21 April 2013

Committee Secretary
Standing Committee on Social Policy and Legal Affairs
House of Representatives
PO Box 6021,
Parliament House
Canberra ACT 2600

Dear Ms Pauline Cullen,

Attached please find a submission relating to the Public Interest Disclosures Bill 2013 relating to whistleblower protection.

Thanking you for your patience with us,

Yours faithfully

G M McMahon
Secretary
Whistleblowers Action Group Qld Inc

SUBMISSION RELATING TO THE PUBLIC INTEREST DISCLOSURES BILL 2013 ON WHISTLEBLOWER PROTECTION

Outline

We propose that the legislation has two serious deficiencies:

A. The Bill does not provide for a separate Whistleblower Protection Authority [hence **WPA**], empowered and resourced to ensure that whistleblowers survive the reaction to the Public Interest Disclosures [hence **PID**s] that they make
B. The Bill assigns roles important to the survival of whistleblowers to the Commonwealth Ombudsman

These deficiencies indicate that the legislation does not have in mind or otherwise contemplates the current forms of wrongdoing in Australian public and private sectors, that are amassing:

A. Accumulations of particular forms of wrongdoing and affected communities of victims, built up over years during which authorities turned a blind eye to the allegations of such wrongdoing and the treatment of whistleblowers , in some instances becoming involved or complicit in the wrongdoing disclosed and in the mistreatment of those who made the disclosures;
B. An increasing stream of Royal Commissions / Judicial Inquiries when the accumulations became just too large for parliamentary authorities to continue the denial of their plight

These accumulations of wrongdoing, we submit, are the outcome of:

A. The wrongdoing or corruption becoming systemic within the agencies and within the procedures agencies used for investigating PIDs and managing whistleblowers
B. gross failures by watchdog authorities such as the Ombudsman's Office to fulfill their role of investigating and reporting such systemic wrongdoing within the agencies for which the watchdog authorities like the Ombudsman have had oversight

Within documented cases of systemic wrongdoing within agencies, the types of provisions included in the Bill under evaluation, like the requirement to investigate provision, are consistently ignored without any interference by watchdog authorities such as the Ombudsman.

Within documented cases of systemic wrongdoing within agencies, the failure of the watchdog authority in its role as a 'sword' against wrongdoing appears to rob the watchdog of any will to act in its 'shield' role protecting whistleblowers.

In situations of systemic wrongdoing, WAG Qld proposes, a separate WPA devoted to ensuring the survival of the whistleblowers irrespective of the response taken by the agency or its watchdog towards the disclosed wrongdoing, poses the only viable course of action for ensuring such survival.

If the whistleblower survives, it is further submitted, then the witness and the voice against the wrongdoing remains viable. This surviving voice is the best chance for the original wrongdoing to be addressed and for any accumulation of crimes and victims to be prevented, where the level of wrongdoing is systemic.

The jurisdiction in the United States has established a separate WPA (the US Office of Special Counsel), and it has the False Claims Act, because that jurisdiction appreciates that systemic corruption has happened, is likely to be happening and is likely to happen again within its agencies. The US has just amended its legislation, by bipartisan support in its political system, in continuing development of a legislative framework that is based upon a separate WPA.

Footballers Can Get it Right

The National Rugby League is to be congratulated for the approach that it is adopting to protecting whistleblowers in their Game, by comparison with the State and Federal Governments of Australia.

Whistleblowers in Australia are hoping that our governments will follow a similar approach.

The NRL decision to separate the protection function from the investigation function in their governance structure is the key ingredient to an effective protection scheme. The Whistleblower organisations in Australia have adopted jointly this key ingredient, terming it the Sword and the Shield design to defending good governance in organisations.

Putting both functions in the one entity, as governments have done with Ombudsman and with Crime Commissions, has not worked. The integrity workers who made disclosures to assist with one investigation, are forgotten when the next investigation gets underway. Further, whistleblowers has been reprised by the Ombudsman Office, actively or passively, where the integrity worker continues with their disclosures when the investigation Ombudsman body does nothing or is itself compromised by the corruption.

Australian whistleblower advocates have had success in getting ‘the Sword and the Shield’ approach incorporated into the Australian Standard AS8004-2003 on ***Whistleblower Protection Programs for Entities***. Governments do not comply with that Standard. It is a prominent example to government bodies that the NRL has decided to adopt the Sword and the Shield approach and to follow the Australian Standard.”

There has also been another very encouraging sign for the NRL in its efforts to extract itself from its corruption influences. That sign is the criticism of the NRL’s watchdog authority, ASADA, led by coaching guru, Wayne Bennett. Bennett was direct in putting the responsibility for the problem with drugs in his Game at the feet of ASADA, the drug detection and investigation watchdog, rejecting the assertion by ASADA that the problem lay just with the clubs.”

That insight is rare in our community. For example, there have been 21 inquiries into mistreatment of persons in the Australian Defence Force, in the last 21 years; but no authority inquiring into complaints about abuse within the Defence Force has inquired into the performances of the Defence Force Ombudsman, or into the performances of the two Inspector-General Offices, when disclosures of mistreatment of persons had come before those Defence watchdogs at earlier times in history of those same complaints.

Coaches have to be performance oriented in NRL to succeed. The Army and other parts of government might benefit from Wayne Bennett coaching a few government Ministers and several government Committees.

It is a matter of current inquiry as to whether drug detection agencies in cycling have experienced the phenomenon of 'capture'. Capture occurs where the regulator, such as those being set up by the NRL to eradicate drug use in their Game, begin to act in the interests of or in the defence of those who the regulating body should be prosecuting. Allegations arose that actions by drug agencies protected former Tour de France cyclist, Lance Armstrong, from prosecution. It certainly was another regulator which stuck to its responsibilities for investigating disclosures and prosecuting offenders that caused Armstrong's use of drugs, eventually, to be disclosed & admitted.

Activities by the Commonwealth Ombudsman to advocate to other agencies the methods and programs used by Defence, prior to the last six inquiries into abuse within Defence, may indicate a vulnerability of that Office to influence from or capture by Defence. That will be the coming challenge for the NRL, after this good start to their efforts to protect the integrity of their own governance. The NRL will need to protect their offices from becoming captured by those players and organisations that they should be prosecuting. Ombudsman Offices have not been able to avoid capture; international drug agencies have not been able to avoid the allegations – it is not easy to achieve.

There is a third advantage that should be benefiting football administrations, including the NRL. This advantage is the recent experience of wrongdoing organized not by

individual players but by the clubs themselves. Governments in Australia have been misled badly on whistleblowing in their 'clubs' (agencies), and are not designing schemes for protection where the chiefs of the agencies are organising the wrongdoing, or defending it, or covering it up. When the chiefs are directing or allowing the wrongdoing, individual whistleblowers disclosing wrongdoing by their Defence Chiefs receive severe treatment.

Governments are being misled by research that the Ombudsman Offices and Crime Commissions steered through Griffith University. That research simply assumed that the Ombudsman Offices were doing a good job in fighting corruption – this was not researched. The Griffith research simply assumed that government agencies were well intentioned towards staff who made disclosures about wrongdoing in those agencies. Governments therefore have focused only on wrongdoing 'in the ranks' by individuals acting largely alone. Reality for our governments has been shaped by the research and their Ombudsman Offices, shaped away from any consideration that agencies could be organizing or permitting the wrongdoing.

The NRL's experience with breaches of payment caps by clubs, and alleged organisation of systemic drug taking by club administrations, teach that the most damaging corruption is systemic corruption, organized by the club chiefs, forcing the players to comply.

The separation of the Sword function for investigation of wrongdoing, from the Shield function for protection of those disclosing the wrongdoing, strengthens an organisation's defences. The separate functions bring depth to an organisation's ability to resist against both the phenomenon of 'capture', and the potential for systemic corruption. Simply, now there are two regulators, not one, that have to be so affected.

The whistleblower protection function is the one that governments are shying away from. This may be because when this Protection body does its job, that is, when the whistleblowers survive, so too do their disclosures. Continuing disclosures force, albeit only 'eventually' in many cases, proper investigation, and admissions.

Investigator bodies appear to be more corruptible, in the experience of Australia and overseas. Whistleblowers appear to be more reliable for holding the line, and thus represent a better investment for funds expended on good governance. Both Sword & Shield, however, are needed.

Origins of the Deficiencies

It appears that the Public Interest Disclosures Bill in the Australian Parliament, under evaluation by your Standing Committee, has been led to the two critical deficiencies, cited by our Group, by advice and inputs provided to the Parliamentary Member by researchers from Griffith University.

These researchers undertook a study into whistleblowing, a study steered by the Commonwealth Ombudsman, the Crime & Misconduct Commission [hence CMC] and other watchdog authorities. It was called the ‘Whistle While They Work’ Project [hence TWP].

The TWP, and the ideas arising from that research project have been criticized by whistleblower organisations and a large number of whistleblowers because it simply assumes that agencies like the Australian Defence Force and watchdog authorities like the Ombudsman have good intentions towards its officers who make PIDs, and are not systematic in how the disclosures by whistleblowers will be denied and suppressed.

In support of these propositions, this submission offers comments on four topics

1. The scope of current Royal Commissions / Judicial Inquiries
2. The performances of the Commonwealth Ombudsman
3. The flaws in the Griffith University WWTW Study, in Summary and in Detail
4. The Sword and the Shield Approach to Whistleblower Protection jointly agreed by whistleblower organisations in Australia.

7

CURRENT COMMISSIONS OF INQUIRY

The Royal Commission into Child Abuse will inquire into the crime of abuse and its effects on the victims. The Commission is also to investigate the failures by authorities, who received disclosures about these crimes, to address these disclosures where there was a duty under law for the authorities to do so. The wrongdoing that is at issue is alleged to have been **systemic** rather than *ad hoc*, because those in authority to address the abuse covered it up instead, and mistreated whistleblowers who would not comply with the cover-up policy or stratagem. This allowed the wrongdoing to continue, and great accumulations of crime and injury to develop, it is submitted.

The organisations that are expected to draw attention in this way will not just be churches and sporting organisations from the community, but also public sector organisations such as Australian Embassies and the Department of Foreign Affairs, and the Queensland Justice and Judiciary administrations that became involved in the Lindeberg disclosures about the Qld Government's John Oxley Centre (also called the Heiner Affair). The failures of Police Forces and Public Prosecutors to act upon disclosures from both the private and public sector will further evidence **the systemic wrongdoing** that allowed perpetrators for decades to wreak misery upon generations of children, their families and their own children.

The current **Review into the CMC** in Qld, and the **Carmody Inquiry Part I** (not including the Heiner Affair) **and Part II** (about the Heiner Affair), plus the **Victorian Parliamentary Commission of Inquiry into Child Abuse**, demonstrate the accumulation that has occurred of cases of child abuse, without it being dented or diminished by the efforts of the Ombudsman or the CMC (or its equivalents in other State and the Federal jurisdictions) who now face allegations of complicity by commission and by omission in the cover-up of the wide ranging abuse.

The DLA Piper Review of Alleged Sexual Abuse and other Abuse in the Australian Defence Force. The several hundred cases, judged to be plausible instances of abuse in the Australian Defence Force, are also under consideration for inquiry by way of a Royal Commission. The DLA Piper Report listed the seventeen (17) Inquiries and Reviews into military justice issues in the last 21 years to 2010, including the 2005 Senate Inquiry that found systemic wrongdoing in the Australian Defence Force military justice system. The disciplinary side of the military justice system was taken out of the control of the commanders in the ADF, because the commanders had proven unreliable in using the disciplinary powers without abusing those powers.

The Matthews Inquiry in 1994 (non-enforcement of mining lease conditions by the Queensland Government), and the Davies Inquiry 2005 (health department administration supporting a surgeon who was killing his patients) may provide examples of systemic wrongdoing by government agencies. The Australian Wheat Board (the Cole Inquiry) and the Reserve Bank of Australia are two prominent authorities under investigation for involvement by the agencies in alleged corruption, and for seeking to benefit financially from allegedly corrupt practices, as a matter of organisational business strategy. In all these instances, it is not an individual perpetrator at the centre of the wrongdoing but the whole of an organisation (except for a lone whistleblower).

In the case of RBA Bribery Scandal, the whistleblower is a person in the role of company secretary. In the AWB, the whistleblower is a Federal Police Officer reporting directly to the top of that organisation.

The provisions of the Bill under evaluation have no apparent appreciation as to how the protection of the whistleblower is to be effected in situations where the corruption is systemic.

PERFORMANCE OF THE OMBUDSMAN'S OFFICE

The Ombudsman's Office in 2004 (Redress of Wrongs procedures) and 2005 (treatment of minors) was a principal of one and an initiator of another of the inquiries into the Australian Defence Force. That was then.

Since 2005, the Ombudsman's Office stands accused of allowing to pass proven instances of where the Chief of the Defence Force and Chief of Army have refused to comply with legislative provisions that required these commanders to take steps that would provide due process to soldiers complaining of mistreatment and reprisal. The Ombudsman's Office stands accused of misleading a Senate Committee on the issue of whether complaints had been received by the Ombudsman's Office of reprisals against soldiers after they made a complaint to their superior officers.

Research into the operations of the Commonwealth Ombudsman, undertaken by Professor Anita Stuhmcke of the University of Technology Sydney demonstrates that the Ombudsman's Office only investigates one out of four of the complaints that it receives. Three out of four whistleblowers who may complain to the Ombudsman about reprisals, upon the figures published by Professor Stuhmcke, will have their complaint referred back to the agency against whom the whistleblower is alleging reprisal.

This is what allegedly happened to the whistleblower who went to the Queensland Ombudsman with disclosures about allocations of water in the Murray Darling river system – the Ombudsman referred the matter immediately back to the agency, and the whistleblower lost their staff and duties within a few days of making the disclosure.

The Public Interest Disclosures Bill under review, for example, proposes that agencies investigate disclosures received. In a situation of a systemically corrupted administration, this requirement will simply not be carried out. If the Ombudsman allows this non-compliance to pass, as has been happening allegedly in redress of wrongs situations in the Australian Defence Force, no investigation will occur. The agency will then use the

10

Ombudsman's breach of the legislation to claim that the agency's failure to investigate was proper, and that the whistleblower making the complaint was irrational or obsessed. The whistleblower seeking protection will be vulnerable to further reprisals.

It has been the consistent failure of watchdog authorities with overwatch duties of the ADF that has allowed the ADF to accumulate nearly a thousand known plausible cases of abuse. The Ombudsman's folly in this regard was emphasized when the Ombudsman, after 2005, began praising, to other agencies, the administrative military justice system of the ADF. DLA Piper's Report recommending a Royal Commission into abuse demonstrates just how ineffective has the investigation capacity of the ADF become or remained under the oversight of the Ombudsman.

FLAWS IN GRIFFITH UNIVERSITY'S WWTW STUDY

The Commonwealth Ombudsman was a principal, with the CMC, on the Steering Committee for this research. It must thus take joint responsibility for the flaws in this research.

In summary, the steering board and its researchers

A. Accepted a limiting TOR imposed by the Steering Committee, a TOR that asserted that the watchdog authorities were doing a good job, and that thus the performance of the watchdog authorities was not to be part of the research.
B. Accepted an assumption that all agencies were 'well intentioned' towards the making of PIDs by their staff and towards the treatment of whistleblowers, and
C. Accepted the ADF as a body to be studied under the aforementioned TOR restriction on investigating the Ombudsman's Office and the Inspector General ADF, and under the aforementioned assumption that the ADF was well intentioned towards whistleblowers from amongst its ranks

11

The well intentioned agency assumption is important to the rationale of the Ombudsman in its treatment of whistleblowers, because it allows them a justification for referring whistleblowers back to their agency – this is what the Ombudsman does in three out of four cases. If the Ombudsman was to admit that agencies can be systemically corrupted, the Office of Ombudsman would lose any justification for referring a whistleblower back to the agency that might be ill-intentioned towards any whistleblower

The Whistle While They Work Project, thus, has only a partial coverage, rather than a comprehensive coverage, of whistleblower situations, and the associated bullying and reprisals that are experienced by public servants in the Public Sector in Australia.

Robert Needham, Chair of the Queensland Crime & Misconduct Commission announced the beginning of the Project, back in February 2005. Needham chaired and hosted the first meeting of the Steering Committee for the Project.

On 25 November 2009,however, in response to yet another scandal in the Queensland Government relating to funding for sport, Needham is reported to have stated:

> ***I would be interested in ways in which public servants can be empowered to say no.***

After $1million in funds and public servant hours, the Project appears to have failed to deliver this primary outcome for its Partner Organisations

The Project has simply failed to address the forms of systemic wrongdoing, systemic bullying and reprisals of which the sports rort allegations may have been a recent example of a continuing phenomenon. The coverage that this Project has provided is of the minor or secondary or lower volume forms of whistleblowing, bullying and reprisals taking place in government offices

The Project, and its conclusions and recommendations, may thus constitute a Health & Safety risk for the majority of public servants who make public interest disclosures about wrongdoing in their workplace, or face pressures from their organisations not to do so.

12

The risk may occur where the conclusions and the recommendations of the Project are applied in situations that have not been researched and analysed by the Project.

The conclusions and recommendations from the Project have standing for situations

- where the whistleblower has disclosed wrongdoing by co-workers & supervisors,
- where the agency is a well intentioned agency that shares the employees concern for the wrongdoing to be removed, and
- where the bullying and reprisals are less serious in nature,

that is, essentially in co-worker wrongdoing, bullying and reprisal situations, colloquially termed as **the 'dobbing' whistleblower** situation

The conclusions and recommendations, however, do not appear to be drawn from a deliberate and structured analysis of situations

- where the whistleblower has disclosed wrongdoing by the organization and by its management, or has objected to the bully treatment that they have received
- where the agency is affected by systemic corruption and bullying, and is intent on a close-out of any disclosures about its wrongdoing, and / or,
- where the bullying and reprisals are more serious and very serious in nature,

that is, where the employee is showing resistance or dissent to wrongdoing by the organization, termed in the research literature as **the 'dissent' whistleblower** situation.

Professionals engaged in whistleblower advisory, whistleblower protection and whistleblower support activities need to exercise a duty of care towards all employees, both to whistleblowers and to persons contemplating making a disclosure. All employees should be shown that duty of care in any advice, protection measures and support that is provided to them prior to, during or after a disclosure has been made, and / or a suspected reprisal has been experienced.

13

Such activities by integrity professionals should not be carried out recklessly, without regard to the assumptions and scope limits and background circumstances from which guidelines and factors have been deduced.

The Press Releases and interviews, submissions and papers from the Project, do not appear to be accepting this boundary between what has been researched and analysed, and what has not.

The conclusions and recommendations from the Project may be being advanced as a set of guidelines for all whistleblower situations, bullying environments and reprisals.

The Project does contain some secondary data and anecdotal evidence that is useful for the more serious and more dissent oriented whistleblower bullying and reprisals. Even the bulk data from the co-worker oriented survey is helpful. The secondary data, the anecdotes and bulk results, however, only serve to identify that the occurrences of systemic corruption, systemic bullying and dissent whistleblowing are a real part of the public service in Australian jurisdictions.

These circumstances of systemic wrongdoing thus should have been a part of any comprehensive study of whistleblowing in Australia.

The Project is unable to define the critical parameters, the relationships, the risk rates and other information sufficient to provide guidelines for the more serious bullying and reprisal situations, and for dissent whistleblowing / systemic corruption scenarios.

As a result, there is the prospect, real and immediate, that the Whistle While They Work Project may become part of the problem for whistleblowing management in the systemic wrongdoing scenario, as well as part of the solution where the wrongdoing of co-workers is the issue at hand.

14

At worst, the Project may be acting to paint the situation for whistleblowers and bullied workplaces in Australian jurisdictions using colours that are much rosier than the real situation merits.

The Griffith University Study [GUS] documents appear to have more the characteristics of a consultants' report. The terms of reference for that consultancy may reflect only the view of our bureaucracies, the views held by the client organizations, and this may have led to a major omission.

The GUS documents may not have the characteristics of independent research extending the state of knowledge of organizational dynamics associated with wrongdoing against the public interest.

The causes for this limitation on the applicability of the Project appear to be:

- the failure of the Project to consult with whistleblower organizations early in its development, so as to gain the whistleblower perspective, persons who have seen the corruption and experienced the bullying and the reprisals
- the large scale consultation effort that was made, which was focused on the agencies and watchdog authorities, and which led to an apparent bias favouring the perspectives of these stakeholders

Some technical aspects to the Project contributed to its failure in important regards:

- The Definition used for whistleblowing diluted the figures on whistleblowing with disclosures that had no public interest relevance (and thus were not about whistleblowing). Efforts to cure the study of this dilution effect tended to confuse the analysis with switches during argument amongst multiple populations of different types of 'whistleblowers'
- The cross-sectional survey acted to omit from analysis most whistleblowers and bullied staff who had or would experience termination as a result of their whistleblowing, including those who simply exited the organization to free

themselves from any involvement or association with the wrongdoing and / or any of the pressures and stress experienced because of the bullying

- The linkages to the state of knowledge about whistleblowing were underdeveloped. This was the case with respect to knowledge from past research, from the major whistleblower cases, and from recent inquiries arising from disclosures by whistleblowers
- Critical parameters, such as the seriousness of the allegations made, and the degree of systemic corruption established within agencies and watchdogs, were crudely structured or over-simplified. Any peaks in the stratifications that would be expected to dominate these parameters were smoothed out by the crude treatment and simplifications.

The Credibility of the Project also suffered as a result of practices used and claims made by the Project:

- The Project did not include the possibility of the systemic wrongdoing / dissent whistleblowing situation in its analytical framework. Retaliation rates including bullying from higher management were dominating the retaliation rates from co-workers, by 3 to 1. This was one of 10 figures that suggested that some agencies may be exhibiting systemic wrongdoing
- The Project claimed that it had discovered the strength of retaliations coming from higher management, when the literature appeared to show that other researchers were well advanced, by as much as 10 years, upon this 'discovery' by the Project
- The Project criticized whistleblowing organizations and academics as having an 'anti-dobbing mentality', when these stakeholders had been on the record for a decade about systemic wrongdoing, systemic bullying and mobbing, regulatory capture and dissent whistleblowing
- The figures on retaliation rates are biased by the absence from the survey of the terminated whistleblowers. Termination is the worst form of retaliation imposed upon whistleblowers. Adopting methods that leave terminated whistleblowers out of the data collection appears to be a major flaw affecting all results

- The Project referred to the whistleblower cases in Dempster's book, Whistleblowing', as 'mythic tales'. This may reflect a reluctance by the Project to accept as real the major whistleblower cases or as real the evidence that they offer about systemic corruption amongst watchdog organizations, who comprised all bar one of the Partner Organisations of the Project
- The Press Releases advertised retaliation rates as low as 22%. This data was gained from self-nominating whistleblowers. The 22% figure was selected when sections of the study for known whistleblowers reported that the retaliation rates might be 66%. The 66% figure, if adjusted for a likely percentage of terminated whistleblowers, might have been 80%
- The Project was inconsistent, where it dismissed other research for using methods that the project also used. This is a major loss of consistency and integrity in the analysis. The Project dismisses prior research because of the way that that research formed its study group of whistleblowers, but then the Project uses the same methodology for gathering its own group of known whistleblowers
- The Project made an assertion without research on a matter important to protection from reprisals and bullying. The Project stated that *only in very rare cases is the nature of the reprisal such that it could meet the legal thresholds required to prove criminal liability on the part of any individual*
- The Project used language like *absence of commitment*, *violation of systemic procedural justice* and *less positive reporting climate* when words like 'the presence of systemic wrongdoing' and 'oppressive bullying environments' seemed to have at least the same likelihood
- The Project did use the systemic wrongdoing scenario, not to explain the results from the Project survey, but to argue mitigation of the error made by the Project in the Definition of whistleblowing
- The Project claimed that reprisals against whistleblowers were ***unlikely to involve a single decisive blow such as a sacking*****,** but the Project did not collect data from whistleblowers who had been terminated

- The Project rejected one result from the survey of managers and case handlers, by claiming that the unexpected result indicated that the managers did not know their own organization
- The prospect that the conclusions and recommendations may be close to or aligned with **government spin** on the integrity of our administrative and justice systems, and remote from the experiences of whistleblowers and bullied staff

It is recommended that the Federal Government organize for such research to be done again, independent of the watchdog authorities that have misdirected the Griffith study away from any meaningful consideration of principal dynamics faced by whistleblowers and bullied staff in Australia's public sector workplaces.

Best practice research methods need to be employed.

THE NEED FOR PROTECTION OF WITNESSES AND WHISTLEBLOWERS
THE SWORD AND THE SHIELD

This submission advocates the need for protections, to persons alleging wrongdoing, or persons acting as witnesses to alleged wrongdoing, if integrity and accountability is to exist within the Australian Government Public Sector

Further, this submission advocates that protection can only be provided if the governance structures that underpin anti-corruption law enforcement provide for two mutually supporting but separate organizations, not one

The two organizations have the distinct but mutually supporting roles of:

- Investigating the allegations
- Protecting the complainant and the witnesses

The two functions are termed the **'Sword'** and the **'Shield'**.

18

This term was first coined by the Whistleblowers Action Group and Whistleblowers Australia in promulgating their national policy on Whistleblower Protection. A copy of that policy is attached

Australian organizations have learned that both the 'sword' organization and the 'shield' organization need to be established for any whistleblower protection program to be effective

This has been recognized by private industry, in no less a form than the Australian Standard AS 8004 – 2003 'Whistleblower Protection Programs for Entities'.

This best practice document has followed the Sword and the Shield doctrine, where it is careful to recommend that an entity establish both a Whistleblower Investigations Officer (the Sword) and a Whistleblower Protection Officer (the Shield) to manage whistleblower cases.

This mutual support approach needs to be followed within the public service entities as well as private organisations. Structurally, too, the organization for whistleblower protection within the total public service needs to consist of two separate bodies, one to be the 'sword' against wrongdoing, the other to be the 'shield' against reprisals.

Australia has ample examples of how the efforts at whistleblower protection can be undermined and reversed if only one of these two bodies is established. The principal examples of this failure, where only one of the two bodies is established, are

- <u>The **'sword' only** approach</u> – Qld's Criminal Justice Commission now Crime & Misconduct Commission [CJC/CMC] is a world renown example
- <u>The **'shield' only** approach</u> – The Australian Defence Force [Army]

Significant Cases

Primary concern about the role of watchdog authorities arose from the rogue legal opinion used by lawyers within Queensland's CMC to excuse the Qld Cabinet of alleged criminal acts in destroying documents required for impending legal action – the Heiner Affair.

The Queensland jurisdiction has also been blind to other cases of the destruction of evidence. This jurisdiction has had whistleblower legislation since 1994.

Most elegant has been the 'mutual support' between the CJC/CMC and the Ombudsman Office with respect to the disclosures of one whistleblower, which involved alleged disposal of evidence required for judicial proceedings already on foot. In this matter,

- The Ombudsman found that any maladministration was associated with claims of suspected official misconduct, and required the whistleblower to take the allegations to the CJC/CMC.
- The CJC/CMC found that the allegations did not give rise to a suspicion of official misconduct, but may be maladministration and of interest to the Ombudsman's Office

Both 'Sword' organizations argued that the other should do the investigation, and refused to investigate the matter themselves. Both 'swords' knew of the others argument.

No investigation was carried out by either 'Sword' organisation.

The officers associated with these decisions were also officers associated with the decisions concerning investigation of the destruction of the Heiner documents

The Heiner Affair is one of five Whistleblower Cases of National Significance accredited by Whistleblowers Australia

20

A similar rogue legal opinion was used to excuse the forced transfer of whistleblower Jim Leggate, another Whistleblower Case of National Significance

The CJC/CMC were also at hand in a third Whistleblower Case of National Significance, that of Qld Police Inspector Col Dillon. Col Dillon was the police whistleblower who opened up the flow of evidence from honest police officers that rescued the Qld Fitzgerald Inquiry from failure.

The post Fitzgerald Review of the Qld Police Force found that the treatment of Inspector Col Dillon by the Police Service, after the Fitzgerald Inquiry was completed, was 'anomalous in the extreme' – Inspector Dillon was transferred to a position reporting to an officer three levels lower in rank than Inspector Dillon. The CJC/CMC who served on the Review Steering Committee failed to do anything to correct the anomalous treatment, and it worsened.

Eventually Inspector Col Dillon was assigned to a 'corridor gulag' – no office or desk or chair or tasking.

Three out of Australia's five Whistleblower Cases of National Significance are a product of alleged failures by the CJC/CMC to 'shield' the whistleblower, nor wield the 'sword' upon the wrongdoing

The failure of the 'sword' organization to wield the sword on wrongdoing is a phenomenon so common that it has a name – **Regulatory Capture**.

'Capture' of the 'sword' organization can be caused by a number of factors.

Firstly, the governing legislation can cause this flaw

The Ombudsman's Office can be limited in its involvement until after the entities own investigatory processes are completed. Entities in this regime can simply delay their

21

processes and change the circumstances of the whistleblower [restructure / transfer / …as with Leggate and Dillon] such that the task before the Ombudsman becomes too problematic for the under-resourced Ombudsman's Office to redress. The Defence Force Ombudsman's Office allegedly has succumbed to this form of 'capture'.

A one year timeframe for persons to have their matter dealt with by their entities and reach the Ombudsman phase of their complaint, as is the case in Queensland, assists this process of 'capture'

External persuasion can also modify an Ombudsman's Office from pursuing proper process. Again the Defence Force Ombudsman provides a primary example. Faced with a legitimate military 'Redress' application against the Chief of Army, the DFO required the Chief of Army in another case study to redress one of three wrongs – but the DFO allowed the Chief of the Defence Force to refuse to accept that the document headed 'Application for Redress of Wrongs' was a Redress Application. This refusal to accept that the redress was a redress allowed the CDF to avoid having to give reasons why the redress of the other two wrongs was refused when the CDF was the Chief of Army who made the original decision.

In questioning the DFO for this apparent leniency, the DFO stated that one redressed matter was enough for the applicant, that the military justice system had made progress since all the Senate inquiries into that system had been completed, and that the applicant should be happy with that result. An emotion of sympathy for the hard times faced by the military in overcoming the appalling shortfalls in the military justice system was 'capturing' the DFO into a position of accepting continuing shortfalls in that system

These two externally initiated forms of 'capture' can lead to a third more entrenched form of capture – a culture of capture – internally activated by the vision held by the Ombudsman's Office of its role.

22

One State Ombudsman's Office may have exhibited such a culture, in the job application of the successful candidate for an Assistant Ombudsman position in that Office. This application from an internal candidate, already acting in the role, espoused a theoretical principle in support of investigating alleged wrongdoing, but immediately thereafter explained the practical and political restraints that the applicant would impose on themself when putting that theoretical principle into application.

The outcome from such capture is always the same outcome – the outcome that occurred for whistleblowers Lindeberg, Leggate and Dillon in the three aforementioned Whistleblower Cases of National Significance – they all lost their positions, their careers, and their employment

The role of the **'Shield'** whistleblower body is to protect the whistleblower so that the whistleblower survives the denial, the delay, the destruction of the evidence and the defamation of the whistleblower that occurs while the captured 'Sword' organization is distracted from its duty:

- Anti-Deny: The whistleblower is given advice, assistance and representation in hearings and preparations therefor
- Anti-Delay: Progress reports on the investigation are called for and the response reported to the Parliament
- Anti-Destruction: The evidence of the wrongdoing is secured, witness statements are taken immediately after the disclosure
- Anti-Defamation: The evidence of the proficiency of the whistleblower in their job, prior to the making of the disclosure of alleged wrongdoing, is secured

If the whistleblower survives, the last line of defence in our system of justice and accountability remains intact – the 'Sword' organization in this scenario will be worn down into performing its duty through the capacity of the true witness to face the investigation

23

Australian Defence Force (Army)

In this organization the situation exists where there is a ‘Shield’ body, but there is no ‘Sword’.

In fact, the ADF has two whistleblower protection bodies – one for the Head of the Defence Department, and another for the Chief of the Defence Force.

The tactics used by Defence authorities to turn the whistleblower protection bodies against the whistleblower is genuinely elegant.

The first rule effecting this turnaround is one that stipulates that the ‘Shield’ bodies are not allowed to investigate the disclosures made by the whistleblower – Rule 1

The second rule effecting the reversal is one that requires any investigation into the disclosed wrongdoing to cease once the whistleblower seeks protection from the ‘Shield’ authorities – Rule 2.

An Army Unit or School, say, seeking to end investigation into disclosed wrongdoing within its walls (bullying, discrimination, drug commerce, fraud, say) have endeavoured to apply to the ‘Shield’ authorities on the whistleblowers behalf, or falsely claim that the whistleblower has sought the protections of the ‘Shield’. This can be done so that the School or Unit can then apply Rule 2, and cease the investigation

The whistleblowers on the other hand, say, a commander or an instructor, seeking to protect their men and women in uniform from wrongdoing, have had to refuse whistleblower protections for themselves from the ‘Shield’ bodies so as to keep the onus on their Units and Schools to continue with the investigation of the wrongdoing.

24

If a ‘Sword’ body was operating in the Australian Defence Force, the commander or instructor could seek protections for themselves and their members from the ‘Shield’ without having to put at risk an investigation into the wrongdoing that has beset them.

Unfortunately, in the Australian Defence Force, the closest thing to a ‘Sword’ body is the DFO, and the legislative regime, forces of persuasion and sympathetic identification with the ‘uniforms’ appears to have caused the phenomenon of ‘capture’ to deprive the DFO of any edge to their ‘Sword’.

Apart from the DFO, the integrity of any ‘sword’ wielded by the Australian Defence Force is best exemplified by the hallmark investigations by Chief of Army Cosgrove (the Burchett Inquiry) and by the current Chief of the Defence Force, in 2006, into bullying at Defence Schools. The Burchett Inquiry appeared to take on the properties of a ‘black hole’ for disclosures that did not make it to the ‘Sixty Minutes’ program. The 2006 investigation reported that there was no bullying at Defence Schools.

During the 2006 CDF’s investigation into bullying, however, allegations of unacceptable behaviour (including discrimination and bullying) by senior officers against officer trainees were made by an instructor at one of the Army’s prestige training establishments.

During the CDF’s investigation, as one of several examples, disciplinary action was undertaken against the instructor for being absent from parade at the death bed of the instructor’s mother.

The allegations of bullying and discrimination were not investigated, and the instructor was suspended from parading for 14 months without any disciplinary procedure.

In the end, the Head of the Defence Registered Training Organisation tore up all actions taken against the instructor except for the suspension, and ordered that the instructor was not to be posted to an Army School.

25

A legal opinion from an Australian Army Legal Corps COLONEL that treatment of the instructor was a notifiable incident was passed over in favour of an opinion from a Captain on the staff of the Head of the Defence RTO, that officers can be suspended for long periods without the need of disciplinary procedures.

The Head of the Public Service refused submissions that the Public Service should intervene in the treatment of the instructor, claiming that military personnel are outside the ambit of the authority of the Commonwealth Public Service.

On all experiences of this matter, the case study appeared to confirm the effective absence of any 'Sword' within Defence to investigate wrongdoing. The instructor refused to seek protection of the 'Shield' authorities, after the School ordered that a COLONEL investigation officer cease his investigation of the bullying and discrimination – the School claimed that the cessation of the COLONEL's investigation was appropriate because the instructor had asked for whistleblower protection.

A 'sword' organization within Defence appears to be a necessary addition to the Defence Whistleblower Protection schemes if bullying and discrimination at Army Schools is to be arrested

Summary

Whistleblowers and witnesses are the last line of defence against systemic corruption and other forms of wrongdoing.

Any public sector accountability can not claim to have integrity if evidence is destroyed and witnesses are intimidated.

To defend the last line of defence, whistleblowers and witnesses must be protected.

Single body whistleblower models have shown themselves to be unsuccessful in meeting the integrity objective.

The model that can succeed is a model based on two bodies with mutually supporting functions:

- One to be ***the Sword***, to investigate the wrongdoing, and
- One to be ***the Shield***, to ensure the survival of the whistleblower and the witness, so that the whistleblower survives the denial, the delay, the destruction of the evidence and the defamation of the whistleblower that occurs while the captured 'Sword' organization is distracted from its duty:
    - Anti-Deny: The whistleblower or witness is given advice, assistance and representation in hearings and preparations therefor
    - Anti-Delay: Progress reports on the investigation are called for and the response reported to the Parliament
    - Anti-Destruction: The evidence of the wrongdoing is secured, witness statements are taken immediately after the disclosure
    - Anti-Defamation: The evidence of the proficiency of the whistleblower or the witness in their job, prior to the making of the disclosure of alleged wrongdoing, is secured

27

DETAILED REVIEW OF THE WHISTLE WHILE THEY WORK PROJECT

PART I – INTRODUCTION

This paper has collected and reviewed criticisms, from the executive and committee members of the two principal whistleblower organizations in Australia, of published reports and associated press releases and public comments by the Griffith University 'Whistling While They Work' Project [hence TWP].

The TWP advocate their work to be the best-to-date research into whistleblowing. The studies and reports enjoy the support of governments and their watchdog authorities, but have received a variety of negative reactions from whistleblower representatives, ranging from immediate dismissal to argued allegations of blunder and bias.

Concerns about the TWP began amongst whistleblowers before any report or press release was ever published by the TWP. Some watchdog authorities, Queensland Health System Review (the Forster Review) and Office of the Public Service Commissioner, had also withheld their support for the TWP early in its history (GUS IV, p19). Since TWP published its first report and press releases in 2008, academics with recorded experience and publication credentials in whistleblowing have also discussed the credentials of the TWP team and the value of the product from that Project (Whistleblowers Australia, 2008).

What would be the cause of this early dissent about a purported best-to-date world research into whistleblowing? Why would whistleblowers be leading the criticism of a project purportedly undertaken for the benefit of all parties involved in the whistleblowing phenomenon?

Purpose.

This paper is an assembly, by the author, of points made by whistleblowers in their reviews of the inputs to, the methodology used by and the outputs from the TWP. Some of these criticisms have been published (Sawyer 2009). Other points have been made in correspondence and meetings between committee members, and in feedback to this review. More points are coming from credentialed researchers learning of the TWP.

The points included herein are a selection from all points made to date, and that selection was made by the author.

The selection has been made in order to explain the major objections held by a stakeholder group, whistleblowers, to the outputs from the TWP. The author is one of those critics.

28

The criticisms were given to TWP as part of the feedback to TWP about their draft report [GUS I]. This policy will be followed with other critiques coming from other parties. Those criticisms in summary are directed at:

1. The Inputs applied to the TWP, including
   - The experience and inexperience of the TWP and of its steering committee
   - Consultations made and the failures to consult
   - The definition of whistleblowing used by the TWP
   - Categorisations used to break-up the spectrum of whistleblowing situations for later analysis.
2. Methodologies used by the TWP in collecting and analyzing the data, including
   - Cross-sectional survey techniques used, and,
   - The lack of, or the crudeness or over-simplification of, hierarchies or stratifications used by TWP, when describing the range of particular dimensions to the whistleblowing phenomenon in the survey framework.
   - The framework adopted appears to be largely based upon a single whistleblowing situation, namely, of Ad Hoc wrongdoing within a Well-intentioned Agency supported by watchdog authorities acting with integrity
3. Outputs derived from the TWP, including
   - Findings made that do not relate to the experience of whistleblower groups in real whistleblower events from the recent history of Australian jurisdictions, nor to the results from well credentialed research by others into whistleblowing
   - Lack of relevance of the studies by the TWP to large portions of the whistleblowing situation relevant and important to whistleblowers suffering the worst reprisals in Australian jurisdictions
   - Failure by the TWP to define, in its reports and press releases, the limits of relevance of the TWP results to important whistleblower situations

The implications for all stakeholders of any ‘blunder and bias’ or other defect in the TWP will be proposed

Preliminary Concepts. The review uses a number of whistleblowing related distinctions that are now outlined.

‘**Whistleblower Protection’ procedures** can, in the hands of agencies and watchdogs, be developed to a spectrum of purposes between two endpoints:

> **Effective Protection of Whistleblowers**. Agencies and watchdogs with this end are termed **Well-intentioned Agencies** which, even if systemic corruption is occurring, still have control of the agency or watchdog and of its relevant procedures. Whistleblowers in this situation have access to an investigation of their disclosures, made upon their reasonable belief of the allegations involved. They have access to a right of review, both internal and external, of the disclosures made and of any disadvantages imposed upon their employment

following their disclosures. Problems with the whistleblowing procedures are due to acts of omission or inefficiency, or are caused by a lack of skills or information or guidelines, that are preventing well intentioned managers from fulfilling those good intentions.

Counter Protection of Whistleblowers. Here, the agency, whether for one issue or for a host of issues, are **Ill-intentioned Agencies.** Ill-intentioned Agencies design and implement *'whistleblower procedures'* so as to protect the Agency, the watchdog or the senior managers, rather than to protect the whistleblowers. Disclosures and the whistleblowers are subjected to an array of obstructions and retaliations, so as to effect a **Close-out** of the disclosure. Whistleblowers are forced to seek investigation and protection from authorities outside of the Agency, and the Agency responds most heavily to any disclosures externally made. The problems thus faced by whistleblowers are acts of commission by the Agency or watchdog, undertaken in order to effect the Close-out of all disclosures.

The close-out is a demonstration of systemic corruption in the Agency or watchdog. The Australian Defence Force / Defence Force Ombudsman (in the federal jurisdiction, regarding military justice and bullying), and the Heiner Affair / Cabinet & Justice Watchdogs (in the Queensland jurisdiction), allegedly, have exhibited degrees of Counter-Protection in recent times.

Appreciate that counter-protection can be built into watchdogs, by starving them of resources or by constraining them with limited jurisdiction. Counter-Protection can also be implemented, however, by decision-making that is unrelated to the law or to the facts, or by procedures that, without due care, send the disclosures back to the agency against whom the disclosures have been made, to give only two prominent examples.

These two situations, of Effective Protection and of Counter Protection, are later described, in this review, as 'blue sky' and 'black sky' scenarios, respectively.

Types of Whistleblowing Situations. Employees can come to suspect wrongdoing within an organization, and to disclose or not to disclose their suspicions, across a variety of situations. The spectrum of situations that have attracted research include the following:

The 'Dobbing' Situation. Here the employee suspects that a colleague or colleagues, either in a junior position, in a position at the same level, or in a senior position, is or are acting in their own interests and contrary to the code of conduct of the organization, to ends that conflict with the public interest. The employee then makes a public interest disclosure.
NOTE: 'Dobbing' is an offensive term to many whistleblowers, but it is necessary to use it in this review as it has been used in the TWP documents that are under review.

30

The 'Dissent' Situation. Here the employee suspects that the organization or a significant part of the organization is acting in its own interests in ways that constitute wrongdoing against the public interest. The employee makes a public interest disclosure. The employee may also refuse to participate in the wrongdoing, orally explaining, to colleagues or to their superior, that the activity is wrongdoing. They may not make any formal written disclosure. In either case, the employee is resisting what the organization is doing, or is showing dissent towards the organization, or is acting in a way tending to reform the organisation.

The Silence Situation. This is **the bullied staff** environment. Here, the employee suspects wrongdoing but fails to make a disclosure about the wrongdoing, or does not resist the wrongdoing, usually from fear. Silence can occur in the face of wrongdoing by co-workers or by the organization, or can be adopted immediately after a first disclosure is made, or after a first reprisal is threatened or made.

The Secrecy Situation. Silence becomes illegitimate Secrecy when the silent employee acts to cloak knowledge of the wrongdoing from another or to ensure the silence of another member of the organization. Stronger secrecy scenarios include situations where silence amongst managers (and employees) becomes ***voluntary compliance***, then ***willing behaviour*** , and stronger still where the organization and its top management confer legitimization (and reward) upon the illegitimate secrecy (see de Maria 2006).

Whistleblower Naivety Situation. Employees are entitled to make their disclosure and, if it is ignored or dismissed, repeat their disclosure progressively to higher authorities following the stipulated procedures. 'Naivety' occurs where the employee does this in the belief that the public sector authorities above the employee have the intent to respond properly to disclosures of wrongdoing, and that belief is a mistaken belief.

REVIEW OF TWP

In Parts II, III and IV, this review, in turn, looks at the Inputs to the Whistle While They Work Project conducted by the Griffith University, the Methodologies used by the Project, and the Outputs from the Project

31

PART II – INPUTS

Consultation. A steering committee of partner organisations was formed for the Project, but it consisted, with one exception, of watchdog authorities who funded the Project.

It appeared that it would be the watchdog representatives who would be providing TWP with experience of involvement in the whistleblowing situation.

The perspective of watchdogs towards whistleblowers is a controversial issue. The major plank of whistleblower protection policy by the two major whistleblower associations in Australia is for a separate Whistleblower Protection Body to be established (McMahon 1996). The Australian Senate agreed with this 'separation' approach (Senate 1994). The 'separation' insisted on by the two whistleblower associations is a separation of the protection body from the Ombudsman Offices, Justice Commissions and the like. It is these latter types of bodies, however, who dominated the steering committee for TWP.

Whistleblowers were concerned about the steering committee, right from first knowledge of the membership of this committee. The concern was that the steering committee may not be able to give the balance and breadth of perspective that might be gained if there were representatives of the community of whistleblowers on the steering committee.

Presentations from members of TWP were given during the National Conferences of Whistleblowers Australia, in 2005 to 2007. Those presentations drew criticism for the lack of whistleblower input on aspects to the design of the study.

A particularized criticism was the TWP decision not to investigate principal whistleblower cases. A stated intent by the TWP to derive ways to assist whistleblowers to 'move on' appeared to indicate that the study was being strongly influenced by the perspectives of the watchdog authorities.

Definition. Whether by influence of the watchdogs or through the experience levels of the TWP, the first misjudgment made in the Project was the definition chosen for 'whistleblower'. The definition affected the design of the survey which, once the survey was completed, could really only be addressed by re-surveying the 7663 public servants who answered the original questionnaire. TWP may not have known who these respondees were. A re-survey was not attempted.

The distortions in the definition allowed the survey to record, as whistleblowing, large numbers of complaints & grievances that would not meet the public interest test that is innate to any accepted definition of whistleblowing. Was bullying related to wrongdoing and reprisals, or was the bullying personal or discriminatory – we do not know.

Further, when the results showed that the bulk of reprisals and bullying were being imposed by senior officers and managers, the TWP did not have a definition of whistleblowing that distinguished this whistleblowing situation from the 'dobbing' situation that the TWP appears to have expected.

32

Categorisations. Some aspects to whistleblowing were broken down by TWP into their components (eg, the type of wrongdoing disclosed by the whistleblower). Important categorizations of the whistleblowing situation, however, were not fully incorporated into the structures of responses gained about whistleblowing. Where some effort was made, it was done crudely or using over-simplifications. Foremost amongst these were:

- Whether the whistleblower was disclosing wrongdoing
  - by an individual (eg, a train conductor stealing towels),
  - by a group (eg, driving license examiners taking bribes),
  - by a part of the organization (eg, medical malpractice being accepted and covered up by a ward at a hospital) or
  - by the total organization (eg, an environmental authority requiring its inspectors not to enforce conditions of leases held by polluting industries)
  - by the watchdog with authority to act on the relevant wrongdoing
- The seriousness of the wrongdoing disclosed

Again it is not known whether these flaws or deficiencies were due to the experience or inexperience of the TWP, or to the influence of the watchdog authorities on the steering committee.

Again, once the surveys were completed without these primary information sets, the situation could only be recovered by doing a second restructured survey.

The over-simplifications used to categorise these dimensions to the whistleblowing phenomenon minimised the value of any relationships drawn across these two factors. Such relationships might have been depicted by a matrix. The matrix could then be used to sort the responses, say, about reprisals, and thus be able to link, say, rates of retaliation and types of retaliation to each combination of the two driving parameters.

Table 1 represents the style of analytical tool that might have been derived.

On Table 1, allegations made by notable whistleblowers – the Whistleblower Cases of National Significance jointly recognized by WBA & WAG, RAAF whistleblower Nathan Moore, Wilkie and Smith from the recent SBS 'Law & Disorder' Program – have been plotted against the points of combination of Seriousness of the Wrongdoing, and of the 'Size' or Power of the Wrongdoer.

Plotting allegations made against any agency or watchdog might serve as a basis for categorizing agencies and watchdogs.

Allegations too can be categorized, say, into allegations

- leveled by a single employee,
- leveled by multiple employees, then
- leveled by employee(s) and supported by findings of internal investigation, then
- leveled by employee(s) and supported by findings of external investigation, then
- levelled by employee(s) and supported by findings of a court or appointed inquiry.

These categorizations could have then been used to analyse the survey results for any relationships between, say, retaliation rates or bullied worker ‘silence’ rates and the pattern of allegations made by employees in, say, the last five years plus all unresolved allegations of any age.

TABLE 1:
MATRIX - SERIOUSNESS OF DISCLOSURE AGAINST ‘SIZE’ OF WRONGDOERS

‘Size’ of Alleged Wrongdoer(s)		**Maladmin-istration**	**Misconduct**	**Crime**	**Serious Crime**	**Criminal Conspiracy**
Watchdog	**Dissent**	Wilkie	Leggate; Hoffman	Dillon; Leggate	Skrijel	Heiner; Dillon; Leggate; Toomer; Warrior (appeal)
Agency	**Dissent**	Bingham (re Dillon)	Leggate; Hoffman	Dillon; Leggate	Heiner	Dillon; Warrior (retrenchment)
Unit / Branch / Division	**Dissent**		Toomer; Dillon		Warrior (dispose of record)	
Senior Individual	**Dissent**	Warrior (disentitlement)	Warrior (secret file)	Warrior (reprisal)	Hoffman	
Loose Group	**‘Dobbing’**			Moore (re RAAF drug trafficking)	Skrijel	
Colleague	**‘Dobbing’**				Smith (re abuse of the aged)	
Junior Individual	**‘Dobbing’**		(falsification)	(theft)		

NOTE: Examples in the matrix are **allegations only**

Seriousness of Alleged Wrongdoing

Table 1 also allows the history of a whistleblower case to be mapped.

See on Table 1 the case of the whistleblower codenamed ‘Warrior’, allegedly, by an agency and watchdog. A file by that name allegedly was used to store records off the whistleblowers personnel file. A simple matter of alleged maladministration grew to criminal conspiracy, it is also alleged, as the documents were disposed of, with some then rewritten and re-introduced onto the agency and watchdog files during FOI review procedures.

See also the pattern for Col Dillon, and for Jim Leggate.

34

Such maps are useful in describing the levels of risk associated with combinations of parameters, and of the time profile of escalation of particular cases, from maladministration to serious crime, and from senior officer to watchdog.

This escalation repeatedly occurs in systemically corrupt agencies, where any level of insistence by an employee to their rights may be perceived as unwanted, and receive a bully response. This could occur, say, where an issue over a leave entitlement leads to a disclosure of simple maladministration, but the management response of reprisal upon reprisal - falsified performance appraisal, then low level work assignments, then punitive transfer, then to the 'departure lounge' or 'gulag' and then to destruction of documents required for litigation – overtakes the seriousness of the initial issue.

Such maps are important in demonstrating, to agencies and watchdogs, the benefit-costs of reprisals and bullying. They demonstrate why disclosure management, like projects, can fail at the beginning

Table 2 represents the matrix that is available from the crude and over-simplified categorisations used by TWP.

TABLE 2: MATRIX - SERIOUSNESS vs 'SIZE' USING TWP CATEGOTISATIONS					
'Size' of Wrongdoer	More than one wrongdoer	[Dissent?]			
	One wrongdoer	Dobbing			
			Somewhat serious	**Very Serious**	**Extremely serious**
			Seriousness of Wrongdoing		

TWP, by comparison, did identify the spectrum of junior, co-worker and senior officer when categorizing individuals. With respect to groups, however, TWP have only described groups of 1 and groups of more than 1. That is a crudest categorization of the spectrum of group power and influence that occurs with the mobbing form of group bullting. It appears to be a gross over-simplification of the sources of power held by organizational elements when public servants are talking ***truth to power***.

35

Seriousness, on the other hand, appears to have been scaled as 'somewhat serious', 'very serious', and 'extremely serious' [GUS III, p45]. That scale, if this has been accurately interpreted from the report, is both a subjective assessment by each respondee, and is also vulnerable to inconsistencies.

TWP does not recognize 'dissent' whistleblowing, it appears. The response by TWP to this pattern in the results may constitute a major credibility issue for TWP in the field of whistleblower research:

1. TWP claim to have discovered the strength of the retaliations being imposed by higher managers
2. TWP criticize other academics and whistleblower organizations for still being focused on 'dobbing' forms of whistleblowing
3. TWP do not give a name to this category of whistleblowers, which is not part of the 'dobbing mentality'.

The distinction is not carried further by TWP.

Unfortunately, TWP, for the main part of their analysis, appear to group all higher management under just one term, 'senior staff'. [An exception to this observation is the question put to a special group of whistleblowers, about whom those whistleblowers held responsible for the bad treatment they received. Here, 31% of whistleblowers held their CEO responsible]

Again it is not known if these deficiencies were due to the experience or the inexperience of the TWP, or to the influence of the watchdog authorities on the steering committee.

In the Press Release announcing the TWP (CMC 2005), the Project Manager stated that the areas of interest were the ***welfare*** of whistleblowers and the management of the ***associated internal conflicts***.

It appears that this focus, on management of internal conflict associated with disclosures against a co-worker, may have overlooked the phenomenon of conflict with internal management over disclosures of systemic wrongdoing and systemic bullying of staff by the organisation in its strategy for maintaining staff silence.

Again, once the surveys were completed without these primary information sets, the situation could only be recovered by doing a second restructured survey.

A second restructured survey was not done. TWP persevered with the survey results that appear to have been flawed by deficiencies in the inputs that had been received during the scoping and the design of the survey.

PART III – METHODOLOGIES

It follows from the latter concern that the methodology used by the TWP may not have sought, as much as whistleblowers might have preferred, to link into or build upon or extend the state of knowledge about whistleblowing that has been developed by past research in Australia.

It appears that the TWP might have first decided upon a survey technique and a survey framework, and then selected references from the literature where there was a useful association of ideas. Important criticisms of TWP might have been avoided if TWP had taken more from Miceli & Near (1984) than just the definition of whistleblowing.

The two major studies in Australia that the TWP might have allowed to guide their methodology were the research at University of Queensland by Jan and de Maria during 1992-5 [hence termed the UoQWS] and the research undertaken as part of the NSW Police Internal Witness Program in 2002-5 [hence the NSWIWP]. Both of these studies enjoyed consultative arrangements with whistleblower associations.

In the view of whistleblower organizations, these two benchmark research efforts gave primary leads to future whistleblower research. Those primary leads included:

- The need for longitudinal studies of the impacts on whistleblowers, their use of assistance and support mechanisms, and the effectiveness of those mechanisms
- The hierarchies of factors that determine the impacts experienced by whistleblowers, including the hierarchies, stratifications or levels of
    1. systemic wrongdoing in the organization
    2. employee / employee group or 'gang' against whom the disclosure is made, and,
    3. consequences for the wrongdoer if the disclosure is verified

Miceli & Near (1984), from where TWP selected its definition of whistleblowing, described another short-coming of cross-sectional survey – cause&effect relationships cannot be determined conclusively. Miceli & Near also expressed a desire for the opportunity of a controlled longitudinal study

The TWP, instead, has gone its own way, it seems, with:

- a survey adopting a cross-sectional analysis of experiences of public servants still in the service of their agency, and with
- a framework that expected whistleblowing to occur on an *ad hoc* basis within agencies, who were well intentioned about the welfare of whistleblowers and about correcting any wrongdoing disclosed, and who were supported by watchdog authorities with personal and organizational integrity.

Again, it is not clear as to whether the TWP took this path because of its experience or inexperience with whistleblowing situations, or because of the influence of the watchdog authorities on the steering committee, or because of the influence of agencies, exercised during the symposia and forums held exclusively with these watchdogs and agencies.

37

Let us look at each of these leads, given by the two benchmark studies, both of which were influenced directly by the whistleblower experience.

Longitudinal versus Cross-sectional Surveys. Figure 1 attempts a generic appraisal of the types of histories experienced by whistleblowers. The Figure allows for the cases of termination (by redundancy, sacking, forced resignation, induced resignation, induced illness), cases where people are adversely affected in other ways, cases where people are unaffected, and cases where people are rewarded for making their disclosures.

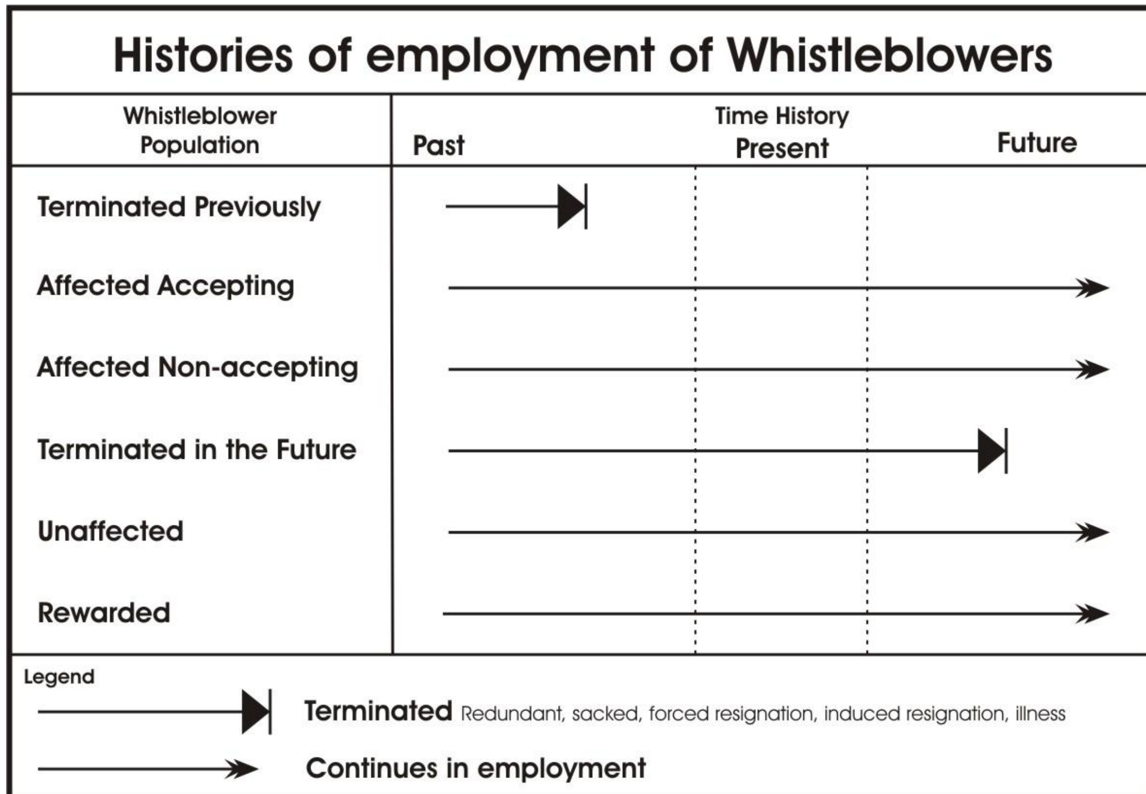

FIGURE 1: The Patterns to the Employment Histories of Whistleblowers

The diagram also allows for two situations for those affected by their whistleblowing: firstly, those who accept the disadvantages suffered, and, secondly, those who do not accept the reprisals and object to those disadvantages.

The UoQWS advertised for whistleblowers and for non-whistleblowers to come forward from the general community and to become participants in the research.

The author was one such participant.

A methodology for researching whistleblowing needs to **catch** all of these situations, else the research will be non-representative of the total whistleblowing phenomenon. The results will be biased statistically by any populations not fully represented in the survey.

The UoQWS approximated the longitudinal framework by recording the past histories of whistleblowers. The purview of whistleblower histories provided by this type of study is given at Figure 2. Their experiences were mapped, in some cases family members were interviewed, and a study was quantified of the collective outcomes coming to participants from agencies, watchdogs, and other organizations, and from support groups and support mechanisms.

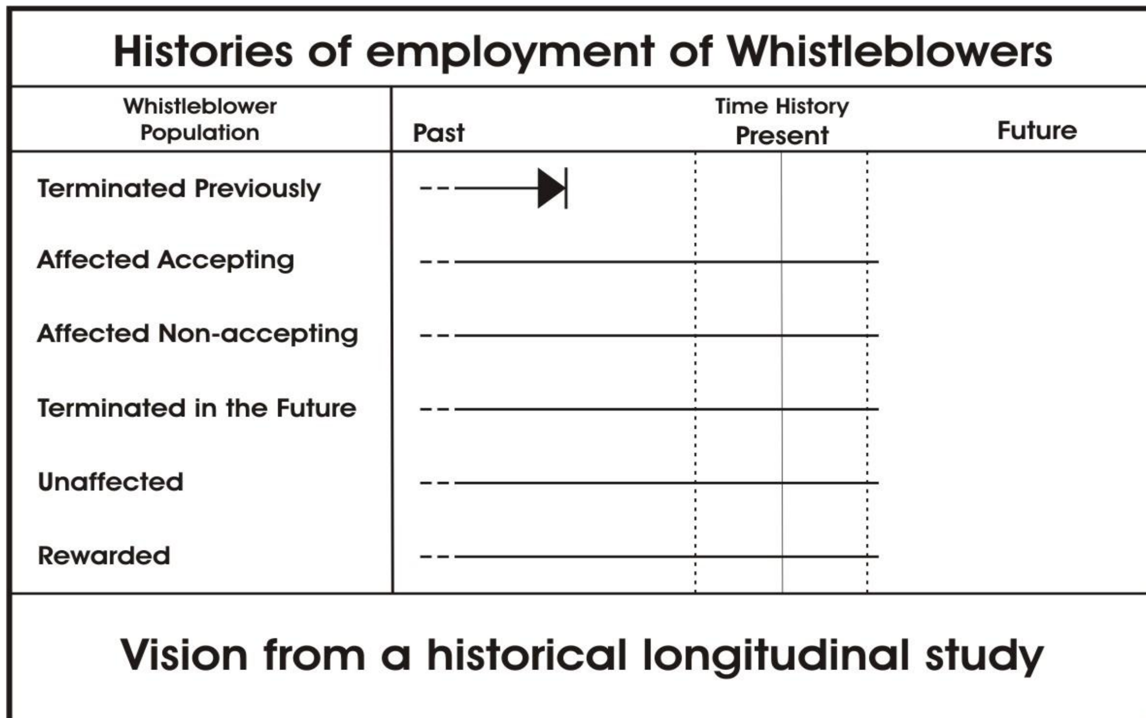

FIGURE 2: The Catch of Whistleblowers from a Historical Longitudinal Survey

The Australian Senate Select Committee on Whistleblowing during 1994-95 also interested itself in the histories of whistleblowers who made submissions and gave evidence at hearings, a weaker form of this methodology.

The results from the UoQWS therefore were a mapping of the common whistleblowing experience across all organisations.

While the Study obtained good insight into the whistleblowing record of the worst agencies (eg, Health, Corrective Services and Universities), it did not provide information on the rationale held by these agencies for acting in the way that they had.

The UoQWS was conducted before any impact of the purported Whistleblowers Protection Act (Qld) 1994 could be expected to be represented in the results.

While the UoQWS captured past terminations of whistleblowers, it did not capture future terminations. The Senate Whistleblowers who participated in the UoQWS, and who still

had their jobs in the Qld Public Service, did not know at the time of the study that they would all be terminated within the next five years. The value of the research could thus have been improved if it had had the funds to continue the longitudinal study forward.

The NSWIWP, from reports to Whistleblower Australia by its representatives on the steering committee for that study, was a tracking longitudinal study within a single organization (Whistleblowers Australia, 2004).

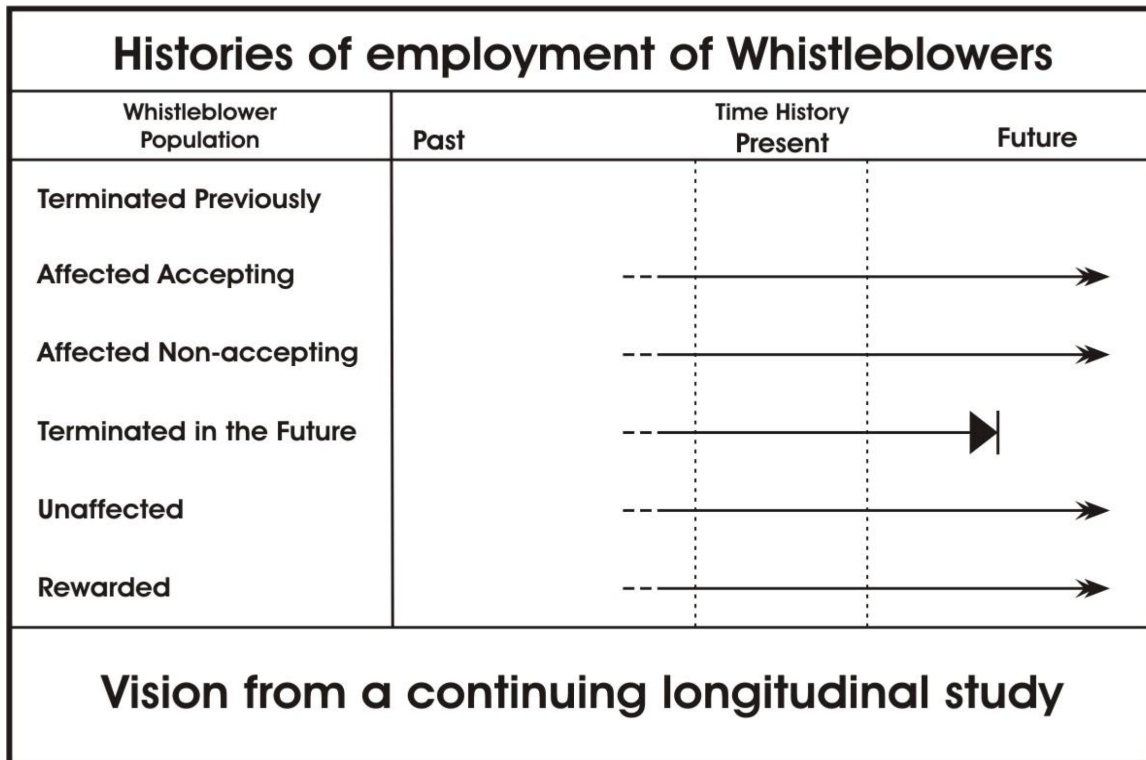

FIGURE 3: The Catch of Whistleblowers from a Tracking or Continuing Longitudinal Survey

This study followed the work experience of police officers after they had made disclosures, with a customized support program in place, and with monitoring of relevant outcomes for whistleblowers included in the study (not all whistleblowers were included). If our understanding of this confidential study is correct, the catch of the whistleblower population obtained from this approach is represented by Figure 3.

This NSWIWP study tracked the employment history that the whistleblowers, included in the study, received over a two year period. The study then made comparisons with the treatment of a population of police officers who had not made disclosures.

The NSWIWP also had the important dynamic that it was recording the treatment of whistleblowers during a period when the treatment was being monitored by a third party. The NSWIWP may have missed an opportunity to compare treatment of whistleblowers

before and after the initiation of the NSWIWP, in that the NSWIWP did not extend its longitudinal study into the past experiences of police whistleblowers in NSW.

The catch of whistleblowers available to the TWP, from its cross-sectional methodology, is given at Figure 4. By comparison with the UoQWS and the NSWIWP, the TWP is blinded by its methodology from observing and recording the worst aspects of whistleblower reprisals, namely, terminations (by whatever method).

Histories of employment of Whistleblowers

Whistleblower Population	Time History: Past	Present	Future
Terminated Previously			
Affected Accepting		-- ——— --	
Affected Non-accepting		-- ——— --	
Terminated in the Future		-- ——— --	
Unaffected		-- ——— --	
Rewarded		-- ——— --	

Vision from a cross sectional study

FIGURE 4: The Catch of whistleblowers from a Cross-Sectional Survey

By its design, TWP should not have received any contributions from any whistleblower who has been terminated. The responses that it did receive, describing bad treatment by terminations, must have been from public servants who were terminated in a previous agency within the prior two years.

This is because the whistleblowers who were already terminated should not have been there in the workplace to receive the survey. Further, the whistleblowers who would be terminated in the future did not know that this was to happen at the time that they responded to the survey.

Whistleblowers to whom the worst has happened are not involved in a cross-sectional study. Those who are involved do not yet know the worst of what will happen to them.

41

Not knowing now what has already happened, and what will happen in the future, will also be true of other whistleblowers who suffer other forms of reprisals.

As has been stated already, within 5 years of appearing before the Senate and making disclosures about wrongdoing in the Queensland Government, all of the Senate Whistleblowers from Queensland were no longer employees of the agencies against whom they made disclosures, and were no longer public servants.

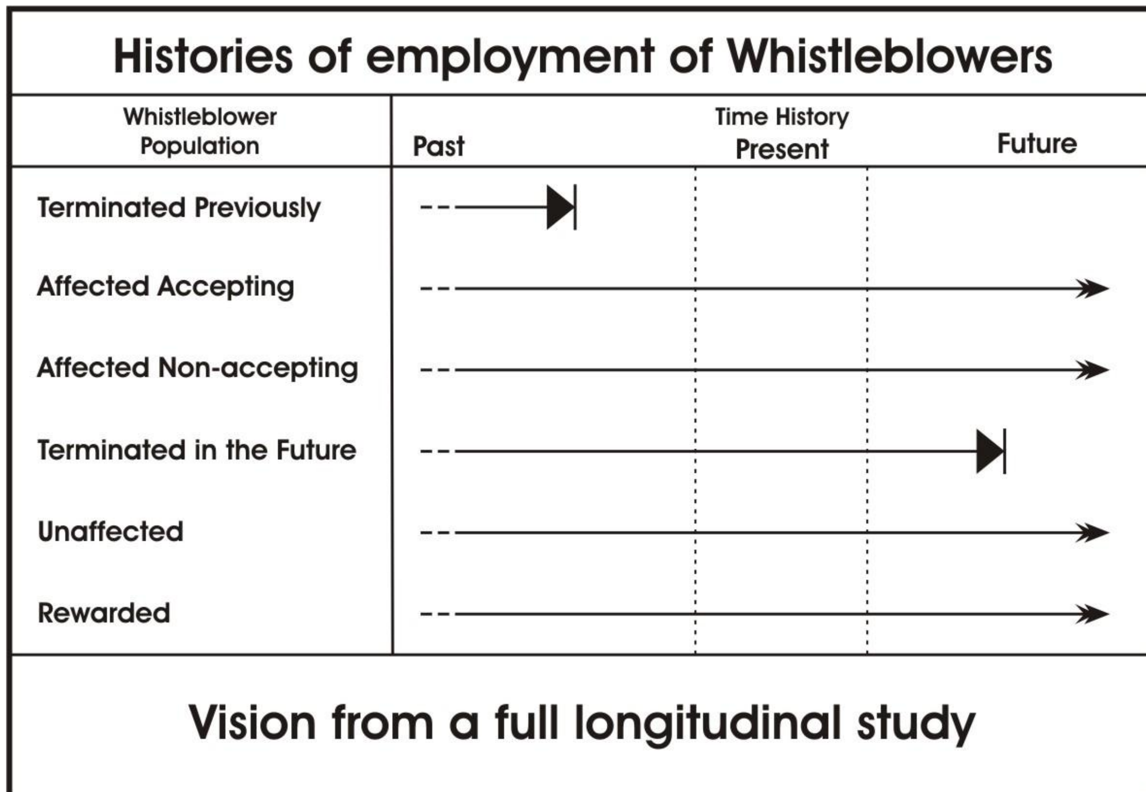

FIGURE 5: The Catch of Whistleblowers from a Full Longitudinal Study

A study of whistleblowing by Alford (2001) (reported in Sawyer 2008) gives an interesting time dimension to reprisals:

> ***The average length of time between blowing the whistle and being fired was about two years. Little of this time was taken up with appeals. Rather, most time was spent waiting for time to pass until management could adequately disconnect the act of whistleblowing from the act of retaliation.***

The whistleblowers *kept their heads down* and hoped, but they still got terminated.

The two years of the NSWIWP was long enough to capture the average period for termination of whistleblowers who made their disclosures recent to the start of the NSWIWP. The NSWIWP had the interest and the patience to follow the history of the whistleblower, and track the events and causes that affected them and their employment.

The UoQWS found whistleblowers who had already been terminated, and was able to map their history and the events and the causes that had affected them and their employment, including the post-termination experience for them and for their families.

Proper research procedures will adopt a longitudinal study paradigm, such as is shown in Figure 3 (used for the UoQWS) or Figure 4 (used by the NSW Internal Witness research program), as a minimum.

Both of these studies captured, in their results, the terminations of whistleblowers, and the worst of what happened to many of them

Figure 4, by comparison, illustrates the limited vision given of important whistleblower histories when the survey that is done is just a cross-section of current employees in an organization at one point in time.

By omitting terminated whistleblowers, and those influenced to leave because of the wrongdoing, the TWP is at a great disadvantage in representing whistleblowing. Such a study can be gathering little of the critical information relevant to the worst outcomes for whistleblowers.

Its results with respect to terminations and reprisals must be statistically biased.

The TWP can fairly be described as 'blinded' by its methodology in this respect, rather than enabled by that methodology.

Hierarchies of Wrongdoing. The two hierarchies of wrongdoing that appear, in the collected experience of whistleblower organizations, to have a significant impact on the outcome for the whistleblower are:

1. The Level of Systemic Wrongdoing involved in the matters disclosed
2. The Seriousness of the Wrongdoing disclosed by the whistleblower.

The seriousness of the wrongdoing. Taking the second of these first, the TWP categorises wrongdoing into 'types', and in doing this mixes up wrongdoing of vastly different levels of seriousness into the one 'type'. Thus, 'unlawfully destroying records', which can be a criminal act and a criminal conspiracy if the records are needed for litigation, is in the same 'type' as the activities termed 'covering-up poor performance' and ' false reporting of agency activity', colloquially known as 'spin' [see GUS II, Table 3.5, p64]. The dilution factor of 'destroying records' (the essence of the Heiner matter) with responses about 'spin' is 9 to 1 [GUS I, p43]

The design of the categories used by TWP does not reflect an increasing scale of seriousness, as would be required for using the seriousness of the disclosure as an indicator in compiling summaries of the survey data.

43

The TWP thus can have little to say, at least upon the basis of the work done by TWP, about the impact of the seriousness of the whistleblower's disclosure upon the outcome for the whistleblower.

The TWP, through mixing 'spin' activities with serious crime, appears to be diluting the latter. Thus the pool of results may only represent the lower more numerous levels of the total stratification of whistleblower situations outlined in Figure 6 below.

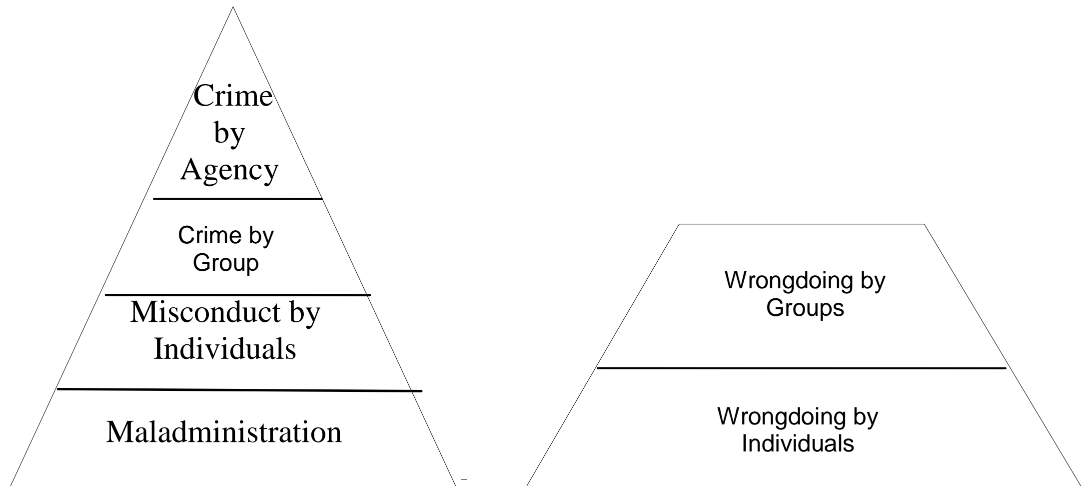

Figure 6: A Simplified Stratification and an Over-Simplified Stratification of Public Interest Whistleblower Situations

An attempt was nevertheless made by TWP to map 'seriousness', as perceived by the whistleblower, against the risk of bad treatment. The basis for the scale of 'seriousness' used is not clear, but may be each respondent's subjective assessment as to whether the matter that they disclosed was or was not serious (using 'somewhat', 'very', or 'extremely'- see GUS III, p45).

Even in this diluted pooling of the 'seriousness' of matters disclosed, the correlation with bad treatment was strongly positive [see GUS II, p147-150].

It is unfortunate that this was not realized before the survey was sent out, such that the matters disclosed by respondents could be categorised by a more objective and more descriptive scale of the level of 'seriousness'

The Level of Systemic Wrongdoing. This question is another example of the type of insight available from a study of major whistleblower cases. The information gathered on grievances by the TWP survey is less likely to describe situations of systemic corruption than would information gathered from the major whistleblower cases.

Figure 7 is a representation of what is termed **'ad hoc'** wrongdoing. The wrongdoers are in black, their supervisor is in yellow or marked with a cross, and those with review authority above the supervisors are marked in blue or with the Greek letter theta.

Wrongdoing, in this category, is occasional and sparse, involving an individual, or a small group of individuals. The wrongdoer could be in a supervisory or managerial position. Whistleblowing procedures are driven by management to ensure that wrongdoing is disclosed, that it is quickly eradicated, and that the ethical workers who have assisted the organization by their disclosures are protected.

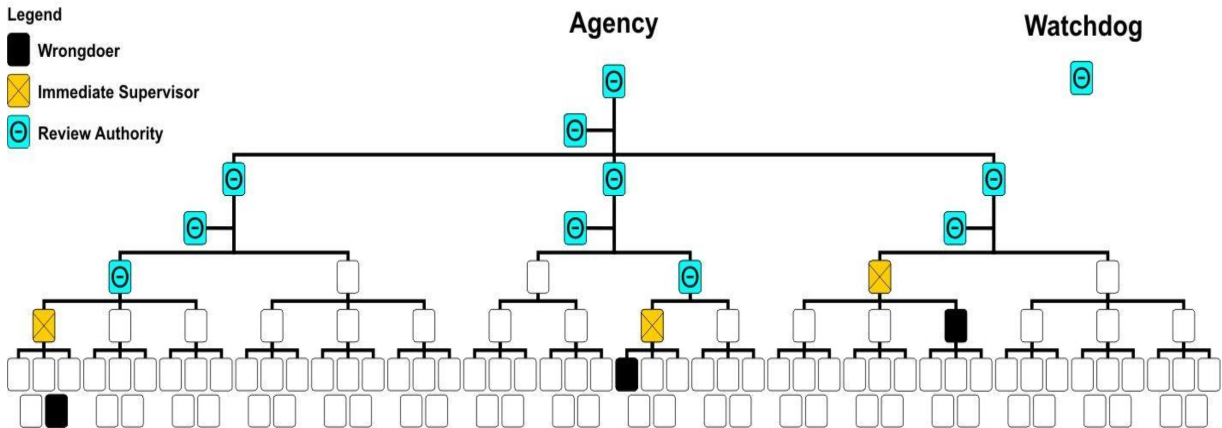

Figure 7: A Representative Mapping of ‘AD HOC Wrongdoing in an Organisation

When the potential whistleblower in Figure 7 looks up at their organization, they see a ‘sky’ of blue review authorities above them. Most line managers, senior managers, the CEO and the relevant watchdog authorities are not involved in the wrongdoing (they are coloured in ‘blue’, or marked with theta’s, on Figure 7). Staff officers who have a role supporting the integrity of the organization (internal auditors, equity officers, human resource managers, investigation officers, and the like) are also not involved in the wrongdoing. These Staff appointees are free to review any disclosed wrongdoing and any failure by a manager to properly supervise a wrongdoer (they are also coloured blue or marked with theta’s on the diagram).

This situation is termed the ‘blue sky’ organizational scenario. This is the situation most favourable to a good outcome for the whistleblower. If the supervisor is involved in the wrongdoing, or the supervisor acts to cover-up the wrongdoing by a subordinate in order to save themselves embarrassment at their lack of supervision, the situation is still not lost for the whistleblower. The whistleblower only needs to refer their complaint to the next higher authority, or to the watchdog. In any eventuality their disclosure will receive proper investigation from one of the several ‘blue’ review authorities above the blockage.

When whistleblowing is suppressed in these situations, it is presumed that the problem lies, not with the intent of the review authorities above the wrongdoing, but with:

1. Awareness, training and education levels of managers and staff
2. Processes developed or not developed by the agency or organisation
3. Resources available to responsible organizational authorities to handle the disclosures and the protection of the whistleblowers
4. Perceptions by whistleblowers and by managers that are incorrect.

This is in contrast with the any of the ‘black sky’ organizational scenarios, where the Executive and / or the watchdogs are involved in the wrongdoing. The ‘Nested’ form of what is termed the INTEGRATED Wrongdoing scenario (a Level 4 Corruption scenario) is depicted in Figure 8. Whistleblowing procedures here are designed to force the disclosure to be directed to a ‘safe’ officer, [‘safe’ meaning protective of the wrongdoers]. From the safe officer, any threat can be controlled by Denial, Delay, Destroying of evidence and Discrediting / Dismissal of the ethical worker.

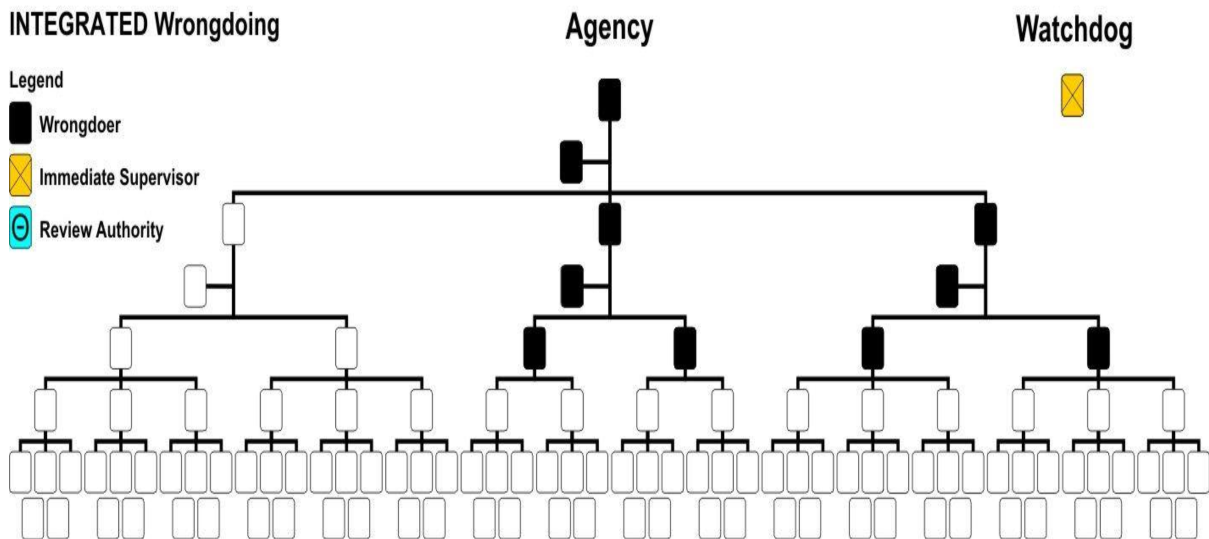

Figure 8: A Representative Mapping of Nested ‘INTEGRATED’ Wrongdoing in an Organisation

In Figure 8, for example, the CEO and a majority of the Executive Team, with the bulk of the Staff Officers who have a role in reporting the wrongdoing, including the most senior of these officers, are also involved by commission or by omission in the wrongdoing.

Corruption or wrongdoing in the AD HOC Wrongdoing scenario is **not systemic**.

The INTEGRATED Wrongdoing scenario is a case of **systemic corruption.** The full set of systemic corruption scenarios within organizations can be described as the following:

- **PLANNED** systemic corruption, as with, say, making ‘friendly’ appointments to the bureaucracy, to watchdog authorities or to the judiciary, or the setting of self-limiting terms of reference for investigations, or failures to carry out regulatory inspections. In this form of systemic wrongdoing, control of the organization is not held by the wrongdoers, and each wrongdoing thus needs to be planned [see Figure 9]
- **MANAGED** systemic corruption, as with, say, Police practices protecting criminals for a share of the profits, as exposed by then Sergeant Col Dillon during the Fitzgerald Inquiry. – the practices are conducted without interference or the threat of interference from higher management [see Figure 10]
- **INTEGRATED** systemic corruption, as with, say, the repeated falsification of hydrologic information, in order to justify proposals to build more dams and thus elongate the existence of the dam building organization. The practices become a part

of the organisation's methodology, as can the practices used to cover-up and to protect the cover-up of the practice [see Figure 11]. The situation where a watchdog refers a disclosure against an organization back to the organization that is the subject of the allegation, shows an integration of processes that may act to deny a fair review

- **OPTIMISED** systemic corruption, where the watchdogs are themselves involved. Reprisals against whistleblowers, or cover-up of criminal acts, can draw this level of systemic wrongdoing – for example, two watchdogs, one charged with investigating crime, the other with investigating maladministration; each tells the whistleblower that the disclosure is the responsibility of the other watchdog, and neither watchdog investigates, in full knowledge of the position taken by the other [see Figure 12].

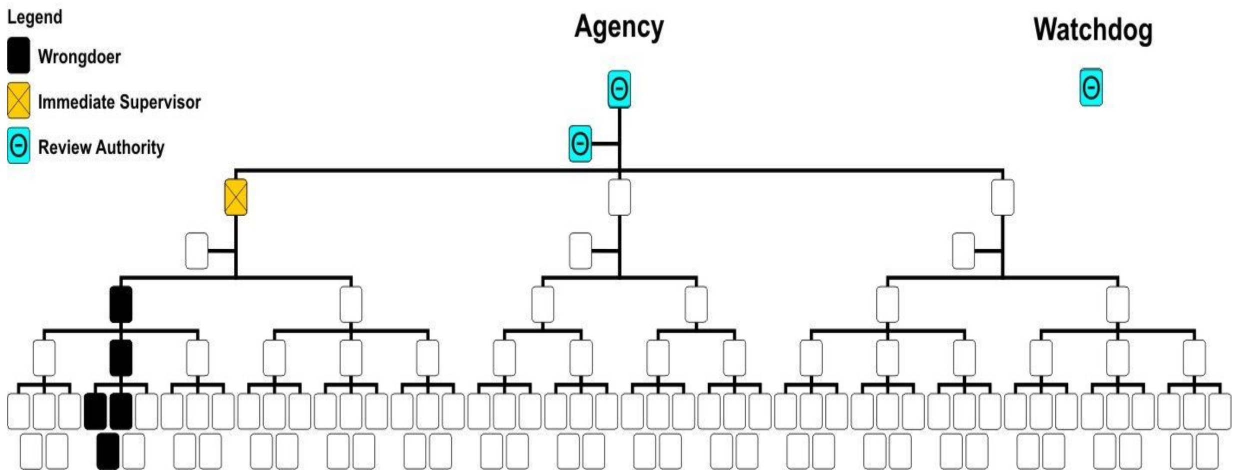

Figure 9: A Representative Mapping of 'PLANNED' Wrongdoing in an Agency

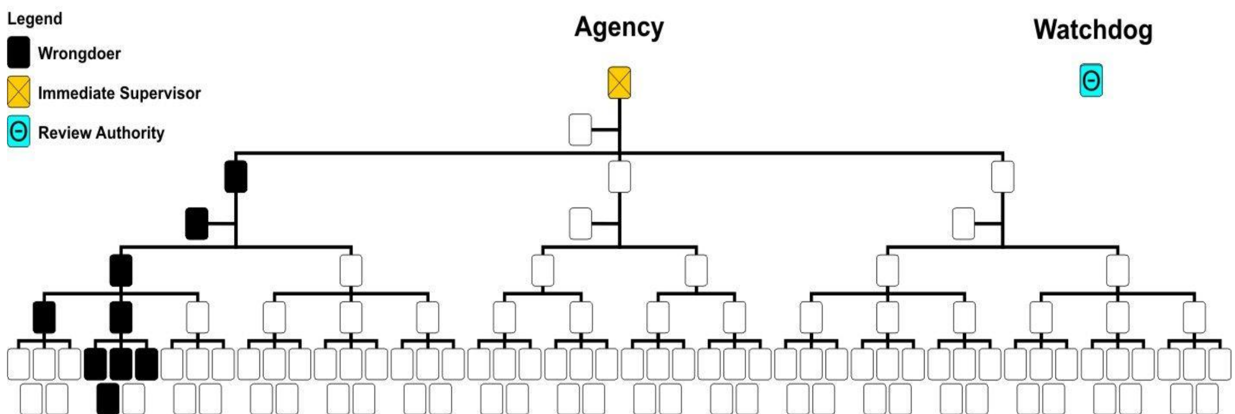

Figure 10: A Representative Mapping of 'MANAGED' Wrongdoing in an Agency

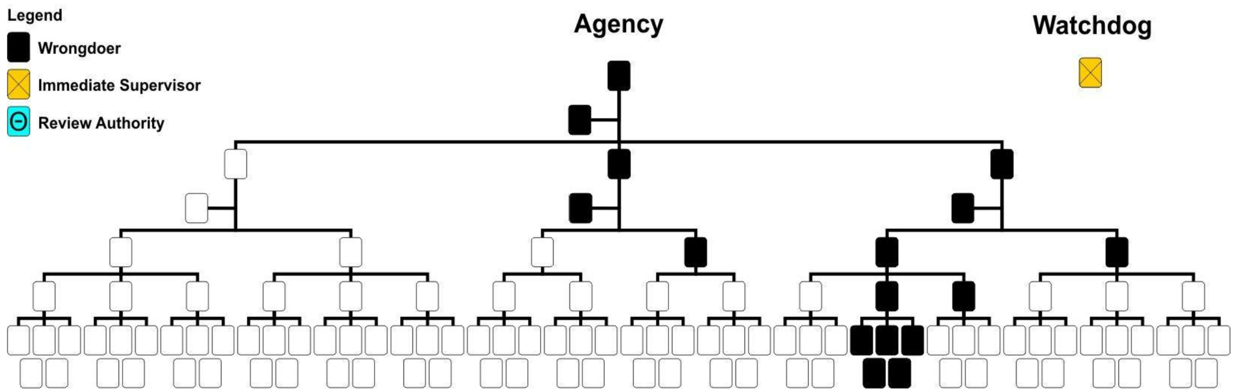

Figure 11: A Representative Mapping of Vertically 'INTEGRATED' Wrongdoing in an Agency

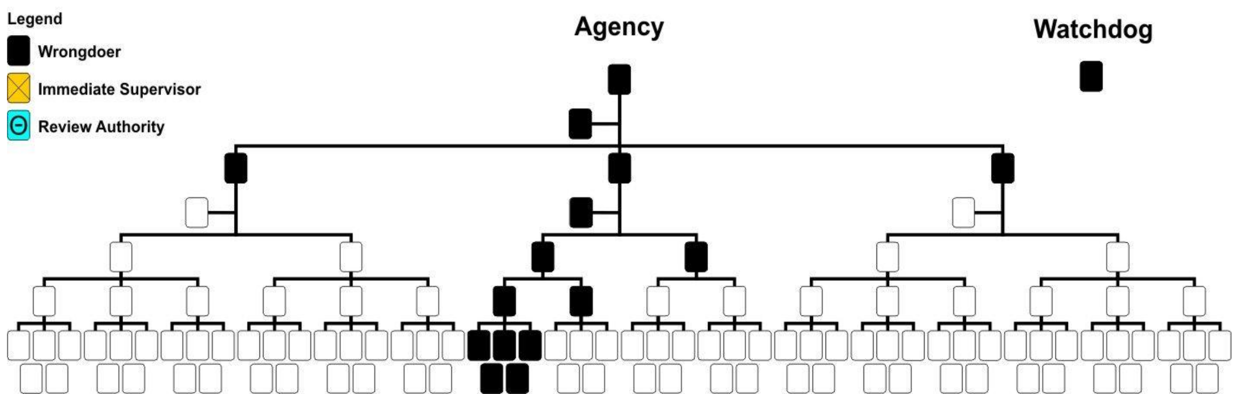

Figure 12: A Representative Mapping of 'OPTIMISED' Wrongdoing in an Agency

In the 'blue sky' organisational scenario, the act of disclosing wrongdoing is more likely to be against a colleague or subordinate. This whistleblowing situation has been colloquially termed 'dobbing'.

In the 'black sky' organizational scenario, the act of disclosing wrongdoing is more likely to be against more senior executives, against the organization, and against failures by the relevant watchdog authority. Such acts are termed 'dissent', 'resistance' or 'dissidence'.

The TWP has not reported any questioning in the survey about whether the parent organization of the respondee exhibited systemic wrongdoing. The analysis of the results from the questions that were asked appears to assume that a 'blue sky' dwelt above the whistleblower – the problems for the whistleblower, TWP presumes, had to be the result of education, communications, resources, processes, perceptions and the like.

48

The watchdogs too are favourably treated. They are termed ***'integrity organisations'***, and have not been categorised or analysed.

Only when questioned by this author, about the 'Well-intentioned-Agency' versus the 'Ill-intentioned-Agency' assumption, did the TWP add one comment upon its analysis – but the survey answers were already in, and any commenting about the Ill-intentioned Agency assumption was attempted without the benefit of survey data specifically addressing the systemic corruption issue.

TWP is substantially a survey into the 'dobbing' form of whistleblowing. Little inquiry has been made into the 'dissent' perspective to the same whistleblowing phenomenon.

Again, it is not clear as to whether the TWP took this 'Well-intentioned-Agency' assumption because of its experience or inexperience with whistleblowing situations, or because of the influence of the watchdog authorities represented on the steering committee. The host for the first meeting of the steering committee, CMC chair Needham, declared at the beginning that other research titled 'Speaking Up' had shown

> ***that investigating authorities can and do take internal disclosures seriously***
> (CMC 2005)

GUS I, II, III, and IV have not questioned that announcement by Needham, not even when the TWP findings suggested the opposite, in large measure. Such questioning may have put the TWP in a ***truth to power*** predicament with its Partners.

The TWP did provide data from a large number of public servants. If systemic corruption is real within the Agencies that were surveyed, their watchdogs and the Public Service, then there should still be the symptoms from that systemic wrongdoing in the results from TWP's survey. This should be expected, albeit that the survey may be flawed.

The TWP should still be a source for evidence of the presence, amongst the agencies and watchdogs, of systemic wrongdoing, if systemic corruption is a significant part of the public sector in Australia. Systemic wrongdoing, of the severity and continuity alleged by whistleblower organizations and by many, many individual whistleblowers, should have some impact upon the results.

The Ishikawa procedure for analyzing the causes of problems uses a test that might be applied to the results of the TWP, so as to predict the likelihood of systemic corruption in the agencies surveyed. We should be able to make predictions about what the results of the questions that were asked might be if a substantial number of the agencies were engaged in or affected by systemic wrongdoing.

If those predictions prove accurate, then the systemic corruption or 'Ill-intentioned-Agency' thesis may be supportable from the data that the TWP did assemble. At the very least, predictions that prove accurate should deny TWP any justification for ignoring or failing to address the systemically corrupt agency and / or watchdog scenario.

The Ishikawa Analysis. In this approach, derived for identifying the likely real causes of a problem, and here applied to the causes of wrongdoing, the question is asked;

> ***If systemic corruption was a major cause of the wrongdoing problem that we are addressing, what else would this systemic corruption cause?***

The problem solver then looks for these other symptoms of the systemic corruption hypothesis. If, then, these symptoms are found, confidence is gained that the postulated cause is a real force in the outcomes that are being observed.

We repeat Figure 7 (the ***'blue sky'*** situation) and Figure 8 (one ***'black sky'*** situation) for use in this Ishikawa Analysis.

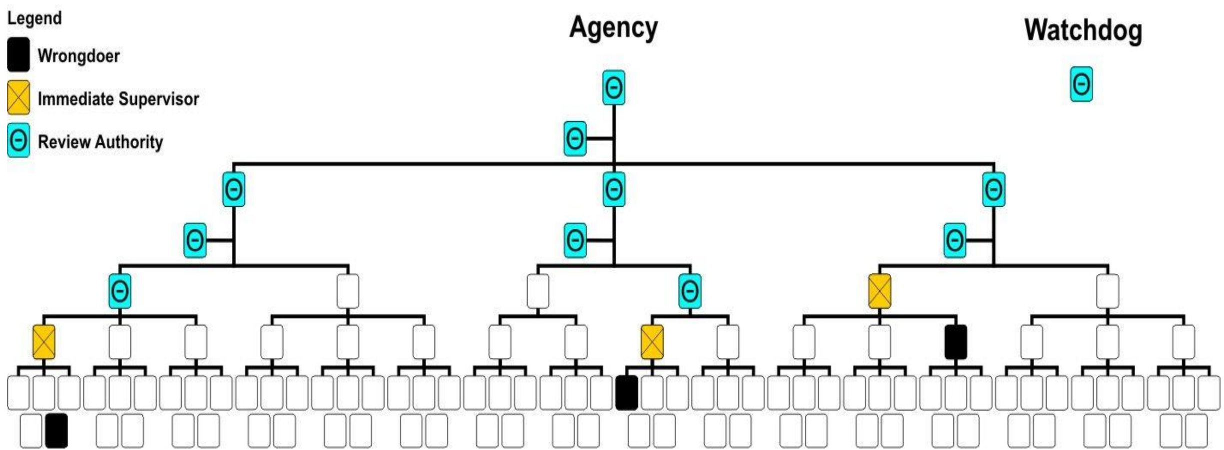

Figure 7 (repeated): A Representative Mapping of 'AD HOC Wrongdoing in an Organisation

Figure 8 (repeated): A Representative Mapping of Nested 'INTEGRATED' Wrongdoing in an Organisation

We will take a modified or comparative Ishikawa approach, put down the results on significant factors that TWP did report, and ask:

> ***Which of the above scenarios is more likely to have caused these major statistics from the TWP survey?***

Finding A: 71% of respondents have witnessed or have direct evidence of wrongdoing, and 61% witnessed wrongdoing that was somewhat serious and occurred in the last 2 years [GUS II, p28-30]. Is such a high figure more likely where wrongdoing is ad hoc or where it is systemic? Would so many witness wrongdoing in an Ad Hoc scenario?

Finding B: 57% [GUS III, p36] or 61 % [GUS II, p31] of public servants who observed wrongdoing did not report the wrongdoing. This is the Whistleblower Silence Situation. Would so many hesitate in the employ of a well intentioned agency? Is it a lack of ethics amongst the employees, or a presence of deterrents in the agency, that may have caused so many to turn away from making disclosures?

Finding C: :80% of public servants who did not report wrongdoing that they saw decided to remain silent because they expected that nothing would be done about the disclosure or about protecting them from reprisals [GUS I, p49]. May not this figure tend to show a consistent close-out being effected upon integrity reporting?

Also, 82 to 91% of public servants, who gave fear of reprisal as their reason for not reporting, were referring to a fear of reprisals from senior managers [GUS II p73-74]. For these public servants, is this fear factor not consistent with a ‘black sky’ scenario and / or inconsistent with the ‘blue sky’ scenario?

Finding D: 44% of a selected whistleblower group (termed ‘internal witnesses) ‘believe’ that their disclosures were <u>not</u> investigated [GUS II, p112] – ‘believe’ is used as 68% of selected whistleblower group were not informed or not very informed about the outcome of their disclosure [GUS II, p118]. May not this figure tend to show a close-out being effected upon feedback to integrity workers who made disclosures?

Finding E: No effective action was taken to address the wrongdoing in 81% of disclosures which, upon investigation, did detect wrongdoing [GUS II, p115]. May not this figure tend to show a close-out in place upon adverse findings from investigations?

Finding F: 29% of whistleblowers were ‘role reporters’, that is, Staff officers who held responsibilities for reporting wrongdoing in their organizations [GUS II, p35]. Does this mean that 71% are not looking for wrongdoing, are looking but have found nothing (in their role reporting responsibilities) to report, or are not reporting what they have found? Are these results linked to Findings C, D and E?

Finding G: 51% of public servants, and 61% of the selected whistleblower group, who made a first disclosure, did not disclose a second time [GUS II, p90-91, & III, p50]. In combination with Findings C (silence rates), D (investigation rates) and E (corrective action rates), why did these whistleblowers stop after their first disclosure?

Finding H: Extract GUS II, p156:

> When the number of internal reporting stages was restricted to one, reporters were much less likely to indicate poor treatment. Where persistence attracts worse treatment, does this not indicate that there may be no 'blue sky' above the wrongdoing?

Finding I: Risk of bad treatment increases by a factor of 4 to 5 if the investigation did not remain internal [GUS II, p149-150]. May not this figure tend to show a close-out being effected upon integrity reporting to external watchdogs?

Finding J: 78% of reprisals are initiated by managers, against 25% being initiated by colleagues, (with no exploration of cases where the colleagues are reprising at the instigation of, or through coercion by, the manager) [GUS I, p88]. Does not the comparison indicate that the interests being threatened by the whistleblower, three times out of four, are those of the management of the organization? Is this fear factor not consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario?

Finding K: 31% of the selected whistleblower group held CEO's mainly responsible for the deliberate bad treatment and harm that they received [GUS II, p130]. For a large portion of agencies, is this judgment not consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario?

Finding L: 89% of all agencies do <u>not</u> have whistleblower support systems, and 98% of agencies do <u>not</u> have procedures that comply with the Australian Standard [GUS II, p230 & 235].This is recorded more than a decade after the introduction of whistleblower protection legislation in most jurisdictions in Australia. Are not these statistics consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario? May not these figures tend to show a close-out being effected upon whistleblower protection?

Finding M: 11% of public servants (and 30% of selected whistleblowers) make disclosures to external bodies (ie watchdogs) [GUS II, p90-91]. Given the failures of internal reporting systems indicated in Findings B, C, D, E, I, J, K and L, may not these figures also tend to show a close-out being effected upon integrity reporting to external watchdogs?

Finding N: 66% of the selected whistleblowers group, 38% of whom went external in their reporting of the wrongdoing within their agency, reported bad treatment [GUS I, p84-86; p62 & GUS II, p124-128]. May not these figures also tend to show that, the greater the proportion of a population that make disclosures externally, the greater is the proportion that suffer reprisals. May not then these figures also tend to show a close-out being effected upon integrity reporting to external watchdogs?

Finding O: The most accurate opinions from the different sets of managers and case handlers came from those that had the lowest opinion of the success of organizations- that is, the lowest reporting rates and the highest inaction rates [GUS I, p34]. May this trend

be extrapolated to suggest that, if the respondees had an even lower opinion of agencies, including the view that they exhibited systemic corruption, the opinions received would be more accurate again?

Finding P: Extract GUS III, p52:

> Many integrity agencies adopt a policy of filtering reports received and referring some of those back to the agency where the reporter was employed.
> As one manager explained the situation:
>
> > ***It's very rare for*** (the integrity agencies) ***to investigate … essentially it's rare for them to investigate.***

May not this opinion from a manager also tend to show that, given the failures of internal reporting systems indicated in Findings B, C, D, E, I, J, K, L, M and N, a close-out is being effected upon integrity reporting to external watchdogs as well, and that the usual actions by watchdog authorities are a part of that close-out effect?

Finding P may be tending to show **Level 5 OPTIMISED Wrongdoing**. Of course, when systemic corruption has been optimized, the 'black sky' environment would, by definition, have been successful in painting itself 'blue'.

That is the role of government 'spin', to paint 'black' situations as 'blue'.

Albeit the strengths of the above results may have been diluted and or distorted by structural flaws in the survey, namely-

- the wide inclusions in the definition of whistleblowers,
- the failure to test for any stratification in the results with the seriousness of the wrongdoing disclosed, and
- the 'soup' of results mixed across all agencies irrespective of whether they exhibit AD HOC wrongdoing or degrees of SYSTEMIC wrongdoing-

the reported TWP figures do provide results that are supportive of the 'black sky' organizational scenario more so than they reflect the 'blue sky' scenario.

On the above Findings, the 'black' hypothesis, that 'black sky' or systemic corruption environments may dominate some agencies amongst the agencies surveyed, is about three times more persuasive than the 'blue' hypothesis, that agencies are troubled mainly by non-systemic or AD HOC patterns of wrongdoing.

The principal criticism that can be directed at the TWP is that the figures tend to show that the 'Well-intentioned Agency (and Watchdog)' assumption may not be consistent with these results. Therefore the alternative scenario of the 'Ill-intentioned Agency (and Watchdog)' should have been incorporated into the survey, with and alongside the 'Well-intentioned Agency' situation. If all legitimate scenarios had been included in the survey, the results might have captured the breadth and the detail of the agency and watchdog environment faced by integrity workers. It might also have assessed the environment faced by managers and Staff officers in agencies and watchdogs who do have integrity.

The ‘dobbing’ phenomenon, on the weight of evidence from TWP’s own surveys, appears to be a minor scenario. It would not be ‘minor’ for the whistleblower suffering reprisals. In the sense of relative occurrences of the different sources of reprisals, however, the reprisals from co-workers is a secondary source within agencies, not the primary source.

The major scenario, possibly three times stronger than the ‘dobbing’ or Ad Hoc Wrongdoing scenario, appears to be the ‘dissent’ whistleblowing scenario. Exposure by disclosure, of wrongdoing by upper and / or top management, and by the relevant watchdog, must be a possible cause of the retaliation patterns uncovered.

TWP has used the phrase, ‘systemic’ wrongdoing, in its report; for example:

> ***The nature and characteristics of the perceived wrongdoing appear pivotal in determining when whistleblowing will result in a bad experience. … the wrongdoing … was more likely to be more frequent or systemic; to involve more people in the organization; and, most importantly, to involve people more senior than the whistleblower.***

The only parameter in this argument that has not been directly or indirectly measured, to any degree by the structured questions in the TWP survey, appears to be the phenomenon of ***systemic*** wrongdoing.

The TWP, and its definition and categorization of whistleblowing, appear not to understand the predominance of dissent in the phenomenon of whistleblowing occurring within public sector agencies within Australia.

The TWP appear not to have pursued the logic in that direction. The TWP appears not to contemplate the systemic corruption hypothesis, not even to dismiss it.

When TWP discover the above findings, they are described as ‘unexpected’, the results are stated to be ‘new’, but the Ad Hoc Wrongdoing assumption is not critically examined.

The ‘blunder’ that TWP has made is attributed by TWP to others. Whistleblower organizations and UoQWS are criticized for the irrelevance of their ‘anti-dobbing mentality’. TWP also asserts the existence of a ‘wide belief’ that whistleblowing is about ‘dobbing’ on co-workers and reprisals from co-workers [GUS II, p 121 & 143].

The organizations criticized by TWP, however, are on the public record about the dominance of ‘dissent’ whistleblowing rather than ‘dobbing’ whistleblowing in the grief that is brought upon integrity workers. They have drawn the attention of the public to the allegations of systemic corruption of agencies, and of the regulatory capture of watchdogs. TWP actually cites Lennane (from Whistleblowers Australia) and de Maria (from UoQWS) as the sources of the notion of ‘organizational dissent’ [GUS I, p6]. TWP could have cited former President Brian Martin who has a website for access to his many writings on whistleblowing and dissent (Martin 1993-2009). The author of this review as National Director of Whistleblowers Australia has followed these themes (McMahon

2001, 2002, 2005). De Maria in particular is poorly served by the remark, having a decade previously written reviewed papers with titles like

- 'Quarantining Dissent: Queensland Public Service Ethics Act' (Australian Journal of Public Administration December 1995) and
- 'Eating its own: the whistleblower's oganisation in vendetta mode' (Australian Journal of Social Issues, vol 32, no 1, February 1997)

In this respect, TWP may be doing itself discredit, which does not gain the credibility that might be a pre-requisite for any thesis on integrity systems. The error of assuming AD HOC Wrongdoing in agencies and watchdogs, without allowing for Systemic Wrongdoing in these same bodies, denying the historical knowledge that we have of such organizations, was TWP's error alone.

Miceli & Near (1984), from where TWP selected its definition of 'whistleblowing', discusses the situation where ***'an organization is dependent on a questionable practice'*** (a situation of systemic wrongdoing), and organizations have been ***'well socialized to believe that organisational dissidence is undesirable',*** (a reference to the dissidence or dissent whistleblowing situation)**.** TWP clearly read this paper, and can reasonably be held to have known about the presence of systemic wrongdoing scenarios and of dissidence or dissent whistleblowing in the literature.

It is not clear as to whether the TWP took its own course because of its experience or inexperience with whistleblowing situations, or because of the influence of the watchdog authorities on the steering committee, or because of the milestone forums and workshops that TWP conducted with the agencies.

Having recorded the higher retaliation rates that were imposed by senior managers, TWP realized the error in their assumption. The association of the unexpected results with systemic corruption, however, was not made. Instead, explanations were canvassed by TWP only as to how such results could come from well intentioned agencies.

Corollaries.

A corollary to the above mistake is a second mistake by TWP. TWP excluded the responses from Staff officers who had responsibilities in their organizations for disclosing wrongdoing (termed ***'role reporters'*** by TWP).

In the dissent whistleblowing scenarios, these Staff appointees are situated amongst the 'black clouds' of the systemic wrongdoing. The 'systems' for perpetrating the wrongdoing, and for maintaining the cover-up of the wrongdoing, depend greatly on the complicity, by omission or commission, of these Staff. Their input should be insightful to the whistleblowing situations associated with dissent whistleblowing – how many if any had long periods acting in the role before permanent appointments, interactions with ministerial advisers, interference with investigations, rewrites of reports by senior line managers, and other mechanisms of control, agreed destruction of all copies of documents to avoid possible release of them through Freedom of Information.

A further corollary to the systemic corruption scenario is the rationale that agencies may have when the agency rewards the whistleblower, versus when they punish the whistleblower. Under the 'black sky' versus 'blue sky' situations, do some public officers benefit in their employment after and because of their disclosures, or does the benefit arrive after and because they ceased to make further disclosures (when they took the cues given to them by the corrupted organization, and / or they realized that the agency was not going to act)? The NSW Police Department, allegedly suffering from systemic corruption, apparently benchmarked, in their NSWIWP study, the employment events for whistleblower police officers against those of officers who were not whistleblowers.

The TWP does not come near to this issue. All rewards appear to be assumed, by TWP, as legal, normal, well intentioned and deserved.

A third corollary concerns the purpose to which agencies, in the 'black sky' systemic corruption scenarios, put the whistleblowing procedures that the organizations do publish and use. The Findings from the TWP indicate that a Dead Hand response can be given to disclosures made internally, and that a Hard Hand response can be made when disclosures are made externally. The Dead Hand / Hard Hand result leads a pattern to the listed Findings that appears strongly suggestive of a possible systemic close-out strategy being applied to whistleblowing.

A dissenting whistleblower can show dissent to the strategy adopted by management to close-out the whistleblower's disclosure. The 'dissent' hypothesis, that agencies allow workers to make one disclosure internally, but will apply adverse treatment if the worker does not accept the Dead Hand placed upon that first disclosure, appears to be consistent with the results from the survey by the TWP.

Further, the pattern to the many instances of public servants, either

- not making any disclosure of observed wrongdoing or of
- making only one disclosure of observed wrongdoing, and remaining silent thereafter,

may be a group behaviour displaying the phenomenon of **compliance,** rather than an aspect of whistleblowing.

The TWP has failed to survey for any of these corollaries, it appears from GUS I, II, III and IV.

56

PART IV – OUTPUTS

The inputs and methods used by the TWP have led to the following concerns about the results of the cross-sectional survey conducted, and about the conclusions drawn from those results.

A. The results have been diluted. This has occurred through the numerous personnel grievances [49%, see GUS III, p45] that have been included in the collected results. This has been caused by the definition of whistleblowing used by the TWP.

B. The results have been smoothed. Serious allegations lead to serious reprisals, the research by others has shown (eg, QUS I & II, Dempster 1997). Categorisations that have mixed the most serious disclosures with the less serious have denied a perspective of the less numerous more serious events reported by the participants. This mixing factor was 9 to 1 on one issue of interest to this author. Crude categorizations have also acted to smooth any peaks to relationships between important parameters.

C. The results have been blind-sided with respect to:

1. The worst reprisals imposed on whistleblowers, namely, termination, in all its forms. The cross-sectional survey methodology used theoretically can not capture information from whistleblowers who are no longer in the agency. Those who will be terminated do not know this and will not be able to describe the processes yet to emerge.
2. The dominance of '**dissent**' whistleblowing against ill-intentioned agencies intent on a close-out of the disclosure, over '**dobbing**' whistleblowing against colleagues or co-workers in a well-intentioned agency intent on correcting wrongdoing.
3. The existence of **systemic corruption** amongst agencies and watchdogs within the jurisdictions participating in the surveys

With respect to these difficulties:

- TWP has sought to differentiate the types of whistleblowing within its results, so as to reduce the dilution effect. It does require concentration when reading the reports to keep focus on which of the several populations are being discussed. There are frequent switches. In important areas, too, the TWP prefers to follow the results from diluted populations, such as in the controversial claim that only 22% of whistleblowers are harmed
- TWP has sought to analyse some stratifications in the results, namely, with respect to the seriousness of the matter disclosed. The analysis appears to be based on a crude and subjective scale of seriousness, however, thus smoothing of the results is still expected
- TWP has simply stated that it has not captured the data from whistleblowers who have left the agency. It appears that TWP may feel that acknowledging the deficiency is enough. The justification for choosing the cross-sectional methodology, in lieu of the longitudinal methodology, is not offered. Efforts to

57

overcome the disadvantage are not made. One argument by TWP claims that the data distorted by the deficiency is real data – another detraction from the credibility of the TWP

- TWP has identified some patterns in the results that are suggestive of 'dissent' whistleblowing and of systemic corruption of agencies and watchdogs. TWP, however, tries to analyse and explain these patterns within an assumption of well-intentioned agencies and watchdogs

In these responses to its difficulties, the outcomes from the TWP appear to show two further tendencies:

1. **Weak Linkages to the State of Knowledge about Whistleblowing**, including the knowledge held about pre-existing research and about the recorded history of whistleblowing cases in the jurisdictions studied; and,
2. A perception of **a pre-disposition** or **bias** towards TWP's original TOR that: ***investigating authorities can and do take internal disclosures seriously*** (CMC 2005)

Linkages to the State of Knowledge. Aspects that might be considered here include:

- Lessons from recent history of corruption in Australian Federal and State jurisdictions
- Findings from recent research on whistleblowing and associated subjects

Lessons from Recent Political History. There may not have been a historian or a political scientist on the TWP. Either discipline might have reminded the TWP of the recent experience of Ministers, Heads of Agencies and of Watchdogs who have been removed and / or imprisoned because of the allegations of systemic corruption in the organisations that they headed. Even a TWP member who read the paper would be able to remind the TWP that systemic corruption has happened in the recent past.

Two primary examples are derived from the reports of TWP.

Both examples bear upon the occurrence of Level 5 Systemic Wrongdoing, termed OPTIMISED Wrongdoing. For Level 5 to occur, the agency at issue needs to have 'captured' the relevant watchdog into the agency's systemic wrongdoing, either by involvement in the wrongdoing but more usually by 'looking away' from the wrongdoing or legitimizing the systemic wrongdoing in some way.

This capture is termed 'Regulatory Capture'.

Briody and Prenzler (1998) attributed the occurrence of regulatory capture to either 'systemic capture' (procuration of an entire regulatory system by the regulated industry) or 'undue influence' (personnel exchange, identification with values through frequent contact, direct corruption). Their paper was heavily influenced by the disclosures of Jim Leggate before the Matthews Inquiry (Matthews QC, 1994). Their paper concluded that there was a strong prima case of capture of the mining regulator reported by O'Malley (2002). The paper explained the cause of capture for the mining regulator as a tradition of

under-enforcement based on a non-prosecutorial history. So capture can become ingrown, cultural, inherent. The Briody and Prenzler (1998) paper was complimented by the West Australian Royal Commission on Finance Broking (Temby QC, 2001).

Grabosky and Braithwaite (1986) describe circumstances where 'capture' is more readily effected. These pre-conditions include where only one industry is being regulated, where the regulator is part of a larger organisation, where there is conflict between the regulator and the regulated, where regular contact occurs between the regulator and the regulated, and / or where significant personnel interchange occurs between the regulator and the regulated. The Defence Force Ombudsman Office, for example, may need to be wary of these 'pre-conditions' with respect to the Australian Defence Force.

An additional comment by Briody and Prenzler (1998), on the significance of threats to agency survival on an agency's behaviour, corresponds with the author's views on causes of capture. The author (McMahon, 2001) prefers a concept of self-capture, internally organised and orchestrated, because of some 'impossibility' that the executive of an organisation sees or perceives about their strategic situation. Miceli & Near (1984) recite the situation of the organisation that ***is dependent on a questionable practice.***

Examples of the 'impossibility' cause can be

- a watchdog that has been given insufficient resources to meet its responsibilities, and can only meet its workloads by ignoring matters with merit.
- a dam building agency that has run out of economic dam sites, and decides to publish inaccurate hydrology and economic impact figures for dam proposals
- a watchdog that compromised its integrity on an earlier political scandal and needs to adhere to the 'rogue' law that it used on that earlier occasion.

The Australian Defence Force. The 'military' were a 'participating agency' in the TWP [GUS II, p17]. The 'military' is the only agency that has been named by TWP as a participant.

It is the only agency, therefore, which can be evaluated for any allegations of systemic wrongdoing. If such allegations exist for the military, then the treatment of the military as a Well-intentioned Agency, as an agency exhibiting AD HOC wrongdoing only, or as a 'blue sky' organisation, can be discussed.

[Does the Australian Defence Force face allegations of systemic wrongdoing in any of its functions?]

The history of the Australian Defence Force regarding the alleged mistreatment of whistleblowers is well documented in reports by credible authorities (Street & Fisher 2009).

On 26 June 2008, the Senate Standing Committee on Foreign Affairs, Defence and Trade asked the Defence Force Ombudsman's Office [hence DFO] if there had been any

complaints of reprisals after members had lodged grievances in the administrative justice system (Hansard, 2006, FAD&T 5-6)

The Australian Senate is separately monitoring the treatment of whistleblowers in the Australian Defence Force. This follows 11 inquiries since 1997 into failures within the military justice system. During the period of the TWP, the Senate effected a separation of the Australian Defence Force's disciplinary system away from the military managers who had been systemically corrupting, allegedly, the disciplinary processes.

One notable driver for this separation was the alleged practice by military managers of including, in an officer's performance appraisal, what an officer did when sitting on a court martial board deciding on the guilt of a service person.

Using adverse performance reports to punish members for decisions made in integrity roles (auditors, training assessors, investigating officers, court martial boards) is an allegation often made about military managers

The Whistleblower organizations have described to recent Government inquiries how the Australian Defence Force allegedly uses its two Whistleblower Protection Schemes to control disclosures about wrongdoing, rather than to protect whistleblowers (McMahon 2008 and 2008a).

From the perspective of Defence whistleblowers, the Senate's efforts over a 12 year period appear to have been largely ineffective, and need to be continued.

Allegedly, military managers, having had the Disciplinary system shifted from their influence and control, may now appear, allegedly, to be seeking to 'discipline' members using the Administrative system rather than the Disciplinary system.

[What is the view of the Australian Defence Force?]

The Australian Defence Force, however, is arguing that the military justice system, including the Administrative justice system, is now reformed.

A Learning Culture Inquiry ordered by the Chief of the Defence Force and conducted in 2005-06 found that there were no instances of bullying or harassment in Defence Training Establishments.

To the Senate Committee, the DFO representatives spoke of personal meetings with the leadership of the Defence Force and of the leadership's ***strong personal commitment … in ensuring that the problems exposed … have been accepted and recommendations implemented***, and of being ***impressed by the positive response*** that was received

The DFO is involved in presentations to other public and private organizations advocating the Australian Defence Forces 'reformed' administrative justice system as best practice (Street & Fisher 2008, para 90).

Street & Fisher (para 101) have also described the ***'systemic issues'*** as ***'past'*** and ***'no longer a risk'***, with any future occurrences to be only ***'isolated incidents'***. These descriptions are very close to the 'blue sky' or AD HOC Wrongdoing scenarios outlined in this review.

[The issue then is whether the Defence Force, which was a 'Black sky' organisation, is now a 'true blue' agency, or has just been painted 'blue' by the Defence Force.]

Recall the pre-conditions to regulatory capture by Grabosky and Braithwaite (1986)
1. where only one industry is being regulated,
2. where the regulator is part of a larger organisation,
3. where there is conflict between the regulator and the regulated,
4. where regular contact occurs between the regulator and the regulated, and / or
5. where significant personnel interchange occurs between regulator and regulated.

Given the public endorsement by the DFO of the Defence Force's administrative justice system, the DFO would be in a conflict of interest situation when any military member presented the DFO with evidence of a continuation of illegal punishments being imposed by military managers. This conflict would be greater where the complaint was from a responsible professional defending their subordinates against any bullying, harassment, victimization or other form of mistreatment.

Given the public endorsement, by the DFO, of the personal commitment by the leadership of the Defence Force to implementation of justice systems, the DFO would be in a conflict of interest situation when any military member presented the DFO with evidence of a decision by the leadership of the Defence Force denying the member a recommended administrative practice.

According to McMahon (2008, 2008a), such a Defence whistleblower has emerged.

[How did the watchdog authority respond?]

The issue reported in McMahon (2008, 2008a), that was critical of the DFO, was the failure of the DFO to require Defence authorities to give reasons for decisions.

Street & Fisher (2009, para 110) stated that giving detailed reasons is a ***must***. The italics were added by Street QC.

> As the final arbiters of many personal performance decisions, commanders and managers ***must*** provide a clear Statement of Reasons (SOR) for their executive decision-making.

The Defence whistleblower described in McMahon (2008, 2008a) complained that the DFO had required the Defence authorities to provide detailed reasons in an earlier

incidence, but were now refusing to require the Defence authorities to provide the ***must*** of these detailed reasons for a current decision.

It is noteworthy, that Defence members are allowed to complaint to the DFO after they have complained to the leadership of the Defence Force, and they remain dissatisfied with the decision by the leadership.

An evaluation of these alleged events, and we are dealing with allegations, as to any tendency towards the ***'systemic issues of the past'***, may be determined by:

1. Whether an action by the top management to deny detailed reasons is an act tending to show a 'systemic failure' or is just an 'isolated incident', and
2. Whether a watchdog, in assessing an agency for systemic wrongdoing, should be influenced more by the written procedures and statements of general intent by top managers, or by the actions taken by top management

[What about Street and Fisher?. It was also favourable to Defence Forces.]

These same two questions arise with the opinion by Street & Fisher (2009), which was also favourable to the Administrative justice system in the Defence Force:

1. Would Street&Fisher have regarded an action by top management to deny detailed reasons, if this had happened, as a ***systemic issue*** or an ***isolated incident***
2. Would Street&Fisher give weight to written procedures, or to actions to implement those procedures, in deciding whether ***systemic issues*** were in the ***past*** and ***no longer a risk***

Street & Fisher (2009) was an audit in part of the Administrative justice system in the Defence Force. It was ordered by the Defence Department, not by the Senate. The Defence Department also set the terms of reference [TOR] for the audit.

Only six submissions were received, and the only two of these six submissions that were published were:

- A Thank-You note from a very senior officer, and
- A suggestion about the Disciplinary system, not the Administrative system

Possible mechanisms of regulatory capture of the audit, however, may have been reported by Street & Fisher. Regarding private submissions:

> ***In accordance with the TOR*** (terms of reference)***, no single issue or private complaint was inquired into; however each submission was assessed for systemic issues.***

Street & Fisher do not define what might have been classified by them as a 'systemic issue', nor are we given any examples of an issue that was judged to be non-systemic.

Street & Fisher were persuaded by ***'Instructor Codes', 'extensive reporting regimes and safety nets now provided to trainees and staff'***.

The TOR thus denied the audit the possibility of any findings that ***Instructor Codes*** have been breached, that ***reporting regimes*** led to illegal punishments that could not have been imposed by court martials, and that ***safety-nets*** led to, say, threats of psychiatric examinations.

By themselves, the Codes, regimes and nets looked impressive, so Street & Fisher found that the 'sky' over the trainers and trainees of the Australian Defence Force was 'blue'.

Street & Fisher would have had to investigate the correspondence from the Defence Whistleblower, and to interview or gain reasons from the Defence Force, to establish whether detailed reasons had been denied, and who if any had denied the detailed reasons that Street & Fisher described as a ***must***.

But the Defence whistleblower had allegedly been suspended for 14 months, and was thus not at a work station to know about the Street audit, or to gain an interview when Street QC came on visits to training establishments. We do not know whether Street & Fisher asked the Chief of the Defence Force to be given the names of all whistleblowers and other service persons currently under long term suspension when the audit started.

McMahon (2008, 2008a) also describes allegations of bullying during the period when the 2006 Learning Culture Inquiry was being conducted. That Inquiry found no instances of bullying in training establishments.

Hansard (2008, FAD&T 5-6) reports that the Senator's question about reprisals was answered. It was stated to the Senate Committee that the DFO did not ***have any complaints that a person has suffered reprisal or victimization by reason of using the complaint system.***

In all three instances, of an audit, an inquiry and Parliamentary questioning, the allegations of bullying and reprisal described in McMahon (2008,2008a) have not surfaced.

The question then appears to be whether the failure of the allegations to surface, in any one of the three searches for wrongdoing, was due to some ***system*** at work to prevent the surfacing of such allegations, or to a coincidence of ***isolated incidents***.

[What does this all mean for TWP?]

On these allegations in McMahon (2008, 2008a),

1. the Defence Force may be in breach of Street & Fisher's ***must***,
2. the DFO may not have intervened, as it may have done in earlier years, to ensure that the ***must*** was complied with by Defence Force authorities,
3. complaints may have been made to the DFO alleging the Defence Force's failure, and then to the DFO about the failure of the DFO to act,

4. the Senate Standing Committee asked about complaints concerning behaviours towards members who lodged grievances, and is not told about the whistleblower's complaints to the DFO,
5. Street & Fisher may not know about any of it, as the whistleblower may have been allegedly suspended from duty, and,

the Australian Defence Force gets a favourable recommendation from Street & Fisher.

If this is 'black' is being painted to appear as 'blue', alleged OPTIMISED systemic wrongdoing in the Australian Defence Force may have been achieved, with respect to the administrative justice system in the treatment of whistleblowers..

While the TWP, like Street & Fisher, is not in a position to accept unreservedly or inquire into allegations about its Partnering Organisations and participating agencies, TWP could have made some consideration of the 11 inquiries that had been conducted into the administrative justice system of the Australian Defence Force. TWP, for example, could have taken these recent on-the-record inquiry findings into consideration, when TWP was deciding:

- whether the TWP should have included the Australian Defence Force as a participating agency, and, if it was to be included,
- whether the TWP should or should not be designed to capture information about what happens to whistleblowers when systemic forms of wrongdoing may exist at the top echelons of an agency and its watchdog.

In doing this, TWP may have been required to state ***truth to power*** to the same watchdog amongst its Partner Organisations that went before the Senate, and that has gone before other agencies claiming that the military Administrative justice system is 'blue', and is a model for other agencies to consider.

The prospect of this type of conflict would have been reduced if whistleblower organisations had also been on the steering committee. Such representation could have guided the TWP, in its use of significant taxpayer funds, not towards a criticism of the Australian Defence Force or any other agency, but towards an analytical framework that allowed for systemic wrongdoing to be analysed for its impact upon the whistleblowing phenomenon.

The whistleblower representatives could have spoken truth to power at the meetings of the steering committee if this was necessary in the design and evaluation of the surveys

This analysis was completed before the revelations from the DLA Piper Review

The 'Mythic Tale' about Jim Leggate. The most troubling example of attitudes within TWP is the reference to the book, 'Whistleblowers', by Dempster (1997). TWP refer to the whistleblower cases in that book, and more generally to whistleblower cases known to the public, as ***mythic tales*** [GUS II, p109].

A ‘myth’ is a ‘***purely fictitious narrative, usually involving supernatural persons and embodying popular ideas on natural phenomenon***’ (Fowler & Fowler 1964).

The word appears to discredit the disclosures of Jim Leggate and the other ten cases in the book, as **fiction rather than true**, as **popular rather than researched,** and / or as beyond this world rather than as part of this world.

The remark is tending to disqualify, from consideration in whistleblowing research, any whistleblower case that the public comes to know about through publication – a step towards a kind of Optimised Close-out of external disclosures.

One of the factual accounts in that book, written by a well credentialed investigative journalist, is that of Jim Leggate. Leggate is one of the five Whistleblower Cases of National Significance acknowledged by the two major Whistleblower organizations in Australia. The Leggate case was about a mining authority that allegedly required its mine inspectors not to report any breaches of the mining lease conditions by particular mines.

The Leggate disclosures involved $2 billion in costs that are being faced by the taxpayers of Queensland because the Mines agency allegedly was not enforcing lease conditions. The main issue was mine re-habilitation. The case of Jim Leggate is selected here, from Dempster’s eleven cases, because Dempster gave this case the sub-title of ‘Regulatory Capture’.

The Regulatory Capture allegations were that the watchdog over the mining companies was not enforcing the law. Leggate claimed that the failure of the mining watchdog to enforce the law constituted official misconduct by the mining watchdog.

The watchdog over official misconduct then defended the mining watchdog, by asserting that non-enforcement of the mining lease conditions was not official misconduct – it was not official misconduct because everyone knew that the mining watchdog was not enforcing the mining lease conditions, the misconduct watchdog asserted.

The higher watchdog also defended the mining watchdog over the forced transfer of Leggate to a lower level non-gazetted position in another agency. This was not illegal, the higher watchdog asserted, because agencies had the power to forcibly transfer officers.

What the higher watchdog failed to add was that that power to force transfers was only available where the transfer was to a position at the same level. The higher watchdog, allegedly, refuses to investigate what the level of the non-gazetted position was. This was controversial, because the non-gazetted position reported to an officer at the same level as Jim Leggate’s original position, and thus, prima facie, had a lower responsibility level than Leggate’s mining inspector position. The desk for the non-gazetted position, allegedly, was half across a corridor.

That defence of the mining watchdog by the higher watchdog has led to allegations about both watchdogs. The matter continues to this day, with all relevant watchdogs, including

65

the newly appointed Integrity Commissioner, refusing this year to consider Leggate's disclosures and the treatment that Leggate received.

The great expansion of mining in Queensland during this decade, the trends in water quality in coastal rivers feeding sediment towards the Great Barrier Reef, the conviction in 2009 of a Cabinet Minister for taking bribes from the principals of two mining companies, one of which allegedly was in Leggate's list of companies enjoying the benefit of non-enforcement, keep Leggate's disclosures current and relevant.

Leggate's disclosures are a case that, the author would propose, alleged the existence of systemic wrongdoing consistent with the OPTIMISED Level 5 Wrongdoing scenario at Figure 12

Any notion that such systemic corruption was nowhere in operation now, that it had become 'mythic', could not reasonably be derived from any research. Any such notion would appear to be based on a belief or a system of beliefs or a pre-determined position that such systemic corruption is now a thing of the past, and thus of no relevance to current inquiry.

Findings from Recent Research. The TWP appears to have failed to incorporate the results of research on significant points published by principal researchers in the area of whistleblowing.

A review of recent research may have prevented certain of the poor choices that have been made in formulating the TWP survey. It may also have caused the TWP to take some opportunities to contribute significantly to our knowledge of specific aspects to whistleblowing.

It has already been noted that further reading of Miceli & Near (1984), the paper from which TWP obtained its definition of whistleblowing, should have alerted TWP to the notions of systemic corruption and of the reaction to systemic corruption, namely, dissent whistleblowing

Further instances of where TWP might have gained more from recent research are offered below

> **Near & Micelli**. The TWP, for example, cited the finding by Near & Micelli that the 'Characteristics of the Wrongdoing' is a primary predictor that retaliation against the whistleblower will occur. TWP explains that the **seriousness of the wrongdoing** is one example of Near & Micelli's 'Characteristics', the other example is **systematic wrongdoing** [GUS II, p146].
>
> The first characteristic, seriousness of the wrongdoing, was examined, albeit crudely, it appears. This was described earlier in this paper.

The second example, of systematic wrongdoing, was examined even more crudely. This was done, it appears, by equating '*wrongdoing involving more than one person'* with systematic wrongdoing.

Wrongdoing involving more than one person would apply to junior staff as well as senior managers, say, sharing and using unlicensed or illegal software on their departmental computers. The TWP response to Near&Micelli's principal finding, therefore, was to subject the TWP analysis to dilution of the results and to mixing of the results across all levels of systematic wrongdoing.

In the approach used by TWP, sharing unlicensed software would be in the same statistical bin as destruction of evidence of multiple pack rapes against children in State care (the Heiner allegation). This is because they both involved disclosures against more than one person.

UoQWS (Jan & de Maria). This was a study of whistleblower experiences in Queensland, the first reports from which were published in the months during the Parliamentary debate of the Whistleblowers Protection Act. It would have been instructive, as to the impact of that legislation on whistleblowing in Queensland, for the TWP to link to that earlier research rather than to dismiss that work.

- **Support to Whistleblowers**. Both the UoQWS and the TWP looked at the support that whistleblowers received from a variety of sources. If the latter had framed or presented their survey to align with that of the UoQWS, a time comparison of sources and strength of support received would have been useful to the current agenda for reforming whistleblower protection. Did the enactment of the Whistleblowers Protection Act serve to change the support available to whistleblowers, and in what ways if at all?

- **Types of Wrongdoing Disclosed**. A similar opportunity was missed with respect to this issue – did the two sets of disclosures, made 12 years apart, one set occurring 12 years after the coming into law of the Whistleblowers Protection Act, show changes in seriousness, for example? The failure to address this comparison was an opportunity lost by TWP.

- **Effectiveness of Legislation**. The TWP included a secondary study of a population of public servants (114 from 15 agencies) termed Internal Witnesses [GUS I, p84-87 & GUS II, p19]. The Internal Witness population was a group public servants who were ***known whistleblowers***, known by so termed ***integrity agencies.*** The responses from these whistleblowers were used in a study of reprisals suffered by this selected whistleblower group. The results showed that 66% of this group claimed that they had been treated badly. The percentage of claims of termination (theoretically, this figure should be zero, but in the TWP it) was under 6%

67

By comparison, the UoQWS did a survey of 102 whistleblowers from 17 agencies, 70% of whom claimed that they had been the subject of officially sanctioned reprisals. 19 of them, or 27% of the 71 affected, alleged a form of termination (dismissed or retrenched). The whistleblowers had to show proof of the disclosures that they had made.

A correction could be argued for the TWP figures in order to compensate for the terminated whistleblowers that were not included in the TWP survey. This would probably lift the percentage of reprisals by 21% = [27%-6%], causing an adjusted TWP figure for the reprisals upon the selected whistleblower group to rise to 80%.

The comparison available, then, of rates of reprisals, firstly, 70% in 1994 (from QUS II, p13) and, secondly, 80% in 2007 (from TWP as modified in the last paragraph) for a similar population (102 versus114 respectively) of known whistleblowers, is information tending to show that a 14% increase or deterioration in reprisal rates has occurred during the first 12 years after the Whistleblowers Protection Act 1994 was introduced into Queensland.

- **Termination of the 1994 Senate Whistleblowers**. These whistleblowers, for whom a second Senate Select Committee Inquiry was conducted during 1994, had not all been terminated at 1994. The Senate whistleblowers from Queensland, however, were all terminated before 2000. A follow-up study of these and other whistleblowers from the UoQWS would have provided a longitudinal dimension to the TWP methodology, and this may have assisted it to avoid certain pitfalls and to reap practical, credible information about how legislation works and how it does not work

In this regard, it is noteworthy that the TWP dismissed the UoQWS for the way that the UoQWS went about attracting whistleblowers into their study.

The UoQWS advertised for volunteer whistleblowers, and this, the TWP stated, was 'likely to bias the sample' [GUS I, p6]. TWP, however, states that it advertised for its ***known whistleblowers*** to join its selected whistleblower group (the Internal Witness Group) [GUS II, p19].

If there is bias in such methods, the bias would seem to be the same for both the TWP and UoQWS studies.

There was no valid reason in this regard for rejecting comparisons made of the UoQWS whistleblower study group and of the TWP's selected whistleblower group.

The TWP also missed the clue about **'dissent'** whistleblowing, available to them by the work of de Maria and Jan – this work had defined whistleblowing, the TWP itself reported, as *principled organizational* ***dissent***.

Perception of Bias. The issue of bias in methodology was first raised by the TWP in criticizing the work of another whistleblower study, the UoQWS.

TWP claimed that the methodology used by UoQWS was likely to introduce bias into their results. TWP thought that the bias was of a size that TWP dismissed the whistleblower research conducted by UoQWS. The fact that the TWP have also used the same methodology with its Internal Witness Study appears inconsistent.

The inconsistency could mean that the rationale and the messages from TWP sub-projects have not been well coordinated. It could also mean that a negative attitude exists within the TWP towards the UoQWS, for which the reasons given so far are unconvincing.

This concern, that pre-determined attitudes within the TWP may be influencing TWP to vary from best research practice, arose at page 6 of the draft Report [GUS I].
The concern has thereafter been extended by other observations, both general and specific, about how open the TWP has been to what is known about whistleblowing from this field of research.

The TWP state that the focus of its research methods has been to

> ***… shift attention from whistleblowers as individuals to the performance of organizations in response to whistleblowing as a process***. [GUS II, p21]

It appears that it can be inferred, reasonably from the TWP, that its thesis about the ***performance of organizations*** (both agencies and watchdogs) maintains that agencies and watchdogs are no longer vulnerable to systemic corruption. This may be in accordance with a claim by Needham's press release announcing the Project that:

> ***investigating authorities can and do take internal disclosures seriously***
> (CMC 2005)

On one hand, TWP does describe ranges of results for different agencies, and refers to poor performances by individual agencies not identified. On the other hand, no inquiry is made or results collected or discussion proposed or recommendations fashioned for situations where agencies have been substantially and systemically corrupted.

The acceptance by TWP of that notion, that systemic wrongdoing by agencies and watchdogs is not a scenario for

> ***the performance of organizations in response to whistleblowing as a process***,

may constitute a pre-determination.

There appears to be no evidence to support such a notion or pre-determination. There is evidence available on the question. That evidence is both statistical and historical. That evidence appears to rebut any such notion held by the TWP that systemic wrongdoing of agencies and watchdogs is not active in ***the performance of organizations in response to whistleblowing as a process***.

McMahon (2002) listed several examples of what, on the basis of reports, may have constituted regulatory capture from the year leading up to a Biennial International Conference on Public Ethics:

- Medical researchers providing findings on medicines for controlling high blood pressures that omit or understate or misstate the results of that research (Sunday, NINE, 2002) – **the misinformer capturing the fact finder?**
- Partner of an international Auditor Company pleading guilty to the obstruction of justice by the destruction of papers relevant to audits that allegedly misstated, understated and / or omitted the true and fair financial position of a mega-corporation that subsequently went into liquidation (SBS, 2002; McCullough, 2002). The evidence included a training video that allegedly trained auditors to destroy evidence before the police arrived – **the audited capturing the auditor?**
- Police who allegedly broke the law in order to secure convictions against alleged law-breakers (Rule, The Age, 2002) – **law-breaking capturing law enforcement?**
- Criminal justice investigators allegedly failing to follow a document trail and using a rule wrong in law to read down the criminality of actions by a government to destroy documents pertaining to the pack rape of a young girl in the care of the government (Austin, ABC Radio, 2002) – **a government capturing its watchdog?**
- Insurance regulators allegedly failing to report findings that a major insurance company was heading towards insolvency, and then approving a re-insurance contract while knowing that the contract would allow the failing insurance company to report artificially high profits (Walker, Courier Mail, 2002) – **the flawed capturing the flaw finder?**
- Archbishops allegedly allowing paedophile priests and ministers to move to a succession of fresh parishes where they re-offended against the children of the archdiocese (Lieblich, Chicago Tribune / Courier Mail, 2002) – **the wolf capturing the shepherd?**
- An environmental protection authority and mining regulator allegedly failing to complete compliance audits of mines or enforce the law when mines are in breach of the conditions of their mining leases (O'Malley, Courier Mail, 2002; Southwell, The West Australian, 2002) – **the leasee capturing the landlord?**

As this review is being edited, the troubled CMC is reported to be asking how public servants could be empowered to say 'No' to Ministers and to ministerial advisers who allegedly bully the public servants. The context for the statement was an allegation of such bullying of bureaucrats into approving millions of dollars to sporting entities in apparent breach of guidelines (Johnstone, 2009).

70

The CMC, Griffith University and the Australian Research Council, with other partner organizations, have just spent $1 million in funds plus staff hours on ***the performance of organizations in response to whistleblowing as a process***, and the CMC is not able to answer that question.

That is because the systemic bullying of senior public servants, by Ministers through their Ministerial advisers, has been 15 years in development. It has been happening in the Queensland Public Service, allegedly, since the Senate Whistleblowers told their experience to the Senate Inquiry. It has been happening, allegedly, without effective interference from any watchdog. The TWP failed to look at these systemic wrongdoing scenarios.

If some public servants did say 'No' to ministerial advisers, would the retaliation rate be only 22%?

If systemic wrongdoing is expected to be a continuing aspect to the ***performance of organizations in response to whistleblowing as a process***, then the TWP have failed to explain why its focus on the performance of organizations has not caused it to categorise agencies and watchdogs to some scheme:

- that incorporates the case where systemic corruption exists, and,
- that incorporates the reasons why disclosures have not been investigated.

Assuming away the impact of systemic corruption upon whistleblowing as a process, is not the only example of apparent pre-determinations by TWP.

TWP appear also to have pre-determined the criminality associated with whistleblowing and reprisals against whistleblowers.

This is another set of primary issues upon which TWP could have gained evidence in their survey. But TWP resolve the question by simple assertion:

> ***Only in very rare cases is the nature of the reprisal such that it could meet the legal thresholds required to prove criminal liability on the part of any individual*** [GUS II, p130]

There is no evidence of this assertion. Cases are 'very rare' only in Australia, but the reasons for this have not been researched or referenced by TWP

Whistleblowers could, however, have been asked what legal advice if any was received.

With systemic corruption of the police and / or the justice system, the Agency can:

- Destroy or dispose of evidence
- Fabricate evidence
- Assert 'rogue' rules of law, introduced by legal opinion
- Reprise against the whistleblower, removing his job and income
- Threaten the whistleblower with criminal action, psychiatric assessment, and other harm that affects health and family relationships

The watchdogs can also:

- Refuse to prosecute, say, on the basis that the prosecution would not be in the public interest (this is the latest response by Queensland's justice system about the Heiner allegations)
- Decide not to prosecute, without having any regard to the merits of the case.

These possible causes, amongst many others, for preventing success at law have not been canvassed by TWP.

A first and second basis for concerns about a perception of bias in TWP are:

- An inconsistency in the arguments used by TWP, with both sides of the inconsistency being used to favour the TWP viewpoint, and
- Some pre-determinations, both of which appear to dismiss the prospect of the worst aspects of agency and watchdog behaviour, namely systemic corruption and criminal reprisal

Figures, however, have come forward from the surveys by TWP that have caused the TWP analyses to address widespread wrongdoing of the most serious kind.

Comments were given to TWP about these figures, during the feedback on their draft report. How TWP responded to these figures and argument also may reflect upon the strength of any pre-determination by TWP on important whistleblowing issues.

When the analyses by TWP came upon data, with implications that others might find strongly suggestive of the possibility that agencies or watchdogs may be systemically corrupt, the TWP used language in describing these implications that appears not to step outside of the AD HOC Wrongdoing assumption. For example:

> TWP use only 'climate' and 'culture', two concepts associated with the total workforce, to explain negative situations regarding workforce silence and ineffective whistleblower policies and procedures
>
> > ***Where wrongdoing is being observed by employees but reported at a lower rate, this can be taken as one indicator of a less positive reporting climate.*** [GUS II, p45], and
> > ***There was a strong link between the issue of the ethical climate of the organization (organizational culture) and effective whistleblower policies and procedures. Many respondents and interviewees noted this connection both in a positive and a negative light.*** [GUS III, p23]
>
> The possibility that management parameters could also be responsible, especially with respect to effectiveness of policies and procedures, has not been added to the equation.

When management parameters are added to the equation, the parameter is described only as the ***absence of commitment***. The possibility of a presence of wrongdoing amongst the higher ranks of management is not considered:

> ***A number of factors can indicate the absence of organizational commitment to whistleblowing …cover-ups, … damaging the careers of staff members who make disclosures.***
> [GUS III, p24]. Note that 'termination' is not listed.

Then there are arguments that likely negative associations are '***misreads***', and that the favourable associations are ***'in fact'***:

> ***While a higher than expected incidence of whistleblowing might be misread as an indicator of higher than expected wrongdoing, in fact, it can equally be regarded as an indicator of a healthy public sector environment, in which employees feel willing and able to speak up about perceived problems in the organization.*** [GUS II, p45]

This appears to suggest that any results, across the full range of possible results, will all be interpreted to mean that management is doing its job

When the possibility of management being responsible for real harm is considered, the situation is described by TWP as a violation of systemic justice, rather than as an implementation of systemic wrongdoing

> ***If management itself is seen as responsible for or unable to protect a reporter from real harm, the perceived level of systemic procedural justice will have been violated.*** [GUS II, p81

Having omitted the consideration of the systemic wrongdoing explanation for all of the above, the TWP still find a use for the ***'systemic corruption'*** scenario.

A principal flaw in the TWP methodology is that the personnel and workplace grievance data appears to be diluting the survey results. When arguing that this flaw should be disregarded, TWP invite the reader to offset any impact of the flaw by considering the benefit of the flaw when in a situation of systemic wrongdoing:

> ***Indeed, the extent to which these wrongdoing types could also be re-categorised as personnel grievances is offset by the likelihood that some personnel or workplace grievances excluded from the analyses of whistleblowing in this report involve entrenched or systemic wrongdoing of sufficient seriousness that they could be reclassified objectively as matters of public interest.*** [GUS II, p15]

Not only does 'systemic wrongdoing' exist, it has a positive 'likelihood', when the concept is being used to support the TWP methodology.

Note that Figure 1.7 in GUS III, p34 is titled '***Systemic or ad hoc communication of policies by case study agency***', indicating that the TWP is aware of the terms, 'ad hoc' and 'systemic' as a spectrum that can be applied at least to organizational communications

When, too, a second principal flaw can be helpful to the TWP argument, the flaw and the implications of the flaw have been ignored. The second flaw is the exclusion, largely, of terminations from the statistics on bad treatment and reprisals experienced by whistleblowers.

This flaw is openly used, without qualification, to downplay the seriousness of what management often do to whistleblowers.

First, the acknowledgement of the flaw:

> ***By sampling current employees, the major employee survey data does not include former employees, such as those who might have observed and reported wrongdoing but have since left the organization***.
>
> Note the use of the clause, ***but have since left the organization,*** by itself, and the omission of a second description such as ***'and / or have suffered retrenchment, forced transfer or dismissal'***. [GUS II, p20; see also GUS II, p111-2]

Second, the claim that sackings are not likely to occur. This claim is associated with the TWP result that only 5.6% of respondees reported that they had been sacked

> ***… when bad treatment does occur, it is unlikely to involve a single decisive blow such as a sacking …*** [GUS II, p129]

Third, no qualification is offered for the fact that sacked people would not be at the agency to complete the survey, so the presence of any claim of sacking is a special case if not an anomaly

When the results tend to question or overturn the Well-intentioned Agency and AD HOC Wrongdoing scenarios, the TWP simply reject the figures.

In the example below, the senior staff, the case-handlers and the managers are suggesting that an agency that has developed whistleblower procedures is more likely to perform poorly in protecting whistleblowers:

> ***…senior staff were more confident of the likely management response in agencies with less comprehensive procedures, and were less confident in those agencies with stronger procedures.*** [GUS I, p122; see also GUS II, p253-4]

TWP has termed this result as ***perverse***, and concludes that

> ***senior staff have low knowledge of real contents of their own systems and procedures, and/or do not know whether what they contain is valuable or not.*** [GUS II, p254]

Senior staff, according to TWP, do not know their organization, if what they say offends the TWP expectations of what the survey should reveal about the whistleblowers' world.

If the agency was Ill-intentioned, however, if the whistleblower is in a 'black sky' scenario, it might be expected that the agency would develop its whistleblower procedures to protect the agency, not the whistleblower. This is the allegation that has been made about the Australian Defence Force, the only agency in Australia with a separate Whistleblower Protection Scheme, and it has two of these Schemes.

The procedures, say, could be developed to ensure that its whistleblowers are forced or induced to report only internally, to the agency's 'Dead Hand'.

The same procedures are unlikely to have much development of whistleblower support and protection provisions. TWP in fact has found that this is what the agencies across Australia have done. The best aspects of the existing procedures are those dealing with reporting, but

> ***The weakest areas were those associated with whistleblower protection and support.*** [GUS II, p246 & 257]

In feedback to TWP about the draft report, it was argued that an assumption that there were Ill-intentioned Agencies would explain what TWP thought was not explainable. TWP, in their report, did respond here to the 'Ill-intentioned Agency' argument on this one point.

TWP did this, by going back to the greater pool of the employee survey, and arguing that, overall, the response was positive. [GUS II, p254].

This response is hardly to the point. It is not suggested that all agencies are ill-intentioned, only that some agencies may be, and that those that were ill-intentioned might cause the trend to tilt. TWP, by going back to the total survey results pool, have diluted, mixed and smoothed out any spike in the results that might be seen if statistics were collected just for the agencies that exhibited systemic wrongdoing.

This TWP response, however, does acknowledge that the Ill-intentioned Agency case was put to the TWP, and that TWP were reminded of this additional whistleblowing situation before they wrote their final report. Clearly, on all other points at issue, the TWP have decided to turn away from the hypothesis that could explain much of what has been recorded.

The question arises as to whether the analysis by TWP gives rise to a perception of bias towards the assertion by its leading Partner Organisation, the CMC:

> ***that investigating authorities can and do take internal disclosures seriously***
> (CMC 2005)

Summary. It does, on balance, seem that TWP may have allegedly avoided the incorporation of the systemic wrongdoing scenario into its methodology and into its analysis of the results. It further appears that this may have been in accordance with the view of the public service held by some of its Partner Organisations.

If the systemic wrongdoing scenario was not avoided, but was just not supported by TWP, then TWP would be expected to at least discuss the scenario to explain why the survey figures do not support the scenario.

This possible avoidance does not appear to be because of TWP's experience or inexperience with research into whistleblowing situations. The concept of systemic wrongdoing has been used by TWP on more than one point, and the implications have been discussed (albeit unsatisfactorily) on another.

The omission of the systemic wrongdoing issue, when TWP designed their survey instruments, appeared to be a wrong assumption or a pre-determination. When, however, the results of the survey were collected, and the TWP continued to omit the prospect of systemic wrongdoing in the principal areas of analysis offered by TWP, a different perception arose. The question arose as to whether or not there may be a willful blindness to this factor amongst those in a position to influence the GUS documents.

The possibility of ill-intentioned agencies and systemic wrongdoing, it appears, may have been vetoed or put outside of the scope of the TWP. If this was the case, we do not know the reason for this – the scenario is just not discussed other than with respect to the secondary instances cited previously.

The failure to discuss the Ill-intentioned Agency or systemic corruption scenario is simply not explained.

Nor do we know conclusively what influence the watchdog authorities who were on the steering committee, or the milestone forums that TWP conducted with the agencies, had on TWP's approach in this regard.

There appears to be a perception of bias in the TWP, where there appears to be a bias for the AD HOC Wrongdoing situation in public service agencies, and a bias against the Systemic Wrongdoing situation.

Any wrongdoing by agencies is consistently explained as an omission within the context of a 'blue sky' organization. The possibility of the wrongdoing being a commission within the context of a 'black sky' organization has been inexplicably omitted.

It is not the case necessarily that TWP should have replaced the former with the latter, but it would seem mandatory upon any genuine research effort into real whistleblowing situations that TWP considered both, and explain the Project decision with respect to both.

The absence of a purposeful survey into the systemic wrongdoing situation constitutes a failure by the TWP. The failure of TWP to include the systemic wrongdoing scenario in the analysis of information provided by the survey, where that information was strongly

suggestive of failures by managers, by agencies and by watchdogs, compounds that failure.

In the whistleblower community, the notion that there is no more systemic corruption in a jurisdiction is regarded as 'government spin'. Only governments push that non-reality.

The TWP appears to be uncomfortably close to, or aligned with, that government spin.

The GUS documents appear to be 'on message' with the public relations strategy that appears to be consistently followed by some of the Project's Partnering Organisations.

77

PART V – CONCLUSIONS

Mistakes Made. The TWP appears to have made two essential mistakes.

Firstly, an incorrect assumption was made about the nature of whistleblowing dynamics in public sector organizations. TWP appear to have assumed that worker disclosures about co-workers, or 'dobbing' events, dominated integrity issues within public agencies and watchdogs. This proved not to be reflected in the results that TWP obtained from its survey. The assumption was an error. The error appeared to limit the relevance of TWP to the 'dobbing' form of whistleblowing, and to peer forms of bullying and harassment.

Secondly, when TWP discovered their error, TWP appear to have claimed that their discovery was a discovery for everybody, and an advance for the state-of-knowledge about whistleblowing. There was a 'new picture' emerging, TWP claimed.

This claim is not supported by the literature. It is a doubtful claim, and researchers familiar with the literature might have withdrawn from such a claim.

> ***'… until now, …'***, GUS II, p143 states, we were not able to identify the risks to whistleblowers.

This claim appears to have affected the credibility of the TWP.

The TWP has something to say about the 'dobbing' whistleblowing situation and associated reprisals and bullying, and about the lower forms of dissent whistleblowing where the corruption is contained to the PLANNED Level 2 Wrongdoing scenario.

The TWP has little that it can say, however, with the safety of the whistleblower in mind, about situations where the whistleblower's disclosure is about serious forms of wrongdoing. This is true too for the safety of the potential whistleblower from the population of staff bullied into silence. The analysis by TWP on this factor appears to be too crude, or to have been over-simplified.

The TWP has little that it can say, with the safety of the whistleblower or potential whistleblower in mind, about situations where the whistleblower is in an agency-watchdog environment that appears to be affected by MANAGED Level 3 systemic wrongdoing, or by higher levels of this malady. TWP has not provided for such a situation in its analytical framework.

The TWP has nothing that it can say, with the safety of the whistleblower in mind, about situations where the whistleblowing is dissent whistleblowing, by workers resisting any involvement in wrongdoing perpetrated by the organization and its management.

Nevertheless, it appears that the TWP is advocating that its findings, and the recommendations made on the basis of its findings, are a new basis, a new framework, for jurisdictions to deal with all whistleblowing situations of reprisals and bullying in Australia.

And this is the point about TWP press releases and submissions, that draws a response from whistleblowers and from their organisations.

> ***… the WWTW study is not representative of my whistleblowing experience, nor of the 16 unresolved cases which were profiled by the 1995 Senate Select Committee Report, nor by many of the cases represented by the membership of WBA***. (Sawyer 2009)

On the basis of the data that TWP has collected and analysed, and the whistleblowing bullied silence scenarios that TWP has considered, TWP can not justify this advocacy for all whistleblowing situations, it appears from this review.

The TWP appears to be steadfast in refusing to acknowledge:

- The relevance of systemic wrongdoing scenarios to the current whistleblowing environment in Australian jurisdictions
- The failure of the TWP to research this aspect of the whistleblowing situation in Australia
- The lack of insight in the TWP analysis, and the lack of applicability of what TWP has surveyed and analysed, to the serious wrongdoing and to the systemic bullying very much at the core of the worst whistleblowing situations.

TWP has gathered a large amount of spot data based on an expectation that whistleblowing is largely a worker – co-worker phenomenon, and their data remains relevant to that dimension to the whistleblowing phenomenon.

Worker – co-worker interactions are, however, a minor aspect to modern organizational dynamics related to whistleblowing. The core interactions are between the working whistleblowers and their management, between the higher level rogue management and the staff bullied into silence, and between the harmed whistleblowers and the watchdogs.

Duty of Care. The survey structures used by TWP did not prepare TWP for a useful analysis of this core set of integrity-based interactions, referred to as ***dissent whistleblowing***, and as ***worker resistance*** or as ***organisational dissidence*** against wrongdoing that is being committed by their organization.

Agencies are now much more sophisticated in the ways that they have turned whistleblower protection procedures into systems for the intimidation and bullying of staff in order to maximise the protection of the agencies and their managers.

79

The TWP thus does not constitute a reliable reference for dealing with this core dimension, the serious end, of the whistleblowing spectrum.

Tony Fitzgerald wrote:

> ***If either senior officers and / or politicians are involved in misconduct or corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only unwelcome but attract retribution***
>
> Report of the Commission of Inquiry into
> Possible Illegal Activities and Associated Police Misconduct

Integrity professionals can not adopt research and recommendations about whistleblowing without a duty of care towards those that will be the recipients of that advice.

It is not just the whistleblower who might act recklessly when corruption exists in high places within the government or the public service. Whistleblower Support professionals might be reckless as well, if they give advice to whistleblowers that does not appreciate that the whistleblower is confronted by a corrupted agency and a captured watchdog.

Generally speaking, lessons learned from one situation, say, the 'dobbing' whistleblowing situation, may be counter-productive if they are relied upon in dealing with a more serious situation, a more threatening situation, such as where there exists or may exist systemic corruption as described by Tony Fitzgerald.

Inspection of some leading recommendations by TWP may raise concerns amongst experienced whistleblowers if these advices were to be given to a whistleblower or potential whistleblower at the serious end of the whistleblowing spectrum

1. GUS III recommend the message 'when in doubt report'. In a systemic corruption situation, better advice may be 'when in doubt find out' [summary p1].
2. GUS III describes an adverse management response (by omission or commission) as 'attitudinal'. In a systemic corruption scenario, the response may be deliberate and rational, the product of a plan, initiated in defence of the benefits that managers obtain from a continuation of the wrongdoing or from a denial of exposure of the wrongdoing [summary p3].
3. GUS III recommends leadership and training before investigation. Where systemic corruption exists, investigation may lead to a much more effective outcome, and would be the demonstration of the leadership required by staff who were remaining silent under an oppressive bullying environment [summary p3]
4. GUS III regard watchdog bodies (the report calls them integrity bodies) as alternative points for making disclosures. In systemic corruption, watchdog bodies can be a critical part of the systemic wrongdoing [summary p3]
5. GUS III advocate agencies maintaining close and positive working relations with these watchdogs. In systemic corruption (ie, regulatory capture), close relations is seen to be one of the major causes for turning the watchdog into a 'lapdog' [summary p3]

6. All reasons for not reporting, in the TWP mindset, lie within the employee ('fear of …' , 'unwillingness to …' , 'desire to …', 'uncertainty over …'). Less emphasis and inspection is given to the systemic corruption situation, where the reasons may lie in the actions taken by the organization, including threats received directly or through others, reprisals upon others, destruction of the evidence, or similar [summary p3].
7. The analysis by TWP, of the implications of the 'Post Office' behaviour by watchdogs, is a shallow analysis – in a systemic corruption scenario, the tactic of informing the agency about any worker contacting the watchdog is critical to the maintenance of the corruption and the initiation of the bullying reprisals[summary p10, report, p43 & 52]
8. TWP III focuses on SUPPORT to whistleblowers before PROTECTION of whistleblowers [eg, embedded policies: report, p116]. With a systemically corrupt agency, PROTECTION can be an IMMEDIATE requirement
9. The need to separate the Investigation of the whistleblowers disclosure from the 'Support' of the whistleblowers, is mentioned in a shallow way [summary p10, report, p113]. It is then forgotten by TWP, and has not been incorporated into the major recommendations for practice [report, Fig 5.1, p110 & Fig 5.2, p111]. Colocation of whistleblower support with or subordinate to HR and corporate services is unsafe where wrongdoing is systemic. These offices (and it must be acknowledged, the whistleblower support office) are the first offices that a systemically corrupt agency will compromise. Systemic wrongdoing, and the associated oppressive bullying regimes, can not be integrated if these offices (auditors, appointments & selections, staff appraisals, grievance investigations) are not part of the 'system' of wrongdoing and the controllers of the bully strategems.

The treatment of whistleblowers is a workplace health and safety issue. A large number of whistleblowers end their working lives with Work Cover claims. Governments, watchdogs and agencies need to be responsible, in any advice that they implement, that may impact upon the health and safety of individuals. It would be reckless to do otherwise.

That responsibility to act, with due care rather than recklessly, applies not only to the person taking retribution against a whistleblower. It also applies to the agency or watchdog that is obliged to protect the whistleblower. Influencing a whistleblower to take advice fashioned for 'dobbing' situations, when the whistleblower is in a much more dangerous situation, may offend the duty of care, held by that agency or watchdog, to that whistleblower.

Responsibilities to eradicate serious crime and misconduct in an organization must appreciate the advantage that the wrongdoers gain whenever a whistleblower, acting to disclose their wrongdoing, is terminated. That sends a message to all staff and managers about the relative levels of effectiveness of the wrongdoers and of the agency or watchdog that attempted to investigate the wrongdoing. It is very intimidating, and bullies the remaining staff into the silence that management requires.

Agencies and watchdogs acting recklessly in this situation, with respect to the protection and support of the whistleblower, can seriously impede efforts to eradicate wrongdoing in those agencies and watchdogs

The recommendations for managing whistleblowing, made by TWP, appear to be leading to situations which may have a risk of such recklessness occurring.

The recommendations of TWP need to be applied only to those situations for which the research by TWP has some legitimacy. Going by press releases and submissions from TWP, it does not appear that TWP is prepared to define these areas of legitimacy.

Workplace health and safety issues may arise with the unrestricted application of the recommendations from TWP. Whistleblowers, managers and organizations who are stakeholders in the national efforts to improve the protection of whistleblowers, and to improve the investigation of their disclosures, need to be made aware of the limitations to the scope of whistleblower reprisal and bullying situations that TWP surveyed.

With respect to the recommendations made by TWP that are applied to whistleblowing against co-workers, caution is also advised. The major TWP results are based upon responses from self-nominating whistleblowers in a cross-sectional study.

> As Miceli et al (2009) recites, ***…the key point is that what people say they would do is not necessarily the same as what they would actually do***, and,
>
> As Miceli & Near (1984) states: ***With cross-sectional survey data, the cause-effect relationships among these variables cannot be determined conclusively***, and,
>
> As Heard & Miller (2006, from Miceli et al, 2009) set out, there are two errors to be made with managing wrongdoing in organisations. One is ‘shooting the messenger’ which TWP also advise against, and the second is ***failing to identify the systemic cause***. This failing is a major criticism that this review has of TWP

LESSONS LEARNED

Firstly, for TWP.

Consultation. Professionally run projects, and their directors and managers, set out to involve stakeholders at the earliest opportunity, as a first expression of their professionalism.

Projects fail at the beginning

is the adage remembered by project managers and project directors at the start-up of any project.

82

The TWP appears to have taken some wrong turns, probably because it failed, from its very beginning, to consult with one group of stakeholders, the whistleblower organizations.

A recent submission from TWP to the Queensland Government's Integrity Inquiry appeared to complain that the Qld Public Service watchdog, the Office of the Public Service, had undertaken a review of whistleblowing procedures in 2006 without consulting with TWP.

This may demonstrate that TWP have an appreciation, now, of the part that consultation plays in reviews.

> ***In my respectful opinion, the advice of the OPSC – on which the Whistling While They Work project team was not consulted at the time, and with which the Ombudsman continued to disagree – was neither internally consistent nor persuasive. It was also prepared in consciousness that the results of the Whistling While They Work project were not yet available (OPSC 2006: 2). The Queensland Government should consider that advice to have now been superseded***.[GUS IV, p19]

It may also mean that, in the view of TWP, no authority should now consider the whistleblowing situation and related phenomenon of reprisals and bullying without consulting with TWP.

It is hoped that the request by whistleblower organizations to be consulted has not been made with arrogance, but out of a genuine concern for the welfare of future whistleblowers and of staff left in workplaces oppressed by bullying into silence.

Whistleblower associations might agree with the Office of the Public Service [hence OPS] and the Health System Review in any 'stoush' that these bodies are having against the Qld Ombudsman and the Crime & Misconduct Commission (GUS IV, p19).

OPS is a watchdog, a past Commissioner of which was demoted allegedly over actions taken or not taken towards a person making a complaint and disclosure. The Equity Commissioner resigned from OPS while reported to have been suspended during an investigation of the same issue.

On the positive side, the OPS is also the only watchdog in the Queensland Government known by the Whistleblowers Action Group in Queensland to have tried to refer disclosures of reprisals and bullying against a whistleblower to the Criminal Justice Commission / Crime and Misconduct Commission – other watchdogs are on record as having refused to do so, in alleged defiance of the Crime and Misconduct Acy. Other watchdogs have been requiring the whistleblower to do it themselves.

The OPS has a watch over Health, Corrective Services, Child Services, Emergency Services and other QPS agencies who have been a part of serious allegations, judicial inquiries and / or criminal court cases.

QPS might be trying to deal with serious wrongdoing and systemic whistleblowing situations that, not only may TWP have failed to consider, but also TWP may have decided not to recognize as part of the TWP.

On the basis of what TWP has studied, and what TWP have not studied, it seems eminently reasonable of OPS to see little value in what TWP can offer watchdogs involved with the serious end to the spectrum of whistleblowing. Just on the basis of what has been studied, TWP can have little credibility outside of the 'dobbing' form and low level dissent forms of whistleblowing.

Retaliation Rates. The Press Releases from TWP, containing selections and summaries of its reports for public consumption, claimed that 22% of whistleblowers face disadvantages after making their disclosures. This figure is central to TWP's credibility.

The 22% figure has been selected from a report where the retaliation rate for a group of 'known whistleblowers' is 66%. If the TWP had captured data from whistleblowers who had been terminated, this latter retaliation rate might have been 80%.

This low retaliation rate figure, 22%, however, may have formed the basis of all risk assessments and risk assessment procedures that TWP recommend for the administration of whistleblower protection measures, at least according to some press releases.

Consider again Table 1, reproduced below.

Which of the whistleblower situation, set out in a matrix on Table 1, could safely be expected to draw a 22% retaliation rate.

Could a 22% retaliation rate be suggested, responsibly, as the retaliation rate that whistleblowers and whistleblower support advisors could expect for situations at the top half or on the right hand half of Table 1?

Any professional working with the whistleblowing issue, having to do a risk assessment as a part of their duty of care, will have to make a judgment as to whether a 22% retaliation rate is a realistic estimate or a reckless estimate for the situation 'box' on Table 1 that is at hand.

For the Four Whistleblower Cases of National Significance in the top right corner of Table 1, who are the sixteen other whistleblowers who made allegations of a comparable nature and escaped retaliation.

TABLE 1:
MATRIX - SERIOUSNESS OF DISCLOSURE AGAINST 'SIZE' OF WRONGDOERS

'Size' of Alleged Wrongdoer(s)		Maladmin-istration	Misconduct	Crime	Serious Crime	Criminal Conspiracy
Watchdog	Dissent	Wilkie	Leggate; Hoffman	Dillon; Leggate	Skrijel	Heiner; Dillon; Leggate; Toomer; Warrior (appeal)
Agency	Dissent	Bingham (re Dillon)	Leggate; Hoffman	Dillon; Leggate	Heiner	Dillon; Warrior (retrenchment)
Unit / Branch / Division	Dissent		Toomer; Dillon		Warrior (dispose of record)	
Senior Individual	Dissent	Warrior (disentitlement)	Warrior (secret file)	Warrior (reprisal)	Hoffman	
Loose Group	'Dobbing'			Moore (re RAAF drug trafficking)	Skrijel	
Colleague	'Dobbing'				Smith (re abuse of the aged)	
Junior Individual	'Dobbing'		(falsification)	(theft)		

NOTE: Examples in the matrix are **allegations only**

Seriousness of Alleged Wrongdoing

This is a reality check for the findings of TWP. That reality check appears to challenge the reliability of using TWP findings in any general way, especially with respect to the factors of retaliation and oppressive bullying.

The lower retaliation rate of 22%, and the assumption of the Well-intentioned Agency only, have also led to one notion about whistleblowers that undermines the validity of the calls for protection.

The notion goes:

> why don't the 22% who obtain bad treatment behave the same as the 78% who don't receive bad treatment? After all, the notion continues, the agency is doing everything it can to ensure their support and protection.

With retaliation rates of 66-80%, and with the acknowledgement that some agencies and watchdogs can become systemically corrupted, there can be no thought that whistleblowers have any control over their own fate. With the latter scenarios, the harm done to whistleblowers is an implementation of a plan, which is beyond the means of whistleblowers to turn around or prevent.

85

These retaliation rates and systemic bullying scenarios appear to have been omitted from or suppressed within the Press Releases and other publications from the TWP.

The TWP appears to have been influenced by the attitudes of the watchdogs on its steering committee, and by the major symposia, forums and workshops held with the agencies. This imbalance in inputs to the study, it appears, may have caused an imbalance in the perspectives given to TWP about integrity dynamics in public sector organizations.

Status of Whistleblower Organisations. The exclusion of the whistleblower organisations from the early development of the research project suggests an attitude by the TWP that the whistleblower organisations were not stakeholders in the project.

Whistleblowers were asked to sit on the steering committee for the NSW Police Internal Witness Protection Program. Whistleblowers were invited to give evidence at the Senate Inquiries and provide data and feedback for the research at University of Queensland by de Maria and Jan.

But whistleblower organizations have been refused the opportunity to participate in one of the parliamentary reviews of the Criminal Justice Commission (now Crime and Misconduct Commission), the drafting and review of the Queensland Whistleblowers Protection Act, and the joint authorship of the CJC's guidelines for whistleblowing – examples are from Queensland only. The Whistleblower Action Group were not invited to participate in the OPS review lamented by TWP in GUS IV

The product of the TWP appears, as a result, to be more of a consultancy for its steering committee than an independent research program on whistleblowing.

It is surprising that the Australian Research Council allowed funding for a research project that treated the subject stakeholders in the way that has occurred.

The distortions and flaws in the TWP render the TWP part of the problem now faced by stakeholders in protecting whistleblowers, rather than part of the solution.

Secondly, for the Whistleblower Research

A requirement exists for a policy on the best practices for conducting research into the reprisals and bullying faced by whistleblowers, and for research into health and safety conditions within oppressive bullying environments intended to maintain the silence of staff.

That policy might set the boundaries to the scope that holistic research programs into bullying should include.

Those boundaries might be extended to include the performance watchdog authorities.

As well as the criticisms of TWP described earlier, the TWP missed an excellent opportunity to research the attitudes and performance of watchdogs. These watchdogs were on the steering committee, and the effort to include their organisations should have been made.

The types of whistleblower that Australian public sector organizations may now need the most are whistleblowers from the ombudsman offices and from the justice watchdogs. [Of course such whistleblowers should act within the law].

Eventually, Australia's insight into the corruption agenda, including whistleblowing and oppressive bullying, will join that of other developed countries and begin to question the performance of watchdogs and their CEOs.

In Australia, despite their decades of failure, the watchdogs are lining up to administer any new whistleblowing legislation and anti-bullying regimes.

With the TWP, the watchdogs have received a clean sheet.

A policy on whistleblowing research, research that is extended to the performance of the watchdog authorities, may be influential towards the research that now needs to be done to overcome any apparent distortions from the TWP.

One of the Senate Whistleblowers, in 1993, made allegations of poor performance of medical officers in the Bundaberg region. More than a decade later, the performance of medical officers and their administrators had grown to the proportions of the criminal and toxic bullying environments described during the Bundaberg Hospital scandal.

The performance of watchdogs in response to repeated disclosures about the poor performance of Queensland's medical systems did not prevent 'Bundaberg' from happening. Dr Brian Senewiratne, Nurse Wendy Erglis, Dr Con Aroney, for example – none of their disclosures found sufficient response from the watchdogs. As a response to the Davies Inquiry into the Bundaberg Hospital, however, one of the watchdogs responsible for an oversight role of hospitals, the Ombudsman's Office, asked to be put in charge of whistleblower protection

If whistleblower organizations can not get inquiries into the performance of watchdogs, and can not get admission to the Parliamentary reviews of these watchdogs, perhaps the organizations should set a requirement that watchdog performances be included in research programs for whistleblower protection.

The instigator of the TWP research, the CMC, understood the importance of a systemic approach if any management initiative was to be effective:

> ***effective management of whistleblowing is a systemic challenge for all organizations*** (CMC 2005)

87

Watchdogs have seen the 'system' show true effectiveness in removing whistleblowers, not in protecting them. Whistleblowers like Lindeberg, Dillon, Leggate, Toomer and Skrijel, as well as the Senate Whistleblowers, do not appear to have been given effective protection. These whistleblowers said 'No' to the alleged bullies and bully organisations above them, and they lost their careers.

It is a core objective of ill intentioned agencies, affected by systemic wrongdoing and oppressive bullying within their workplaces, to ensure that public servants who are capable of saying 'No' to wrongdoing, do not progress to the higher positions within agencies and watchdogs.

It appears to be blindness, today, to wonder why there may no longer be any senior public servants who will say 'No' to power. That word they reserve for whistleblowers

88

REFERENCES:

Alford (2001): *Whistleblowers Broken Lives and Organisational Power*, Ithaca Cornell University Press, New York, 2001

Austin (2002), 'Discussion regarding past inquiries into a pack rape of a young girl in State care. Interview with Alastair MacAdam, Senior Law Lecturer, University of Queensland; excerpt of previous interview with Bruce Grundy, Journalist in Residence, School of Journalism and Communications, University of Queensland', *ABC Radio Interviews – The Heiner Affair*, 612 ABC Brisbane 4.37PM, Rehame Transcripts, 20 May 2002

Briody and Prenzler (1998), 'The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture'' *Environmental and Planning Law Journal*, Vol 15, No 1

Commonwealth Ombudsman (2008): Submission No 31 to Inquiry into Whistleblower Protections within the Australian Government Public Sector, House of Representatives Standing Committee on Legal and Constitutional Affairs, 2008, http://www.aph.gov.au/house/committee/laca/whistleblowing

EARC (1990): *Protection of Whistleblowers*, Issues Paper No 10, Electoral and Administrative Review Commission, December 1990

CMC 2005: Media Release, *Whistleblowers being heard … but are they being protected*, Crime and Misconduct Commission, 16 February 2005

De Maria (2006): Brother Secret, Sister Silence: Sibling Conspiracies Against Managerial Integrity, *Journal of Business Ethics*, 2006 65: 219-234

De Maria (1999): *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia*, Wakefild Press

Dempster (1997): *Whistleblowers*, Sydney, ABC Books

Fitzgerald (1989): *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, Report of a Commission of Inquiry pursuant to Orders of Council dated 26 May 1987 et al, Brisbane, July 1989

Fowler & Fowler (1964): *The Concise Oxford Dictionary*, Clarendon Press, Oxford, 1964

Grabosky & Braithwaite (1986): *Of manners gentle: Enforcement Strategies of Australian Business Regulator Agencies*, Melbourne Oxford University Press, 1986

89

GUS IV (2009): Brown, *Whistleblowing Legislation in Queensland The Agenda for Reform*, Submission No 177, Qld Govt Integrity and Accountability Review, September 2009, http:www.premiers.qld.gov.au/community-issues/open-transparent-gov/submissions

GUS III (2009): Roberts et al, *Whistleblowing in the Australian Public Service*, Griffith University, October 2009

GUS II (2009): Editor Brown, *Whistleblowing in the Australian Public Service*, ANU Press, September 2008

GUS I (2008): Draft Report, *Whistleblowing in the Australian Public Service*, Griffith University, October 2007

Hansard (2006): SENATE, Standing Committee on Foreign Affairs, Defence and Trade, Official Committee Hansard, Monday19 June 2006

Hansard (2008): SENATE, Standing Committee on Foreign Affairs, Defence and Trade, Official Committee Hansard, Thursday 26 June 2008

Heard & Miller (2006): Creating an Open and Non-Retaliatory Workplace, *International Business Ethics Review*, 2006, Summer, 1-7

Johnstone (2009): Public servants too scared to say no, *Courier Mail*, 26 November 2009, p4

Lieblich (2002), 'Abuse victims slam Pope's crisis stance', Knight Rudder / Tribune, through *The Courier Mail*, 23 March 2002

McCullough (2002), 'Fatal blow for Anderson', *The Courier Mail*, 17 June 2002, p 13

McMahon (2008): *The Need for Protection of Witnesses and Whistleblowers – The Sword and the Shield*, Submissions No 45 and 45a to Inquiry into Whistleblower Protections within the Australian Government Public Sector, House of Representatives Standing Committee on Legal and Constitutional Affairs, 2008, http://www.aph.gov.au/house/committee/laca/whistleblowing

McMahon (2008a): Submission No 40 and 40a to Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984, Senate Committee on Legal and Constitutional Affairs, 2008, http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/submissions/

McMahon (2005): 'Fitzgerald Inquiry, A Sword Without A Shield', Whistleblowing in Queensland, Conference: *'Reform in Queensland: The Post-Fitzgerald Era*, University of the Sunshine Coast, Noosaville, November 2005

McMahon (2002): Regulatory Capture: Causes and Effects, *International Institute of Public Ethics Biennial Conference*: iipe.org/conference, Brisbane, October 2002

McMahon (2001): Bullying Using Organisational Procedures, from McCarthy et al, *Bullying: From Backyard to Boardroom*, 2nd Edition, The Federation Press, Sydney, 2001

McMahon (1996): The Sword and the Shield: A National Policy for Whistleblower Protection, *Beyond Whistleblowing: Towards a Culture of Dissent*, Whistleblowers Australia Conference, Melbourne, June 1996

McMahon (1995): *Whistleblower Protection Body: A Strategy for Effective Protection*, Submission to the Commission on Government, Western Australian Government, Perth, January 1995

Martin (1993 - 2009): *Brian Martin's Publications on Whistleblowing and Suppression of Dissent*, http://www.bmartin.cc/pubs/03utslr.html

Martin (2003): Illusions of Whistleblower Protection, *UTS Law Review* No 5 2003, pp119-130

Matthews, R (1994): *Report on its Public Hearings into Improper Disposal of Liquid Waste in South East Queensland* (Vols 1 and 2, July and October), Brisbane: Criminal Justice Commission

Miceli & Near (1984): The relationships among beliefs, organizational position, and whistleblowing status: A discriminant analysis, *Academy of Management Journal*, 27(4), 687-705.

Miceli, Near & Dworkin (2009): A Word to the Wise: How Managers and Policy-Makers can Encourage Employees to Report Wrongdoing, *Journal of Business Ethics,* 2009 86:379-396

O'Malley (2002), 'Greens hit mine audit cutbacks', *The Courier Mail*, 16 May 2002, p8

QUS II (1994): De Maria and Jan, *Wounded Workers*, The University of Queensland, October 1994

QUS I (1994): De Maria, *Unshielding the Shadow Culture*, The University of Queensland, April 1994

Rule (2002), 'How the west was a state where police ran wild', *The Age*, 15 June 2002, through www.theage.com.au/articles/2002/06/14

Sawyer (2009): The Dreyfus Report: a Regression from 1994, *The Whistle*, No 58, April 2009

91

Sawyer (2008): The Test Called Whistleblowing, reported in Medical Whistleblower, *OpEDNews* by Parker, 2009

Senate (1995): *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, The Parliament of the Commonwealth of Australia, October 1995

Senate (1994): *In the Public Interest, Report of the Senate Select Committee on Unresolved Whistleblower Cases*, The Parliament of the Commonwealth of Australia, August 1994

Southwell, M (2002), 'Pollution policy under fire', *The West Australian*, 15 June 2002, p13

Standards Australia (2003): *Whistleblower Protection Programs for Entities*, AS 8004 - 2003

Street & Fisher (2009): *Report of the Independent Review on the Health of the Reformed Military Justice System*, Military Justice System Review, ACT, January 2009

SBS (2002), *SBS News*, 16 June 2002

Sunday (2002), NINE, 16 June 2002

Temby QC: (2001), *Discussion Paper as to State Regulatory Authorities Terms of Reference*, Royal Commission into Finance Broking, West Australian Government

Walker (2002): 'Regulator kept quiet about HIH difficulties', *The Courier Mail*, 11 April 2002, p25

Whistleblowers Australia (2008): Discussion following papers by Dreyfus and de Maria, National Conference of Whistleblowers Australia, Melbourne, November 2008

Whistleblowers Australia (2004): Reports by Lennane and Kardell regarding the Whistleblower Study being conducted by the NSW Police Department, National Conference of Whistleblowers Australia, Melbourne, November 2004

92