

The Victorian Whistleblower Protection Act Patting the Paws of Corruption?

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ABSTRACT

The Victorian Whistleblowers Protection Act was assented to on 19 June 2001 and commenced operation on 1 January 2002. This leaves the Commonwealth, Tasmania, Western Australia and the Northern Territory yet to respond to the issue of disclosure protection.

This paper conducts an audit on the Victorian scheme by applying 24 performance criteria to it. The Act comes through this audit fairly well. However major deficiencies in the scheme have been exposed.

We must not make a scarecrow of the law,
 Setting it up to fear the birds of prey,
 And let it keep one shape, till custom make it
 Their perch and not their terror.

William Shakespeare, *Measure for Measure*

Introduction

The Victorian *Whistleblower Protection Act* is the fifth such statute to be enacted thus far in Australia.¹ While it stands above the crowd, having overcome many of the deficiencies of the related legislation, it still bears major structural deficiencies.

It is interesting that the drafting of protected disclosure legislation has not escaped globalisation. Presently substituted for the debate about what constitutes effective whistleblower legislation is a high level of mimicry from country to country in the construction of whistleblower laws. If the copied law is flawed (as is usually the case) then that flaw becomes a transmissible condition. For example the UK law was followed to a substantial extent in the South African statute and the Irish Bill. The New Zealand Act is a copy of the South Australian Act and the new Bill currently before the Australian Parliament is a copy of the statute in the Australian Capital Territory. As mentioned, all these progenitive statutes have serious deficiencies.²

There are other examples. In fact the question of effective whistleblower design is now becoming an international issue. The transitional economies of the former Soviet Republic and certain Asian states aspiring to membership of various world bodies are becoming more conscious of the need to build disclosure protection into their respective anti-corruption strategies.

With that as background, the paper applies 24 performance criteria to the recently enacted *Victorian Whistleblower Protection Act*. These criteria have been developed to respond to the issue posed above, how

¹ The others (in order of enactment) are: South Australian *Whistleblower Protection Act* 1993; Queensland *Whistleblower Protection Act* 1994; Australian Capital Territory *Public Interest Disclosure Act* 1994; New South Wales *Protected Disclosures Act* 1994.

² See W. De Maria, Common Law – Common Mistakes: The Dismal Failure of Dismal Failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom.” Paper presented to the International Whistleblowers Conference, University of Indiana, 12-13 April 2002 (available at <http://www.whistleblowers.org.au/papers/whistleblowers.pdf>)

does one make internationally-relevant assessments of disclosure protection legislation?

But first some contextualising comments are in order.

Public Administration as a Covert Operation

It is usual to ground statutory whistleblower protection in a context of major corruption scandals and rising levels of community demand for governances of probity. While this is the case, it can lead to an enormous amount of sociological denial and celebrationism.

There is another context, and that is of *secrecy*. It is contended here that whistleblowing laws have been born in the “house” of secrecy. In fact we can take this metaphor a bit further and state that both houses of the Victorian Parliament that enacted the disclosure protection law are the same ones that have over the years enacted some very onerous secrecy legislation.

This observation offers us two interpretive choices. We can either conclude that parliamentary outputs (even as varied as secrecy and disclosure legislation) must bear a common ideological stamp, or that Parliament is capable of producing quite contradictory outputs. While both interpretations appear valid, the preference here is for the former view which detects no substantive difference between secrecy and disclosure legislation.

Concealment has an unbroken presence in official policy.³ That arch intriguer Cardinal de Richelieu (1585-1642) said it all in his famous utterance: "Secrecy is the first essential in the affairs of the State." What is also concealed is the link between secrecy and whistleblowing. In popular consciousness whistleblowing and secrecy are in opposition. One is openness-focussed, the other seeks clandestinity. Those who set up disclosure-protection programs see the world in this simple, bifurcated way. Below this shallow public perception, at a level to do with system maintenance, is a curious interdependency between secrecy and whistleblowing. Secrecy “needs” whistleblowing:

- to moderate public anger about official concealment
- to control perceptions of organizations
- to maintain preferred hierarchies of power

³ Leyser, H (2000) *Covert Operations: The Medieval Uses of Secrecy*, Addison-Wesley, London.

and whistleblowing surely needs secrecy, because destroying it is its single *raison d'être*. Curiously every “win” for a whistleblower is a triple-win for secrecy. A whistleblower win (typically a powerful disclosure that is received well in the media and pushes officialdom to at least a promise of reform) is thrice reaped by the state as a public relations exercise. The State reframes the whistleblowing as evidence of openness. A whistleblower win captures the imagination. It is a story of David winning over Goliath. The next day David is inducted into the whistleblower hall of fame, we feel good, and Goliath quietly shambles on.

The largely unexamined predominance of secrecy over whistleblowing must be subject to a new and powerful curiosity.⁴

The structural conditions that preserve, indeed amplify, official secrecy are far more powerful than the countervailing conditions that endorse openness. What are these dominant conditions? To be brief, conditions that nurture secrecy are to be found in:

- The current revolution in government-business relations.
- The vigorous re-plantation of official British obsessions with secrecy to its former Empire dependencies.
- How the secrecy-shrouded dealings of intelligence and military services have been affirmed as models of public administration.

The contemporary worldwide reconfiguration of government-business relations is a revolutionary movement of commensurate import to the last great revolution – feminism (which was also about changing relationships).

During the 1990s Australia had one of the largest privatization programs among OECD countries. In dollar terms Australia's privatizations have been second only to the UK. During the first half of 1999 Australia was the world leader in both announced and realized privatizations.⁵ The shrinkage of the service state and the marketisation of government services means that a huge amount of prior government production and servicing is now conducted according

⁴ On that point it is interesting to observe that the paltry disclosure-protection money that governments spend and the (still) paltry amount of whistleblower research going on around the world are focused on why people disclose, not why the great majority don't. See A. Gorta & S. Forrell (1995) “Layers of Decision: Linking Social Definitions of Corruption and Willingness to Take Action” *Crime, Law & Social Change*, 23 315-343; L. Zipparo (1999) “Factors Which Deter Public Officials from Reporting Corruption”, *Crime, Law & Social Change*, 30, 273-287.

⁵ Walker, B & B. Walker (2000) *Privatisation: Sell Off or Sell Out? The Australian*

to the disclosure-shy protocols of business.⁶ In these circumstances secrecy is amplified.

There is also the issue of historical British influences. One of the many negative inheritances from British history has been their quiet obsession with official secrecy.⁷ Richard Crossman, a former British Labour minister, once said:

Secrecy is the British disease, and it has reached epidemic proportions. No other western democracy is so obsessed with keeping from the public information about its public servants, or so relentless in plumbing new depths to staunch leaks from its bureaucracy.⁸

The epitome of official British concealment is of course the *Official Secrets Act*, rushed onto the statute books in a single day in 1911.⁹ The spirit of that Act (revised in 1989) was transported to Australia and reappeared as equally (some would say more) oppressive public servant secrecy provisions in various crimes acts.¹⁰

The third place I think we should look for explications of secrecy in national insecurity. The evidence is clearly there to show that the secret operations of intelligence and military services continually violate the norms of democratic openness and accountability.¹¹ While it

⁶ De Maria, W (2001) "Commercial-in-Confidence: An Obituary to Transparency"? *Australian Journal of Public Administration*, 60:4, 92-109; De Maria, W (2002) "Rescuing FOI: Rescuing Democracy", *The Drawing Board: An Australian Review of Public Affairs* (www.econ.usyd.edu.au/drawingboard).

⁷ Bowed over with the enormous weight of this culture of secrecy, the United Kingdom, not surprisingly, was one of the last western countries to cross the line and implement a heavily compromised freedom of information act. The *Freedom of Information Act 2000 (UK)* received Royal Assent on 30 November 2000. However the right of access will not come into force until January 2005. A provision in the Act requiring authorities to produce access schemes describing information they intend to publish proactively, will be phased in earlier, starting with central government departments in November 2002. This Act is the sixth one drafted since 1976. The other five all failed to progress to law.

⁸ See Robertson & A. Nichol, *Media Law*, Penguin, London, 1992, 3rd edition; Robertson, G., *Freedom, the Individual and the Law*, Penguin, 1993, 7th edition.

⁹ The notorious Section 2 made it a crime for public servants to disclose any information about their jobs, created, according to the Franks Committee, over 2000 potentially criminal acts. See Hooper, D., *Official Secrets: The Use and Abuse of the Act*, London, Secker & Warburg, 1987; Hull, J., *Commercial Secrecy: Law and Practice*, London, Sweet & Maxwell, 1998; Thomas, R *Espionage and Secrecy: The Official Secrets Act 1911-1989 of the United Kingdom*, London, RKP, 1991.

¹⁰ Terrill, G *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond*, Melbourne, Melbourne University Press, 2000, Appendix II.

¹¹ Two weeks after the bombing of the World Trade Centre in New York, the Australian Government introduced the *Criminal Code Amendment (Espionage and Related Offences) Bill*. This provided two-year prison sentences for communicating official information and seven year sentences for receiving this information. In May

is common to believe that security and non-security information is managed separately, it can be argued that the management of security information is the model for disclosure management of all forms of public information, including whistleblower laws.

Whistleblower laws, in other words, could be considered as contaminated with the spirit of secrecy rather than liberated with the spirit of openness. Does this observation hold up in an examination of the Victorian *Whistleblower Protection Act*?

The Victorian Whistleblower Protection Act: An Audit

The [Whistleblowers Protection] Bill implements a key commitment of the Brack's Labor Government...[it] demonstrates that this government is serious about ending the Kennett Government's legacy of secrecy and lack of transparency...

Hon. M.R. Thompson (Minister for Small Business).¹²

I am happy to put on the record that the National Party would not have initiated this [whistleblower protection] bill. The National Party thinks that the Bill is more about public relations than public administration.

Mr R. M. Hall (Member for Western).¹³

How do we evaluate the performance of the Victorian whistleblower law? Is it possible to construct performance capacity criteria and assess the legislation accordingly? That is the task ahead.¹⁴ By performance capacity is meant the *statutory potential* to create an impact on the protection and reform agendas, by examination of the *endogenous* features of whistleblower statutes. This is based on the notion that the ultimate test of a "good" whistleblower statute is:

- The capacity to protect whistleblowers to the full extent of the available law.

the *Government Communications Security Bureau Bill*. The Bill aims to provide a statutory footing for the Government's spy agency, the Communications Security Bureau. See R. Donald, "Government Communications Security Bureau Bill, First Reading," New Zealand Green Party, 2001. For an expose of the Government Communications Security Bureau see N. Hager *Secret Power: The New Zealand Role in the International Spy Network*. Craig Potten, Nelson, 1996.

¹² Victorian Legislative Council, *Hansard*, 1 May 2001.

¹³ *Ibid*

¹⁴ This project builds on earlier work. See W. De Maria, "Public Disclosure Laws in Australia and New Zealand: Who Are They Really Protecting"? *Alternative Law Journal*, Vol. 20, No. 6, 1995, pp. 270-281; W. De Maria, "Common Law: Common Mistakes: The Dismal Failure of Whistleblower Laws in Australia, New Zealand,

- An effective and *direct* throughput from disclosure to systemic reform.

There are two broad methodological pathways into these areas. The first focuses on the whistleblower process.¹⁵ The second, the one presented here, has an internal focus, interrogating the construction of laws and administrative protections with a view to the question: Do the laws and administrative procedures provide a *capacity* to meet the broad aims of protection and reform?¹⁶

¹⁵ See for example Marquart, J. & J. Roebuck (1985) "Prison Guards and 'Snitches'" *British Journal of Criminology*, 25:3, 217-233; Miceli, J., J. Near & C. Schwenk (1991) "Who Blows the Whistle and why?" *Industrial Labour Relations Review*, 45:1, 113-130; Rothschild, J & T. Miethe, "Whistleblower Disclosure and Management Retaliation (1999) *Work and Occupations* 26(1) 107-128; Miethe, T & J. Rothschild (1994) "Whistleblowing and the Control of Organisational Misconduct" *Sociological Inquiry*, 64:3, 322-347; Near, J & T. Jensen (1983) "The Whistleblowing Process: Retaliation and Perceived Effectiveness" *Work & Occupations* 10:1, 3-28; Near, J & M. Miceli (1986) "Retaliation Against Whistle Blowers: Predictors and Effects" *Journal of Applied Psychology* 71:1, 137-145; Miceli, M. B. Roach & J. Near (1988) "The Motivations of Anonymous Whistleblowers: The Case of Federal Employees, *Public Personal Management* 17:3, 281-295; De Maria, W. (1999) *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia*: Wakefield, Adelaide. See also W. De Maria (1992) "Sterilising the Queensland Whistleblower", *Australian Journal of Social Issues*, 27:4, 248-26x; W. De Maria (1996) "The Welfare Whistleblower- In Praise of Troublesome People" *Australian Social Work* , 49:3, 15-24; W. De Maria (1997) "Eating Its Own: The Whistleblower Organisation in Vendetta Mode" *Australian Journal of Social Issues*, 32:1 37-60.

¹⁶ Dworkin, T & J. Near (1987) "Whistleblowing Statutes: Are They Working?" *American Business Law Journal* 25 24-264; Price, P (1992) "An Overview of the Whistleblower Protection Act" *Federal Circuit Bar Journal*, 2:2 69-97; Allars, M (1992) "Whistleblowing: Where Public Interest Parts Company with Government Interest", paper presented at "Blowing the Whistle" Seminar, Royal Institute of Public Administration (NSW Division) September, 1-21; Feerick, J (1992) "Toward a Model Whistleblower Law" *Fordham Urban Law Journal* XIX, 585-597; Minahan, D (1993) "The Whistleblower Protection Act: Death of a Statute" *Merit Systems Reporter* 93:3D; Cripps, Y (1994) *The Legal Implications of Disclosure in the Public Interest*, Sweet & Maxwell, London; De Maria (1997) "The British Whistleblower Protection Bill., A Shield Too Small?", *Crime, Law and Social Change*, 27 139-163; Vickers, L (1995) *Protecting whistleblowers at Work*, The Institute of Employment Rights; Vickers, L (2000) "Whistling in the Wind? The Public Interest Disclosure Act", *Legal Studies*, 20(3) 428-444; Lewis, D (1995) "Whistleblowers and Job Security", *Modern Law Review*, Vol. 58, 208-221; Lewis, D (1998) "The Public Interest Disclosure Act 1998", *Industrial Law Journal*, 27(4) 325-330; Miceli, J., M. Reh & J. Near (1999) "Can Laws Protect Whistleblowers?" *Work and Occupations*, 26(1) 129-151; Lewis, D., C. Ellis, A. Kyprianou & S. Homewood (2001) *Report of a Survey on Whistleblowing Procedures in Further and Higher Education*. Centre for Research in Industrial and Commercial Law, Middlesex University.

What follows is an examination of the Victorian Act according to 24 performance criteria, presented in four categories:

- **Working features**
- **Scope**
- **Legal protections**
- **Services**

There will no doubt be disagreement over the inclusion and exclusion of various criteria. While important, the main debate should be on the question: can we assess whistleblower laws by applying performance criteria to their legal construction? If so, how do we do it?

Performance Criteria

<p style="text-align: center;">Working Features</p> <ul style="list-style-type: none"> ▪ Independent Authority ▪ Disclosure pathways ▪ Detriments specified ▪ Disclosure threshold ▪ Duty to Investigate ▪ Compulsory review of Act ▪ Annual report to Parliament 	<p style="text-align: center;">Scope</p> <ul style="list-style-type: none"> ▪ Sector Penalties ▪ Who May Disclose ▪ Private Sector coverage ▪ Media Protection ▪ Previous Wrongdoing ▪ Application to Politicians ▪ Extra-Territorial Application
<p style="text-align: center;">Legal Protections</p> <ul style="list-style-type: none"> ▪ Civil & criminal Indemnity ▪ Secrecy breach indemnity ▪ Injunctive relief ▪ Adverse Employment Appeals ▪ Defamation indemnity 	<p style="text-align: center;">Services</p> <ul style="list-style-type: none"> ▪ Counselling ▪ Relocation ▪ Entitlement to damages ▪ Whistleblower feedback ▪ Fighting fund

Table 1: Working Features

Independent Authority	Disclosure pathways	Detriments specified	Disclosure characteristics	Duty to Investigate	Compulsory review of Act	Annual report to Parliament
Yes	Un-mandated	Yes	Reasonable belief	Yes	No	Yes

Working Features
<ul style="list-style-type: none"> ▪ Independent Authority ▪ Disclosure pathways ▪ Detriments specified ▪ Disclosure characteristics ▪ Duty to Investigate ▪ Compulsory review of Act ▪ Annual report to Parliament

The first seven benchmarks refer to internal or working features of disclosure protection legislation. They are seen as important (necessary?) for the optimum performance of whistleblower legislation.

Independent authority

An independent authority with disclosure reception, investigatory and educative powers is vital because it articulates a message of political commitment to the anti-wrongdoing agenda. It also gives the statute a clear, stand alone identity by encasing it in an administrative “home”. Most whistleblower statutes are Acts without agencies; simply statutes on a Minister’s portfolio list.¹⁷

The Victorian Act has a powerful home in the Office of the Ombudsman. On that basis the Act can be said to be encapsulated in an independent authority. This makes it unique in Australia, indeed in other parts of the world.

Under the Victorian Act, the Ombudsman has the following powers:

¹⁷ Tasmania has produced some of the most impressive draft legislation centred around independent authorities. See *Public Interest Disclosure Bill 1995 (Tas)*, Part 2: Public Interest Disclosure Agency; *Public Interest Disclosure Bill 1997 (Tas)*, Part 2: Public Interest Disclosure Commissioner and Tribunal. Neither Bill survived the political process.

- To determine whether a disclosure is a public interest disclosure.
- To investigate matters disclosed in public interest disclosures.
- To prepare, publish and oversight the guidelines to be followed by public bodies in relation to internal disclosures and investigations.
- To monitor investigations by public bodies and the Chief Commissioner of Police.
- To review procedures used by public bodies for the reception and investigation of whistleblower allegations.
- To decide not to investigate disclosures.
- To refer disclosed matters to other authorities for investigation.
- To determine how an investigation will proceed, including a decision whether to hold a hearing or not and whether parties to the investigation should be legally represented.
- To seek police secondment to the Office of the Ombudsman.
- To obtain information from any person.
- To require police to answer questions and produce documents.
- To enter premises occupied or used by public officers or public bodies.
- To take over an investigation.
- To seek information from public bodies in respect to investigations currently under way.
- To require final reports from public bodies on investigations undertaken.
- Report to Parliament on any relevant matter.

This is an impressive corpus of power, and will go a long way to answering the oft spoken complaint that whistleblower authorities are watchdogs with rubber teeth. There are some huge problems however:

- There is no easy appeal from decisions by the Ombudsman that a disclosure is not a public interest disclosure.
- Nor is there an easy appeal from decisions by the Ombudsman not to investigate when he or she has determined that the complaint is vexatious, trivial or more than 12 months old.
- The requirement that all investigations must be conducted in private immediately raises serious issues of transparency and accountability.
- The s 55 requirement that police only are required to answer questions and provide information suggests an over-zealousness in capturing police corruption.
- The *Freedom of Information Act 1982* does not apply to any document in the possession of a public body to the extent that the document reveals information that relates to a disclosure. This surely is the type of document that should be in the public arena. The whistleblower act is silent on whether this embargo is for the life of the investigation or is permanent.
- As the Ombudsman is an exempt agency for the purposes of the *Freedom of Information Act 1982*, documents in his or her possession, eg those that detail wrongdoing and the

Ombudsman's response, are not accessible. Again we have a situation of "trust me, I am a credible watchdog."¹⁸

Finally in this section the comment must be made that to a very great extent the Victorian Whistleblower Act will only be as good as the Ombudsman is effective, adequately resourced and sympathetic to the plight of whistleblowers. It is known that the fortunes of Ombudsmen throughout Australia wax and wane. Sometimes the Office is captured by a conservative culture with no drive to be hard hitting. Other times there is a genuine spirit of protecting the public interest against mal-administration. These years of activism are sometimes followed by government retribution in the form of replacing the "difficult" Ombudsman with a yes person.

The point is that the health of the whistleblower act depends to a great extent on the health of the Ombudsman, and that cannot be guaranteed. This places a certain structural vulnerability into the Act. I suspect it will need permanent bi-partisan patronage to remain effective.

Disclosure pathways

The great majority of whistleblower acts here and overseas mandate the *disclosure pathways* that whistleblowers must travel if they seek protection. Preference is unambiguously given to internal pathways. The provisions that establish these pathways are usually the most authoritarian features of the laws. Why is this so? One answer is that these requirements mirror the law of confidence and thus provide immunity against breach of confidence if one discloses to one's employer.¹⁹

In the construction of the narrow pathways however one can feel the heavy hand of the state. One can talk about the State *supervision* of disclosers. Revealed is a powerful official perception about whistleblowers and their reports. Whistleblowers, when viewed positively, are usually seen as well-meaning, ethically consistent and organizationally-focused. In the hands of the State these qualities can be patronized, ignored or contradicted. Not such an easy thing to do with their messages, which are usually dangerous to those in power. All this leads to an official response of keeping the would-be whistleblowers on a tight rein. Vickers sees in these requirements "A concern for procedural correctness [that] can seem to overshadow the public interest..."²⁰

¹⁸ *Age*, 4 December 2000.

¹⁹ L. Vickers, *op. cit.*, p. 436.

²⁰ *Ibid*, p. 440.

While it makes good administrative sense to direct allegations to the relevant work unit this can be done in a more flexible way and at the same time escaping from the numerous frailties of the internal disclosure model.²¹ Why can't unions, advocacy groups, NGOs and professional bodies be the *first* port of call for the discloser?

The Victorian Act makes a valiant effort to overcome the standard myopia with respect to mandated internal disclosure pathways. S. 6 allows a whistleblower to make disclosures either to the Ombudsman or to the relevant public body (including Parliament). S 6(3) prescribes an external pathway for all allegations of improper conduct by local government councillors. S. 6(4) does the same with respect to allegations of improper conduct by the Police Commissioner. In both instances the allegations must be made to the Ombudsman. In S. 6(5) there is a choice of three pathways for disclosures about police misconduct.

However the point must be raised that there is a real danger here of internal disclosure pathways superseding the external pathway to the Victorian Ombudsman, particularly through the misdirection of resources. Pathways internal to the agency, where the misconduct is alleged to have or be occurring, provide too many un-vetted opportunities to bury the disclosure in paperwork and perverse administration.²² One must remain deeply suspicious of the recently announced policy to appoint "protected disclosure officers" and "welfare managers" in Victorian departments²³. Experience suggests that the "over-administration" of disclosures in departments soon leads to disaffection amongst potential whistleblowers. There is the added burden of protecting these officers from higher-level intimidation to downgrade disclosures from "protected" to "unprotected."²⁴

Detriments specified

²¹ The priority to internal whistleblowing takes a bizarre turn in the UK Act when a disclosure is protected when it is made to the alleged wrongdoer! See Vickers, *op. cit.* p. 436. I suspect the alleged wrongdoer is in no need of extra information about his or her bad practice. This irresponsibly drafted section leaves the whistleblower in a very vulnerable position.

²² In the Queensland Whistleblower Study 67% of all agency disclosures were rated by the whistleblowers as "very ineffective." See W. De Maria & C. Jan, "Behold the Shut-Eyed Sentry", *op. cit.*, p. 163.

²³ *Age*, 22 November 2001. See also Department of Justice Procedures under the Whistleblowers Protection Act, no date.

²⁴ Recently in Queensland there has been documented accounts of CEOs and ministers pressuring their FOI officers to change access decisions on politically damaging documents from open to exempt.

The Victorian Act puts down in black and white what the outlawed reprisals are. Many whistleblower instruments do not specify *detriments*. The listing and specification of detriments makes the issue of reprisal less ambiguous. Without such specification there is a greater risk of perpetrators not knowing that they have broken the law. Lack of specification can also facilitate administrative and judicial write-downs of managerial attacks on whistleblowers. It can also compromise investigations of reprisals.

Disclosure characteristics

It is common now for most disclosure protection laws to express common requirements about what constitutes a protected disclosure. These are, among other things, that the disclosures be made to the correct authority and that they be made in good faith.²⁵

On the face of it the Victorian Act simply requires that that a reasonable belief exists that the observed conduct constitutes wrongdoing. However because the Ombudsman can dismiss alleged vexatious complaints, the questions of good faith also arises.

On this almost universalistic good faith requirement one must ask, why? We don't impose that requirement on police informants and those who report anonymously, even maliciously²⁶, why whistleblowers? On the assumption that the truth is being reported, informants disclose important and socially useful information for all sorts of reasons (eg revenge) that should not necessarily diminish its evidentiary quality. I suspect the good faith requirement is an additional ethical high jump deliberately imposed on whistleblowers by the State in return for protection. The state is very much caught up in the contradiction with which we view those who make public interest disclosures. Having said that research shows that there is a very small percentage (3%) of malicious reporting of self-defined whistleblowers.²⁷

²⁵ There is a third requirement in the UK and South African Acts requiring, in some circumstances, a belief that the allegations are substantially true. The requirement of a belief in the substantial truth of an allegation places a heavy forensic burden on the whistleblower who may only have a small glimpse of a wrongdoing picture.

²⁶ In *Re a companies application* [1989] 3 WLR 265, the court found that the discloser served the public interest even though it was made in malice.

Reference to this case is found in L. Vickers, *op. cit.*, p.437.

²⁷ See J. Rothschild and T. Miethe, *op. cit.*, p. 119.

Lewis does not go as far as I have in seeking the abandonment of the good faith test. He does however question why the onus of proving good faith is on the whistleblower. He suggests it should be the employers' responsibility to demonstrate that the whistleblower disclosed in bad faith.²⁸

Duty to Investigate

The Victorian Act virtually stands alone in the requirement that authorities that receive disclosures must exercise an investigative duty.²⁹ This is a very important feature of the Act. Research has shown that a major source of whistleblower grievance is the failure of authorities to conduct competent (and timely) investigations into their claims.³⁰ Research also shows that a major reason why people won't disclose is that they do not trust authorities to do the right thing with their allegations.³¹

The duty to investigate provisions in the Victorian Act are indeed impressive. S. 39 requires the Ombudsman to investigate all received disclosures which he or she has determined are public interest disclosures. Similarly, under SS 72 & 84, all public bodies and the Police Commissioner must investigate all public interest disclosures referred to them by the Ombudsman. On the other side of the issue the Ombudsman must investigate all public interest disclosures about the conduct of parliamentarians, referred to him or her by either the Speaker of the Legislative Assembly or the President of the Legislative Council. There are also oversight powers in the Act that allow the Ombudsman to monitor ongoing investigations. This is essential for meeting the second criteria of effective whistleblower legislation: an effective and *direct* throughput from disclosure to systemic reform.

Compulsory review of Act

The Victorian law does not require a regular and formal review of the workings of the statute. In fact it is unusual for whistleblower laws to require reviews of the respective Acts.³² While such reviews can take place by subsequent parliamentary or administrative decision, an actual requirement in the Act regularizes that process and guarantees that it will occur. Why is

²⁸ D.Lewis, op. cit., p. 326.

²⁹ See W. De Maria, "Common Law – Common Mistakes", op. cit.

³⁰ See De Maria, W *Unshielding the Shadow Culture*, Queensland Whistleblower Study, The University of Queensland, Result Release One, 1994; W. De Maria & C. Jan, "Behold the Shut-Eyed Sentry: Whistleblower Perspectives on Government Failure to Correct Wrongdoing", *Crime, Law and Social Change* 24:2, 1996, 151-166.

³¹ A. Gorta, op. cit.; L. Zipparro, op. cit.

³² New Zealand is an exception.

this important? All the whistleblower legislation has been through fairly similar bureaucratic and parliamentary formation processes. That just means that they are legal. The extent of community ownership of these particular laws I suspect is very low. This is partly because the Acts have not followed periods of community anger as was witnessed in the passing of race and gender discrimination laws in Australia.

There is a very clear detachment between the electorate and whistleblower legislation in Australia. This may well be attributable to the fact that most people don't disclose, so, the argument goes, why would they wish for this type of legislation? I think that the general community temperament with whistleblower laws is similar to the attitude to foreign aid bills. They are a "good" thing but hardly central to one's life.

If this is an accurate observation then it is a grave matter. Grave because whistleblower legislation, like statutes that guarantees rights and freedoms, surely are part of the preservation of democracy. In these terms these acts, when well-drafted, are legislation of national significance. Given this, it is important to involve communities in reviews of their whistleblower laws. Beefing up the extent of public deliberation will go a long way in challenging the contradictory attitude people have towards whistleblowers (heroes or snitches). It could also have the potential to change the community focus to secret state issues.

Annual report to Parliament

Finally in this section is the question of parliamentary accountability through annual reports to parliament. The Victorian Act is very strong on this point. However it remains to be seen whether the detail gets into the public arena via fulsome annual reporting. In other jurisdictions, for example Queensland, this is not the case. In that situation annual reporting amounts to a desultory one-liner.

The Victorian Act stipulates that the Ombudsman must, on an annual basis, report to parliament on the workings of the whistleblower law from his or her point of view. There is an additional requirement for all public bodies to include in their annual reports to Parliament, details of how the Act was managed during the previous year. This performance criterion is connected to the previous point about compulsory review, and the same arguments apply.

Table 2: Scope

Sector Penalties	Who May Disclose	Private Sector coverage	Media Protection	Disclosure of Previous Wrongdoing	Application to Politicians	Extra-Territorial Application
No	Anybody	No	No	Yes	Yes	No

Scope

- Sector Penalties
- Who May Disclose
- Private Sector coverage
- Media Protection
- Previous Wrongdoing
- Application to Politicians
- Extra-Territorial Application

Eight performance criteria to do with the *scope* of the legislation are applied here to the protection schemes.

Sector Penalties

Sector penalties can be understood as a test of official commitment to discloser protection and reform. Sector penalties are whole-of-work unit punishments for implicative or vicarious involvement in whistleblower attacks. They can take the form of time-limited reductions in CEO remuneration, time-limited budget control on forecasted non-essential service expenditure and compulsory ethics training.

The Victorian Act, like most other similar statutes, provides individual penalties for reprisers but none for the repriser's work area. The only meaning we can get out of this is that the disclosure-reprisal phenomenon continues to be understood in individualist not organizational and political terms. Usually the only person who acts "individually" is the whistleblower. Research on the vendetta culture has now put organisational complicity beyond doubt.³³

³³ See J. Near & T.Jensen, op. cit; J. Near & M. Miceli, op cit; R. Perrucci, R. Anderson, D. Schendel & L. Trachtman "Whistleblowing: Professionals' Resistance to Organisational Authority" *Social Problems*, Vol 28 149-164, 1989; J.Rothschild & T. Miethe, op cit; De Maria 1994, op. cit; "De Maria, W & C. Jan "Eating Its Own: The Whistleblower Organisation in Vendetta Mode", *Australian Journal of Social Issues*, Vol. 32, No. 1, pp. 37-60, 1997.

Yet the laws fail to target the errant workplace. There is some argument that this can be done in other places (eg codes of conduct, ethics commissions, public inquiries). But what better place to put the focus on organisations than in whistleblower laws?

Who May Disclose

In the collection of whistleblower laws throughout the world there is enormous variation as to who may disclose and who shall be the subject of disclosure.³⁴ Notwithstanding this diversity there is a bias towards the employed. This excludes whole classes of people: consumers students, retirees, unemployed, prisoners, and physically and intellectually handicapped people not in employment.

This bias does not operate in the Victorian Act. Anybody (“natural persons”) may disclose. However the bias comes in two other forms. The first is with respect to the target of disclosure. Reports can only be made about the alleged misconduct of public officials and public bodies. Secondly, only natural persons can make protected disclosures. This denies regulators, whistleblower groups, trade unions, professional bodies and the media from access to the Act. In some cases no real issue of protection exists (eg if the “whistleblower” is the Australian Competition and Consumer Commission). However for unions and professional groups it’s a different matter.

Private Sector coverage

When disclosure protection legislation throughout the world is finally moving to provide private sector coverage, the Victorian law is moving in the opposite direction.³⁵ Given that the Act was

³⁴ For example in the Queensland law, generally speaking, only public servants can be protected whistleblowers. In the UK Act “workers” can obtain protection. This has a wide canvass and includes public servants, contract-based employees, medical personnel in the National Health Scheme and Medical Boards and those on or were on work experience. It does not cover members of the public, police and military intelligence. In the Irish Bill “employees”, as defined in the *Terms of Employment (Information) Act*, can make protected disclosures. The New Zealand Act goes a step further and allows protection for current and former employees and homemakers. The South African Act allows for the protection of all employees bar private contractors.

³⁵ For example the Queensland law only allows for such disclosures when there are allegations of substantial dangers to the environment and people with disabilities. The South African Act confines private sector disclosures to the

crafted in a period in which private sector wrongdoing was at the forefront of public awareness, the failure to encapsulate it is an extraordinary exercise in denial.³⁶

Failure to recognise private sector wrongdoing in the Victorian law does not auger well for positioning an effective anti-corruption strategy to deal with wrongdoing in government-business relationships.

Media Protection

One of the strongest criticisms one can bring to bear on the Victorian Act is its failure to protect *media whistleblowers*. None of the schemes in the other parts of the world, bar the United States, appear to protect media whistleblowers.³⁷ It is common knowledge that the media is often the only door open to the whistleblower determined to expose wrongdoing. It is also common knowledge that government often will only move on allegations once they have been aired in the media.

The oft-stated objection to protecting media whistleblowers is that journalists can run the story with a slant, pander to conspiracy theorists, oversimplify complex matters and be a magnet for the vexatious. All these are true. However do they outweigh the public's right to know where the corruption and wrongdoing is?

If a person's allegations are defamatory, without factual justification or made for a motive other than the public interest, he or she is simply denied protection according to the procedures set out in the schemes for assessing *bona fides*. These assessments could be done during a period when the court has granted a temporary injunction against the continuance of reprisals spurred on by a media disclosure.

Perhaps the real reason why governments wont protect genuine media whistleblowers is to do with control. The whistleblower

employer-employee relationship. Disclosures about private sector wrongdoing are provided for in the UK Act.

³⁶ There is however a very limited opportunity for private sector wrongdoing to be caught by the Act. People may be protected if they disclose on the improper conduct of contractors within the meaning of the *Health Services Act 1988* and the *Corrections Act 1986*. This is because these contractors are defined as "public bodies".

³⁷ The UK whistleblower advocacy group, Public Concern at Work, says that the UK Act does protect media whistleblowers. Vickers also sees media protection in the Act, but ads "...it will be rare for this to be protected under PIDA". See L. Vickers, *op. cit.*, p. 440.

following internal reporting pathways, mandated in most schemes, is at the behest of complex bureaucratic processes, over which he or she has no say and no influence. Investigation processes can take forever, there is always the likelihood of corrupt interventions in that process, and the final outcome may be a confidential report read by a small group of senior public servants or police. In the United Kingdom and South African Acts, disclosures to employers (always the preferred disclosure pathway) are protected if one condition is met in the UK Act and two conditions are met in the South African Act.³⁸ However disclosures to the media, if they are indeed possible under these two Acts, are protected if *six* conditions are met in the UK Act and *seven* in the South African Act!³⁹ What does this say about the preferential attitude to the narrow path-keepers *vis-a-vis* the “strayers”?⁴⁰

The whistleblower briefing a journalist, particularly on matters where the government has acted illegally, incompetently or breached the public trust, is a grave threat to power. Millions of people stand to read, hear or watch his or her allegations and make up their own mind.

Previous Wrongdoing

The Victorian law allows for the reporting of past wrongdoing. Retrospectivity is a challenging concept. On one hand it allows for the disclosure of past misconduct. However that wrongdoing would have to be of an extremely serious nature to warrant the re-routing of scarce investigative resources from current matters. There is also the issue of the quality of corroborating evidence on matters in the past. Disclosure protection in these circumstances is not as vital as it would be with current or forecasted wrongdoing. Either the whistleblower or the reprisers are probably out of the system by the time the disclosure is made. However it is still an important provision in whistleblower legislation as it at least allows for investigation of past wrongdoing, particularly when that misconduct was substantial and is connected to present patterns of wrongdoing.

Application to Politicians

Most whistleblower laws shy away from protecting disclosures and requiring investigations about parliamentary wrongdoing. The Victorian law is a welcome exception here. The failure to

³⁸ S43 © and S6(1) respectively. See Vickers 2000:436.

³⁹ S43(G) and S9 respectively.

⁴⁰ See L. Vickers, *op. cit.*, p. 440.

include parliamentary wrongdoing in most of the schemes is a serious failing because it sends out signals of political immunity at that stage in our history when the collapse of trust in the integrity of our political leaders is now a central feature of governance relationship between politicians and the people. Again it remains to be seen how strong this Victorian provision is.

Extra-territorial coverage

The recent batch of whistleblower laws (eg The South African and the UK laws) provide for extra-territorial coverage for disclosures. This is to be admired and makes sense in a globalising world of borderless economies and one in which transnational groups (eg European Union) are establishing their own regulatory and disciplinary regimes. The Victorian Government (like governments everywhere) is entering into more and more contracts with multinational enterprises. It seems appropriate that people should be able to seek protection under the Victorian whistleblower law for disclosing on local misconduct that was planned in head offices far off shore.

Table 3: Legal Protections

Civil & criminal Indemnity	Secrecy breach indemnity	Injunctive relief	Adverse employment appeals	Defamation indemnity
Yes	Yes	Yes	No	Yes

Legal Protections

- Civil & criminal Indemnity
- Secrecy breach indemnity
- Injunctive relief
- Adverse Employment Appeals
- Defamation indemnity

Five performance criteria to do with the *legal protections* offered in the legislation are applied here to the Victorian law.

Civil & criminal Indemnity

Like the schemes in Queensland and New Zealand, the Victorian Act provides dual indemnity against civil & criminal action. These can be powerful protections because of the strong tendency to attack messengers and leave aside the message. The Victorian Act extends this protection to provide immunity to the whistleblower against administrative and disciplinary action within the whistleblowers workplace.

While fine in theory, the practice is that whistleblowers experience great difficulty getting over the wall of causation. The Victorian Act will protect only when the evidence points to a clear disclosure-reprisal pattern. Management are long skilled in blurring this pattern by the force of their "evidence." The American concept of proximity should be seriously considered here. American courts have deemed a reprisal to have occurred if it is reasonably proximate in time to the disclosure. The reversed onus then requires management to prove that its adverse employment response was not caused by a disclosure.

Secrecy breach indemnity

The Victorian scheme also indemnifies from prosecution whistleblowers who disclose material in the public interest which is the subject of *secrecy* orders or enactments. This is an important

protection⁴¹. We know for instance that surveys conducted in the last twelve years have found over 150 secrecy provisions in Commonwealth acts and regulations,⁴² over 100 such provisions in Western Australian law⁴³ and 160 secrecy provisions embedded in Queensland law⁴⁴

Injunctive relief

Injunctive relief, as a restrain order, is available in the Victorian scheme. This is important because protection needs to be delivered at a quicker pace than reprisals. While the costs and complexities of getting to the Supreme Court are not addressed, at least there is no stipulation like the one that appears in the UK Act where applicants for interim relief must establish that they have a good chance of success in any substantive court action that may follow.

Adverse Employment Appeals

Curiously there is no provision in the Victorian scheme for mechanisms for appealing adverse decisions of management made in response to damaging disclosures.

Defamation indemnity

The Victorian law, in alignment with other schemes in Australia, provides for the defence of absolute privilege in defamation.

⁴¹ The extreme and farcical measures our governments go to keep information from us are scenarios straight out of the madness of Monty Python. For example the Victorian Land Tax Act 1958 prevented disclosure "to anyone whomsoever"! (*Cowan v Stanwell Estates Pty Ltd* (1966:604).

⁴² J. McGinness, "Secrecy Provisions in Commonwealth Legislation", *Federal Law Review*, Vol. 19, 1999, p. 49.

⁴³ Western Australian Commission on Government, *Report 1*, 1996, point 2.3.1.1.

⁴⁴ Queensland Law Reform Commission, *The Freedom of Information Act 1992. Review of Secrecy Provision Exemption*, Report No. 46, 1994, Appendix C.

Table 4: Support Services

Counselling	Relocation	Entitlement to damages	Whistleblower feedback	Fighting Fund
No	No	Yes	Yes	No

Services

Counselling
Relocation
Entitlement to damages
Whistleblower feedback
Fighting fund

In the final section five performance criteria are applied to the schemes to evaluate the level of service available.

Counselling

There is no counselling as a lawful right available in the Victorian Act. The declaration of a statutory right to rehabilitative counselling for the whistleblower and her or his family, and to services that redress the whistleblower's damaged career, would be an enormous step in the right direction for the State. It would be an important official acknowledgement that disclosure-based trauma can be long-lasting and highly intrusive into core relationships.⁴⁵ An innovation such as this could be connected to the sector penalty proposal. Orders could be made requiring organisations which hosted the victimisation to pay for the counselling.

By administrative decisions "welfare managers" are to service whistleblowers in the departments. In departments like Justice these managers are to be on contract to the departments concerned.⁴⁶ Their job descriptions do not include essential interventions such as trauma counselling. One can only conclude that this initiative smacks of tokenism.

⁴⁵ W. De Maria & C. Jan, *Wounded Worker*, Queensland Whistleblower Study, Result Release Two, 1994.

⁴⁶ Department of Justice Procedures under the Whistleblowers Protection Act, no date, section 6.5.

Relocation

Relocation provisions, as they exist in the Queensland and South African laws, are not provided for in the Victorian scheme. Like the absence of statutory rights to counselling, this reflects the system's lack of interest in whistleblowers after they have made their disclosures.

Entitlement to damages

The Victorian scheme allows a whistleblower to recover damages in proceedings as for a tort. Importantly this includes the award of exemplary damages.

Whistleblower feedback

The Victorian Act provides a very impressive feedback system to the whistleblower. It is probably the finest in Australia now. It may not seem like much of a provision but it has many positive aspects to it. First the whistleblower experience is invariably an alienating one; from peers, family, self and the state. By offering feedback on the conduct of investigations the whistleblower is joining the loop again. This allows the whistleblower to help the investigators with the hardest of all tasks: correcting procedures to ensure the disclosed pattern of wrongdoing does not arise again.

Mandatory reporting to the whistleblower under the Act takes the following form:

- Notice as to whether the disclosure is classified as a protected disclosure.
- Notice that disclosure, while not a protected disclosure, could constitute a complaint under the *Ombudsman Act 1973* or the *Police Regulation Act 1958*.
- Notice that protected disclosure has been referred to another agency for investigation.
- Notice about the result of the investigation.
- Notice that insufficient steps have been taken by a person or public body on the Ombudsman's report and recommendations.
- Notice that a public body has referred a whistleblower's disclosure to the Ombudsman.
- On request from the whistleblower, a public body conducting an investigation into the disclosure must furnish a progress report with 28 days, if such information would not prejudice the investigation.
- Notice of the result of a public body's investigation.

- Notice that the Ombudsman has taken over an investigation from the police.
- Notice of the result of an investigation by the Commissioner of Police.

Interestingly there appears to be no feedback provisions when the disclosures are about the misconduct of state politicians and local government councillors.

Fighting fund

Once the steam starts rising from a whistleblower-management conflict we usually know who will win because of the gross disproportion of resources available to the organisation. All whistleblower protection schemes, including the Victorian one, walk away from this issue. What is needed is a statutory limit on the amount of human and physical resources that each party is allowed to commit to conflicts that erupt after a disclosure has been made.

Conclusion

The Victorian *Whistleblower Protection Act 2001* was audited with respect to 24 performance standards, recently developed to assess the effectiveness of international whistleblower legislation. This was done after the concept of whistleblowing was re-contextualised into the framework of official secrecy. Within that framework the common depiction of secrecy and whistleblowing as been polar opposites was challenged. It was concluded that the structural conditions that maintain and amplify secrecy are far more powerful than the impulses to disclosure and openness.

The strengths of the Victorian Act were noted, particularly the central role of the Ombudsman (although this was seen to be problematical). Other strong features included: the un-mandated disclosure pathways, the duty to investigate, the application of the law to politicians, a good range of legal protections and a very impressive feedback mechanism to the whistleblower.

On the debit side the restraint of the Victorian *Freedom of Information Act* in its application to the Ombudsman was seen as a problem for, rather than a solution to, the growing demand for official accountability and transparency. Other deficiencies included: the lack of sector penalties, the prohibition on organisations making protected disclosures, no private sector coverage and no protection for media whistleblowers.