crumble once a typical employer reaction starts. A body such as Whistleblowers Australia is useful, not only for general support and advice, but also in some cases to take the whistleblower's information to the media or outside agencies, rather than them having to take the risk of doing it themselves. There are at least two important psychological considerations in having the matter raised externally to start with: first, that since one issue is the indignity of having imperfections in the organisation pointed out by a 'traitor' within it, particularly since that person is usually in a relatively low position, it may in fact be easier for management to approach the matter realistically if the person who first raises it is an outsider, second, that even if it is fairly obvious who the informant is (as it often will be, no matter what precautions are taken), the appearance of an outsider right from the start removes the perception of the whistleblower as a lone eccentric who will be easily disposed of by a concerted attack. The more and sooner the unequal power relationships can be seen to be altered in the whistleblower's favour, the less unfair their treatment is likely to be.

A very important piece of advice for whistleblowers, which they ignore at their peril, is never to use an official, internal 'anti-corruption' body for anything but the most trivial matter, and preferably not to risk using it even then. Whistleblowers Australia suffers from an inevitable bias in the information we get, in that satisfied whistleblowers are unlikely to contact us. It is possible that there are internal anti-corruption bodies that are genuine, but in our experience the problem pointed out by Bok, regarding dissent, also applies to lesser corruption:

> *If the abuse – the secret bombing of Cambodia, for instance, or corporate bribery, or conspiracy to restrict trade – is planned by those in charge, then the 'open-door' policy turns out to be a trap for the dissenter.* (Bok, 1981)

Internal anti-corruption bodies often seem to aim to trap and weed out actual and potential whistleblowers rather than do anything except produce glossy brochures on weeding out the corruption itself.

Another important piece of advice is that at all stages whistleblowers and their supporters have to be prepared for the long haul. It was clear from the survey that the damage done to the whistleblower, and particularly to the family, increases as time goes on. The children said not to have been damaged were all from cases that

had been going less than four years. Even four years, of course, would seem an incredible length of time to a whistleblower in the early stages – they assume it would be resolved in a few weeks or months. It won't be. The legal system, and statutory authorities, work on a time scale where three months to answer a letter is reasonable, and indeed rather fast. It is exceedingly difficult, even when both sides want a matter settled, to achieve it expeditiously. When one side does not want it settled, or indeed to get into open court, and that side has the power and the money, it can be drawn out almost indefinitely, for as long as necessary to exhaust the whistleblower's emotional and financial resources. The industrial court system is less unwieldy, and is therefore the best option for whistleblowers, as long as they can get support from their union.

Advice to management

The basic question that has to be decided by management is one of ethics, and if top management is not corrupt, that question is relatively simple. It is not only unethical to support and conceal corruption, it is also bad for business; it is not only unethical to put employees (or indeed any fellow human being) through the prolonged and devastating torment whistleblowers suffer, it will also mean an unhappy, guilty, fearful and much less efficient and productive workforce – bad for business again. The difficulty, though, in implementing a Fitzgerald-like approach to encouraging whistleblowers, and exposing and weeding out corruption, is that the small and 'justified' lurks that have become accepted practice in management are likely to be exposed too; and it is quite possible that, as in Queensland, once exposed, the stain will be seen to extend right to the top.

Corruption is like white ant infestation – silent and unnoticed until part of the structure collapses; but once it is found somewhere in a building, it must be assumed to be everywhere until proved otherwise. Bosses who refuse to recognise this must, I believe, be assumed to be part of the problem, i.e. actively involved. They may in fact simply be naive, but far more often, I believe, they are also corrupt.

A related issue is the extreme difficulty that known whistleblowers usually have in getting another job in their field. If managers of similar organisations were committed to eliminating or preventing the type of practice the whistleblower complained of, then obviously there could in fact be no better person to employ than those who have shown, in an extensive trial by ordeal, that they are not corruptible; are particular in their attention to facts and details, and have the longer-term interests of both the public and the organisation at heart, rather than opting for a quiet life in the short term. It seems, however, that in practice managers are not all enthusiastic about exposing themselves and their organisation to such people. Again one has to ask whether this is simply a matter of authority figures sticking together no matter what; being nervous of staff who may rock the boat; or whether it means that most managers have something to hide.

In the long term, there is an obvious need for more education and research into this area. On what is known now, it would seem that astute and honest CEOs would insist on all internal complaints coming directly to them in the first instance; would make it clear to subordinates that any victimisation of complainants would not be tolerated, and any complaints against complainants on 'unrelated' matters will be treated as victimisation until proved otherwise; and would follow up outcomes of complaints, including by personal interviews with the complainants. This assumes

that the CEO is not corrupt, and is prepared to deal appropriately with complaints that may turn out to involve others in top management. It also assumes that the CEO is willing to listen to criticism, is open to input from people lower down the hierarchy, and is not being leaned on by corrupt politicians from above.

But in the end, it comes back to ethics – in management, and in the general workforce; an acceptance that corruption, financial or otherwise, is damaging both to the organisation and to the whole community and that whistleblowers represent an important and valuable resource in helping to keep standards the way we would like them to be.

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THE CJC EXPERIENCE

Andrew Marjason, Complaints Section, Official Misconduct Division, Criminal Justice Commission

The Complaints Section is located within the Official Misconduct Division of the Criminal Justice Commission and, in accordance with the provisions of the *Criminal Justice Act*, is required to accept complaints against a wide range of public sector officers in Queensland including those in the police service, public service and local government.

From April 1990 when the section first became operational until 31 October 1993, a total of 10,379 complaints were registered at the Commission. Not all complaints are treated similarly. Of this total 2,485 are relatively minor matters which have emanated from the Queensland Police Service. The Commission, by administrative arrangement, no longer investigates these matters and, upon agreeing with the assessment of a commissioned officer which accompanies each notification, this Commission has no further part in the determination of those matters. These matters are termed 'breach of discipline matters' on the table at Attachment 1, all others are referred to as 'standard complaints'.

The Commission has different responsibilities with respect to police officers from those with respect to other public sector position holders. For the Commission to investigate a complaint against the latter group, the reported conduct must be related to that officer's duties and must either constitute a criminal offence or a disciplinary breach which, if proven, would warrant that officer's dismissal. The effect of these legislative provisions is that Chief Executives rely on existing disciplinary provisions in resolving minor complaints against members of their staff. They are only required to notify this Commission when the allegations satisfy the above criteria.

Each fresh complaint is assessed by a committee comprising a lawyer, a senior police officer and myself. An average of eight matters are reviewed daily in addition to a similar number of minor matters as described above and other correspondence which, at face value, does not constitute a complaint but still requires an appropriate response.

The number of 'standard complaints' received at the Commission is increasing steadily. Progressive monthly figures for the financial year to date are consistently higher than for the previous corresponding period.

The computerised database on which complaints information is stored allows us to look separately at complaints against public servants and local authorities. At 31 October 1993, the Commission had received 907 complaints against public servants. This represents 11.5% of the total standard complaints received. For the same period, 664 complaints or 8.4% of the total were received against employees or elected representatives within local authorities.

The number of complaints received from each sector remained comparable until the lead up to the last local authority elections when there was a distinct increase in the

number of complaints against elected representatives. After the elections, the rate of intake normalised and this situation was maintained until approximately July 1992. Since then there has been a greater rate of complaints about public servants. No doubt this has been due at least in part to the efforts of the Corruption Prevention Division in educating Principal Officers of their obligation to notify this Commission of suspected official misconduct. This rate of increase is not reflected across the breadth of the public service however. For instance, 183 of these complaints have emanated from the Department of Education. The Commission does not consider that this figure on its own is alarming as there are over 28,000 teachers and 32,000 other non teaching employees in Queensland. Rather, it reflects the co-operative efforts of this Commission, the Education Department and others to develop an appropriate response to allegations of assault levelled at Education Department employees.

The complaints database records allegations made against each person. The most common allegation levelled at public servants is corruption or favouritism. This tally also includes allegations of bias. Only in a minority of cases does the allegation describe what one might ordinarily consider corrupt behaviour. The second most commonly lodged allegation alleges criminal conduct. The overwhelming majority of these cases involve stealing or the misappropriation of departmental property. There are 186 notifications alleging duty failure. As is the case with many allegations, there is frequently a subjective component to these complaints. Complainants may view an unpalatable decision as duty failure by the departmental officers.

In the period under review the Commission has also received 121 assault allegations against public servants. In addition to those already mentioned, the Commission has also received complaints against staff working in institutions operated by both the Health Department and the Department of Family Services.

Of the 1,098 allegations received to date against local authorities, 576 of these allege corruption or favouritism. A significant proportion of these allegations stem from rezoning or redevelopment applications. As mentioned previously this code is broader than its name alone implies and includes perceived bias and inconsistencies. Complainants frequently extrapolate from their own unsuccessful applications before Council, assuming that the decision making process has been compromised by a corrupt official. The next most commonly reported allegation involves criminal activity, and as with public servants the single most common incident reported is theft. Unless these matters are indicative of a large, organised system they are referred for the immediate attention of the Queensland Police Service. The Commission would only normally investigate matters where the allegations suggest wholesale systematic abuse.

The 7,894 standard complaints have come to notice courtesy of 8,320 complainants. Approximately 70% of all complainants are members of the public. However, for the period since 1 July 1993 this proportion has fallen to 54% with a concomitant increase in notifications by police officers, principal officers and prisoners or detainees. It is notable that, in this last group, the majority of complaints stemmed from incidents at police watchhouses.

Only 4% of the complainants for the year to date identify themselves as public administration employees, a slight increase over the 3% recorded for the period 1992/93. The statistics tell a different story however when one looks specifically at complaints against either public service departments or local authorities. This

excludes over 70% of complaints which is the portion attributable to members of the Queensland Police Service. I believe the selective viewing of these statistics to be valid, however, because clearly public servants can only fulfil a whistleblowing role within their own employment sector. The profile of complainants against public servants has changed dramatically since 1991/92 when 59% of all complainants were members of the public. Now only 30%, or just over half that figure, are lodged by members of the public. In the same period the proportion lodged by principal officers has increased from 12% of the total to 46%. While whistleblowers have remained relatively stable up to this period at around about 10%, many of the notifications attributable to principal officers have been initiated by whistleblowers who in many instances advised supervisors, who in turn caused the complaint to be lodged with the Commission in accordance with the provisions of the *Criminal Justice Act*.

Similar trends are discernible within local authorities where notifications from members of the public have decreased from 66% to 43% of the total from the period 1991/92 to the current financial year. Thirty-eight per cent of complainants come from within the organisation with approximately half sourced each to the principal officers and other employees. The Commission is pleased to report these trends, as it reflects an increasing willingness by whistleblowers to come forward.

I have spoken to many complainants since I joined the Criminal Justice Commission in February 1990. It seemed that many found difficulty not with the whistleblowing per se but rather arriving at the personal decision that the particular conduct was sufficiently offensive to warrant their coming forward. Therefore it seems that many individuals have a personal threshold determined by their own values and that once they witness conduct by a work colleague which exceeds this threshold, they are prepared to complain.

Perhaps the challenge for us as public sector supervisors may not be to just frame the ultimate legislation and attendant services, which would be enlivened only after a notification, but also to generate and sustain an environment where employees feel comfortable to examine their own workplace values and those of their colleagues.

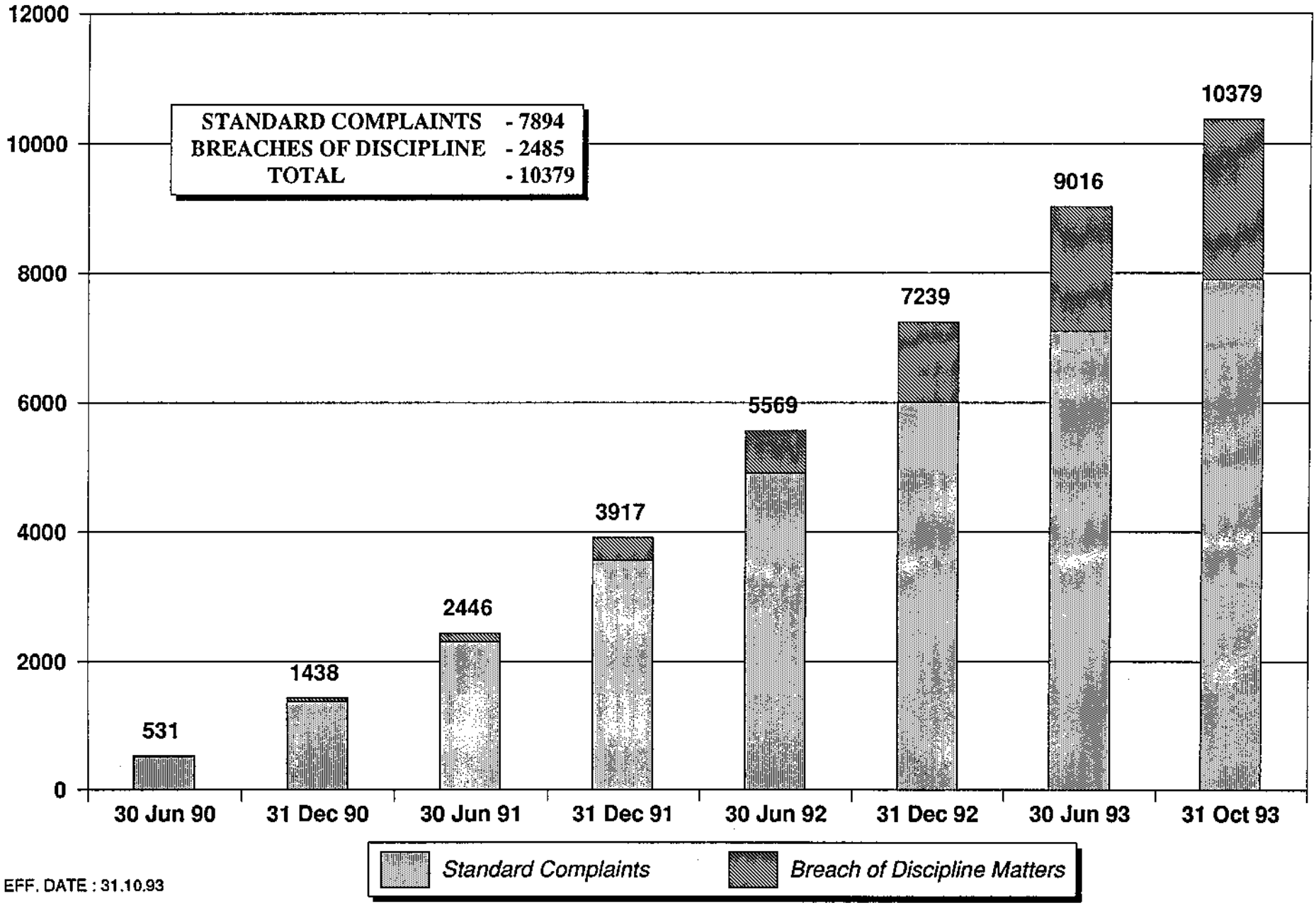
Attachment 1

Complaints Received

Progressive Total All Complaints

1. COMPLAINTS RECEIVED
(a) Progressive Total
All Complaints

42



EFF. DATE : 31.10.93

THE IMPLEMENTATION OF WHISTLEBLOWER PROTECTION LEGISLATION: PROBLEMS AND PROSPECTS IN THE SOUTH AUSTRALIA CASE

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Introduction

It may be said that the easiest part of the policy process is the making of a law and that the hardest part of the process, and the part that causes the most problems, is what happens after a bill becomes a law. In this paper I shall comment on the implementation of the *South Australian Whistleblowers Protection Act* 1993. The first preliminary to note in this connection is that the Act was only assented to on 8th April 1993 and only came into force on 20th September 1993. On the other hand South Australia is the first jurisdiction in the country to pass such legislation and one noteworthy aspect of the passage of the legislation is that a great deal of work was done prior to drafting to lay the groundwork to ensure that its successful implementation would be more likely than otherwise. Thus even though the working experience of the implementation agencies has been slight, the South Australian case may serve as an example though not necessarily as a prescription.

It is not proposed to discuss the legislation in detail, though occasional references will be made to it and a copy of the legislation appears as an appendix to this paper. The analysis in this paper is very much based on the public policy implementation literature with reference to the public sector experience of Total Quality Management (TQM). The paper begins by explaining the importance of both the internal organisational culture and the external political-legal environment as key elements in successful implementation. In order to understand these points it will be necessary to explore the shifts in concepts of public accountability. One other preliminary point needs to be noticed. While this conference is concerned to explore whistleblowing in the context of TQM in both the public and private sector, in the South Australian case TQM was not mentioned as a consideration at the time the legislation was passed. Notwithstanding this the contribution of managerialism to improving the managerial climate in a complex organisation has been a consideration in recent public sector reforms in the State and many TQM concepts are referred to in various legal instruments. The main issue to be considered is whether an attack on waste, inefficiency, fraud and corruption is best mounted via general managerial and organisational changes that are durable rather than by a simple anti-corruption campaign per se.

The shifting paradigm of public sector accountability[1]

Traditionally accountability in the public sector has been seen in constitutional terms, that is, in terms of ensuring that officials adhere to prescribed legal standards. Given the special legal environment of accountability, public organisations have generally been rule governed,[2] rather than purposive, though, of course, the rules are supposed to assist the agency in the attainment of statutory purposes. In Australia's case there has been a marked intensification of legal institutional accountability since the beginning of the 1970s with the acceptance of Ombudsmen in all jurisdictions, the rise of the Administrative Appeals Tribunal system in the Commonwealth and Victoria, and the growth of judicial review throughout the country.[3] The Ombudsman and AAT phenomena are interesting in this connection because in both cases there has been a move of the legal boundary lines and a preoccupation with whether official acts were intra or ultra vires, into the agency in the case of the Ombudsman, and into the substance of the decision in the case of the AAT. In both cases, and to a lesser extent with some recently developing aspects of judicial review,[4] the legal institutional approach has become more intrusive. There is some evidence that the office of the Ombudsman, for example, has done more that merely redress individual grievances, but has also changed administrative policies and improved management practices.[5] The other major developments have been the rise of freedom of information legislation designed to provide greater openness in administration, and the development of modes of external review of agencies such as the police, once thought sufficiently legitimate to be trusted to regulate their own affairs.[6] Notwithstanding these developments the emergence of greater external scrutiny has not always been accompanied by greater public satisfaction[7] with the administrative process nor with better decision making.

The problem with the legal institutional approach is that it risked elevating adherence to rules over other public interests such as effectiveness, efficiency, and fairness in a substantive sense. Another difficulty is that the intensification

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[1]For a discussion of the meanings of the term accountability see: Ian Thynne and Jack Goldring, *Accountability and Control* (Sydney: Law Book Co, 1987), pp 6-9; P. Day and R. Klein, *Accountabilities* (London: Tavistock, 1987), pp 4-31.

[2]M. E. Dimock, "Bureaucracy Reexamined"(1944) in R. K. Merton, et al..(eds.), *Reader in Bureaucracy* (Glencoe, Ill: Free Press, 1952), p 399.

[3]There are numerous accounts of these developments. For a public accountability approach, see Robert D. Lee Jr., "Legal Parameters of Administration in a Democratic Society", *Administration and Society*, Vol 23, No 2(August 1991), pp 201-226; Bruce McCallum, *The Public Service Manager* (Melbourne: Longman Cheshire, 1984), pp 157-182; John Wanna, et al., *Public Sector Management in Australia* (South Melbourne: MacMillan, 1992), pp 183-194. For Queensland see *Judicial Review Act* 1991(Qld) and T. H. Jones, "The Reform of Judicial Review in Queensland", *Civil Justice Quarterly*, Vol 12(July 1993), pp 256-267.

[4]Consider the emerging doctrine of review of factual determinations: *ABT v Bond* (1990) 94 ALR 11(HCA)

[5]Dennis Pearce, "The Ombudsman: Neglected Aid to Better Management", *Australian Journal of Public Administration*, Vol 48, No 4(December 1989), pp 359-362. While this may be true, it is hardly a substitute for systematic internal improvements not occasioned by external scrutiny. Of course the advocates of the office would not say that this should be its role.

[6]Matthew Goode, "Complaints Against The Police in Australia", in Andrew J. Goldsmith, *Complaints Against The Police: The Trend to External Review* (Oxford: Clarendon Press, 1991), pp 115-152.

[7]See A. Daniel and S. Encel, "Public Perceptions of The Public Administrator", *Australian Journal of Public Administration*, Vol 40, No 3(September 1981), pp 187-200. In fact levels of saisfaction vary according to the organisation concerned.

of this type of accountability necessarily raises administrative costs,[8] may slow down the pace of decision making and often elevates formal procedural fairness over substantive outcomes. It is perfectly possible for a public agency to be fair but inefficient, or even efficiently unfair. One explanation for this is that these mechanisms were designed by and are largely operated by lawyers who specialise in formal procedural fairness, but who are sometimes ignorant of the substantive areas and not concerned with the particular policy arenas themselves.[9] The matter was further complicated by the fact that agencies were often required to pursue multiple objectives, some of which might conflict.[10] There is an expectation that an agency working with limited resources must work within the statutory rules, be fair and open, rational and effective. Many of these value conflicts originated outside the public sector and arise from political disputes sometimes not completely resolved by the political process. One consequence of these unresolved conflicts was that the bureaucracy became the battleground for wider disputes that the political process failed to resolve and with which agencies were ill-equipped to deal.

It was realised, however, from an early date, and most recently since 1976 at the Commonwealth level,[11] and later in the States,[12] that managerial accountability was as important as legal-institutional accountability.[13] The recognition that an agency had to set and achieve goals, as well as mobilise scarce resources to attain these objectives produced an appreciation of the tensions between rules, many of which either became ends in themselves (goal displacement), or which stifled initiative and innovation and thus produced inefficient results, and managerial imperatives which favoured goal attainment.[14] In the running of state owned corporations, such as the utilities, the application of managerialism was easier to implement in principle than in agencies that did not produce a product or raise significant revenue, but did provide a service often to clients with a very limited ability to pay for it. Even setting on one side the merits and demerits of applying private sector

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[8]R. C. Davey, "The New Administrative Law: A Commentary on Cost", *Australian Journal of Public Administration*, Vol 42, No 2(June 1983), pp 261-265; R. W. Cole, "The Public Sector: The Conflict Between Accountability and Efficiency", *Australian Journal of Public Administration*,Vol 47, No 3(September 1988), pp 227-228 for critical comments on the costs of the new administrative law.

[9]W. F. West, "Judicial Rulemaking Procedures in the Federal Trade Commission" *Public Policy*, Vol 29, No 2 (Spring 1981), pp 197-217; Barry R. Boyer, "Too Many Lawyers, Not Enough Practical People": The Policy Making Discretion of the Federal Trade Commission" *Law & Policy Quarterly*, Vol 5, No 1(January 1983), pp 9-33; Robert A. Kagan, "Adversarial Legalism and American Government", *Journal of Policy Analysis and Management*, Vol 10(1991), pp 384-386.

[10]B. W. Hogwood and B. Guy Peters, *The Pathology of Public Policy*(Oxford: Clarendon Press, 1985)

pp 46-61.

[11] *Report of the Royal Commission on Australian Government Administration* (Canberra: AGPS, 1976) p 36 para 3.2.12 (promotion of efficiency) and *Review of Commonwealth Administration*, January 1983(Canberra; AGPS, 1983) pp 44-45.

[12]For South Australia, see Bruce Guerin, "Setting New Directions in Management at a State Level: South Australia ", *Australian Journal of Public Administration*, Vol 44 No 4(December 1985), pp 385-394.

[13]E. Blankenberg, "The Waning of Legality in The Concept of Policy Implementation", *Law and Policy*, Vol 7(1985), pp 481-491.

[14]Bruce Buchanan, "Red-Tape and The Service Ethic", *Administration and Society*, Vol 6 No 4(February 1975), p 442. "But heavy rule emphasis can have undesirable consequences. It may promote goal displacement, a transference of rules into ends in themselves. It may retard innovative risk-taking and encourage the avoidance of personal responsibility. And it may undermine the adaptive flexibility of organisations by fostering undue rigidity in operations."

commercial principles to all aspects of public sector activity, the realisation that the extraction of revenue, either by direct taxes or by user fees, has its limits either by reason of tax payer resistance[15] or by reason of the adverse impact of the growing public sector on the economy as a whole had its limits. In an era of low economic growth the realisation dawned that simply deploying more money to solve problems was not producing the expected results, something that became clear by the late 1970s. There were various responses to this situation, one of which was to transfer activities to the private sector, another was to cutback services, a third has been the search for fresh sources of revenue by widening the tax base.

Another approach to the decline in resources was to try to extract more value and effort from public agencies by making employees work harder, and by eliminating waste, fraud[16] and corruption where it was believed to exist. Management auditing went some way towards achieving a reduction of waste as did law enforcement agency activities against corruption, bribery and other forms of maladministration.[17] The difficulty with direct coercive solutions to these problems, and this is a problem with laws generally, is that the persons and organisations expected to respond by compliance with external imperatives, often resisted these directives. The conflict between the assumptions built into laws and the attitudes of those expected to comply forced attention to shift from external top-down compliance towards the internal culture of organisations and the values of those who worked in them. What this research showed was that mere exhortation from the outside rarely deals with enduring patterns of behaviour and values at variance with legal directives.[18] In one study into popular perceptions of right and wrong, it was discovered that various forms of minor tax fraud, suspected to be widespread, were regarded as non-criminal by citizens.[19] Similar findings have been recently reported in Australia where it was shown that, while 74.3% of social security claimants said they would be honest in declaring income, the rest indicated otherwise.[20] There is also evidence that in the case of corruption occupational groups often regard

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[15]J. Sensenbrenner, "Quality Comes To City Hall", *Harvard Business Review*, Vol 69 (March-April 1991), p 65.

[16]See the issue of the *Canberra Bulletin of Public Administration* No 56(September 1988) "Fraud in the Public Sector" and Peter Grabosky (ed) *Government Illegality* (Canberra: Australian Institute of Criminology Proceedings No 17, 1986).

[17]For discussions of these phenomena see D. F. Morgan, "Varieties of Administrative Abuse", *Administration and Society*, Vol 19(1987), pp 267-284; Hogwood and Peters, op. cit.; C. Hood, "Administrative Diseases: Some Types of Dysfunctionality in Administration", *Public Administration*, Vol 52(1974), pp 439-454; Gerald E. Caiden, "What Really is Public Maladministration", *Public Administration Review*, Vol 51 No 6(1991), pp 486-493.

[18]H. R. Rogers Jr. and R. Harrison, "The Rule of Law and Legal Efficacy" Private Values vs General Standards", *Western Political Quarterly*, Vol 27 No 3(1974), pp 387-394.

[19]Michael Johnston, "Right and Wrong in Public and Private Life" in R. Lovell and S. Witherspoon (eds.), *British Social Attitudes: The 1985 Report* (London: Gower, 1985), pp 121-147.

[20]R Weatherby, "Doing The Right Thing: How Social Security Claimants View Compliance", *Australia and New Zealand Journal of Sociology*, Vol 29 No 1(March 1993), p 37.

behaviour that would be seen as corrupt under legal codes as an acceptable business practice.[21] One American study found that 70% of federal employees who had personal knowledge of corruption did not report it.[22]

The response in various administrative systems to the need to pay attention to the values of public servants and where necessary to change them produced a call for codes of ethics.[23] In the case of the Commonwealth a 1979 report into conflicts of interest by public servants recommended a short Code of Conduct which was adopted by the Government[24] and extended to all members of the Commonwealth Public Service.[25] The difficulty with these codes was that if they were too detailed they might either be ignored or be regarded as excessively rigid; yet if they were too short they would inevitably have to be interpreted in order to be applied and would still necessarily call upon the discretion and judgment of the officers concerned. The real problem of course was whether the values embodied in the codes would be internalised by public officials and implemented by their organisations.[26] Internal change within organisations could not be effected simply by sanctions and formal restraints, but, in the words of a Victorian committee, "The establishment and continuance of training programs, counselling and the maintenance of well-defined channels of communication are also essential."[27] Thus attention in the public accountability debate moved away from external review towards internal value changes within public organisations.

Implementation

(a) The findings in the literature

Implementation may be defined as actions by public and private individuals and groups that are directed at the achievement of objectives set forth in prior policy decisions.[28] Policy itself may be expressed in legal form, as many major policies are, but may also be found in non legal forms such as press releases,

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[21]S. Chibnall and P. Saunders, "Worlds Apart: Notes On The Social reality of Corruption", *British Journal of Sociology*, Vol 28 No 2(June 1977), pp 140, 149-150; Michael Johnston, "Right and Wrong in American Politics: Popular Conceptions of Corruption", *Polity*, Vol 18 No 3(Spring 1986), pp 367-391; Michael Johnston, "What Price Profits?", in R Jowell et al(eds.), *British Social Attitudes: The 9th Report*(Aldershot: Dartmouth, 1992), pp 131-154.

[22]Judith A. Truelson, "Blowing The Whistle on Systematic Corruption", *Corruption and Reform*, Vol 2(1987), p 56, citing a study by the US Merit Systems Protection Board.

[23] N. Preston, "Can Virtue be Regulated? An Examination of 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; J. F. Zimmerman, "Preventing Unethical Behaviour in Government", *Urban Law and Policy*, Vol 8(1987), pp 335-356.

[24]Public Service Board, *56th Annual report 1979-1980* p 4, Commonwealth Parliamentary Paper No 206 of 1980.

[25]See *Public Duty and Private Interest: A Report of The Committee of Inquiry*, July 1979 Commonwealth Parliamentary Paper No 353 of 1979 pp 31-32. Note the bibliography to this report that also lists reports from Victoria and New South Wales on the same phenomenon.

[26]R. Lovell, "Ethics Charter: The Cultural Challenge", *Public Administration*, Vol 70(Autumn 1992), pp 395-404.

[27]Victoria, Parliament, Session 1976-78, Vol 3: *Report of The Public Servants Ethical Conduct Committee on Conflicts of Interest*, June 3, 1976, p 8, para 51.

[28]D. S. Van Meter and C. E. Van Horn, "The Policy Implementation Process: a Conceptual Framework", *Administration and Society*, Vol 6, No 4(February 1975), p 447.

parliamentary statements, internal guidelines, codes and rules. Following the emergence of implementation studies in the 1970s[29] it was soon realised that the strong bias in the public policy literature towards top down studies of policy implementation[30] was inadequate and that in practice implementation had to be prepared in advance of policy formulation, and had to take into account the views of those who were expected to implement the policy.[31] As this process involved bargaining with employees in organisations there was always the risk of policy slippage as the bargaining process departed further and further from the original policy.[32] Bottom up approaches based on the welling up of policy through democratic consensus were also vulnerable to criticism,[33] especially if the effect was to prevent organisational change and to leave in place the very practices sought to be changed in the first place. It is also by no means inevitable that subordinate participation in decision making, whether about the policy or the process of implementation, will result in a consensus about goals or that the process of consultation will put an end to the problems of implementation.[34] On the other hand since top policy makers often formulated policy in ignorance of the actual conditions and the situation in which it was to be implemented, it was clear that effective implementation did require organisational consensus building and flexibility to adapt policy to its local context.

One of the major findings to emerge from the literature was that implementation is more likely to succeed if there is a high degree of organisational consensus in regard to a policy that requires the least change. In contrast the greatest difficulties arise where there is a low consensus about a policy requiring large scale change.[35] Where the goals are vague and poorly understood, where there is weak leadership from the top, or, at the other extreme, leadership is elitist, and there is a rejection of the new policy by subordinates, implementation will either be non-existent and merely symbolic. On the other hand it helps if the goals are clear and well understood by all and that the disposition of the implementers is in favour of the policy for if they reject the goals of the policy the probability of successful implementation is low.[36] Certainly in administrative systems with a good record of successful implementation prior consensus building within the affected organisation is regarded as an essential.[37] All of this points towards greater intra-organisational involvement in the implementation process, a measure of

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[29]One of the first studies was Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law*(Cambridge, Mass: MIT Press, 1977), a study of a mental health program in California.

[30]B. Hjern and C. Hull, "Implementation Research as Empirical Constitutionalism", *European Journal of Political Research*, Vol 10(1985), p 107.

[31]R. C. Lippincott and R. P. Stoker, "Policy Design and Implementation Effectiveness: Structural Change in a County Court", *Policy Studies Journal*, Vol 20, No 3(1992), pp 376-387.

[32]S. A. Linder and B. Guy Peters, "A Design Perspective On Policy Implementation", *Policy Studies Review*, Vol 6, No 3(February 1987), pp 465-466.

[33]P. Berman, "The Study of Macro- and Micro- Implementation", *Public Policy*, Vol 26(1978),

pp 157-184.

[34]Van Meter and Van Horn, op. cit., p 460.

[35]ibid., p 460.

[36]ibid., pp 465-466, 472.

[37]D. A. Cothon, "Japanese Bureaucrats and Policy Implementation: Lessons For America", *Policy Studies Review*, Vol 6, No 3(February 1987), pp 439-458.

decentralisation to encourage flexibility constrained by performance measurement to ascertain whether the goals of the policy are being achieved.[38] In short, implementation, especially in democratic cultures, needs to stress negotiation, consent and permission rather than simple control and command.[39]

Given that a static model of policy which assumes that once the policy has been formulated it cannot develop further seems to be discredited if it faces organisational resistance, policy implementers have to accept a measure of policy evolution as a consequence of the policy implementation process and this may involve what is called backward-mapping.[40] This term refers to the practice of taking elements that came into being in the past and subsequent synthesis of these elements into a policy for the future, rather than forward-mapping which is the practice of formulating a policy de novo for the purposes of future use. While backward-mapping may seem like an ex post facto rationalisation of a policy, it may also save public money by using existing institutions and policies rather than starting the process from the beginning.

The literature has also witnessed a widening of perspectives on implementation, especially where that process is to be carried out in an organisation, by considering the wider context of both the policy and the organisation itself.[41]. Thus even if one were to assume, in the case of public sector corruption, that a clean up of the organisation was necessary, if the problem is one of the general attitudes of the wider society then it would not make sense to stop at the organisation itself. This approach assumes that the environment in which policy is implemented is fluid,[42] if not turbulent, and that a rigid policy may not be the best design, but rather a policy that distinguishes between essentials that must be insisted upon from details that may be unimportant. A recognition of the fluid environment sensitises policy makers to the contingent nature of implementation and alerts them to accept that opposition to a policy may not be malicious, but simply arise from the incompatibility between the policy and existing administrative routines and attitudes.[43] Thus it is accepted that while top level political support may be necessary to initiate a policy, it is also

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[38]R. Common, et al., *Managing Public Services* (Oxford: Butterworths-Heinemann Ltd, 1992).

[39]B. Hjern and D. O. Porter, "Implementation Structures: A New Unit of Administrative Analysis", *Organisational Studies*, Vol 2, No 3(1981), p 223. See also the important synthesis in Law Reform Commission of Canada, Working Paper No 51, *Policy Implementation, Compliance and Administrative Law*, (Ottawa: LRC of Canada, 1986), p 12.

[40] Linder and Peters, op. cit., D. J. Palumbo, "Implementation: What We Have Learned and Still Need To Know", *Policy Studies Review*, Vol 7 No 1 (Autumn 1987), pp 91-102.

[41]M. Kiviniemi, "Public Policies and Their Targets: A Typology of The Concept of Implementation", *International Social Science Journal*, Vol 38(1986), p 263.

[42]Q. U. Khan, "A Model of The Public Policy Implementation Process", *Indian Journal of Public Administration*, Vol 33, No 1(1987), pp 31-39.

[43] Given the greater contrast between modernising policies and existing attitudes in third world countries this realisation was greatest in development administration: J Khan, "The Implementation Process", *Indian Journal of Public Administration*, Vol 35, No 4(1989), pp 851-868.

necessary to sustain the policy over time both to ward off waning enthusiasm and to deal with resistance to it if that should arise.[44]

The practical problem for implementers of new policies is to appreciate the nature of the organisational context they will have to work with. These vary and it has been suggested by one study from New South Wales[45] that these may be classified as follows:

(i) Collegial cultures

These cultures stress egalitarianism and embody a commitment to the organisation for social rather than task purposes. The emphasis here is on cohesion, participation and solidarity and there is a de-emphasis on organisational control over individual performance. This organisational type relies on norms internally generated rather than authority based control, and allocates resources and rewards on the basis of the notion of overall organisational excellence rather than by emphasising individual performance.

(ii) Meritocratic cultures

Meritocratic cultures are also egalitarian, but they stress performance appraisal and individual effort. The stress is on equity processes rather than on equal outcomes. Change in such cultures tends to be driven by individual effort.

(iii) Elite cultures

These are non-egalitarian organisations which stress differences and inequality. There is a de-emphasis on cohesion through group participation, with a stress on control from the top, economic rewards and authority.

(iv) Leadership cultures

A leadership culture is task and control oriented, but it also emphasises social cohesion through loyalty to the leaders. The emphasis is on leadership integrated with performance, with a high stress on teamwork, rather than a sharp differentiation of roles.

Each type is a simplification of reality, but it is a useful device since in each some values are strongly subscribed to while others are not.[46] Thus in a collegial system, found predominantly in the public sector, the strong

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[44]Paul Sabatier and Daniel Mazmanian, "The Implementation of Public Policy: Framework for Analysis", *Policy Studies Journal*, Vol 8, Special Issue(1980), pp 538-560. At pp 541-553 they discuss the following variables:
(1) The tractability of the problem, (2) the capacity of the statute to structure the problem and to understand it properly, (3) whether the formal rules of the organisation are compatible with the organisation., (4) the commitment of the agencies and individual to the objectives of the policy, (5) the support of external forces including politicians, the media and the community, (6) the continuity of this support, (7) the commitment and leadership ability of implementing officials.

[45]B. Kabanoff, et al., "Managerial Change Schema in Different Organisational Cultures", University of New South Wales, Australian Graduate School of Management, Working Paper Series No 93-008(April 1993), pp 5-6.

[46]ibid, p 45, Figure 1.

values are affiliation, commitment, participation and teamwork, while the weak values are authority, leadership, individual performance and reward. One of the strengths of a collegial culture is that when it does accept change it stresses this as desirable provided the group as a whole agrees to it and it also places importance upon the benefits of change rather than sees change as either a threat or a challenge for the sake of survival. The implications of this are clear. An elite style leader, for example, who sought to implement change in a collegial organisational culture would probably fail because of a clash of values. The problem for any change agent is to find a way of working with the existing culture, while trying to steer it in the desired direction. This might mean selecting existing values that are biased in the desired direction and promoting these while de-emphasising other values that retard change.

(b) The South Australian experience

The first point to be made is that the experience with the new legislation is extremely limited since it only came into force on 20 September 1993.[47] To date only the Ombudsman has received complaints and even then only four of them. As this audience will no doubt appreciate, the lodging of complaints is not a simple matter since they are rarely simply lodged in a formal sense, but are preceded by tentative approaches to feel out the agency to ascertain the likely reaction. At present it cannot be said that the four complaints are formally registered since the approaches are still at a preliminary stage. Of the four complaints made one concerns local government, one concerns a university and two are concerned with government departments. None of the complainants was aware of the existence of the legislation and thus it was not a factor in making the complaint. While it is expected that the Commissioner for Public Employment, a recent appointment, will issue a circular on the new legislation, this has yet to be done. It was also accepted that an intensive internal education campaign would be needed and this began in April 1993 with a one day seminar on whistleblowing at which most public sector leaders, including many of the authorised agencies to whom complaints might be made, and the press, were present.

Strengths of the South Australian approach

(i) A high degree of political consensus

One feature of the debate was that all parties in Parliament supported the legislation. Such was the level of agreement during the debate that the Government accepted a number of amendments by the opposition,[48] though not all of them, and the Attorney-General was moved to remark upon the atmosphere of sweetness and light that pervaded the proceedings.[49] The only criticisms of the bill by the opposition Liberal party was in the direction of strengthening the bill if they were to become the government at the next elections scheduled for December 11th, 1993.[50] Thus it would seem that there is no possibility that the legislation would become the victim of a policy change as a result of the electoral process. This, of course, is one of the factors that limits

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[47]South Australia, *Government Gazette*, 16 September 1993, p 1140.

[48]South Australia, Parliamentary Debates, Session 1992-1993, pp 1522, 1526, 1527, 1529(10 March 1993).

[49]South Australia, Parliamentary Debates, Session 1992-1993 p 1527(10 March 1993).

[50]ibid., p 1538.

implementation in democratic systems. That is, where legislation is the product of a bitter political struggle continuity of political support cannot be guaranteed; and even if legislation survives a change of government it may be undermined by being under-resourced or by being given a low priority by the new administration. None of these concerns seems justified in South Australia's case and indeed a Liberal government is likely to be stronger on law and order and the elimination of waste in the public sector than a Labor government.

Another political factor that may adversely affect policy implementation is that, if a crisis occurs during implementation, such as the mobilisation of a powerful group against either the legislation or the agencies that are responsible for it, then it may be necessary to stage a policy retreat. Whether such retreats are damaging in the long run is not clear. In any case it should be noted that the bill was subject to a lengthy consultation process both within and without the government. The private sector was not opposed,[51] and only one local government unit expressed concerns which were soon cleared up.[52] As for internal reactions the public service association supported the bill and there was no significant opposition from inside the public sector. The fact that the Act will allow employees to blow the whistle, and opened up the possibility that even the press might be an appropriate channel in some cases where there was a serious and immediate danger, widened the potential constituency supporting the legislation.[53]

(ii) A simple law with clear objectives

A particular feature of the South Australian law is its simplicity[54] and shortness. This was identified by the Government as a desirable feature in contrast to the bills proposed elsewhere in the country.

Jurisdiction	Pages	Sections
Commonwealth[55]	37	52
Queensland[56]	27	70
NSW[57]	11	26
South Australia	5	12

On several occasions during the debate on the bill stress was laid on a clear and comprehensible bill. In two instances the Attorney-General disparaged the approaches taken elsewhere. He said "Both the Queensland and New South Wales Bills are considerably more lengthy and

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[51]It has to be said that only one private sector reply was received.

[52]One Mayor was worried that a particularly troublesome employee might use the legislation to embarrass the incumbent council. .

[53]South Australia, Parliamentary Debates, Session 1992-1993, p 1483(9 March 1993), p 1530(10 March 1993)

[54]This was in part influenced by the philosophy of the draftsman, Mr Matthew Goode, Interview with Matthew Goode, Adelaide, 29 October 1993.

[55]This was the Whistleblowers Protection Bill 1991 introduced into the Senate by Jo Valentine.

[56]Draft bill in Queensland, Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* (October 1991), Brisbane, 1991.

[57]NSW, Whistleblowers Protection Bill(No 2) 1992.

detailed than the form which is advocated here. But they are also less understandable and informative to the reader."[58] And later he said

> ...when we were considering this bill I was strongly of the view that we ought to make it as simple as possible and ought not to get involved in the great elaborate 70 pages which was being proposed in Queensland and which they have been mucking around with for some three years or so.[59]

The bill applies to both the private and the public sector and there was no dispute about that either inside or outside parliament. During the debate the opposition suggested that the legislation be extended to the private sector and the Government accepted this proposed amendment without demur. All parties accepted that given the nature of legal regulation of the economy and the imposition of various legal duties upon the private sector under environmental and health legislation, for example, it made no sense to distinguish between the public and the private sector. The bill is limited to adults on the principle that it was necessary in the public interest to preserve the confidentiality of child offenders and child victims of crime.

(iii) A minor problem dealt with proactively

Despite frequent allegations of corruption in the State[60] and despite the proven existence of low level corruption, and concern about it,[61] there seems to be little evidence, despite dissenting voices to the contrary,[62] of large scale organised or syndicated corruption in South Australia. The examination of corruption in the State conducted by the National Crime Authority between 1988 and 1991 concluded that there was no evidence of widespread corruption,[63] and the Government decided that there was no need for a Royal Commission on the subject or a Queensland style Criminal Justice Commission.[64] On the other hand the Government was concerned to ensure that institutional arrangements were in place to

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[58]South Australia, Parliamentary Debates, Session 1993-1993 p 1069(26 November 1992). And later at p 1481(9 March 1993) commenting on the failure to pass legislation in Queensland: "...but I suspect that a basic reason is that the Bill is too complex and tries to write into law all the tiniest details".

[59]ibid., p 1520(10 March 1993). Actually the draft bill suggested by EARC was 70 sections and 27 pages long.

[60]Many of these allegations have been made by Ian Gilfillan the Leader of the Democrats in the Upper House as Queenslanders will know: *Report of the Parliamentary Criminal Justice Committee Into Allegations made in the South Australian Legislative Council by Mr Ian Gilfillan against the Criminal Justice Commision's Director of Operations Commander Carl Mengler*, 4 December 1990, Queensland, Parliamentary Papers, Session 1990-1991, Vol 3, p 16 where it was found that there was no credible evidence to support allegations made against Commander Mengler.

[61]In its recently released election policy on the Correctional Services Department the Liberals call for an inquiry into corruption and drug use in prisons: Liberal Party of South Australia, *Correctional Services:Make A Change For The Better* (November 1993), p 9; *The Australian*, 11 November 1993, p 13, cols 1-2.

[62] Ian Gilfillan, the leader of the minority Democrats introduced a bill entitled the *Independent Commission Against Crime and Corruption Act 1992* on 9 September 1992. It is not expected to pass even thorough a post-election Parliament.

[63]South Australia, Parliamentary Debates, Session 1991-1992, p 3495(24 March 1992) for a discussion of this report and extracts from it.

[64]South Australia, Parliamentary Debates, Session 1988-1989, pp 182-183(16 August 1988) and p 342(18 August 1988) where a Hong Kong style ICAC is rejected as is a Fitzgerald type inquiry.

prevent organised corruption from taking hold in South Australia.[65] The view that there is no organised or syndicated corruption in South Australia, if correct, might ensure low levels of whistleblowing and also mean that the problem that the law is intended to address will have a low priority. It should not be thought, however, that low priority matters are doomed to fail since it may be argued that a low priority response is appropriate to a low magnitude problem. In any case to focus on the law alone and to fail to take into account the larger context may divert attention to larger developments that may impinge on the problem.

(iv) The use of existing agencies

Given the perception that there was no need for a separate specialist agency to handle whistleblower complaints and given the view that existing agencies were still seen as legitimate and effective, a decision was taken to utilise a range of existing agencies including the Ombudsman (1972), the Equal Opportunity Commission (1984), the Auditor, Police Complaints Authority (1988) and the Anti-Corruption Branch of the Police (1989), many of which have developed considerable experience in handling complaints. This decision was not based on financial considerations, despite the State's well known financial problems, but on the view that existing agencies having experience with complaint handling could well bring their existing experience to bear on the problem. Not only would this save money, but it would ensure that the policy would be rapidly implemented since there would be no delay whilst new agencies were set up.

A background consideration was that when introducing the bill the Attorney-General announced that it was part of an overall anti-corruption strategy, which he claimed dated from 1988 when the Police Complaints Authority was set up.[66] This seems to have been a form of ex post facto rationalisation, as the opposition noted,[67] but it is true to say that since 1988 there has been a major National Crime Authority reference, the development of codes of ethics and conduct for police and other public sector employees, and the modernisation of offences on the misuse of public office.[68]

This approach, appropriate in the South Australian context, may not work everywhere, but it seemed reasonable to draw upon existing expertise. To take one example, the new legislation[69] allocates responsibility to deal with victimisation to either the courts, where it will be dealt with as a statutory tort, or to the Equal Opportunity Commission under the *Equal Opportunity Act* 1984.[70] If it should be discovered in practice that the Equal Opportunity Commission remedies based on mediation were

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[65] South Australia, Parliamentary Debates, Session 1991-1992, p 3501(24 March 1992).

[66]This was a case of backward-mapping as the Opposition noted, but they accepted the need for a strategy however described: ibid., p 1292 (17 February 1993).

[67]ibid., p 1292(17 February 1993).

[68]Matthew Goode, "Offences of a Public Nature: A Review of Criminal Offences Dealing With Public Sector Corruption and Abuse of Power and The Administration of Justice", *Adelaide Law Review*, Vol 14(1992), pp 103-127.

[69]*Whistleblowers Protection Act* 1993(SA), s 9.

[70]Section 86.

inadequate the Government indicated a willingness to extend the Commission's powers if necessary.[71] Given the large number of potential agencies involved there will have to be referrals from one agency to another if the initial approach is to the wrong agency. This practice already occurs under the existing complaint handling system. The Ombudsman, for example, does not have jurisdiction over police complaints and routinely refers such cases to the Police Complaints Authority.[72]

Possible weaknesses in the South Australian approach

(i) No internal counselling

One gap in the South Australian legislation, unlike draft bills elsewhere,[73] is that there is no provision for a counselling service to assist the whistleblowers both to help them direct their complaints through the potential maze of authorised agencies and to provide psychological help to withstand the pressures of being a whistleblower. During the debate on the bill the opposition spokesman K. T. Griffin stressed the importance of this point, but the Attorney-General resisted attempts to amend the bill and insert sections based on the draft Queensland bill which provided for counselling.[74] The Opposition, who supported the bill indicated that "If we should get into Government, whenever the next election is, I point out that it is something to which I would be very much attracted."[75] The Government's reasoning for resisting the proposal was that since there was no central complaint handling agency in the South Australian case it would be difficult to insist that each engage in counselling especially since one of the authorised agencies was the Chief Justice. A second reason given for the rejection of a counselling function was that the South Australian approach was based on external review, suggesting, perhaps, that the Government had not really thought through this point or that it thought that since the referring agencies were nominated in the legislation it went without saying that counselling was likely in most cases in any event.[76]

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[71]South Australia, Parliamentary Debates, Session 1992-1993, p 1533(10 March 1993).

[72]Interview with Eugene Biganovsky, State Ombudsman of South Australia, Adelaide, 4 November 1993.

[73]See Queensland, EARC, *Report on Protection of Whistleblowers*, October 1991 Appendix A, *Whistleblowers Protection Bill 1992*, clauses 36-38, Commonwealth, *Whistleblowers Protection Act* 1991, clause 20.

[74] South Australia, Parliamentary Debates, Session 1992-1993 p 1291(17 February 1993), p 1528(10 March 1993), p 1763(30 March 1993).

[75]ibid., p 1528(10 March 1993).

[76]ibid., p 1534(10 March 1993). The State Ombudsman has indicated that this is a role he routinely performs as a necessary part of the duties of his office: Interview with Eugene Biganovsky, State Ombudsman of South Australia, Adelaide, 4 November 1993. Given the duties prescribed by statute and the operating style of the Equal Opportunity Commission this is true of other agencies as well.

(ii) Possible internal resistance to change because of the industrial climate.

Despite the fact that an emphasis on efficiency, effectiveness and economy are not new in State and Commonwealth public services,[77] the recent emphasis has turned towards collective effectiveness, the monitoring of performance and cost saving. This is revealed by the mere names of the governing legislation in several states,[78] but has often meant in practice an attempt to either restrict the growth of the public service or even attempts to reduce its size.[79] Recently the Public Service Association in South Australia came to an enterprise agreement with the Government that, amongst other things, would severely limit the ability of a new government, likely to be a Liberal government at the time of writing, to make employees redundant[80]. It has to be said, however, that many other elements of the agreement stress productivity and efficiency, the need for restructuring and workplace change, continuous workplace change and a stress on the provision of services to the public.[81] If the post election industrial atmosphere becomes fraught with rancour and mistrust then the prospects for reform through greater managerialism may be frustrated by employee resistance. If this happens attempts to introduce changes aimed at maladministration might also by stymied by such a development. On the other hand it may be that a new government, if one is elected, may reopen the enterprise agreement and insist on greater efficiency, possibly in exchange for fewer redundancies. Such a policy may affect many of the objectives of the Whistleblowers Protection Legislation, which is actually ultimately not concerned with protecting whistleblowers, though that of course is an intermediate objective, but with uncovering information concerning various forms of misconduct, from informed insiders.

(iii) The problems of organisational cultural change.

Historically public organisations stressed anonymity, independence from political interference, and secretiveness. It was not always so since in the Nineteenth Century in several States public service appointments were

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[77] Complaints about inefficiency and incompetence have often been made: see Queensland, Parliamentary Debates, Session 1866, pp 56-8 and 60(18 April 1866), Victoria, *Report of The Royal Commission into the Public Service and the Working of the Civil Service Act*, 1873 p 68. Public Service Legislation makes it a disciplinary offence to be inefficient and incompetent: *Public Service Act* 1916(SA), s 53(iii); *Public Service Act* 1890(Vic), s 124; *Public Service Act* 1974(Vic), s 59(1)9d); *Public Service Act* 1978(WA), s 44(1)(e); *Public Service Act* 1980(NT), s 52(1)(b); *Public Service Management and Employment Act* 1988(Qld), s 29. while agencies are under a positive duty to promote effective, efficient and economical management: *Public Sector Management Act* 1988(NSW), s 11(1).

[78] Consider the *Government Management and Employment Act* 1985(SA); *Public Sector Management Act* 1988(NSW) and *Public Service Management and Employment Act* 1988(Qld).

[79] In Victoria under the Kennett Liberal Government and in South Australia under the Arnold Labor Government 'downsizing' as it is called is underway. In South Australia's case recent legislative changes have made it easier to dismiss employees who are surplus to requirements: *Government Management and Employment (Miscellaneous)Amendment)Act* 1993 (SA) s 12.

[80] South Australian Public Sector, *Enterprise Bargaining Framework(State) Agreement*, October 1993, p 5.

[81] ibid., p 3.

made on the basis of patronage.[82] Once a merit based entry system was introduced it was expected that the public service would remain outside of politics and would loyally serve the government of the day. In a number of public service statutes officials were forbidden from making public comments about the policies of the government.[83] There was an expectation that public officials in a Westminster system would not comment upon public policies, unless these directly involved industrial matters affecting the employees themselves, and in any case officials could not wage war on policies they did not approve of.[84] From the point of view of corruption control there was a possibility that a silent public service that loyally served the government of the day might use this to cloak various forms of wrongdoing. Advocates of whistleblower protection have often commented on this problem and have argued that the legal prohibitions on revealing information have to be relaxed.[85]

The salience of these dominant values and their adverse impact in a whistleblowing context is well known to Queenslanders given the Creighton affair in 1956.[86] Vivian Creighton was the Chairman of the Land Administration Board and he discovered evidence of corruption by the Minister of Lands[87] in the Labor Government. Despite approaches to other ministers his allegations were ignored so he leaked the information to a workers' newspaper. Once the leak was traced the Government set up a Royal Commission to examine the allegations, but it concluded that

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[82]Thus in Queensland there were complaints in 1866 that some appointments were little better than sinecures: Queensland, Parliamentary Debates, Session 1866(Vol 3) p 58(18 April 1866); in Victoria the patronage system was condemned in 1867: Victoria, Parliamentary Debates, Session 1867 (Vol 4), p 1219(11 June 1867) and only replaced in 1883: Victoria, Parliamentary Debates, Session 1883, Vol 42, p 295. Ten years earlier the practice of patronage appointments had been condemned as an evil: Victoria, *Report of The Royal Commission Into The Public Service and The Working Of The Civil Service Act*, 1873, p. xvi, para 45. Parliamentary Papers 1873, Vol 2, p 699.

[83]This was said to have begun in Victoria in 1867: *Civil Service Regulations* 1867(Vic), rr 20 and 21 Appendix to Victoria, *Report of The Royal Commission Into The Public Service and The Working Of The Civil Service Act*, 1873, Parliamentary Papers 1873, Vol 2, p 17*; Commonwealth of Australia, Parliamentary Debates, Senate, Session 1991-1992, p 4696(12 December 1991). See also R. Plehwe, "Political Rights of Victorian Public Employees", *Australian Journal of Public Administration*, Vol 42, No 3(September 1983), p 365. For other jurisdictions, see *Crimes Act* 1914(Cth) s 70; *Public Service Act* 1923(Tas), s 36; *Government Management and Employment Regulations* 1986(SA), reg 21; *Public Service Regulations* 1988(WA), r 8 and Administrative Instruction No 711 under the same act as cited in Western Australia, *Report of The Royal Commission Into Commercial Activities and Other Matters, 1992* (Part 2)(Perth: Government Printer, 1992) paras 2.3.4 and 2.3.5; *Criminal Justice Commission Act* 1989(Qld), s 2.23 (1)(c).

[84]For an example of this and the limitations on free political speech for public officials, see *Re Fraser and Public Service Staff Relations Board* (1986), 23 DLR(4th) 122, 131-132, (SCC). Note at p 133 Dickson CJC states that a public official may object to policies "if...the government were engaged in illegal acts, or if its policies jeopardised the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability."

[85]Such legal prohibitions were recently said to be a "major flaw in the existing system" in Western Australia, Parliamentary Debates, Session 1992, p 6643(11 November 1992) referring to section 81 of the *Criminal Code Act* 1913 as amended.

[86]For a secondary account, see R. S. Parker: Public Service Neutrality: A Moral problem, The Creighton Case" in B. B. Schaffer and D. C. Corbett(eds.), *Decisions:Case Studies in Australian Administration* (Melbourne: Cheshire, 1965), pp 201-224. For other evidence of Australian whistleblowing, see M. W. Jackson, "The Eye of Doubt: Neutrality, Responsibility and Morality", *Australian Journal of Public Administration*, Vol 44, No 3(September 1987), pp 280-292, especially at p 282.

[87]The Minister eventually resigned.

the allegations were correct. Notwithstanding this the Government took steps to remove Creighton, which in his case involved removal by a resolution of the Parliament. In his speech in his own defence Creighton said that while he recognised the importance of loyalty, "I decided that there was no duty upon me to give blind personal loyalty to my minister", and he added "...it was obvious that there may come a time when these virtues [loyalty and discretion] could be a cloak, not merely for corruption, but for even more serious derelictions of duty."[88] At least one opposition Member of Parliament thought that despite his unorthodox behaviour in leaking the information Creighton should have been commended for his action,[89] but in the event the motion was passed and he was dismissed.

The intermediate object of whistleblower protection legislation is to create a legal immunity for employees if they should disclose information in the public interest concerning illegal activities, irregular and unauthorised use of public monies, substantial mismanagement of public resources or conduct that causes a substantial risk to public health or safety, or to the environment[90] Clearly such a "dobbers"[91] charter is a break with the dominant tradition of prohibiting the release of information unless given prior authorisation. What was created was a system that allowed revelations to authorised agencies[92] where it was reasonable and appropriate in the circumstances of the case to do so[93] without making it too easy for whistleblowers since that might undermine the integrity of the government and the private sector and risk justifiable governmental, commercial or industrial confidentiality.[94] There was a realisation that it might be inappropriate in some cases to expect the official to go to superiors, or even the head of the department, hence the emphasis on providing a range of external "appropriate authorities".

In some parts of the public service, especially the disciplined services such as the police and correctional services, there is an internal culture of secrecy based on the need to support colleagues in stressful situations. This internal cohesiveness may militate against someone blowing the

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[88]Queensland, Parliamentary Debates, Session 1956-57, Vol 314, pp 43 and 46(2 August 1956). Creighton was permitted to appear before the bar of the House to make his own defence: pp 43-46.

[89]The MP in question, Johannes Bjelke-Petersen said at p 71 "...although his actions were unorthodox, the ultimate result, the findings of the Royal Commission, justify his bringing those facts to light". The historical ironies will be obvious.

[90]*Whistleblowers Protection Act* 1993(SA), s 4(1) for this definition of public interest information.

[91]Dobbers are not liked in popular culture, but this expression was used by the Shadow Attorney-General K. T. Griffin in the debate on the South Australia bill. South Australia, Parliamentary Debates, Session 1992-1993, p 1288(17 February 1993): "The description of whistleblowing is somewhat curious. I do not intend to explore its origins, but basically, as I understand it, it means someone dobbing in someone else, and I have no difficulty with that where it relates to illegal or improper behaviour".

[92]See section 5(5) and 5(6) for a list of 12 agencies.

[93]Section 5(2).

[94]Second reading speech on the Whistleblowers Protection Bill by the Attorney-General: South Australia, Parliamentary Debates, Session 1992-1993, p 1069(26 November 1992). Subsequently the Attorney-General Chris Sumner remarked: "We do not want to encourage everyone in the public service who is disgruntled about anything to complain about it or to blow the whistle, because whistle-blowing is about dealing with serious matters: illegality, irregularity, unauthorised use of money and so on.": South Australia, Parliamentary Debates, Session 1992-1993 p 1522(10 March 1993). At p 1527 he cited the observation of the WA Inc Royal Commission that "Officers should not be able to complain of every use of public funds with which they disagree".

whistle and it is not expected that potential whistleblowers will have an easy time of it.[95] Despite section 67 of the *Government Management and Employment Act* 1985(SA), which forbids unauthorised disclosures of governmental information, this provision was not amended since the whistleblower protection legislation creates an "authorised" disclosure in the public interest.

A quality management approach to corruption control

(a) Principal tenets

TQM arose out of the application of statistical methods to the production process. Originally suggested by W. Edwards Deming[96], who taught these methods to the Japanese during the American occupation (1945-1954), by the 1980s the managerial catch cry was quality. Simply put TQM holds that the customer is the ultimate determiner of quality, but that quality should be built into the product at the earliest stages, that preventing variability from high standards is a key to consistent success, that quality can be built into a system and bad quality results not simply from lax individuals, but from bad systems. To achieve quality there must be an organisational commitment to continuous improvement, including innovation, and that to achieve this there must be strong worker participation in the production process both for motivational reasons and to identify mistakes in the process that are otherwise unknown to the organisation's leadership.[97] Another essential is the collection of reliable empirical data on performance rather than reliance on impressions and hunches. The system works best in small organisations and such evidence as exists in Australia shows that even in private organisations with a high degree of commitment to TQM the immediate effects on productivity are slight, though there is an assumption that it holds long term promise.[98]

(b) Problems and applications in the public sector.

One of the difficulties with the application of TQM to public sector organisations, most of which are service oriented, is to decide what is a quality service and to determine who is the customer.[99] This is a serious problem because services are intangible and are harder to measure and study than a

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[95]The evidence shows that whistleblowers are highly likely to face retaliation in Australia: K. Jean Lennane, "Whistleblowing: A Health Issue", *British Medical Journal*, Vol 307(11 September 1993), pp 667-670, and David Fagan, "Whistleblowers Punished", *The Australian*, 5 November 1993, p 5, cols 3-4, citing a study by William de Maria, and even more alarmingly that whistleblowers in systems with protection legislation will face retaliation: Philip H. Jos et al., "In Praise of Difficult People: A Portrait of the Committed Whistleblower:, *Public Administration Review*, Vol 49(1989), p 554, found that only 1% did not face retaliation and that 57% needed medical or psychological treatment. Similar results were found by Judith A. Truelson, "Blowing the Whistle on Systematic Corruption", *Corruption and Reform*, Vol 2(1987), p 57.

[96]W. Edwards Deming, *Out Of The Crisis* (Cambridge, Mass: MIT Press, 1986).

[97]James E. Swiss, "Adapting Total Quality Management (TQM) to Government", *Public Administration Review*, Vol 52, No 4 (July-August 1992), pp 347-358; G. K. Kanji, "TQM: The Second Industrial Revolution", *Total Quality Management*, Vol 1, No 1(1990), p 4; M. Thornber, "A Model of Continuous Quality Improvement for Health Service Organisations", *Australian Health Review*, Vol 15, No 1(1992), pp 56-69.

[98]T. J. Fisher, "Quality Management and Productivity-A Preliminary Study", *Australian Journal of Management*, Vol 15, No 1(June 1990), pp 107-127.

[99]Swiss, ibid., p 358; J. Sprouster, *Total Quality Control: The Australian Experience* , 2nd edn revised, (Maryborough, Vic: The Book Printer, 1984), pp 149-150.

product. In the public organisations where it has been applied it has normally been applied to only part of the operations and even then to areas of work that are easily measurable.[100] Also the production and consumption of a service is not separate in time for services are consumed as they are produced and thus it is difficult to set up filters between the production and consumption phases to weed out bad products.[101] Any such innovation in the public sector will also have to take into account the existing organisational culture which may not be oriented to customer service or constant improvement. Change is best achieved slowly for it may take 2-5 years to implement, and normally involves taking on a few projects, if this is a political option, in order to avoid organisational overload.[102]

The leadership style required for TQM is not at all elitist since the leaders of the organisation need to forge team links with subordinates, reduce organisational barriers, and encourage flexibility. A few highly paid "stars" as leaders will not do since the real objective of TQM is to motivate everyone in the organisation and not merely a few at the top.[103] By definition TQM attacks waste and inefficiency, but it also assumes that everyone in the organisation wants to work hard, will not merely tolerate constant change, though this may not always be dramatic, but embrace it as a constant in the work situation, and further assumes that they have a strong commitment to the organisation and its goals as well to work generally. If the organisational culture or perhaps the culture generally does not set such store by work, then TQM will be very hard to implement.[104]

The initial stages of TQM require that a considerable effort be put into re-training in order to introduce the whole idea to the organisation. Since continuous improvement requires periodic training there is a danger that the process may become bogged down in endless seminars, talk sessions and assessments and thus do little other than to make the organisation more bureaucratic.[105]

The critics of the application of TQM to the public sector point out that certain key assumptions that underlie the theory do not hold true for the public sector.[106] These are: (1) the uncertainty in the external environment especially

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[100]M. Thornber, op. cit., where its application in the Health sector in New South Wales focused on the payroll section of the Hospital and the booking system for bed use. Similarly its application in the education sector, e.g. the Science Faculty at QUT, is limited to parts of the organisation that fit the model best, e.g a team situation in a laboratory: D. W. Piper, *Quality Management in Universities*, DEET, Higher Education Division, Evaluation and Investigations Program (Canberra: AGPS, 1993) Vol 1, p 94.

[101]K. Walsh, "Quality and Public Services", *Public Administration*, Vol 69(Winter 1991), p 506.

[102]C. R. Bunning, "Effective Strategic Planning in The Public Sector", *International Journal of Public Sector Management*, Vol 5, No 4(1992), pp 55-59.

[103]J. Sensenbrenner, "Quality Comes To City Hall", *Harvard Business Review*, Vol 69(March-April 1991), p 74.

[104]Brian Jameson, "TQM and The Policy Adviser", *Public Sector*, Vol 14, No 2 (June 1991), p 12.

[105]Albert C. Hyde, "Rescuing Quality Management From TQM", *The Bureaucrat*, Vol 19, No 4(Winter 1990-91), pp 16-20; R Y Chang, "When TQM Goes Nowhere", *Training and Development*, Vol 47, No 1(January 1992), pp 22-29.

[106]Beryl A. Radin and Joseph N. Coffee, "A Critique of TQM: Problems of Implementation in The Public Sector", *Public Administration Quarterly*, Spring 1993, pp 42-54. For a non TQM analysis of some of these problems, see A. Sinclair, "Public Sector Culture: Managerialism or Multiculturalism?", *Australian Journal of Public Administration*, Vol 48, No 4(December 1989), p 384.

the problem of policy discontinuities by reason of political or electoral changes. TQM, afterall, assumes that a long term approach needs to be taken to achieve change and that the leadership of the organisation and the policies to be followed will remain in place for a long time. (2) The multiple accountability mechanisms in a federal political system based on a separation of powers means that organisations may be subject to conflicting external pressures. These may be generated by other branches of government or by value conflicts amongst those seeking to influence the course of government policy. (3) The fact that much governmental action is undertaken for symbolic purposes and this action is not intended to be effective in a hard sense.[107]. In cases where governments announce objectives that are based on hope or take action merely to show that something is being done, e.g. a one day environmental cleanup, these activities would fare badly if subjected to a TQM statistical analysis. (4) TQM demands that performance and quality be precisely measured by statistical methods. In the case of a product this may be realistic, but in the case of a service designed to satisfy several constituencies this may be very difficult.

It is of interest here that elements of management practice and of industrial culture in Australia seem to be moving in the direction suggested by TQM. Enterprise bargaining, for example, sets store by organisational flexibility, the breaking down of barriers between work units, and attempts to increase a participative style of working.[108] Even in areas of the public sector that do not produce a product there is an increasing emphasis on serving clients or customers.[109] In South Australia's case the statute governing the public service actually sets as a primary objective for the service the courteous treatment of clients and stresses the importance of service to the community, as does the equivalent enactment in Queensland.[110]

Even more promising was the recent announcement in Adelaide that all departments of government have to issue a citizens' charter by next year some of which, following the British model[111] for this, includes a commitment to quality service to clients. The problem with the rash of reform and the inclusion of quality management terms and concepts into statutes and awards is that there is little evidence that it has much impact. One close observer of the

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[107]An example here would be selective law enforcement of vice activities; no police officer actually believes that police action will wipe out prostitution, public drunkenness or illegal drug use, for example.

[108]J. Teicher, "Award Restructuring and Organisational Change in the Australian Tax Office", Monash University, Graduate School of Management, Management Paper No 39(September 1991).

[109] W. P. Birkett, "Public Sector Accountability in Transition in Australia ", University of NSW, School of Accounting, Working Paper No 84 of 1988. L D Parker and J Guthrie, "Public Sector Accounting and The Challenge of Managerialism", Flinders University, Discipline of Accounting, Finance and Management, Research Paper No 98/5 (1989), p 3.

[110]*Government Management and Employment Act* 1985(SA), ss 5 and 7; *Public Service Management and Employment Act 1988*(Qld)s 6 which mentions as an objective standards of excellence in service to the community.

[111]See C. Pollitt, "Doing Business in The Temple: Managers and Quality Assurance in The Public Services", *Public Administration*, Vol 68(Winter 1990), pp 435-452; K Walsh, "Quality and Public Services", *Public Administration*, Vol 69(Winter 1991), pp 503-514; R. Lovell, "Citizen's Charter: The Cultural Challenge", *Public Administration*, Vol 70(Autumn 1992), pp 395-404; G Bruce Doern, "The UK Citizen's Charter: Origins and Implementation in Three Agencies", *Policy and Politics*, Vol 21, No 1 (1993), pp 17-30; N Lewis, "The Citizen's Charter and Next Steps: A New Way of Governing?" *Political Quarterly*, Vol 64, No 3 (July-September 1993), pp 316-326.

situation in South Australia has commented on the managerial changes in the State as follows:[112]

> The State public service has adopted the rhetoric and principles of private sector management without adopting the ruthlessness needed to control the outcomes. Poor performance is tolerated. At most the managers concerned are counselled, sent on training programs or perhaps redeployed or given early retirement. There is a fundamental value conflict between the traditional approach to reward and punishment, and that required by corporate management.

Since it is too early to say if the Whistleblower legislation will work one should, of course, suspend judgment. But given the low priority likely to be assigned to this activity and given that fact that no one knows how much illegality and maladministration there is, it will be very hard to say whether slight use of the legislation is evidence of a small scale problem or not.

If it is decided to extend TQM as a basis for the appeal to the private sector then this is most likely to succeed by pointing out that maladministration adds to the costs of doing business, if their enterprise is operating under costs such as the payment of illegal fees, or labouring under internal costs such as fraud or waste. Appeals along these lines were successfully trialed in Hong Kong in the 1980s when a major effort was made to change an entire business culture that relied upon secret commissions and payoffs.[113] There the appeal was to modern business standards, during an era of economic modernisation and the emergence of the Territory as an international economic centre.

To give one example of this, The Hong Kong ICAC found that its investigations were frustrated by the fact that many Chinese firms kept traditional accounts which were quite different to modern accounting practices. To remedy the situation the Government persuaded the accounting profession to switch to internationally recognised accounting standrds. The profession agreed not simply because it wanted to assist the anti-corruption effort, but because at the time Hong Kong business was anxious to create an image for the territory as an international business centre. To achieve this it was necessary to have, amongst other things, an accounting profession of an international standard.

In Australia the appeal should shift focus to stress the elimination of inefficiency as an ingredient in making the enterprise more competitive in order to compete in both the domestic and international marketplace. This is a matter that must be approached with some care since the leverage the government has over the private sector is less than it has over the public sector, and any measures taken must not involve a confrontation which is likely to produce a widespread outcry, as it did in Hong Kong in the 1970s.[114]

Despite the problems, TQM promises not merely another less direct way of attacking waste, fraud and maladministration, it promises via the emphasis on continuous improvement a long term erosion of these problems. In theory

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[112] Ian Radbone, "Decentralisation in The South Australian Public Service: A Progress Report", *Australian Journal of Public Administration*, Vol 50, No 4 (December 1991), p 442.

[113] Tony Scott, "Losing Your Shirt in Hong Kong", Address to the Australian Chamber of Commerce in Hong Kong, 11 July 1991.

[114] See David Clark, The Anatomy of a Successful Anti-Corruption Campaign: The Hong Kong Case (Mimeo 42pp); and David Clark, "A Community Relations Approach to Corruption: The Case of Hong Kong", *Corruption and Reform*, Vol 2, No 3 (1987), pp 235-258.

successful TQM would remove or at least these phenomena such that whistleblowing should be less necessary than otherwise. The advantage of putting in place a system to deal with organisational quality is that its long term nature should overcome the dangers that often arise in anti-corruption campaigns, namely the decline in political interest and the attendant rise of the belief that the problem has been solved in some final sense. One of the central problems with organisational change in the government sector is that the success of change depends upon the very organisation that made the problem in the first place. Solutions such as new laws, new leaders and processes may stimulate change but cannot guarantee it.[115]

Conclusion

South Australia would seem to be fortunate in that the legislation was passed in the absence of scandal, and with a high degree of support across the political spectrum in order to deal with what is assumed to be a narrow gauge problem. If the assessment of the depth of the problem is correct, and it is always difficult to know in the case of corrupt activities just how serious what are, after all, often underground phenomena, then an approach that mobilises existing institutions and laid the groundwork by extensive prior consultation will probably succeed. The fact that a variety of managerialist initiatives are already in train to gradually increase efficiency in the public sector, in particular, may also help to change the internal culture of the public service.[116] The difficulty is that there is still a question mark over the extent to which any of these changes have been internalised within the public service and the extent to which they may be merely symbolic attacks on a problem to divert attention away from the necessities of public sector reform.

A minimalist whistleblower protection law may not work elsewhere. It is a mistake in policy implementation to assume that the situation in which the problem is located is the same everywhere or that the appropriate response should be everywhere the same. Given the contingent nature of the policy environment, the fact that the situation changes over time and the need for patience as well as political nerve, uniform policy prescriptions are likely to fail. Policy makers will have a harder time of it if they face political division, organised bureaucratic opposition, and syndicated corruption. In such a case the combination of weak consensus about the measure, a lack of political momentum, and a broad gauge problem that runs, not to the behaviour of a few, but to the very values and practices of government agencies will pose a much less favourable, environment for implementation. If none of this suggests a checklist of dos and don'ts it is worth considering that it is the bane of comparative policy implementation, as with comparative history, that it teaches only examples rather than formulae to be followed on all occasions.

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[115]For a discussion of these problems by an experienced Australian public administrator, see Peter Wilenski, "The Strategy of Change", in M. Clark and E. Sinclair(eds.), *Purpose, Performance and Profit* (Wellington: NZ Institute of Public Administration, No 32, 1986), pp 67-80.

[116]In both South Australia and Queensland there is a legal commitment to continued improvement in the efficiency and effectiveness of public servants in the one case, and ongoing training and development, in the other, for example: *Government Management and Employment Act* 1985(SA), s 5(e); *Public Service Management and Employment Regulations* 1988(Qld), r 44(2).

TOP QUALITY MANAGEMENT AND WHISTLEBLOWING

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Introduction

Total Quality Management (TQM) and whistleblowing. On the face of it, it is an odd coupling. TQM is a highly rational, statistically driven approach to management, a resurrected version of operations research techniques, some would say. TQM is about getting people inside the organisation, out of devotion to the customer – someone *outside* the organisation – to "get it right the first time". It is hard at first to see the link between this and whistleblowing, the area in which the *morality* of organisational action, rather than its speed or efficiency, is at issue.

In TQM, devotion to quality arises from the idea that it will always be better to "do it right the first time" rather than do it over again. So employees form quality circles – sometimes in their own time – out of loyalty to the organisation's need to supply this quality to customers in the interests of its longterm survival. This seems strange when linked to a discussion of the value and the needs of the whistleblower, whose actions seem orientated precisely *against* the wishes and desires of the organisation. The whistleblower personifies organisational loyalty stretched past the breaking point in the face of organisational wrongdoing. In the end, whistleblowers recognise a higher loyalty which takes them outside the organisation; in fact sometimes they are even excluded from it. So this "ring-in" theory from Japan, the land of consensus decision-making, seems odd combined with the notion inherent in whistleblowing that, finally, consensus has become untenable.

Yet there are similarities too. We have only to think of the assembly line in a TQM organisation. In this organisation, anyone, in fact, perhaps the lowest ranking employee – has the right to "stop the line" when they notice something wrong. In terms of TQM theory, this usually means something wrong with the quality of the product as it reaches that particular worker from a preceding production stage. The first tug on the cord turns on a green light which alerts a supervisor. If the problem is not fixed immediately, a second tug turns on a red light and brings the whole production line to a halt. The whistleblower, by analogy, is the person who stops the line in their organisation. When the green light of proper channels fails to bring proper results, the whistleblower throws a red light: goes outside their organisation to the media.

Of course, some of the apparent oddities in combining TQM with whistleblowing arise because the view of TQM I have presented, although true, is not all there is to the theory. Nor is the view of the whistleblower I have presented all there is to him or her. In both cases I have glossed over some of the finer distinctions for the sake of simplicity. For example, theorists disagree over whether the definition of whistleblowing can include blowing the whistle inside as well as outside the organisation. For example, wrongdoing may be disclosed to people outside "the usual

channels" but who are still part of the organisation. After all, "the usual channels" are not enough when your boss is part of the problem.

The answer to this may well depend on one's views about where the limits of the organisation lie. Is disclosing wrongdoing to the CJC to be regarded in the same way as going straight to the media? The CJC, after all, is strictly part of the public sector, even if it is not part of the particular department to which the whistleblower belongs. In a similar way TQM, in recommending close, not to say snug, relationships with both customers and suppliers, may well blur the traditional boundaries between the organisation and its environment.

Another theoretical dilemma which has practical implications is that the whistleblower might not be acting out of completely disinterested motives. To what degree are the views of whistleblowers like these to be taken seriously and should they be entitled to protection? How will we tell the difference anyway? Similarly, it is hard to overlook the fact that TQM has often been implemented most successfully in times of organisational crisis, when adopting a radically new method means the difference between organisational survival and going under. So it can be hard to tell whether the motives for intervening necessarily correspond to all the ideals associated with TQM as a theory.

It is these kinds of issues that I am concerned with today: how TQM in both theoretical and practical terms has application to the theory and the practice of whistleblowing, and how the value of whistleblowing can be appreciated through a TQM perspective.

Definition and history of TQM

Now we have been circling around the notion of TQM, and indeed it is probably true to say that there are as many definitions and changes in emphasis as there are theorists. What the definitions have in common, however, can be summarised as follows:

(a) a focus on the customer,

(b) a commitment to continuous improvement,

(c) an opportunity for employees to contribute their ideas and expertise to improve quality, and

(d) the measurement of quality and performance.

Many of you will be familiar with the almost legendary status of W. Edward Deming who took a set of statistical techniques for improving production quality to Japan at the end of WWII, having failed to get the recognition he felt he deserved in the United States. The statistical methods were later combined with ideas about how to get employees more involved in solving production problems, leading to the idea of continuous, incremental improvements (KAIZEN) (Imai, 1988). The whole of the TQM philosophy flowed from a recognition that virtually all of the quality problems of organisations lay with management, or "the system" rather than with workers. In fact, the traditional structures of organisations prevented people at the coalface from being

able to solve the problems they saw every day. The result was that Japanese products came to signify superior rather than inferior quality, Deming's techniques were re-exported to the West, and the rest, as they say, is history. The rest is history, but even the first part was history: much of Deming's statistics came from the work of Sherman in the Twenties and Thirties. Moreover, it is often argued that the idea of using workers' knowledge to improve production processes is merely the continuation of Taylorist management techniques.

But, however new or old the theory, TQM is everywhere, including in the public sector. Purchasing policy for Queensland Government departments now require quality assurance standards to have been met by all suppliers, from GoPrint and construction firms to the Government's legal advisers. There are also TQM initiatives appearing in the less commercially orientated departments such as DPI and Q-Build.

Growth in TQM initiatives and whistleblowing

So the first similarity between TQM and whistleblowing becomes apparent: both whistleblowing and TQM seem to be on the increase, although both find their roots much earlier. American writers on whistleblowing hearken back to the proud tradition of the muckraking press and the noble principles of dissent enunciated by Ralph Waldo Emerson. But the American research literature, like that in Australia, suffers from the fact that, until the advent of the CJC, no government body had monitored the incidence of whistleblowing. It appears, however, that the very event of this conference, has given rise to one new whistleblowing case.

Most commentators say, with Finney & Lesieur (1982), that organisational wrongdoing is "extremely common and much more costly than common crime." Why the increase? Again, the U.S. literature suggests that it is partly due to the trend away from litigation over wrongful discharge, discrimination and similar issues, and a shortage of entry level workers which is forcing employers to take more notice of their needs. This in turn leads to a "trickle up" effect for workers at higher levels. The other part of the story, however, is a greater recognition of employee rights in the workplace. TQM is certainly a part of this "consumer rights" trend. It may be that, as we are often not far behind U.S. trends in management practices, we can expect a continuing increase in the incidence of whistleblowing here.

Theoretical and practical issues

While whistleblowing and TQM applications may both be increasing, they are also both subject to some similar theoretical and practical problems.

(a) Costs

In TQM, do we or do we not count "the cost of quality"? One longstanding dispute in TQM theory is whether there are costs of quality which might outweigh the benefits brought about by TQM. Crosby (1984), for example, demands that what he calls "the costs of quality conformance" be measured in any TQM exercise so that its true costs and benefits can be assessed; other theorists assert that the benefits of doing it right the first time will inevitably outweigh costs. Recently, it appears that the experience of the companies using TQM is bringing the debate around in favour of the need to count the cost of quality, at least in the short term. The TQM consultant, the

manuals, the costs of accreditation, of maintaining TQM accreditation, all need to be accounted for.

Whistleblowing has indisputable costs, and these costs are particularly noticeable in the public sector. What we have heard today is a good deal about what can be done to reduce the whistleblower's costs, but these are not the only costs to be reckoned with. There are costs to the organisation too. As EARC (1990) has pointed out, whistleblowing questions the internal lines of authority and responsibility. It may be destabilising for the organisation if employees have a unilateral right to gauge the merits of their own complaint and to choose when to go public (McMillen, 1990 cited in EARC, 1990: 35). Information may be sensitive, not merely in matters of national security, but in areas such as police work. Interests other than those of the whistleblower may need to be protected, and not only because the whistleblower may have mixed motives. Near & Miceli (1992) make a similar list, and also point to the costs to society of the court logjams that are likely to arise if everyone took the whistleblowing option.

So the issue of costs is both similar and different to this issue in TQM. We do not count the costs of whistleblowing in the end, not because we *cannot* – they are all too obvious, after all – but because on moral grounds we *must* not. The issue then becomes how to make these moral imperatives attractive on other grounds. After all, the impossibility of legislating for morality is nothing new. The problem is similar to that experienced with Equal Employment Opportunity legislation: how to make the moral necessity of removing discrimination in employment attractive simply as "good business sense". In many respects TQM, with its emphasis on the "consumer rights" of employees, presents an answer to this problem. On the one hand employees have the right to take part in decision-making, to exercise their creativity and problem-solving ability. At the same time, it recognises that organisational problems are often best solved by those closest to them.

(b) Performance review

Another, related area of debate is whether TQM, with its emphasis on standard setting and the measurement of performance, has a place in performance review systems of staff. This is particularly important when pay for performance is under discussion. On the one hand we can quote the Chairman of Westinghouse, who is typical of many TQM practitioners when he says:

> *You have to have a scoreboard because if you don't want to win, why keep score? Here's where you create the objectives, the recognition, the pay for performance* (John Marous, quoted in *BRW*, August 1992).

On the other we can cite the original TQM guru, W. Edward Deming, who argued that we needed to "drive out fear". Indeed, the principle of driving out fear underpins much of the practice of TQM.

According to this view, to the extent that performance review contributes to employees' fear – fear of losing their jobs, of creating a competitive rather than a cooperative workplace, of simply being measured and found wanting – it should be eliminated. This is aside from the argument that is often raised with any performance review system, that setting any kind of measurable standard involves the temptation to make that a minimum standard of behaviour.

(c) 100% defect-free?

While the debate about performance review is still fierce, the closely related argument that "we can and should produce 100% defect-free products" – part of early TQM thinking – has largely been answered in the negative. Most theorists now say that the relationship is more of an asymptotic one, that is, that the aim is to have the number of defects approaching but never quite reaching zero.

With whistleblowing, there are analogies to the issues of performance review and ethical perfection in organisations. The second problem – achieving absolutely zero errors – is the simpler of the two. Generally we recognise that there will always be wrongdoing in organisations, given the nature of people. Organisations aim to prevent there being more wrongdoing than there need be, and to reassure both the internal and external customers (common terms in TQM, but not without their problems as we shall see) that organisational wrongdoing is detected early.

How to do this – and whether to reward it – is more difficult. To gain the benefits of reform that whistleblowing brings with it, should we, as with some applications of TQM, not merely drive out the fear of whistleblowing's consequences, but actually reward whistleblowers for their behaviour? Again, the issue requires a distinction between the extremes of practical responses. We need to distinguish between whistleblower *protection* and *rewarding* whistleblowing, say by providing cash benefits to those who bring organisational wrongdoing to notice. The American research on this issue in the public sector throws doubt on whether such rewards actually play a role in encouraging valid whistleblowing (MSBP, 1981; 1984). In the Australian view of things, where the disinclination to "dob in a mate" is perhaps stronger, it is a tactic that is likely to give rise to ethical dilemmas.

Another view, and this is the one espoused by the CJC's current policy, is that whistleblowers should be protected from reprisal: sidelining, transfers, withdrawal of substantive tasks, loss of their jobs. Yet even this may be disputed. Peters & Branch declare themselves unsympathetic to guaranteed job security for the whistleblower. They quote Lessard's analogy between holding onto a job and holding on to a shaky marriage:

> *... in which the wife can't decide whether she really wants to leave or stay, but because she is so terrified of being alone, never discovers that in the absence of terror she would have decided for positive reasons to stay. [...] If, unafraid of being fired, you work courageously with conscience and commitment, then the job is far more rewarding – worth staying in – than if cowed by the fear of dismissal, you yielded to all pressures in the effort to keep it.* (Peters & Branch 1972:x)

Even they, however, make one important exception to this principle: that of the public sector employee whose responsibility is to protect the public health or safety. That person, they argue, "must be free to go to the public whenever it is threatened by defective products or dangerous practices" (1972:x). This, of course, given the undertakings of confidentiality which public servants must often sign, is just the freedom that they may be denied.

Again, this is consistent with the fact that some of the more successful applications of participative management styles have been in the occupational health and safety arena (Quinlan & Bohle, 1991). The need to drive out fear is supported yet again; only the means of doing so is in question.

(d) Codes of ethics/slogans

The need for organisations to become more ethical and hence avoid the need for whistleblowing at all finds a counterpart in TQM. Creating formal codes of ethics is often suggested as a way of doing this, although much research (e.g. Mathews, 1987) suggests their effects are doubtful and it is unlikely that they are adequate on their own. In a similar way slogans, especially posters exhorting various forms of excellence that used to be placed around workplace walls are frowned upon by most TQM theorists as counter-productive.

Fostering an ethical organisational *climate*, however, is a different thing altogether, and does appear to reduce wrongdoing and hence the need for whistleblowing. So it appears that the formal exhortations to certain behaviours and views is demonstrated by both TQM and the growing incidence of whistleblowing to be ineffective, especially in comparison to producing quality and ethical behaviour as living and unspoken realities.

(e) How much can be attributed to TQM?

If an ethical *climate* rather than formal ethical *codes*, and if an everyday devotion to quality rather than a profusion of slogans are the things that produce ethical behaviour – and quality products – in organisations, we might ask how much can really be attributed to the theory of TQM *per se* when good effects appear to result. How do we know, for example, that other, pre-existing factors in the environment are not the real factors behind the success of TQM applications? TQM has been argued to be more difficult to implement in countries such as Australia where individual rather than group values predominate, where there is less government intervention to assist industries where TQM has been applied, where employment conditions such as life time employment are relatively unusual (Orphen & Vilijoen, 1985). Of course, arguments opposing these viewpoints are just as frequent and vociferous.

We seem to be faced with a similar complexity with whistleblowing. Exhaustive studies suggest that there is no definitive whistleblowing personality, although the strength of religious views, and a greater need for control may be associated with someone who is more likely to blow the whistle (Miceli & Near, 1992, 93-135). So it will be impossible simply to choose staff who will be willing to report wrongdoing when they see it. There is somewhat more evidence about the *circumstances* which lead to whistleblowing, with co-worker approval (Keenan 1988), group norms (Allen & Wilder, 1980; Latane, 1981; Wolf and Latane, 1980) and type of relationship with top

management (Blackburn, 1988; Enz, 1986, 1988; Near & Miceli, 1985) figuring heavily as predictors of whether or not an employee will blow the whistle.

It seems that, with both TQM and whistleblowing, the degree and direction of causality may never be clear. That is, we may never know whether whistleblowing or devotion to quality are made possible by the environment in which they take place, or whether, on the contrary, devotion to quality and a respect for ethics create the environment where these things can happen. What is clear is that the organisational climate and the general cultural environment are crucial variables which we ignore at our peril.

(f) The public vs the private sector

This "nature vs nurture" issue in both whistleblowing and TQM have special relevance in the public sector. As we pointed out earlier, it is true that TQM has pervaded a large number of work places, including in the public sector. But it is here that the problems of certain assumptions in TQM tend to become more obvious. The problem is frequently raised when attempts are made to implement TQM in service industries. How do we measure or control the amount of improvement in a "product" where the customer is necessarily part of that product? The problem is still more difficult when the customer must receive a product which he or she does not particularly want to receive. Taxation services are still a prime example, despite the energetic attempts of the Australian Taxation Office (ATO) to make us see them otherwise. Mastenbroek (1991) provides numerous examples of these and other difficulties in stretching the usual definition of quality to fit the public sector. Universities, in their role as providers of education, are subject to the same problem. This is because they must sometimes provide a product whose value for which the customer cannot immediately measure and appreciate (Barrett, 1993: 99). Briefly put, not everything that counts can be counted, and not everything that can be counted counts.

(g) The customer

The notion of the customer – that crucial figure in TQM theory – is problematic in the public sector. In TQM the customer is so important, in fact, that everyone in the organisation, not just those behind the counters, has a customer. The "internal customer" refers to the idea that every person who is part of a process regards the next person in that process as their customer.

The idea of the customer is infinitely more complicated in public sector organisations. In the public sector it is probably more correct to say that what are being satisfied are *constituencies*, which more often as not are in potential or actual conflict with one other. The demands of clients whose claims on scarce resources may not be able to be satisfied in total, and who want decisions immediately, must be balanced against the needs of the public at large who rightly require due process and transparency of decision–making, the very things that slow down the process for individual clients. It's tough to "get it right first time" and quickly when you have to get it right for everyone and for some time to come. The goal of "delighting" (rather than merely satisfying) the customer, of beating your competition through sheer speed of delivery may be remote indeed! The conflicting demands that typify the customer relationship in the public sector are nonetheless real because so many of them are abstract: Paradoxically, it is when service to the public is regarded as an ideal for its own sake,

rather than principally as a source of competitive advantage that things become complicated.

So it is in whistleblowing. Who can reasonably be regarded as the customer in that situation? Surely, ultimately, a number of constituencies ultimately gain. As Peters & Branch argue, when real reforms are being achieved through whistleblowing, then the organisation as well as the society at large are the ultimate beneficiaries.

Not that this is easy or comfortable for organisations to acknowledge at first. The view of Seligman (1981) that laws prohibiting discrimination against whistleblowers merely amount to "rat protection" are all the evidence we need. The same is true with the TQM practice of stopping the line, which may be equally difficult. This can be a difficult process for both the organisation – acknowledging the existence of quality problems – and for the person who brings them to notice. Some critics have gone so far as to characterise the TQM practice of stopping the line as "management by stress," since the line puller must shoulder the burden of deciding when to stop the line, and has to wear the flak which may ensue from fellow workers and management alike (Parker & Slaughter, 1988).

All this suggests that the sense in which TQM provides a theoretical home for the whistleblower is the result of the environment it creates, its practice rather than the detail of its theoretical underpinnings. Ideally, TQM is consistent with a genuinely participative approach to management, one which – to use this word just one more time before it becomes unendurably hackneyed – encourages employee empowerment. As we said, anyone can challenge the system. Whistleblowers have always been the proof of this. What may be different is that, with the climate created and sustained by TQM at its best, the organisation listens to and learns from its dissenters; dissenters can state their views without fear of reprisal. As General Patton is reputed to have said, "no-one said anything when they all said the same thing." And he was in the army!

(h) Simplicity

A further point in a discussion which has tended towards the theoretical and abstract. Whistleblowers are not professional ethicists; they are most likely uninterested in explaining the theory of the wrongdoing they have uncovered, or why in philosophical terms, it is wrong. That is, they rely on natural law, rather than obscure theories of ethics. TQM is similar. TQM relies on the measurable and the visible rather than the arcane and the philosophical, and even the philosophy of participation and empowerment, really amounts to the need to listen to those who are close to the problem.

(i) The process perspective

Finally, and again to underscore the practical value of examining TQM and whistleblowing together, it is important to realise that both of them are better understood as a process than as a single event.

TQM, it is often asserted by its proponents, must be taken as a lifelong process rather than a program in organisations. This is to avoid its becoming simply another management fad that will "blow over" as soon as its deficiencies are revealed, and the next fad appears. A process view applies both to the phenomenon of TQM in general,

and the TQM response to the discovery of a particular defect in quality. Similarly, any particular incidence of whistleblowing is really not a single event. We have been greatly helped in the literature by Graham's (1987) conception of the process of principled organisational dissent. A comparison of Graham's model of organisational dissent with a prototypical TQM approach to a problem will make the comparison clear.

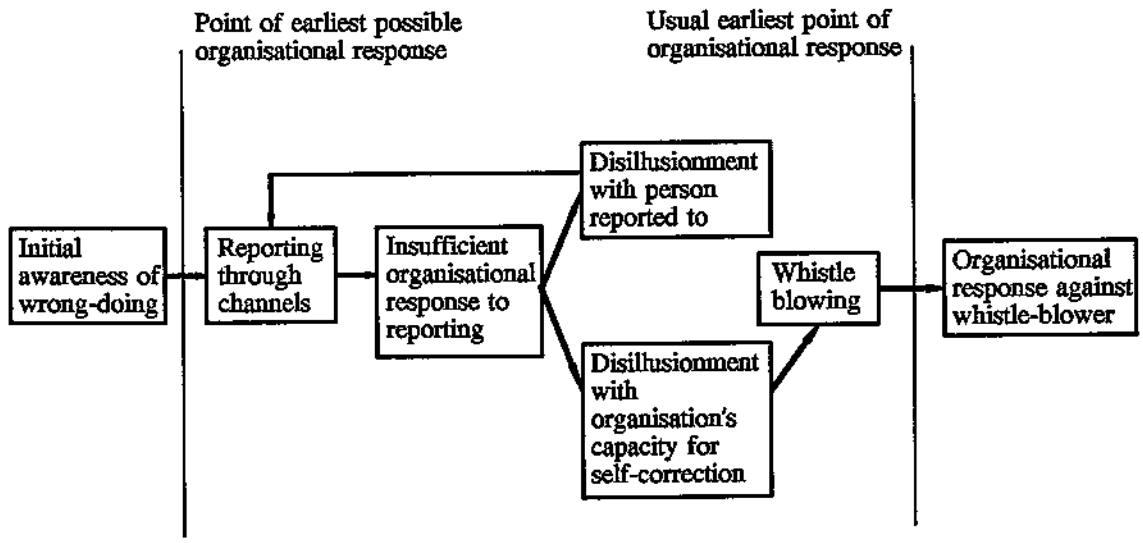

Figure 1 — The process of principled organisational dissent
Source: Adapted from Graham (1986)

Graham's (1986) representation of the whistleblowing process makes it clear that a whistleblower goes through a fairly extended process, and several iterations of disillusionment before finally taking the matter outside the organisation. The earliest effective organisational response may be when the whistleblower feels the cold breath of reprisal. Even the earliest possible organisational response is one stage removed from when the whistleblower first becomes aware of wrong doing.

The TQM process, by contrast, is considerably shorter, because the quality problem immediately becomes the concern of the work group, the work group *are* the official channels. The first point of organisational response occurs simultaneously with the work group's attention to the problem.

Conclusion

TQM is a theory which pays attention to the rational; it imposes the rational on the tendency of processes to become chaotic, out of control. In doing this, it at least acknowledges that the chaotic exists, the dark side of organisations is there. It is in this rather than the detail of statistical process control that the theory of TQM may be a refuge for the whistleblower. So it is entirely in accordance with the spirit of

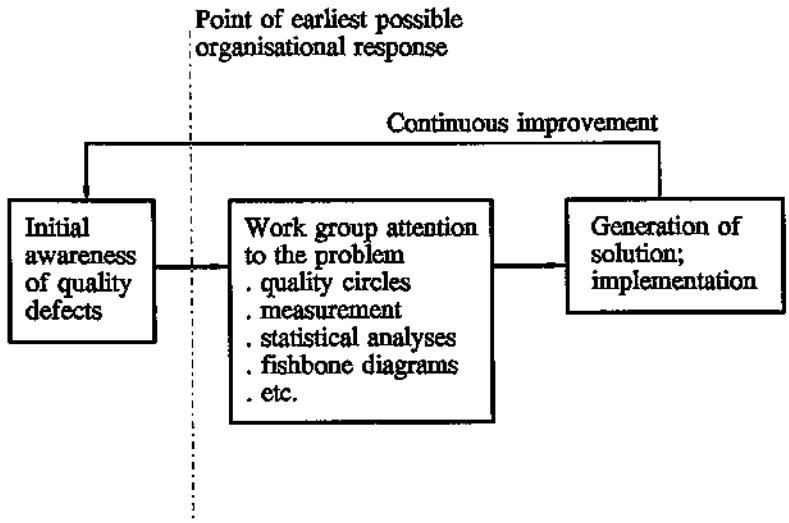

Figure 2 — The TQM process

TQM that measures are devised for the protection of whistleblowers. TQM, that umbrella of theories, would surely endorse the need to provide the whistleblower with a roof in a storm.

This is not to say that, even though we have recognised a number of points of linkage, that TQM and whistleblowing "map" onto each other exactly, and even less to say that TQM represents some kind of total panacea for the problems that whistleblowing alerts us to in organisations, and the problems the whistleblower faces as an individual. After all, "the jury is still out" on TQM, particularly its effectiveness in the public sector. TQM has a set of potential ethical problems of its own: the cosy relationship between suppliers and the organisation is one source. What I think I have shown is that, oddly enough, it is in some of the more remote linkages between TQM and whistleblowing, that the theory has value. It is in the type of environment which ideally is created and sustained by TQM, as much as in the detail of the TQM process, that TQM has much to offer both organisations and whistleblowers, even organisations like the CJC which offer advice and support to whistleblowers.

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