South Australian Whistleblower Protection: A New Opportunity

A Submission to the Review of the
Whistleblower Protection Act 1993 (South Australia)

Prepared by **A J Brown**
Centre for Governance & Public Policy, Griffith University
For the **Don Dunstan Foundation**

December 2013

Remember the future...and make a fair world now

The Dunstan Foundation honours the social reform legacy of the late South Australian Premier, Don Dunstan, by inspiring visionary leadership and progressive thinking. Don Dunstan was one of the most courageous and visionary politicians of the 20th century. He was a dedicated reformer with a deep commitment to social justice.

The Foundation is a charitable Trust and operates on a set of values written by Don Dunstan himself:

Values

- Respect for fundamental human rights
- Celebration of cultural and ethnic diversity
- Freedom of individuals to control their own lives
- Just distribution of global wealth
- Respect for indigenous people and the protection of their rights
- Democratic and inclusive forms of governance

The views expressed in this submission are those of the author(s), prepared at the request of the Don Dunstan Foundation as a contribution to public policy and debate rather than necessarily representing the position of the Foundation.

South Australian Whistleblower Protection: A New Opportunity
A Submission to the Review of the
Whistleblower Protection Act 1993 (South Australia)

Prepared by A J Brown for the Don Dunstan Foundation

Executive Summary

In 1993, South Australia was the first Australian jurisdiction, and one of the first in the world after the United States, to pass a comprehensive whistleblower protection law.

With the role of whistleblowing established as increasingly important for public integrity and corporate social responsibility, the review of the *Whistleblower Protection Act 1993* (SA) now stands as an important opportunity for South Australia to not only catch up with other jurisdictions, but once again establish a benchmark for a 'best practice' approach.

While many countries and other Australian jurisdictions have recently undertaken reform of their whistleblower protection legislation, no single jurisdiction has yet captured all elements of legislative design which hold out promise of such an approach.

There are also particular aspects of South Australia's institutions and history which require careful consideration of how best to achieve such an approach.

This submission, prepared at the request of the Don Dunstan Foundation, seeks to provide guidance to South Australia on how to return to the forefront of best practice in this area by answering ten basic questions:

1. **Does South Australia need to replace its current legislation?**

   Yes.

2. **Is there a single clear legislative precedent that South Australia can follow?**

   No. The single statute most relevant as a departure point for design and drafting is the *Public Interest Disclosure Act 2012* (ACT). However significant adaptation and extension is required on this precedent, to be effective for South Australia and approach prospective 'best practice', including on the following issues.

3. **What conceptual framework should inform the design of new legislation?**

   The best international thinking reflects a realisation that whistleblower protection efforts over the last 30 years have cut across many areas of law, and sought to achieve a range of objectives, not all of which have been well thought through or integrated. Best practice legislation therefore needs to attempt to maximise at least three basic objectives: the 'institutional' objectives of facilitating the timely disclosure and rectification of wrongdoing, and preventing or limiting adverse consequences for whistleblowers; the further 'anti-retaliation' objective of ensuring effective compensation or other remedies flow to whistleblowers who do suffer unfair adverse consequences; and the 'public' objective of making clear when whistleblowers have rights and obligations to make disclosures to the media or other third parties.

4. Should South Australia also be the first Australian jurisdiction to introduce a 'reward' or 'bounty' model of whistleblower protection?

There is no reason why not. However, this approach to incentivising and compensating whistleblowers, which has been successful in the United States, should be seen as ancillary or additional to the above objectives, and not an alternative or higher priority.

5. What does the 'institutional' model of whistleblower protection require in the South Australian context?

It requires more comprehensive definition of the scope of wrongdoing that should be disclosed; more specific requirements on organisations to respond appropriately to disclosures; more specific requirements on organisations to protect and support whistleblowers, proactively or preventatively; and clear identification of one or more oversight agencies with power and responsibility to ensure these requirements are met.

Such an approach is especially important for a State with a proud history of responsive democracy, fairness and social inclusion, including tolerance of diversity. In addition to providing more specific, intelligible guidance to employees and other citizens on what they should expect, the institutional approach makes it clear that it is the responsibility of institutions to respond appropriately to legitimate concerns in order to ensure the rectification of wrongdoing – not simply on diverse and sometimes disadvantaged citizens to 'litigate' on their own behalf to secure protection.

This more comprehensive approach raises the new challenge that greater differentiation is needed between the obligations that are appropriate to impose on South Australian public sector institutions, and on other organisations (e.g. private companies). A clear policy decision is needed on how to manage these differences.

6. What does the 'anti-retaliation' model of whistleblower protection require in the South Australian context?

It requires updating and strengthening of the remedial and compensation rights that apply to whistleblowers or others who suffer unfair adverse consequences as a result of whistleblowing. Best practice involves recognising (a) that these rights should flow for unintended, negligent or collateral adverse consequences, in addition to deliberate reprisals; and (b) that since most whistleblowers are employees or workers in organisations, the most accessible and appropriate remedies should often be provided through the workplace relations system in addition to any available through the general courts or other mechanisms. Current practice in all other Australian jurisdictions, apart from South Australia, is also to criminalise intentional reprisals.

However, updating the South Australian approach in these regards requires ancillary reforms to the workplace relations system. This is readily achievable for State public sector employees through amendment of the *Fair Work Act 1994* (SA). It nevertheless requires clear policy decisions about complementarity with existing remedial avenues under the *Equal Opportunity Act 1984* (SA), and about how remedies for private sector employees in South Australia are to be most efficiently and effectively achieved, given these are covered by the *Fair Work Act 2009* (Cth).

7. What does the 'public whistleblowing' model require in South Australia?

It requires making explicit the circumstances in which whistleblowers will retain protection even if they go to the media or other third parties. Prospective best practice is to be found in adapting the best elements of the *Public Interest Disclosure Act 2012* (ACT) and/or *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth).

8. Should 'any person' continue to be the statutory definition for who is entitled to 'whistleblower' protection?

Ideally, no. Some early Australian legislation such as the present Act made a well-intentioned mistake in extending 'whistleblower' protection to any type of informant or complainant, irrespective of organisational status or position. The difficulty this now creates is that an effective, comprehensive approach to whistleblower protection relies on disclosure facilitation and reprisal prevention approaches which are designed to meet the organisational and institutional challenges confronted by whistleblowers – i.e. organisational 'insiders' – not necessarily other types of informant or complainant.

If South Australia wishes to also continue to provide a basic 'floor' of protection rights to other types of informant or complainant, then it either needs to (a) provide these in other legislation (some of which is pre-existing) or (b) adopt a clear 'two-track' approach in its new legislation, differentiating between responsibilities and protection obligations pertaining to whistleblowers, and protections that should be available for other persons who provide information to authorities about wrongdoing irrespective of whether they are whistleblowers.

9. Should South Australia's legislation continue to apply to the private sector at all?

This is a legitimate question because one option is for South Australia to replace its present legislation with a more comprehensive Public Interest Disclosure Act applying simply to its public sector, like other Australian jurisdictions; and call on the Commonwealth to take the lead on an effective national approach to whistleblower protection across the private sector. However, this could also be seen as reducing some of the current rights of South Australian private sector employees, even if only temporarily. A middle path is to simply preserve existing rights for private sector employees, while deepening the rights and obligations that pertain to public sector whistleblowing, and also call for – and support – Commonwealth reforms for private sector whistleblower protection.

10. Who should be the oversight agency for whistleblower protection in South Australia?

For the institutional and anti-retaliation models of whistleblower protection to be more effective, it is clear that an appropriate independent oversight agency must be charged with ensuring the implementation of organisational requirements and positioned to intervene where necessary to ensure organisational justice for whistleblowers. For the State public sector, the most appropriate choice within existing institutional frameworks is the State Ombudsman. However, this role may require an extension of existing powers and resources. It is also vital that integrity and regulatory agencies with responsibilities to make whistleblowing work take an evidence-based approach to the development, monitoring and evaluation of whistleblower protection efforts, including support for and participation in necessary research.

South Australian Whistleblower Protection: A New Opportunity
A Submission to the Review of the *Whistleblower Protection Act 1993* (South Australia)

Prepared by A J Brown for the Don Dunstan Foundation

Introduction

In 1993, South Australia was the first Australian jurisdiction, and one of the first in the world after the United States, to pass a comprehensive whistleblower protection law.

With the role of whistleblowing established as increasingly important for public integrity and corporate social responsibility, the review of the *Whistleblower Protection Act 1993* (SA) now stands as an important opportunity for South Australia to not only catch up with other jurisdictions, but once again establish a benchmark for a 'best practice' approach.

Many countries and other Australian jurisdictions have recently undertaken reform of their whistleblower protection legislation. This includes, most recently, the *Public Interest Disclosure Act 2012* (ACT) and *Public Interest Disclosure Act 2013* (Cth).[1] Further reform is likely, nationally, in particular with respect to whistleblowing in the corporate or private sector.[2] Informing these trends are a range of efforts to set out clear principles for 'best practice' legislative approaches.[3] However, as yet, no single jurisdiction has captured all elements of legislative design which hold out promise of such an approach.

While South Australia is therefore uniquely positioned to again set the standard, there are particular aspects of South Australia's institutions and history which require careful consideration of how best to achieve such an approach.

This submission, prepared at the request of the Don Dunstan Foundation, seeks to provide guidance to South Australia on how to return to the forefront of best practice in this area by answering ten basic questions.

About the author

A J Brown is Professor of Public Policy and Law, and program leader, Public Integrity and Anti-Corruption, in the Centre for Governance and Public Policy at Griffith University. He is also a director of Transparency International Australia. In the 1990s, he was a senior investigation officer for the Commonwealth Ombudsman. In 1998, he was Associate to Justice G E 'Tony' Fitzgerald AC, then President of the Queensland Court of Appeal; and has also worked as a state ministerial policy advisor.

---

[1] See Brown, A. J. (2013), 'Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience', *E-Journal of International and Comparative Labour Studies* 2(3): 153–182.
[2] See Attorney-General's Department and Commonwealth Treasury, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, October 2009; and the current Senate Economics Committee Inquiry into the Performance of ASIC, and submissions thereto, at www.aph.gov.au.
[3] See Brown, A.J., Latimer, P., McMillan, J. and C. Wheeler (2008), 'Best-Practice Whistleblowing Legislation for the Public Sector: The Key Principles' in A.J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organizations*. Canberra: ANU E-Press, 261–288; Robert G. Vaughn (2013), *The Successes and Failures of Whistleblower Laws*, Edward Elgar; Worth, M. (2013), 'Whistleblowing in Europe: Legal Protections for Whistleblower in the EU', Transparency International, Berlin <http://www.transparency.org/whatwedo/pub/ whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu>.

In 2005, he initiated the Australian Research Council Linkage Project 'Whistling While They Work' in collaboration with the anti-corruption bodies, Ombudsman's offices and other institutions from all Australian jurisdictions other than Tasmania and South Australia.[4] He has played a lead role in law reform in several jurisdictions, including the *Public Interest Disclosure Act 2013* (Cth). He is a member of the International Whistleblowing Research Network and is lead editor on the *International Whistleblowing Research Handbook*, to be published in 2014 by Edward Elgar.

1. Does South Australia need to replace its current legislation?

Yes.

The *Whistleblower Protection Act 1993* (SA) was historic in many respects. It followed on legislation such as the *Whistleblower Protection Act 1989* (US), narrowly preceding Queensland's *Whistleblower Protection Act 1994*, as some of the first special purpose legislation of this kind in the world.

Further, unlike the US approach then or since, South Australia's legislation sought in a single law to provide some basic protections across society for persons disclosing wrongdoing, irrespective of whether that wrongdoing was occurring in the public sector or the private sector. In this respect, it preceded the United Kingdom's *Public Interest Disclosure Act 1998* (amending the *Employment Relations Act 1996*) by five years. It remains the only Australian legislation that attempts to do so, raising a variety of unique issues as discussed below.

Nevertheless, the legislation can now be considered in light of experience to represent more of a framework, or statement of principles for how the disclosure of wrongdoing should be recognised and protected by South Australian society – rather than a clearly actionable set of rights and obligations for achieving that purpose. As such it has largely remained in the category of well-meaning but 'symbolic' legislation, adopted by parliaments at a time when the experience and information simply did not yet exist to shape measures to maximise the role of whistleblowing in practice.

Accordingly, much early whistleblowing legislation has been justly criticised as potentially doing more harm than good, in that it may encourage whistleblowing with promises of support and protection that the law does relatively little to guarantee in practice, as against principle.[5]

The clearest demonstration of the transition to more detailed, comprehensive provisions for achieving the same results can be found in the *Public Interest Disclosure Act 2003* (WA). It is the only jurisdiction to have adopted the *Whistleblower Protection Act 1993* (SA) as a base, but extended upon it in various detailed ways. However, the WA legislation is itself now recognised as having limitations, as well as new and different

[4] See Brown, A. J. (ed) (2008), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* Australia & New Zealand School of Government / ANU E-Press; Roberts, P., Brown A. J. & Olsen J. (2011), *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*, Australia & New Zealand School of Government / ANU E-Press.

[5] See Brown, A. J. & Latimer, P. (2008) 'Symbols or Substance? Priorities for the Reform of Australian Public Interest Disclosure Legislation' *Griffith Law Review* 17(1): 223-251; de Maria, W. (1999), *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia*, Adelaide: Wakefield Press.

problems of its own, only one of which was addressed by limited reform under the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA).[6]

As a result, while the principles, objectives and overall structure of the 1993 legislation remain sound, the content of the legislation is now vastly out of date. Based on the limited evidence, some original design limitations have been proven; while in general, the legislation does not contain the mechanisms which evidence from other jurisdictions indicates to provide the best known chances of turning the often difficult goals of whistleblower protection into a reality.

2. Is there a single clear legislative precedent that South Australia can follow?

No.

The best available information as to what might make whistleblowing more effective in Australia was gathered by the 'Whistling While They Work' project, mentioned above. In 2004, lead integrity and public sector management agencies in all jurisdictions were invited to participate; only Tasmania and South Australia did not so. Of greatest relevance to South Australia is the substantial reform or replacement of State legislation which then occurred in Queensland, NSW and the ACT in 2010-2012.[7] Commonwealth reform followed eventually through the combined influence of the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth) (lapsed) and the *Public Interest Disclosure Act 2013* (Cth) (which commences on 15 January 2014).

Of the Queensland, NSW and ACT reforms, the most apposite for South Australian purposes is the *Public Interest Disclosure Act 2012* (ACT), as this is State-equivalent legislation, which involved the most detailed consideration of how to build effective whistleblowing systems in response to new research and evidence, and resulted in a complete replacement Bill rather than fixing particular problems in existing legislation. While comprehensive, it is also an especially clear and well-drafted piece of legislation by comparison with other Australian legislation of this kind.

However, even if the new ACT Act is seen as a good starting point, significant adaptation and extension is required on this precedent, to be effective for South Australia and approach prospective 'best practice'. Some of the issues include:

- The fact that the ACT legislation, like almost all the legislation so far, concerns reporting of wrongdoing in the public sector, but not the private sector;
- The fact that South Australia is a State, not a Territory, with its own different architecture of integrity and regulatory institutions (recently expanded);
- The fact that the ACT legislation did not achieve 'best practice' reform in respect of compensation and other remedial avenues available to whistleblowers who suffer unjustly, notwithstanding its many other strengths. Instead, current 'best practice' in this respect can be found in or behind the relevant provisions of the *Public Interest Disclosure Act 2013* (Cth), as discussed below.

[6] This inserted s.7A into the *Public Interest Disclosure Act 2003* (WA), dealing with public whistleblowing, as discussed under question 7 below.

[7] The NT instituted a Public Interest Disclosure Act for the first time, in 2008, informed by some of the research, but prior to its full results. WA did not reform its legislation other than in 2012 in the respect noted above.

3. What conceptual framework should inform the design of new legislation?

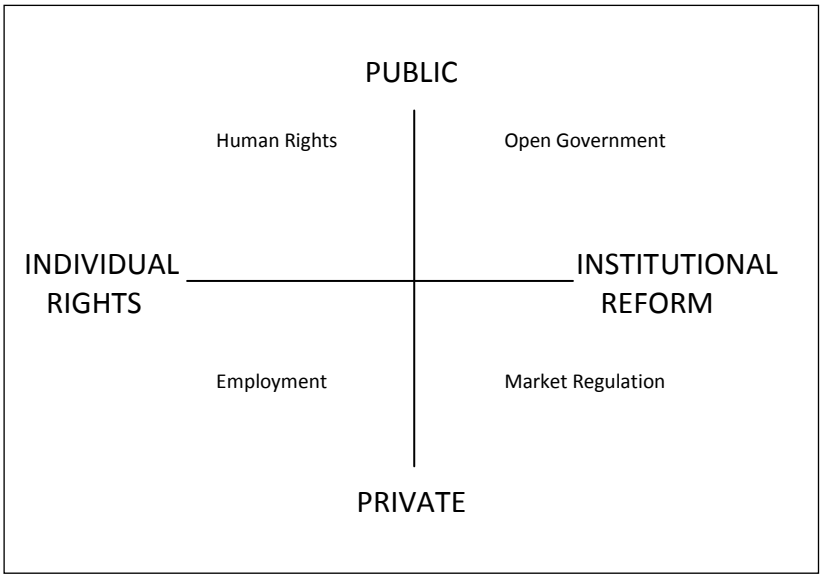
In response to the need for new legislation across multiple jurisdictions, the best international thinking reflects a realisation that whistleblower protection efforts over the last 30 years have cut across many areas of law, and sought to achieve a range of objectives, not all of which have been well thought through or integrated.

Most relevant legislation has similar or consistent overall, statutory objectives. These remain apposite. Section 6 of the *Public Interest Disclosure Act 2013* (Cth) provides perhaps the simplest and best statement of such objects:

(a) to promote the integrity and accountability of the Commonwealth public sector; and
(b) to encourage and facilitate the making of public interest disclosures by public officials; and
(c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and
(d) to ensure that disclosures by public officials are properly investigated and dealt with.

Such statements of objects vary from s. 3 of the current SA Act primarily in their addition of the last of the above – statutory requirements to guarantee disclosures are properly investigated and dealt with. This is just one indicator of the greater comprehensiveness of more recent legislation.

Figure 1. A Matrix of Perspectives on the Nature of Whistleblowing Provisions[8]



More broadly, however, it is now better understood that achieving these objectives is not a 'stand alone' enterprise in which whistleblower protection laws operate as if in a vacant field of law. Instead, their requirements cut across many other fields of law and operate on many dimensions, a useful picture of which is provided by Vaughn (Figure 1 above).

[8] Vaughn, *The Successes and Failures of Whistleblower Laws*, Edward Elgar, 2013, at Ch 15.

Accordingly it is now better understood that best practice legislation needs to maximise at least three basic objectives.[9] The first is the 'institutional' objective of facilitating the timely disclosure and rectification of wrongdoing (operating on open government and regulatory dimensions), as well as preventing or limiting adverse consequences for whistleblowers (regulatory and employment dimensions). The second is the further 'anti-retaliation' objective of ensuring effective compensation or other remedies flow to whistleblowers who do suffer unfair adverse consequences (employment and rights protection dimensions). The third is the 'public' objective of making clear when whistleblowers have rights and obligations to make disclosures to the media or other third parties (both rights protection and open government dimensions).

Like some other early legislation, including US legislation, the current South Australian Act primarily only partially operationalizes the anti-retaliation objective in those circumstances to which it applies. Few provisions directly or explicitly seek to operationalize the other objectives, in the ways that recently reformed legislation now attempts. This underscores the need for comprehensive reform.

4. Should South Australia also be the first Australian jurisdiction to introduce a 'reward' or 'bounty' model of whistleblower protection?

There is no reason why not. This fourth approach, or model, pursues a slightly different objective of incentivising and compensating whistleblowers by entitling them to a percentage of moneys either recovered from the disclosure of fraud or imposed upon wrongdoers (usually corporations, but also individuals) in the form of penalties or fines. It is a dominant approach in the United States under legal regimes such as the federal *False Claims Act* and other 'qui tam' provisions.[10] It has been relatively successful there as a means of both encouraging disclosures and securing monetary compensation for those who make them.

While this relative success is facilitated by the nature of the US legal system and by the huge scale of frauds and penalties imposed in the US (leading to large and worthwhile payouts), past assumptions that such an approach is somehow culturally inappropriate in other countries are being increasingly questioned. For example, where previously Australian inquiries had dismissed the idea, the 2009 House of Representatives inquiry leading to the *Public Interest Disclosure Act 2013* (Cth) accepted a good deal of the evidence that qui tam provisions could play a useful role in whistleblowing law reform, and that those in the US had 'an important role' at least in combating fraud.[11]

South Australia could therefore play a historic role by being the first Australian jurisdiction to attempt this approach. At the same time, it should be noted that the approach has its main effectiveness in relation to wrongdoing in the private sector or by private individuals (whether as fraud upon the government, or other fraud; or other wrongdoing amounting to regulatory breaches by corporations, leading to large fines). It

[9] See Dworkin, T. M. and Brown, A. J. (2013), 'The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws', *Seattle Journal of Social Justice* 11(2): 653–713; Brown (2013), op cit; cf See Fasterling, B., 'Comparative legislative research' in Brown, A.J., Lewis, D., Moberly, R. & Vandekerckhove, W. (eds), *International Whistleblowing Research Handbook*, Edward Elgar (forthcoming 2014).

[10] See Dworkin & Brown (2013).

[11] See House of Representatives Standing Committee on Legal And Constitutional Affairs (2009), *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector*, Canberra: Commonwealth of Australia, at par. 5.51.

has less application to wrongdoing lying entirely within the traditional public sector, where large scale fraud or regulatory breaches are comparatively rare; or to forms of wrongdoing where whistleblower protection should still apply, but which do not lead to these pecuniary calculations. In other words, even if it is added to the legislative strategy in South Australia, this approach should be seen as ancillary or additional to the above objectives, and not as an alternative or higher priority.

5. What does the 'institutional' model of whistleblower protection require in the South Australian context?

The effective institutionalisation of whistleblowing as part of the integrity and regulatory framework requires recast or expanded provisions in at least four main areas:

- ***More comprehensive definition of the scope of wrongdoing that should be disclosed***

  While the scope of wrongdoing that equates to a public interest disclosure under the definition of "public interest information" in the present Act is relatively broad, there is an obvious need to update it in line with the contemporary integrity system; and to ensure sufficient clarity about the meaning of different types of disclosable conduct, to make the scheme easier to understand and implement.

  For example, the current definition of "maladministration" includes impropriety as well as negligence. The new legislation should contain a definition of maladministration which correlates more closely to conventional definitions, as well as the jurisdiction of the State Ombudsman. "Impropriety" should be covered by new or equivalent definitions of corrupt conduct which correlate with the terms of the new *Independent Commissioner Against Corruption Act 2012* (SA), as well as other more precise definitions of improper conduct (for example, by reference to breaches of applicable codes of conduct or State public sector standards which have public interest implications, as opposed to purely personal or employment grievances).

  The definitions also need to be updated to be sufficiently clear to cover contemporary issues of public sector integrity such as nepotism and conflict of interest, if it is intended that honest and professional public servants should report these. For example, it is not clear that any of the current definitions would clearly cover a disclosure that a very senior public servant, favoured by government, was being excessively extravagant with public funds, without good reason, that were otherwise within their authority to expend. It is not clear that such conduct would amount to either 'an irregular and unauthorised use of public money' or 'substantial mismanagement of public resources', even though reporting of such concerns should presumably be encouraged, and be appropriately dealt with, but may easily attract the types of reprisals which the legislation is intended to guard against.

  At the same time, the new Act should make it clearer that protected reporting involves matters of wrongdoing. Current best practice, such as provided by s.31 of the new federal Act, is to provide that 'conduct is not disclosable conduct if it relates **only** to a policy or proposed policy' of the Government, or to 'amounts, purposes or priorities of expenditure or proposed expenditure relating to such a policy or proposed policy', 'with which a person disagrees'.

  If the new Act is intended to continue to apply to the private sector, it should be noted that the present scope of disclosable conduct by corporations or private individuals is

relatively vague and narrow (either an illegal activity; or conduct that causes a substantial risk to public health or safety, or to the environment). The review should consider whether this is sufficient in terms of scope, clarity or specificity.

The threshold test regarding the required minimum state of knowledge, under the current s. 5(2), no longer accords with best practice. In particular, it focuses on the subjective 'truth' of the information, which is a somewhat extraneous consideration. Issues of truth are better confined to provisions which make clear that the Act does not apply (and indeed that other penalties may apply) to information that is knowingly false or misleading.

Current best practice under several laws including sub-s.7(1) of the ACT Act 2012, and the new Commonwealth Act, is that a public interest disclosure is made where either (a) the discloser has an honest and reasonable belief that the information tends to show a form of disclosable conduct (a mixed subjective and objective test), or (b) the information does tend to show a form of disclosable conduct, irrespective of the discloser's belief (on a purely objective test). This second element guards against situations where a discloser might become subject to reprisals for disclosing information whose significance or seriousness they did not realise; and reinforces that the primary onus lies on recipient institutions to recognise and respond appropriately to disclosures, of any kind, irrespective of whether a particular whistleblower is even aware of the Act or specifically asks for protection.

- ***More specific requirements on organisations to respond appropriately to disclosures***

  Similarly, the new Act needs to be updated to reflect contemporary reporting channels, including the new Office of Public Integrity and ICAC.

  The approach to reporting channels under sub-s.5(4) of the current Act is comprehensive, especially when supported by the general guarantee that a disclosure attracts protections wherever 'made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure' (par 5(2)(b)). However, the current approach is also difficult for the average person to understand and navigate, and is probably insufficiently specific for organisations to effectively implement in many cases. It is important that the Act impose both a general obligation on all supervisors and managers in public agencies (and possibly private companies) to recognise and respond to disclosures, and specific requirements for defined reporting channels. Best practice in this respect is currently provided by sections 11 and 15 of the ACT Act 2012.

  As noted earlier, by contrast, the current Act is silent on whether or how a disclosure must be actioned or investigated. Instead it is simply assumed that other appropriate legislation will apply. This is no longer sufficient, especially because (a) the practicalities of whistleblower support are now known to be closely interrelated with the investigative or other response, and (b) it is now well established by research that employee confidence as to whether a disclosure will be heard and actioned is the single most significant factor in decisions to blow the whistle – significantly more important than confidence in protection. As one would hope, most whistleblowers choose to make a disclosure about suspected wrongdoing first and foremost because they want something to be done about it, if only that it be properly examined by appropriate authorities.

The new Act should thus provide base requirements regarding the assessment and investigation of whistleblower disclosures. As reflected in the recent legislation, these requirements must be carefully drafted so as to recognise that several other laws will continue to govern how such assessment and investigation occurs, and to make clear which obligations prevail in the event of inconsistency. In particular, investigative obligations under the Act should not unnecessarily duplicate processes already provided for under other laws. For these reasons, the obligations do not need to be detailed to cover every necessary element of investigative power and process, such as would be the case if public interest disclosures were a new, different and stand-alone category of investigation (as against a term that captures a wide range of mostly pre-existing types of wrongdoing).

Rather, the focus of the base requirements in the new Act should be twofold:

-- Ensuring that appropriate action is taken where, in a whistleblowing situation as opposed to other situations, there are known risks that it may not be – such as the risk of managers sweeping a matter under the carpet in the hope it will go away. See e.g., ss 17-20 and 24 of the ACT Act 2012.

-- Ensuring that support and protection obligations are triggered and followed, with respect to the whistleblower.

- ***More specific requirements on organisations to protect and support whistleblowers, proactively or preventatively***

  Despite this being a primary objective, the present Act is almost entirely silent on what an organisation should do to protect a whistleblower. Instead, the Act is limited to a reactive approach to 'anti-retaliation', which involves offering complaint and remedial avenues if detriment is suffered.

  While necessary, this approach is not sufficient, as it is often a case of trying to shut the gate after the horse has bolted (or as one Commonwealth official once said, of applying a 'band aid to an amputee'). In some cases the availability of such remedies may be sufficient to motivate an organisation to take a more supportive and protective approach in the first place; but existing experience, domestically and internationally, suggests this is relatively rare.

  It is neither desirable nor feasible for the new Act to stipulate a 'once size fits all' approach to how different agencies and organisations should shape their whistleblower protection efforts. Instead, organisations need to develop their own approach to whistleblower support, led by their own management commitment.[12] However, the legislation should provide minimum base requirements, including the requirement for agencies to develop procedures which are both (a) consistent with accepted, identifiable standards (including those in the Act), and (b) capable of oversight for compliance by an identified independent authority. All recent Australian legislation sets out a framework of this kind.

  Particularly significant are four types of base requirement, beyond the assessment and investigation requirements above:

[12] See Roberts, Brown and Olsen (2011), op cit.

- The world-leading requirements contained in the ACT Act 2012 (sub-s.33(2)), and the Cth Act 2013 (sub-s.59(1)), for organisations to have procedures for 'risk assessment' regarding reprisals or adverse consequences once a disclosure is made – representing the first necessary step in the process of preventing or limiting such consequences to the maximum extent possible.
- Requirements for maximising confidentiality as an ingredient in whistleblower protection – such as contained in s. 7 of the current Act – but recognising that protection procedures must also eal with the reality that very often, total confidentiality with respect to the existence or identity of a whistleblower is either impossible or short-lived.
- Requirements for ensuring that a whistleblower is kept appropriately informed of the progress and outcomes of actions stemming from the disclosure, which is especially important in effective management of whistleblowing incidents. While current s. 8 requires notifications of final outcomes, best practice legislation such as in the ACT requires progress reports at minimum periods of 90 days, while procedures should provide for information on an as-needs basis, including more frequently when necessary depending on the matter.
- Requirements for records of disclosures and their handling to be kept so as to support official statistics to indicate whether the scheme is working.

It is worth noting that the South Australian legislation was seen by some as weak, due to the lack of any procedural requirements, even at the time of, or very soon after its passage. For example, in 1994, a later Commonwealth Ombudsman and Australian Information Commissioner, John McMillan identified it as a gap that while the Act protects a person who complains to a 'responsible officer' of an agency, 'there is no obligation upon agencies to define a whistleblowing procedure'.[13] Also in 1994, the SA Police Complaints Authority criticised the new Act for effectively requiring a complaint to be made about victimisation before investigation of a disclosure was guaranteed, with no provision for ongoing support from the start to the conclusion of the matter.[14]

The presence of procedures is not a guarantee of effective implementation, as demonstrated by the Queensland experience.[15] However, given mounting evidence that the bulk of critical decisions that affect whistleblowing outcomes are ones taken (or failed to be taken) within the agencies or organisations concerned, it is clear that no whistleblowing legislation is likely to be effective if it does not implement a direct strategy aimed at influencing those decisions.

- ***Clear identification of one or more oversight agencies with power and responsibility to ensure these requirements are met***

  This fourth and final element is critical to ensuring that organisational responsibilities towards whistleblowing are actually implemented; and that in those

[13] Senate Select Committee on Public Interest Whistleblowing (1994), *In the public interest: Report of the Senate Select Committee on Public Interest Whistleblowing*, Commonwealth of Australia (hereafter SSC 1994), par 4.46.
[14] SSC 1994, ibid, par 4.51
[15] See Brown, A.J. 2009. 'Returning the Sunshine to the Sunshine State: Priorities for Whistleblowing Law Reform in Queensland' *Griffith Law Review*, 18(3): 666–689.

instances where organisations are unable to properly manage the reporting of wrongdoing, or have no effective systems or procedures for doing so, it is clear to whom whistleblowers should go. As a result of recent or reformed legislation elsewhere, South Australia is now the only Australian jurisdiction in which there is no identified lead agency for implementation, monitoring and oversight.

The question of which agency this should be, is returned to at Question 10.

In general, an approach which aims to properly institutionalise whistleblowing as an element of the integrity system is especially important for a State with a proud history of responsive democracy, fairness and social inclusion, including tolerance of cultural and religious diversity. In addition to providing more specific, intelligible guidance to employees and other citizens on what they should expect, the institutional approach makes it clear that it is the responsibility of institutions to respond appropriately to legitimate concerns in order to ensure the rectification of wrongdoing. This is as an alternative to relying simply, and unrealistically, on diverse and sometimes disadvantaged citizens to 'litigate' on their own behalf to secure protection.

This more comprehensive approach also raises the new challenge that so far, in the main, such requirements and obligations have been developed in a manner that is appropriate for the public sector. However, differentiation is almost certainly needed between the obligations that are appropriate to impose on South Australian public sector institutions, and on other organisations (e.g. private companies), if the replacement legislation is intended to also continue to apply to the private sector. A clear policy decision is therefore needed on how to manage these differences, without compromising on what now represents clear current best practice, at least for the public sector – as discussed at Question 9 below.

6. What does the 'anti-retaliation' model of whistleblower protection require in the South Australian context?

The 'anti-retaliation' objectives of the Act, similarly to the US legislation which represented the main international precedent at the time, involve ensuring that effective compensation or other remedies flow to whistleblowers who do suffer unfair adverse consequences. This is the primary objective sought to be served by the present Act, beyond simply relieving whistleblowers of legal liabilities that might otherwise be imposed.[16] Section 9 of Act does this by entitling a whistleblower who is 'victimised' as a consequence, to take action for compensation either by way of an action for tort (in a court of appropriate jurisdiction), or by way of complaint to the Equal Opportunity Commission (EOC) and Equal Opportunity Tribunal, constituted and operating under the *Equal Opportunity Act 1984* (SA).

Such compensation avenues remain crucial. However, experience shows that these remedial and compensation rights for whistleblowers or others who suffer unfair adverse consequences as a result of whistleblowing, require updating and strengthening. Again, likely limitations were documented as early as 1994, including the problem that even if a complaint found its way to the EOC, the Commission was entirely reactive, and had 'no direct authority to stop any institutional response, but only to conciliate. By the time this

[16] In respect of relief of liability, it should also be noted that whereas sub-s. 5(1) of the current Act provides that 'an appropriate disclosure of public interest information incurs no civil or criminal liability by doing so', more recent legislation extends this to explicitly include no disciplinary or administrative liability.

has been done, the damage to the whistleblower would have occurred and any action which could then be taken would be far too late'.[17]

Recent statistics suggest that current remedial avenues in South Australia are unlikely to be sufficiently well-known, adapted, and accessible to be having significant impact in terms of remedying likely actual levels of injustice suffered by whistleblowers.

This does not mean that relatively non-adversarial avenues such as the EOC cannot be accessed. EOC annual reports show complaints of whistleblower victimisation to have risen significantly in recent years. In the two years 2007-09, **9** complaints were received by the EOC, none of which were deemed to fall under the Act. In the two years 2009-2011, **13** complaints were received, four of which were deemed to fall under the Act. In the two years 2011-2013, **30** complaints were received, with at least six deemed to fall under the Act, but with eight still being assessed.[18] In 2013, the EOC also appears to have made its first ever reference of a whistleblower victimisation case to the Equal Opportunity Tribunal for hearing, with full or partial legal assistance from the Commission.[19]

While it is possible that complaint levels are rising because victimisation levels are rising, it is more likely that more people are finally becoming aware of, or actioning their right to complain, combined with heightened awareness on the part of the EOC regarding the need to be responsive to potential complaints. Even so, these numbers are unlikely to represent more than a small fraction of individuals who have made disclosures but suffered mistreatment within or by their organisation, of a kind that the general public would consider should be compensable. An indicative estimate of this number can be made based on extrapolation from the 'Whistling While They Work' research, at least for the public sector. If South Australia is similar to the four jurisdictions studied in detail (NSW, Queensland, WA and the Commonwealth), then notionally, perhaps 7,320 individuals may have reported public interest-related wrongdoing within the State public sector in any recent 1-year period.[20]

If the treatment of these individuals is similar to the other jurisdictions, then if surveyed, between 25 and 30 per cent might report mistreatment by management or colleagues.[21] Even if only 5 per cent of this reporting population, or a quarter or less of those alleging mistreatment, in fact suffered mistreatment that was sufficiently clear and serious to approach a compensable standard, this would equate to **366** individuals – for the public sector alone.[22] Unless most or all such individuals are receiving satisfactory alternative remedies within their agencies without reference to the courts or EOC, which is unlikely, then on any analysis, the gap between the likely potential remedial need and the current level of victimisation complaints is extreme.

---

[17] SSC 1994, op cit, par 4.48.

[18] See EOC Annual Reports at http://www.eoc.sa.gov.au.

[19] *Rice -v- National Centre for Vocational Education Research Ltd*; see EOC, Annual Report 2012-13, p.37.

[20] The indicative national average proportion of public employee respondents who had reported direct evidence of perceived public interest-related wrongdoing in the previous two year period was 12 per cent: see Brown, A.J., E. Mazurski and J. Olsen (2008), 'The Incidence and Significance of Whistleblowing' in A.J. Brown (ed.), *Whistleblowing in the Australian Public Sector. Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*. Canberra: ANU E-Press, chapter 2, 25–52. The calculation for one year (6 per cent) is based on South Australian Government employment of approx. 122,000 employees.

[21] See Smith, R. & Brown, A.J. (2008). 'The Good, The Bad and The Ugly: Whistleblowing Outcomes' in Brown, A. J. (ed), *Whistleblowing in the Australian Public Sector*.

[22] No equivalent systematic research has yet been conducted in Australia into likely levels of perceived mistreatment of public interest whistleblowers in the private sector.

As in most other states, there are no known recent instances of whistleblowers seeking to action victimisation as a tort in the South Australian courts; certainly not with success. Again, this is highly unlikely to be an accurate indicator of the levels of reprisal or mistreatment to which whistleblowers are subject – but rather, the inaccessibility, legal uncertainties and high costs (and costs risks) associated with this avenue.[23]

The updating and strengthening of remedial avenues should take account of two especially important issues. The first is that on top of other issues, civil remedies have generally only been available where clear and deliberate victimisation or reprisal action can be shown to have been taken, even though normally these would be requisite elements only for establishing a criminal conviction for reprisal – not compensable liability on a civil standard. This is confused by the fact that current practice in all other Australian jurisdictions, apart from South Australia, is *also* to criminalise intentional reprisals. The current South Australian Act does not do this, but it should be considered.

Irrespective, the more appropriate approach to civil as against criminal remedies, is to provide a right of compensation wherever detriment is suffered as a result of any failure to fulfil a duty towards the whistleblower – whether a duty to refrain from deliberate reprisal, or a failure to follow proper procedures for the provision of support and protection. This is because many of the serious adverse consequences that may befall whistleblowers, such as career impacts arising from diminished performance due to poorly managed stress, arise not from deliberate intentions to harm a whistleblower, but from simple mismanagement of their circumstances. Accordingly, best practice legislation would ensure that civil remedies can flow in response to unintended, negligent or collateral adverse consequences, where these arise from breach of a duty to support and protect, in addition to deliberate reprisals.

The second key issue is that most whistleblowers are employees or workers in organisations; and most of the mistreatment that befalls them is either taken by, or results from failures of, management. Accordingly, it has become increasingly clear that the most accessible and appropriate remedies might be achieved through the workplace relations system, in addition to any available through the general courts or other mechanisms. This was the approach established with considerable success under the United Kingdom's *Public Interest Disclosure Act 1998.* Most recently, while not yet achieving the same standard as the UK, key elements of this approach have been established in Australia through the *Public Interest Disclosure Act 2013* (Cth), which creates alternative rights of action either through the Federal Court or through Fair Work Australia, under the *Fair Work Act 2009* (Cth).[24]

In addition, section 18 of the *Public Interest Disclosure Act 2013* (Cth) contains a 'public interest' costs provision for compensation actions taken in the Federal Court, under which a whistleblower cannot be held liable for the respondent's costs, provided their claim is not legally vexatious and they conduct the litigation reasonably; even though, if they make out their claim, the respondent may be obliged to pay the whistleblower's costs. This provision recognizes that the making of a public interest disclosure is more than a private right, and also constitutes a public good. In practice, costs impediments

[23] For some of the contested history of take-up of remedial avenues, see Goode, M. R. (2000), 'Policy considerations in the formulation of whistleblowers protection legislation: the South Australian *Whistleblowers Protection Act 1993*' *Adelaide Law Review* 22: 27-49; Whitton, H. (1995), 'Ethics and Principled Dissent in the Queensland Public Sector: A Response to the Queensland Whistleblower Study', *Australian Journal of Public Administration* 54(4): 455-461.

[24] See *PID Act 2013* (Cth), ss 13-18 and 22-22A; Brown (2013).

and risks have likely been the single most significant barrier to civil remedies to date. Unlike most employment legislation, none of the state whistleblowing compensation schemes provide any protection for workers from exposure to the legal costs of their employer, should they lose.

Updating the South Australian approach in these regards requires ancillary reforms to the workplace relations system. This is readily achievable for State public sector employees through complementary amendments to the *Fair Work Act 1994* (SA), which should at least mirror the best elements, in combination, of the *Public Interest Disclosure Act 1998 (UK)* and Commonwealth approaches.

This reform also requires clear policy decisions about complementarity with existing remedial avenues under the *Equal Opportunity Act 1984* (SA). While the current SA EOC approach has been copied in Western Australia and Queensland, it is not clear that this process is the most effective, non-court avenue for securing remedies, especially if appropriate remedies through the Fair Work system can be found. The EOC process works on a rights protection model, equivalent to anti-discrimination, when most whistleblowing requires remedies at a more basic employment protection level. Within Australian systems, there are many policy and legal reasons why employers and those in control of workplaces have responsibilities to see that whistleblowers do not go unjustly treated, on the regulatory, open government, and employment dimensions of Figure 1, before such matters become rights protection (e.g. free speech) issues.

The primary benefit of retaining an *Equal Opportunity Act* remedial route may be its application to informants who are not employees, contractors or workers. However as discussed below (Question 8), the reality is that these informants, while covered by the present Act, are not actually covered by the conventional definition of 'whistleblower' and should not, in my view, be the main focus of 'whistleblower' protection. It may be that for these informants, a right of compensation to the general courts remains a more appropriate remedy – even though this is insufficient to motivate and protect employees, workers, or complainants in more vulnerable situations.

These issues also raise questions about how remedies for private sector employees in South Australia are to be most efficiently and effectively achieved, given that their normal remedial avenues in workplace matters are no longer covered by State legislation, but by the *Fair Work Act 2009* (Cth). This is dealt with at Question 9 below.

7. What does the 'public whistleblowing' model require in South Australia?

This third major objective of modern whistleblowing law requires making explicit the circumstances in which whistleblowers will retain protection even if they go to the media or other third parties.

Early Australian legislation, apart from NSW, was silent on this – in large part because it was hoped that establishing official disclosure avenues and protections would prevent the need for public disclosure. This was not only an unrealistic hope, but a counter-productive decision, since it is now established that organisational and management culture can be positively influenced by recognition that if organisations and institutions do not handle matters well in the first instance, a whistleblower can and should go public if necessary, and be protected for either free speech or open government reasons.

The original South Australian Act does not explicitly rule out protection in the event of disclosure to the media, since this *may* theoretically be covered by s.5(2)(b) ('a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure'). This degree of neutrality on the issue was deliberate. As one of its architects said at the time, the Act was intended to 'deter whistleblowing allegations being sensationalised inappropriately through the media', to help ensure the 'integrity of government and the justifiable need for a politically neutral and impartial public service to keep some matters confidential while serving the government of the day'.[25]

While these objectives remain important as part of achieving an appropriate balance, it is now clearer that they can and should be met while also making it quite explicit why and when whistleblowers will be protected for going to the media.

More detailed discussion of the new range of solutions can be found elsewhere.[26] The relevant provisions adopted in NSW in 1995 have always been largely symbolic, and are now well out of date, not having been reformed with other provisions in 2010-2012. In my view, the very simple criteria for public whistleblowing now contained in the Queensland and WA legislation are perhaps too simple to provide the clearest possible guidance to whistleblowers, agencies and the courts. The new *Public Interest Disclosure Act 2013* (Cth) is similar. All these precedents, along with the UK Act, confirm that it is current best practice to build media whistleblowing clearly into the scheme, as a positive and not simply negative element. However, in my view prospective best practice for South Australia is to be found, along with any new solutions, in adapting the best elements of the *Public Interest Disclosure Act 2012* (ACT) and/or *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth).

8. Should 'any person' continue to be the statutory definition for who is entitled to 'whistleblower' protection?

Ideally, no.

As already noted, several of the design issues for new legislation are made more complex by the fact that section 5 of the current Act offers protections to any 'person' who provides public interest information – not simply whistleblowers, who are conventionally regarded as persons with 'inside information' regarding wrongdoing. This is typically because they are employees, officials, managers, volunteers, workers, contractors or others with inside knowledge of the organisation in which the wrongdoing is occurring. Whistleblower protection is largely aimed at compensating for the fact that such informants are also less likely than others to disclose the wrongdoing, or at higher risk of reprisals for having done so, due to their economic and personal dependence on the same organisation or individuals within it, including potential wrongdoers.[27]

When some early Australian legislation extended 'whistleblower' protection to any type of informant or complainant, irrespective of organisational status or position, this was (in my view) a well-intentioned mistake. The difficulty it now creates is that an effective,

---

[25] M R Goode, 'A Guide to the South Australian Whistleblowers Protection Act 1993', Australian Institute of Administrative Law Newsletter No. 13, 1993, p.14; as quoted in SSC 1994, par 4.43.
[26] See Brown, A.J. (2011), 'Weeding out WikiLeaks (and Why it Won't Work): Legislative Recognition of Public Whistleblowing in Australia.' *Global Media Journal* (Australian edition), 5(1): 1–12; Brown (2013).
[27] See Brown, A.J. (2006), 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation. An Issues Paper' Commonwealth Ombudsman, NSW Ombudsman, Queensland Ombudsman, Available at http://www.griffith.edu.au/__data/assets/pdf_file/0015/151314/full-paper.pdf; Brown (2013).

comprehensive approach to whistleblower protection relies on disclosure facilitation and reprisal prevention approaches which are designed to meet the organisational and institutional challenges confronted by whistleblowers – i.e. organisational 'insiders' – not necessarily other types of informant or complainant.

Especially given its special history of democratic governance and social inclusion, South Australia presumably wishes to also continue to provide a basic 'floor' of protection rights to other types of informant or complainant, in addition to whistleblowers. There are two options for how this could be achieved.

Option (a) involves a replacement *Public Interest Disclosure Act* which follows NSW, Tasmania and for the most part, Queensland and the Commonwealth, in applying whistleblower protections to whistleblowers (employees, etc), while simultaneously updating protections for other types of informant or complainant in other applicable legislation (some of which is pre-existing). This is the preferred option.

Option (b) involves adopting an equivalent 'two-track' approach, but doing so within the one piece of legislation. Under this approach, some base protections could be provided to any type of public interest informant or complainant, with the more comprehensive and detailed responsibilities and protection obligations pertaining to whistleblowers also spelled out, and clear differentiation between them.

A first step in this latter direction is found in section 15 of the ACT Act 2012, which sets out how the Act applies to disclosures made both through (i) channels appropriate for 'any person' (including a public official), and (ii) additional channels that are appropriate 'if the discloser is a public official'. However, the potential complexity of this approach is demonstrated by the same Act, given that protection obligations such as under s.33 of the ACT Act mean that an agency's public interest disclosure procedures must include procedures for assessing the risk of reprisal against all complainants (even members of the public with absolutely no reprisal risk), when the intended focus of such provisions is actually employee support and protection, i.e. the prevention of reprisals against informants who are organisational insiders.

In either case, South Australia needs to consciously choose one of these options, or find another solution, if the new legislation is to be well-tailored, clear and effective as a whistleblower protection statute.

9. Should South Australia's legislation continue to apply to the private sector at all?

This is a legitimate question, raised by many of the above issues. In particular:

- While there is now good research to indicate what is needed in the public sector, no equivalent research has yet confirmed that the same approach is always going to be apposite for the private sector (indeed, given the greater diversity of scale and type of organisations in the private sector, this is unlikely);
- The South Australian Parliament can legislate as it wishes in respect of State public sector whistleblower protection, including in employment law terms, but is part of the national *Fair Work Act* regime when it comes to the pursuit of appropriate employment remedies for most private sector workers;
- There are economic reasons why whistleblower protection obligations falling upon the private sector should be simple and uniform across Australia, rather than varying from State to State.

One option is for South Australia to deal with these issues by replacing its present legislation with a more comprehensive *Public Interest Disclosure Act* applying simply to its public sector, like other Australian jurisdictions; and call on the Commonwealth to take the lead on an effective national approach to whistleblower protection across the private sector.

However, given that the current Act does (at least theoretically) offer some protections to persons in the private sector, that option could also be seen as reducing some of the current rights of South Australian private sector employees, even if only temporarily. Accordingly it may not be seen as desirable.

A middle path is to simply preserve the existing rights for private sector employees provided by the 1993 Act, while deepening the rights and obligations that pertain to public sector whistleblowing, *and* also call for – and support – Commonwealth reforms for private sector whistleblower protection. This would again add complexity to the legislation, requiring careful drafting to differentiate between the different protections and obligations available to different types of complainant. However, it may represent the 'least worst' option at the present time.

10. Who should be the oversight agency for whistleblower protection in South Australia?

As discussed earlier, for the institutional and anti-retaliation models of whistleblower protection to be more effective, it is clear that an appropriate independent oversight agency must be charged with ensuring the implementation of organisational requirements and positioned to intervene where necessary to ensure organisational justice for whistleblowers.

Ultimately, this decision depends on many of the above answers, including the extent to which the private sector, and non-whistleblowers, continue to be captured by the legislation. For example, if remedial avenues for private sector employees are to be built into the scheme, then regulatory agencies aimed at ensuring safe and fair workplaces (such as the Fair Work Ombudsman and workplace health and safety regulators) will have to have stronger responsibilities for ensuring implementation and monitoring, as well as timely complaint investigation and dispute resolution.

To the extent the scheme is focused on the State public sector, then the question of effective oversight is made real by the recent expansion of integrity institutions in South Australia, including the tasking of this review to the new Independent Commissioner Against Corruption. It might be assumed that as a new and relatively well-resourced agency, such an anti-corruption body might be the best placed to take on this new oversight role. However, such an assumption is likely a mistake.

For example, the Victorian Government made this mistake when it instituted the *Protected Disclosures Act 2012* (Vic), alongside its creation of the Independent Broad-based Anti-Corruption Commission (IBAC), with oversight responsibility for the replacement whistleblowing law transferred from Ombudsman Victoria to the IBAC. While the competence of the IBAC to fulfil its many functions will now doubt prove to be high, this particular decision was ill-informed, and reached through poor policy processes which have been subject to much public criticism, from both within and outside government. The result is that the IBAC is tasked with fragmented oversight powers which do not correlate with its own jurisdiction, given that whistleblowing

systems must allow for a diversity of disclosures, including wrongdoing that has nothing whatsoever to do with corruption as defined.

Further, Queensland experience in the 1990s already indicated that giving general whistleblowing oversight responsibility to an anti-corruption body may be ineffective. Anti-corruption bodies should focus on anti-corruption. While this includes managing their own whistleblowers well and consistently with broader legislation, it is neither realistic nor necessarily desirable for their focus to be diluted by also taking responsibility for how organisations deal with unrelated types of whistleblowing.

For the State public sector, the most appropriate choice within existing institutional frameworks is probably the State Ombudsman. This is the situation now adopted in Queensland, NSW, Tasmania and the Commonwealth (and was the previous, better situation in Victoria from 2001 to 2012). The next most appropriate alternative, if one exists, is an independent public sector standards commissioner, or fully independent public service commission, linked to the public sector management framework. However, in Australia such independent commissioners appear to be a thing of the past, and unlikely to revive, with public sector management agencies increasingly (and perhaps appropriately) focusing on the workforce demands and capabilities needed to best serve the government of the day. While they may remain appropriate vehicles for resolving most public employee grievances, they tend to be insufficiently independent of government and senior public sector management to be able to oversight and resolve more complex whistleblowing matters.

By contrast, the State Ombudsman has both the necessary independence, and other general complaint-system functions across the public sector, with which oversight of whistleblowing systems can align. However, it should be recognised that the role may require an extension of existing powers, capabilities and resources. This is because: (a) the Ombudsman may need to develop greater capacity to understand the employment context and implications of decisions, even though not intended to become a new workplace regulator in their own right; and (b) the function of oversight requires a capacity to intervene earlier and more strongly in selected cases, to prevent or limit reprisals, than may conventionally be the case with complaints to the Ombudsman.

It is also vital that integrity and regulatory agencies with responsibilities for whistleblowing take an evidence-based approach to the development, monitoring and evaluation of whistleblower protection efforts. This should include support for and participation in the research necessary to inform best practice strategies. As noted earlier, while advanced empirical research has been conducted in Australia, it did not include South Australia, nor has equivalent research been conducted in the private sector. In taking the lead in what will hopefully once again be new standards of best practice for whistleblower protection legislation, the South Australian government will also be uniquely placed – and have unique reasons – to help fill these gaps in the future.
