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## Editorial

David Lewis and Wim Vandekerckhove \*

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Readers of this special issue may wish to know some of the background to its publication. In June 2009 a conference was held at Middlesex University in London to mark the fact that whistleblowing legislation had been in force in the UK for a decade. This event included a public lecture and attracted delegates from a range of backgrounds, including academics, legal and management practitioners, trade unionists, whistleblowers and students. At the end of the conference the decision to establish an International Whistleblowing Research Network was taken. People can join this network simply by consenting to their email address being used for distribution purposes. At the time of writing, October 2013, there are over 100 names listed. The current convenor of the network is David Lewis, who can be contacted via [d.b.lewis@mdx.ac.uk](mailto:d.b.lewis@mdx.ac.uk).

There have been many developments in the law and practice of whistleblowing since the network was established. Legislation has been introduced in several countries (for example, Ghana, Jamaica and Malaysia) and amended in others (for example, Australia, the UK and the US). Empirical research has shown that employers are increasingly recognising both the need and desirability of having effective whistleblowing policies and procedures in place. Of course, some will be responding in order to comply with the law, for example the requirements of the Sarbanes –Oxley and Dodd –Frank legislation in the US, but others may have acted out of enlightened self-interest.

Another development has been the disclosure of information by Wikileaks. This has led to questions being asked about the relationship

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between whistleblowing and leaking and about how people can be persuaded to raise their concerns internally rather than internationally. A particular issue for organisations is that many individuals have come to realise that if whistleblowers are not protected by law it might be wiser to leak information anonymously than to use official channels. The problem of being identified is amply demonstrated by the cases of Bradley Manning and Edward Snowden. In August 2013 the former was sentenced to 35 years imprisonment for passing restricted military information to Wikileaks and the latter was in exile in Russia after revealing data about the activities of the US National Security Agency.

Another trend worth highlighting is the more widespread acceptance that whistleblowing is an important tool in the fight against fraud and corruption. This is evidenced in Europe by reports, consultation and specialist hearings. For example, the Budgetary Control Committee of the European Parliament commissioned a full report on this topic in 2011 and the Council of Europe Committee on Legal Co-operation invited experts to give evidence at a meeting in May 2013. Subsequently, in June 2013 Middlesex University hosted its third international whistleblowing research conference. This was attended by more than sixty delegates and speakers from eighteen different countries. The sessions were interdisciplinary and involved contributions from academic social scientists, philosophers and lawyers as well as NGO's and management consultants. This special issue on whistleblowing is based on the papers presented and, to our knowledge, is the first of its kind to be published in an international journal.

The first article points out that whistleblowing is an orphan, in the sense that it belongs within no academic discipline or professional occupation. Peter Bowden argues that, for several reasons, such a home is vital. All disciplines and occupations experience whistleblowing issues. Where do people find the information to teach, consult or manage whistleblowing in practice? Where do potential whistleblowers go to find out how to report and how do they protect themselves from the retribution that will possibly follow? Bowden observes that there are many institutional questions about how a society effectively ensures wrongdoing is stopped yet fully protects the whistleblower. He asks how and where are those questions best answered and from what academic base is that knowledge passed on to other disciplines? The author points out that research on whistleblowing is conducted by many disciplines and that researchers are likely publish in their respective specialist journals. How then are these findings cross-fertilised? Finally, Bowden maintains that we do not seem to learn from the different arrangements around the world. We do not

know which systems maximise the ability of ordinary people to speak out safely and effectively against wrongdoing. The author concludes with an exploration of the institutional and academic options that could provide an effective “mother”.

In his contribution, Rodney Smith notes that whistleblowing research has progressed considerably over the past decade. However, one area that has not advanced in the same way is the theorisation of the organisations within which whistleblowing takes place. He asserts that the survey-based literature tends to ignore questions about the nature of organisations, while much other writing on whistleblowing repeats the simple dichotomy between whistleblowers as “ethical resisters” and organisations as “bureaucratic hierarchy” that became prominent in the 1970s. Smith’s article identifies some of the problems with this typical way of thinking about organisations and whistleblowing. It challenges the view that bureaucracy in itself is particularly inimical to whistleblowing. He maintains that bureaucratic hierarchy presents opportunities as well as problems for effective whistleblowing. The article also challenges the assumption that, because bureaucracy presents problems for whistleblowing, alternative participative forms of organization must be the solution. Smith concludes by arguing that the application of Mary Douglas’s grid-group theory suggests that all forms of organisation have the potential to produce mixed results for whistleblowers.

The third and fourth articles arise out of specific empirical research projects. Marit Skivenes and Sissel Trygstad investigate whether the type of misconduct that is reported – subjective or objective issues – has any impact on how Norwegian managers assess the legitimacy of whistleblowing. Misconduct involving harassment will involve a larger element of subjectivity than is usually seen in cases of corruption, which tend to be characterized by more objective facts. The authors’ sample included 1,940 municipal managers from 107 medium-sized and large municipalities. One half of them assessed a vignette that described a situation involving harassment, while the other half was presented with the same vignette but with harassment replaced by corruption. Their analysis found that, when controlled for gender, education, seniority or number of subordinates, there were no differences in the perception of whistleblowing. The only difference detected related to the management level of the respondents. Senior managers stood out in terms of their significantly lower acceptance of whistleblowing in cases of harassment. The authors conclude that senior managers take a more positive view of whistleblowing about financial wrongdoing and a less positive view in cases involving harassment.

Wim Vandekerckhove and Cathy James examine data from the Public Concern at Work advice line in the UK to identify the extent to which trade unions are recipients of whistleblower concerns and how successful raising a concern with these institutions is. The authors define successful whistleblowing as being both safe for the person reporting as well as effective in stopping wrongdoing. Their findings demonstrate that trade unions are not the favourite recipient for workers who want to raise a concern about wrongdoing. If they raise their concern at all with a union, workers tend to raise it with others first. However, their results also show that it is safer for a whistleblower to report to a union than it is to other recipients. Significantly, their findings reveal that raising a concern with a union is less effective in stopping wrongdoing than using other external or internal recipients.

In his contribution, Peter Bowal observes that whistleblowing legislation and corporate policies typically prescribe that reports of wrongdoing must be made in “good faith.” Sometimes this requirement is stated in the negative, that reports made with “malice” or “bad faith” will be disqualified from investigation or protection, or both. Although malice appears to be a popular and effective screening instrument, if not a strong signal to deter potential whistleblowers, the author points out that the rationale for the no-malice rule is rarely articulated by legislators and policy drafters. Definitions in whistleblowing law and policy are hard to find. The author poses a number of related questions. Is someone who personally seeks justice and an end to wrongdoing an actuator of malice? Given the no-malice rule, are individual and personal victims of wrongdoing ever permitted to blow the whistle? How much malice is required to disqualify a report, or is an all-or-nothing approach in effect by default? What is the process for a preliminary determination of malice or good faith when a report is received? Bowal argues that the good faith standard, which focuses entirely on the messenger and not at all on the message, may not be well understood by legislators, policy makers and whistleblowing administrators. It is likely to be a standard that is unevenly applied in practice. This article critically analyses the no-malice rule and recommends discarding it.

The remaining articles discuss various aspects of the law. Richard Hyde and Ashley Savage point out that whistleblowing legislation tends to be territorial. However, concerns disclosed by whistleblowers can cross national boundaries, affecting members of the public in more than one country and requiring a response by regulators and governments in several States. This is particularly the case where workers operate in an industry that is globalised and operates transnationally. Two examples of such

industries, aviation and food, are explored in this article but clearly there are others. Surface transportation, such as shipping and road haulage, energy production and financial services are all capable of posing risks to the public throughout the world. The authors argue that the need to address a concern in order to reduce the risk to the public, whilst protecting the whistleblower from suffering detriment, raises particular issues in transnational situations. This article outlines these issues and considers how they can be best addressed, in the long term, by policymakers and, in the more immediate future, by those advising whistleblowers. In their conclusion, Hyde and Savage offer policy guidance intended to ensure that cross-border concerns are handled in a consistent manner that enables issues to be raised and adequately addressed as well as protecting both the whistleblower and the public.

In his contribution based on extensive experience as a specialist attorney in the US, Tom Devine maintains that legal burdens of proof are unsurpassed for the impact they have on whistleblower laws in actually protecting rights. He notes that the U.S. Whistleblower Protection Act (“WPA”) has pioneered modern burdens for fair rules on what it takes to win or lose a case. Its standard governs all thirteen U.S. corporate whistleblower statutes passed since 1989, covering nearly all the private sector. Devine also observes that this standard has been adopted by inter-governmental organizations, ranging from the United Nations to the World Bank. The WPA burdens of proof consist of three parts: 1) only requiring a causal link between protected speech and the challenged personnel action; 2) in relation to the whistleblower’s burden to prove a prima facie case, replacing the “predominant factor” requirement with the more realistic “contributing factor” test; and 3) for the employer’s reverse burden of proof in an affirmative defence that it would have taken the same action for legitimate reasons in the absence of whistleblowing, replacing the “preponderance of the evidence” standard only requiring 50% plus of evidence, with a “clear and convincing evidence” standard requiring 70-80%. Devine asserts that these legal burdens of proof are currently not in any other nation’s whistleblower laws, most of which are silent on the quantum of evidence. He concludes by arguing that the burden of proof should be carefully considered in drafting new whistleblower laws since its omission could turn well-intentioned laws to protect freedom of speech into Trojan horses.

In a very timely piece that highlights the lessons to be learned from the evolution of legislation in Australia, AJ Brown notes that the form of legal protections and regimes remains contentious. The search for “ideal” or “model” laws is complicated by the diversity of approaches attempted by

jurisdictions; frequent lack of evidence of their success; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing. By using Australia's 2013 federal statute as a case study, this article seeks to aid understanding of the ways in which different policy purposes, approaches and legal options can be combined in the design of better legislation. The 2013 Act is one of the first national laws to seek to integrate divergent approaches to the "anti-retaliation" model of whistleblower protection, including its place in the nation's employment law system, as well as setting new standards for the role of "public whistleblowing". The article suggests how different legal approaches might be better integrated and provides a new, indicative schema of how whistleblower protection might be defined relative to other forms of complaint.

With this special issue, we aim to draw the attention of researchers in the field of Industrial and Labour Relations to the issue of whistleblowing. The contributions in this special issue show whistleblowing as a viable topic for such research from a comparative and international perspective. Because of the complex organisational dynamics whistleblowing triggers, and the public interest in discovering organisational wrongdoing, whistleblowing is more of focal point than a contested place for organization studies, political sociology, psychology, legal research, philosophy, and labour studies, as the various approaches used in the papers presented here shows. It has recently also become a topic on which not just academics from various disciplines interact, but also where academics, campaigners, managers, and policy makers collaborate. We hope this special issue can further facilitate such collaboration.

# Whistleblowing Needs a Mother

Peter Bowden \*

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## 1. Introduction

The arguments behind the assertion that whistleblowing needs a mother are essentially institutional – that blowing the whistle on wrongdoing is an increasingly common phenomenon in many countries, across all disciplines and occupations, with many different practices and legislative requirements under development. This multiplicity of practices and requirements places increasing demands on the teaching and training efforts in each of those occupations, as well as on managing the ethical practices in the organisations that employ those disciplines. This article documents the many research studies that tell us that blowing the whistle on wrongdoing is effective in bringing illegitimate activity into the open, but then explores additional issues that are raised in the process. It undertakes this exploration through an examination of components of the systems operating in three countries – the US, Britain and Australia. These are systems which, in core aspects, are very different in concept and in practice. The paper identifies a number of research problems that need to be answered, and asks how are they best examined. Probably the most urgent is that, although whistleblowing is proven to be effective in identifying wrongdoing, the various legal and administrative systems used by different countries around the world raise questions on their relative effectiveness. The overriding questions are, as noted, institutional. Who does the research that will answer these questions? Who then documents the base information for the many teachers of ethics in all disciplines across our universities and colleges? Or ethics officers in the work force? Or for whistleblowers themselves?

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## 2. Whistleblowing is Multi-Disciplinary in Application

Possibly the most powerful argument to support the assertion that whistleblowing needs a mother – academic or administrative - is that the examples of wrongdoing and the questions they raise are drawn from many disciplines. There have been notable business examples, but corruption in government is an equally pervasive issue. The health professions, however, have possibly seen even greater whistleblowing activity. Stephen Bolsin at the Bristol Royal Infirmary or Toni Hoffman at Bundaberg Hospital in Queensland are only two of many examples.

Engineering has Maria Garzino, of the U.S. Army Corps of Engineers (USACE). Garzino is credited with revealing the inadequate state of New Orleans floodwater pumps installed by the USACE in the aftermath of Hurricane Katrina. Her disclosures, which were fought for years by both the Department of Defense and the USACE, show how New Orleans residents remain in great danger if flooding occurs again. A mechanical and civil engineer, Garzino received the 2009 Public Servant Award from the Office of Special Counsel in recognition of her achievement. Other engineering examples, such as the Challenger disaster, or the Ford Pinto case, are often taught in general ethics classes.

Law enforcement has its share. Frank Serpico in the US was an early example of a police officer who blew the whistle on wrongdoing by fellow officers. Debby Locke was yet another in Australia. Pharmacists can also expose wrongdoing—they are particularly well positioned to discover and report Medicaid fraud – and have brought about a number of highly successful qui tam actions under the US False Claims Act. Even dentistry has its share. A Maine (US) dentist was fined \$72,000 after two employees - dental hygienists - raised concerns over perceived lapses in the infection prevention processes. After they raised concerns with the dentist but were ignored, one of the hygienists filed a complaint with the Occupational Safety and Health Administration<sup>1</sup>.

The many sub-disciplines of business – marketing, finance, personnel management, etc. are also locations where wrongdoing has taken place. The overriding questions for ordinary employees contemplating exposing a wrong in their organisations or disciplines is how best to find out how to blow the whistle, and how to do it without endangering themselves.

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<sup>1</sup> Occupational Safety and Health Administration, (OSHA) Feb 08, 2013, <http://obsonline.com/articles/2013/02/08/osha-fines-dentist-for-punishing-whistleblowers.aspx> (accessed February 12, 2013).

These employees need a readily available source for information or advice. They are unlikely to have read the books on whistleblowing written by legal or management researchers. It is also unlikely that their professional texts or even the ethics publications in their own disciplines will carry much information on whistleblowing. They need assistance.

Some of them will write up their experiences, or even undertake research into whistleblowing in their discipline. One question that we need to face, then, is how do we structure a nation's whistleblowing practices so that we learn across the disciplines?

One argument for an academic and professional mother to whistleblowing then is that the failures and successes of the best available whistleblowing practices need to be examined, and if necessary, communicated across to other disciplines. The teaching of whistleblowing policies and systems in the work practice classes or ethics classes in the various disciplines of our colleges and universities is again another area in which we need to ensure that there is learning across the disciplines.

Four disciplines stand out in answering the question about who does this research and how are the findings broadcast. Two in particular – law and management, and two to a lesser extent – psychology and moral philosophy, are the major contributors, with law perhaps being outstanding. Law, however, is an unlikely home for much of the research on administrative and institutional issues – arguably the overriding set of questions facing whistleblowing. Whistleblowers also face major personal decisions where law is perhaps not the best research home. Business and public sector management, often in the behavioural sciences, also would be major contributors in efforts to strengthen current practices.

Of the dozen contributors to the edited findings of the International Whistleblowing Research Network's 2010 conference, six were lawyers, three management specialists and two were psychologists<sup>2</sup>. One was a philosopher.

In concluding this section, therefore, I should note that the argument so far, is that the existing contributors need to ensure that their lessons are transferred across disciplines. Later I shall argue that they also need to work across the many systems under development in different countries and ensure that this aspect of cross learning takes place. I shall also argue that the new and revised institutional approaches under development also demand cross learning.

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<sup>2</sup> D. Lewis and W. Vandekerckhove (eds.), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, London, 2011.

### 3. Learning across Countries and Systems

An underlying contention of this paper is that whistleblowing is effective in exposing ethical transgressions in organisations. Several major research studies, world-wide, have confirmed that blowing the whistle on illegal or unethical action is the most effective way to expose wrongdoing. Brown<sup>3</sup>, Price Waterhouse Coopers<sup>4</sup>, Dyck, Morse and Zingales<sup>5</sup>, KPMG<sup>6</sup>, Durant<sup>7</sup> are among those who have documented the ability of whistleblowers to expose wrongdoing. This research is extensive and convincing. The benefits from encouraging whistleblowing are such that governments world-wide, as well as stock markets, industry associations, and professional bodies, are now advocating in-house whistleblowing systems.

It can readily be argued that whistleblowing legislation and associated administrative practices have three objectives: (i) to encourage employees to speak out against wrongdoing; (ii) to protect the whistleblower from retribution and (iii) to stop the wrongdoing – by investigating and taking appropriate action<sup>8</sup>. This paper contends that the dominant objective of the three is to stop wrongdoing – and that this objective is the essential measure of effectiveness. The other two are necessary if the primary objective is to be achieved. Current research shows that whistleblowers will come forward, if they are confident that their allegations will be investigated and actioned, and that they will not be harmed<sup>9</sup>. If the administrative system behind them is not effective, then the investigating and stopping of wrongdoing will not occur.

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<sup>3</sup> A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, ANU E Press, Canberra, 2008.

<sup>4</sup> Price Waterhouse Coopers, *Global Economic Survey on Economic Crime*, [http://www.pwc.com/en\\_GX/gx/economic-crime-survey/pdf/global-economic-crime-survey-2009.pdf](http://www.pwc.com/en_GX/gx/economic-crime-survey/pdf/global-economic-crime-survey-2009.pdf) 2009, 9 (accessed February 4, 2013).

<sup>5</sup> A. Dyck, M. Morse, L. Zingales, *Who Blows the Whistle on Corporate Fraud?*, National Bureau of Economic Research, 2007, [www.nber.org/papers/w12882](http://www.nber.org/papers/w12882) (accessed April 6, 2013).

<sup>6</sup> KPMG, *Fraud Survey*, [http://www.kpmg.com.au/Portals/0/FraudSurvey%2006%20WP\(web\).pdf](http://www.kpmg.com.au/Portals/0/FraudSurvey%2006%20WP(web).pdf), 2006 (accessed November 4, 2010).

<sup>7</sup> A. Durant, *Fraud Preventions: The Latest Techniques*, Paper presented at the ACFE 15<sup>th</sup> Annual Fraud Conference, Las Vegas, USA, 2004.

<sup>8</sup> Brown (2008) *op cit*.

<sup>9</sup> Brown (2008) *op cit*.

Another issue to note is that there is limited learning across countries. Most whistleblowing researchers undertake and write up their research, for the most part, within the confines of their own disciplines and on the practices within their own country. There are, as will be documented in the following paragraphs, systems in some countries that provide lessons for other countries, both of success and of failure. The argument that whistleblowing needs a mother – overlying institutional systems that ensure the effectiveness of current practices is maximised – also demands that we examine whistleblowing practices in an international context – that we learn across countries as well as across disciplines.

This exploration of both effective and ineffective systems and procedures in the three countries – the US, the UK and Australia – provides further support to the argument that we need to institutionalise the practice of learning across systems and countries. Other countries are drawn on, in a minor way, as appears appropriate, but these countries provide a wide ranging sample. In any case, as Vandekerckhove tells us in an examination of European whistleblowing systems, there is not really that much whistleblower protection in Europe. He describes the results of his search over 27 countries, as very meagre<sup>10</sup>.

#### 4. Does Whistleblowing Stop Wrong Doing?

The following paragraphs examine some of the issues that might be raised by a cross-country, cross-discipline, examination of whistleblowing practices. I start first with the United States and the Sarbanes Oxley Act (SOX- the Corporate and Auditing Accountability, Responsibility, and Transparency Act, 2002). Developed in response to the financial meltdowns in the early part of the last decade, SOX was in part copied in a number of other countries, including Australia (but not the UK). Early predictions were that it would be effective. Not long after SOX was first introduced, Robert Vaughn described it as “the most important whistleblower protection law in the world”<sup>11</sup>. A mid-term evaluation of its effectiveness identified a few weaknesses but in general stated, with the proviso that it was too early to decide, that in the long run SOX will have a positive impact on the performance of publicly traded companies and

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<sup>10</sup> W. Vandekerckhove, *European Whistleblowing Policies: Tiers or Tears?* in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure*, Edward Elgar, Cheltenham, 2010, 15-35.

<sup>11</sup> R. G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers* *Administrative Law Review*, vol. 57, n.1, 3, 2005.

the willingness of the public to invest in such companies<sup>12</sup>. That review was more concerned with SOX's regulations on financial management, however, than its whistleblowing provisions. Others concurred: "SOX is likely to have the biggest impact on business"<sup>13</sup>.

Moberly tells us that its whistleblowing provisions have not been effective. The reason would appear not to be the act itself but its administration<sup>14</sup>. He states:

Sarbanes-Oxley's greatest lesson derives from its two most prominent failings. First, over the last the decade, the Act simply did not protect whistleblowers who suffered retaliation. Second, despite the massive increase in legal protection available to them, whistleblowers did not play a significant role in uncovering the financial crisis that led to the Great Recession at the end of the decade.

Dworkin, another well-known whistleblower researcher, explains the rationale for the Sarbanes-Oxley Act 2002 then sets out evidence of its failure<sup>15</sup>. She also suggests in relation to the False Claims Act that "even this most successful whistleblowing law has significant problems". Dworkin concludes that there is only an illusion of protection, that whistleblowers need help to look after themselves.

In a more general sense, Moberley suggests that the failure of Sarbanes Oxley may be a failure in managing the investigative process. It is certainly true that the Securities and Exchange Commission has been criticized for its failure to detect the 2008 financial crisis<sup>16</sup>. The National Commission on the Causes of the Financial and Economic Crisis in the United States also blames the crisis primarily on regulatory failure<sup>17</sup>.

Such a failure bears out this writer's own personal experience – of the four cases with which he is closely familiar, not one has been satisfactorily resolved – the reasons being solely in the management of the complaint.

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<sup>12</sup> C. A. Rofe, *Efficacy of the Sarbanes-Oxley Act in Curbing Corporate Fraud*, *Rivier College Online Academic Journal*, <http://www.rivier.edu/journal/roaj-2005-fall/j11-rolf.pdf>, 2005.

<sup>13</sup> M. Miceli, J. Near and T. Dworkin, *Whistle-Blowing in Organizations*, New York, Routledge, 2008, 154.

<sup>14</sup> R. Moberly, *Sarbanes-Oxley's Whistleblower Provisions –Ten Years Later*, Electronic copy available at: <http://ssrn.com/abstract=206406>, 2012.

<sup>15</sup> T. Dworkin, *US Whistleblowing: A Decade of Progress?* In D. Lewis, (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn From Existing Whistleblowing Legislation and Research*, Edward Elgar, Cheltenham, 2010, 36-55.

<sup>16</sup> T. Stabile, *SEC Must Drive a Harder Bargain*, *Financial Times*, (April 3, 2011), 2011, 12.

<sup>17</sup> National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report*, Public Affairs, New York, <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>, 2011.

Moberley<sup>18</sup> further asserts that:

Two primary factors contributed to the difficulties whistleblowers had winning cases: administrative recalcitrance and adjudicative hamstringing.

In 2009 and 2010, these conclusions received some support from two Government Accountability Office (GAO) independent audits of OSHA's whistleblower program. These audits found that OSHA lacked resources to investigate whistleblower claims adequately and that OSHA's investigators often lacked training to investigate complex cases.

He had anticipated these findings in an earlier review of 700 separate decisions from the Department of Labor's whistleblowing group<sup>19</sup>.

A small project on whistleblowing in the National Institute of Health (NIH) bears further testimony. The researchers interviewed 135 NIH Investigators who had examined research wrongdoing. They explored a variety of investigator responses, including reporting to the parent institution, peer shaming, one-on-one discussions with the wrongdoer. They formed the conclusion that at least in research organisations, considerable mismanagement of the investigations into the reported wrongdoing had taken place<sup>20</sup>.

The US failure was the principal reason behind the introduction of the Dodd Frank Act (The Dodd–Frank Wall Street Reform and Consumer Protection Act 2010). In this act, the US has incorporated elements of the original False Claims Act, by introducing a form of whistleblowing management which pays whistleblowers a percentage of the savings.

The above acts are for the private sector. The US has also recently amended its national public sector Whistleblower Protection Act 1989 by passing the Whistleblower Protection Enhancement Act in November 2012, after a 13 year program by activists to upgrade the original legislation. It is too early to assess the efficacy of the new legislation. The activists' attitudes to the earlier program suggest that they did not hold the earlier systems in high regard.

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<sup>18</sup> Moberley, 2012 *op cit.*, 28.

<sup>19</sup> R. Moberly, *Unfulfilled Expectations: an Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, in *William and Mary Law Review*, vol. 49, n. 1, 2007, 65-153.

<sup>20</sup> J. Sieber, *Witness to Research Wrongdoing*, in *Journal of Empirical Research on Human Research Ethics*, vol 7, n. 5, 2012, 3-14.

The Whistleblower Protection Enhancement Act (WPEA) is a landmark good government law that overhauls the defunct Whistleblower Protection Act and provides millions of federal workers with the rights they need to report government corruption and wrongdoing safely (GAP, Government Accountability Project, 2013).

The above paragraphs reach tentatively towards the conclusion that some US whistleblowing programs may not be particularly effective. This finding is supported to some extent by findings from Australia and the UK. Australia now has both federal and state whistleblowing legislation but this is applicable only to the public sector<sup>21</sup>. The country does have private sector whistleblower protection provisions in the Corporations Act, but as will be noted, they are not effective.

A search through the annual reports of state Ombudsman offices in Australia to determine the incidence of reporting wrongdoing and the subsequent outcomes of those reports provides some indicative information about effectiveness. Most states are only starting to provide information that facilitates an assessment of the Australian legislation. Although our search went back for six years for some states, we were only able to determine the outcomes for three states and then only for the most recent year. These findings showed the reporting of many more disclosures than were investigated. In NSW in 2013, for instance, 48 disclosures were made, 28 qualified for protection and 5 were investigated. No action other than minor administrative improvement was taken on any of those investigated. In the state of Victoria the same figures were 117, 59 and 38. The Northern Territory gave figures of 70, 38, and 9. No state gave complete figures for earlier years.

These figures show that a noticeable percentage of reports are not accepted as protected disclosures and that, of those that are accepted; only a small percentage has resulted in action. This may be due to administrative shortcomings as noted by Moberley. An alternate reason could be that a high percentage of complaints were not whistleblowing exposures in the sense that they were considered to be in the public interest.

Australian state legislation, applicable only to employees of state government instrumentalities, stipulates heavy fines or prison terms for those who retaliate against whistleblowers. Brown however, notes that there have been few prosecutions for retaliation in any state. He further

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<sup>21</sup> The Federal Public Interest Disclosure Act 2013 is expected to come into operation in early 2014.

draws the conclusion that the causes of weaknesses are administrative in origin:

That analysis (of Australian whistleblowing legislation ) indicated that while there is a high level of reporting, at the organizational level there are significant shortcomings in the way in which the legislation and its principles are being interpreted and disclosers being supported<sup>22</sup>.

Thomas Faunce and Stephen Bolsin (the whistleblower at the Bristol Royal Infirmary) examined “whistleblowing’s uncertain role in Australia”<sup>23</sup>. Their work concentrated on the health sector. They examined whistleblowing practices that had been used to correct administrative and professional issues in three hospitals. In one of the enquiries (Camden hospitals in NSW), the Independent Commission against Corruption produced a report into claims made by the nurse whistleblowers. It found that not one of the 39 allegations was substantiated<sup>24</sup>. This finding, together with the earlier observations on the small percentage of exposures that were acted on, leaves a very uncertain impression about the efficacy of the administrative processes for dealing with whistleblower complaints.

Returning to the US, the results of a study by the Ethics Resource Centre (ERC) lend further weight to the impression that whistleblowing systems are evidencing uncertain administrative effectiveness.

The study by the ERC was on whistleblower hotlines. It is available on their website, June 2013, under the title of Procedural Justice. The study found that of 619 complainants only 21% were fully substantiated:

38 percent of the reports were “unsubstantiated.” They did not stand up under initial scrutiny [by ethics officials] and were effectively dismissed without further action;  
12 percent were partly substantiated at the initial stage;  
29 percent were referred by ethics officials to the human relations or legal department for additional inquiry. In three quarters of these cases (75 percent) the objective outcome was unfavourable to the complainant;  
And that 21 percent were fully substantiated.

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<sup>22</sup> A. J. Brown, *Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, D. Lewis and W. Vandekerckhove, (eds.), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, London, 2011, 70.

<sup>23</sup> T. Faunce and S. Bolsin, *Three Australian Whistleblowing Sagas: Lessons for Internal and External Regulation*, in *Medical Journal of Australia*, vol. 181, n. 1, 2004, 44-47.

<sup>24</sup> M. Duffy, *A Whistleblower’s Unhealthy Mess*, Sydney Morning Herald, December 23, 2005.

This study, incidentally, included grievance complaints as well as wrongdoing complaints.

### 5. The Whistleblower with a Grievance

Australia has highlighted a related issue in the whistleblowing debate, a problem that may be the cause behind the ERC results, and perhaps the Moberly findings – that of uncertainty over the extent of wrongdoing in the whistleblower’s complaint. Some who come before whistleblower support groups are, without doubt, people who are seriously concerned with the treatment they have received from a supervisor or from their employer generally. They will complain about their concerns, often in a whistleblowing context. This writer estimates that between 5 and 10 % of people who have approached him about a whistleblowing concern are in fact, people with a personal grievance that is not due to a wrongdoing.

Others pose a more serious problem. We are all aware of difficult people in the workplace. The many books on this topic are evidence that there is some substance behind the belief that at least some of our fellow workers suffer from personality disorders<sup>25</sup>. In the inquiry into the need to strengthen the whistleblowing provisions of the Corporations Act, one respondent noted, with some support, “that people with a grudge against their company, or against their supervisor, could raise false allegations, such as bullying or displaying favoritism”<sup>26</sup>.

The other side of this concern, however, is the allegations of the practice of government agencies of discrediting contentious employees, including whistleblowers, by using compliant psychologist assessments<sup>27</sup>. Crikey.com, the activist group behind this assertion, is reasonably convincing. The author has also come across instances where a psychological assessment has been the result of having blown the whistle. The Seage article reveals that seminars on psychiatric issues were presented to legal and HR managers of the Australian Tax Office (ATO).

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<sup>25</sup> L. Faraday-Brash, *Vulture Cultures*, Australian Academic Press, Brisbane, 2012; R. Cava, *Dealing with Difficult People*, Firefly Books, New York, 2004; A. Bernstein, *Emotional Vampires*, McGraw Hill, New York, 2001.

<sup>26</sup> P. Bowden, *Whistleblowing*, in P. Bowden (ed.), *Applied Ethics*, Tilde University Press, Melbourne, 2013.

<sup>27</sup> C. Seage, *The Tax Office, “Hired Assassins” and How to Gag Dissent*, <http://www.crikey.com.au/2013/02/05/>, 2013 (accessed July 25, 2013).

This article quotes a number of supporting references, including one by the chairman of the Australian Justice Tribunal, which says as long as the practice of paying expert witnesses for psychiatric reports on contentious staff remains in force, government agencies like the ATO “will continue to foster miscarriages of justice that destroy innocent lives”.

The obvious response of a genuine whistleblower, who may indeed be harried by superiors, is to gather evidence that the wrongdoing is factual, and highly supportable. Such a requirement makes it all the more necessary that all sides have a common understanding of wrongdoing, and that the mechanisms for verification are well established. A personal grievance, such as being bullied, may be factual, or it may be only in the eyes of the person complaining. If consistent by one supervisor, and across a number of people who are willing to expose it, it is clearly a wrongdoing, and in need of investigation.

## **6. Compensating Whistleblowers as a Deterrent**

The underlying concept behind the United Kingdom’s Public Interest Disclosures Act, 1998, is that the agency that inflicts retaliation should compensate the whistleblower who suffers the retaliation. An exploration of the case studies published by Public Concern at Work (PCaW) –a major whistleblower advice agency in that country – supports this conclusion. Proponents of the UK act would argue that such compensation deters organisations from taking detrimental action against whistleblowers. Nevertheless, if reducing illegitimate or unethical behaviour and correcting the wrong is accepted as a primary objective of the whistleblowing system, this objective appears to be ignored or at least downplayed in the UK. A number of cases are documented where wrongdoing was not proven, nor corrected, yet the “whistleblower” has been compensated. Public Concern at Work notes in its Whistleblowing beyond the Law, Biennial Review (2011):

In the first 10 years of the Act, there were approximately 9,000 claims. Of these, only 3,000 odd had resulted in written judgments, all of which were sent to us by the ET (Employment Tribunal). Of these, only 532 judgments contained sufficient information to identify the public concern that gave rise to the claim<sup>28</sup>.

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<sup>28</sup> Public Concern at Work, *Whistleblowing Beyond the Law, Biennial Review* [http://www.pcaw.org.uk/files/PCAW\\_Review\\_beyondthelaw.pdf](http://www.pcaw.org.uk/files/PCAW_Review_beyondthelaw.pdf), 2011, 9.

PCaW had advocated that the documentation for the Employment Tribunal claim (the ET1 claim form) be sent to the appropriate regulator, so that it can take action to correct the wrongdoing. To quote the same PCaW 2011 review “At present over 75% of PIDA claims are settled before a hearing. One result of this is that we are unable to tell from the Tribunal judgments exactly what happened to give rise to the claims”<sup>29</sup>. The National Association of Schoolmasters, Union of Women Teachers in its submission to the 2011 inquiry by the Department of Business, Innovation and Skills (DBIS) on this issue, claimed that the wrongdoing was currently being “hushed up”. Parliament did decide that, provided the whistleblower agreed (by ticking a box), details of the whistleblower’s accusation of wrongdoing on the ET1 claim form could be sent by an employment tribunal to the appropriate regulator.

It is this writer’s belief, however, that sending the whistleblower’s complaint via the ET1 claim form to a regulator will be insufficient for that regulator to decide whether it should investigate the wrongdoing. Any regulator will at least need to interview the whistleblower, as well as the company (which will likely deny the claim), and investigate the accusation before reaching a conclusion. There are perhaps 40 regulators in the UK, most of which have little experience in investigating whistleblower’s claims and taking corrective action.

The United States also uses a form for submissions by public sector whistleblowers - the Office of Special Counsel OSC Form 12. It is a separate form enabling the whistleblower to provide details of the wrongdoing. The whistleblower lists which of five wrongs he/she is reporting – a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority, or substantial and specific danger to public health or safety. He/she also responds to further questions. The OSC sends the form for all non-trivial issues to the appropriate agency and later checks for response. That process of following up does not appear to exist in the UK.

Research on the extent to which regulators respond to concerns raised is of urgent priority in the UK. Until that research is undertaken, it seems reasonable to conclude that a large percentage of the wrongdoing by organisations in the UK remains uncorrected. It is likely that most of the “hushing up” of the whistleblower occurs in private sector claims, but such an assumption also needs to be checked.

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<sup>29</sup> Public Concern at Work, *op. cit.*, 9.

The UK system also has the unfortunate requirement that the genuine whistleblower has to experience the retribution first, before he /she can claim any compensation. It does seem arguable that to prevent the retribution in the first place is a more laudable objective.

In 2013 PcaW set up an inquiry into the efficacy of the current whistleblowing legislation – the Whistleblowing Commission. It would appear likely that the Commission will recommend on the issue of the extent to which the current system of sending ET forms to the regulators does instigate an investigation. The Commission, it should be noted, is an example of a voluntary agency questioning current institutional practices. It is hoped that the many researchers, teachers and practitioners in ethics and whistleblowing practices become aware of the Commission’s findings and incorporate them, as appropriate, into their own work. Note also that the Government has also set up an Call for Evidence into whistleblowing practices and the efficacy of the Public Interest Disclosure Act, 1998.

## 7. One Legislative Act versus Many

Another difference between the UK practices and those of other countries is that the UK legislation covers both private and public sectors. The United States, as does Australia, has separate acts for the private and public sectors. The US has over fifty-five acts covering different issues in the private sector. It is a near impossible task to sort one’s way through them. As Stephen Kohn writes in a section that has as its title “Finding the law that protects you”: “To this day, Congress has not passed a comprehensive national whistleblower law”<sup>30</sup>. And a little later:

if you are going to blow the whistle, you must understand the complex maze of federal and state laws that govern your conduct, and ensure that you obtain the maximum legal protection.

Kohn’s advice is to find a lawyer to provide assistance. However, this action is neither desirable nor feasible for many employees, and constitutes a further roadblock in the path of those who are wondering whether to speak out against wrongdoing in their own organisation.

Australia, however, has only one private sector statute with a whistleblowing support capability- the Corporations Act. Its provisions are not effective and it is admitted by government that they “appear to

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<sup>30</sup> S. M. Kohn, *The Whistleblowers Handbook*, Lyons Press, Connecticut, 2011, 9.

have been poorly regarded and rarely used". At the time of writing, only four whistleblowers had ever used these protections to provide information to ASIC"<sup>31</sup>.

The government instituted an inquiry into the efficacy of the whistleblower provisions of the Corporations Act in 2009. Most respondents advocated strengthening and extending the protections<sup>32</sup>. The dominant reason for the failure of the Act is that the protections are limited to contraventions of the Act itself. Examples of wrongdoing not covered under this legislation include "health and safety matters, breaches of anti-discrimination laws, environmental damage, waste and corruption"<sup>33</sup>. The government listed nine issues that it believed worthy of investigation. In submissions to the inquiry respondents listed another four that should be protected under the Act<sup>34</sup>. If the Australian government should widen the protection for whistleblowers under the act, it is hoped that it can adopt the UK system of just one statute covering all wrongs, although with an ability to ensure that whistleblower complaints are investigated.

It is also possible for the United States to reconstitute its legislative structure to provide just one act providing protection for exposing the wrongs that companies commit. Such a simplification would certainly assist whistleblowers. Currently however, there appears to be no movement to simplify the US legislation.

A final observation on Australian, UK and US hotline services. Each country has numerous agencies, some of them supplied by the forensic arms of the large accounting companies, who offer a whistleblowing hotline. They sell their services on the basis that they facilitate fraud prevention. Their advertisements promote the benefits of reducing fraud against the company. Under a hotline system, commercial or internal, retribution will likely become less of an issue. Employees who report thefts or fraud against the company, are unlikely to suffer any major retributive damage. They may, of course experience disagreement or even rejection from other members of staff.

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<sup>31</sup> C. Bowen, Minister for Financial Services, Superannuation and Corporate Law, Attorney-General's Department, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, 2009.

<sup>32</sup> P. Bowden, *Stopping Corporate Wrongs – The Effectiveness of Australian Whistleblower Reforms*, in *Australian Journal of Professional and Applied Ethics*, vol. 12, n. 1 & 2, 2010, 55-69.

<sup>33</sup> J. Pascoe and M. Welsh, *Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia*, in *Common Law World Review*, vol. 40, 2011, 144-173.

<sup>34</sup> Bowden, 2010, *op. cit.*

Commercial hot-line services raise a further concern, however, in that they report to a senior manager within the company. If the wrongdoing is by an official and is of benefit to the company, the organisation can still cover up the wrongdoing. An independent “mother” however, can provide an alternate location for the whistleblower to bring the action into the open.

A related issue is whether it is acting the public interest to report a fellow worker who is behaving in an unethical or unacceptable way, but who does no wide spread damage to the public interest. An example might be someone in the cubicle next to you downloading porn on his/her company computer. Or to report a colleague whom you know is cheating on their expenses claim. The legislation in the UK and Australia is titled Public Interest Disclosure Acts, designed to protect persons who reports such acts. An issue of debate, however, is whether reporting such actions is acting in the public interest. Public interest issues could be considered broad wrongdoings – activities that endanger public health, safety, general well-being or the environment, or that raise anti-discrimination concerns. Broadly, a disclosure in the public interest is information that brings our attention matters about which we, in a participative society, should be aware; and include a disregard for the law – dangers to our health and safety, or possible harms to society at large or groups within it , now or in the future, whether direct or indirect.

Reporting an action such as stealing from the company then, is acceptable as whistleblowing, and would be protected. It is an issue that does need clarification, however, for one of the reasons behind the apparently inadequate investigations in the United States and in Australia, mentioned earlier, may be a decision not to investigate as the issue was a concern to the organisation, not the investigators.

## **8. Learning the Effective Practices**

So far we have concentrated on those institutional components of whistleblowing systems where countries might avoid pitfalls currently being experienced. There are lessons, however, where countries can learn of more effective approaches from each other. One such example is the False Claims Act in the US and the extension of the reward systems under Dodd Frank and related acts – Internal Revenue, Commodities Exchange, and the Securities Exchange Acts.

Neither Australia nor the UK has such qui tam actions. Yet the benefits are clear. Department of Justice statistics show that in 2012 it recovered

\$3.3 billion in settlements and judgments under the whistleblower provisions of just the False Claims Act. Over \$US40 billion was recovered through the legislation in the 25 years to September 2012. Some of the recoveries are massive: Glaxo Smith Kline: \$3 billion to settle whistleblower charges of kickbacks and doctoring research, Pfizer \$2.3 billion for fraudulent sales claims, Abbott Laboratories \$1.5 billion, Johnson & Johnson a \$158 million. Other organisations include the State Street Bank, Bank of New York Mellon, BankAmerica, Toshiba, Schering-Plough Inc. All are companies that operate in the UK and Australia.

Stephen Kohn states that the False Claims Act “has proven to be the most effective anti-fraud act in the United States and perhaps in the entire world.”

The reason why Australia and the UK have not developed their versions of a False Claims Act may possibly be a belief that whistleblowers should not be rewarded for reporting dishonesty. If so, they reflect the views of the US Attorney General during WW II, Francis Biddle, who, in 1943, emasculated the FCA. The rise in false claims that followed, however, proved the value of the Act. It was reconstituted in a series of amendments in 1986.

If “bounty hunting” is the reason why the UK and Australia have rejected this very effective whistleblower system, each may wish to consider approaches where the whistleblower is compensated, but less obviously so. One such approach is for the whistleblower to be awarded costs from a fund built up from the fines, or savings, from this and previous actions<sup>35</sup>. Dreyfus argues for a defence fund to cover legal costs, but variations are possible – one being to provide damages as well as costs. Others are to incorporate all reward systems into one piece of legislation, instead of four as in the US. A third is to find an institutional approach where the individual does not have to initiate the *qui tam* action. An examination of the various *qui tam* actions in the US will evidence that great effort over a long period is required. They are the actions of people with great fortitude.

The current PCaW inquiry into whistleblowing in the UK has this issue as one of its terms of reference. The advantages of the US *qui tam* system are so obvious, as are the difficulties faced by the whistleblower, that it is likely that the inquiry will recommend the adoption of some form of compensating the whistleblower for the difficulties he or she has endured.

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<sup>35</sup> S. Dreyfus, *Keeping Us Honest: Protecting Whistleblowers, The Conversation*, <http://theconversation.com/au>, 2 April 2013, (accessed July 7, 2013).

### **9. Then Who Should Be Mother?**

This article is working towards the thesis that effective whistleblowing comprises a multi-faceted, multi-disciplinary set of issues; that there are several outstanding questions to be resolved and that no one single discipline can be responsible for all answers. It is also working toward the conclusion that whistleblowing effectiveness will benefit from having one discipline or one oversighting institutional structure promoting, perhaps even coordinating, the research and the learning across disciplines and nations. It could also promote widespread teaching of effective whistleblowing practices. This one oversighting institutional structure would be for one country, but there is still a need for countries to learn from each other.

One such mother could be the existing disciplines. Teachers, trainers, consultants can draw particularly on law, business and public administration researchers that write about whistleblowing. But then such disciplines need also to be aware of the demand across disciplines and across countries and that the lessons need to flow more widely than within the discipline or within the country.

### **10. Moral Philosophy as Mother?**

A related argument is that whistleblowing is an ethical issue. Ethics is a subject taught in universities and colleges around the world. Many universities require of their graduates additional attributes over and above the specific knowledge and skills of their degree. Such attributes usually include an understanding of ethical behaviour. The University of Glasgow, for instance, requires its graduates to be “ethically and socially aware,” a requirement that is documented in considerable detail. The University of Sydney requires ethical, social and professional understanding. To meet these requirements, many disciplines and faculties offer ethics courses. Such classes in undergraduate or graduate programs need to include whistleblowing. It is, after all, the most effective way to identify wrongdoing. The teachers of these courses, as do teachers in the colleges and other training institutions, have an obligation to learn sufficient about whistleblowing to be able to provide a worthwhile course. As academics, they would also be expected to contribute to the many outstanding research questions.

Let me first spell out the problems faced by a university lecturer who volunteers to teach the newly approved ethics course in his/her discipline.

Or the employee, who, in increasing numbers these days, puts up their hand to be the new ethics officer. Whistleblowing would be a compulsory component of that workload. The lecturer or ethics officer has to become familiar with the more common ethical transgressions in the discipline or in that industry. Each, however, has additional learning requirements. These are primarily to become familiar the moral theory underlying ethical practices. He or she will read the more common texts on ethics – an extensive task, stretching perhaps from the early Greek philosophers, but certainly to modern texts on ethics. They will also draw their material from the ethics books in their disciplines – if an engineer, from the engineering ethics books, or if for a business class, from the business ethics texts, if a nurse or doctor, from the medical ethics books. Beauchamp and Childress, for instance, is a near universal textbook for the health services industry<sup>36</sup>. Even the briefest of inspections, however, will tell you that those books contain very little information on whistleblowing.

I would like to put forth the assertion that philosophy is the ideal discipline mother. But unfortunately, none of the texts on moral philosophy publish research on whistleblowing or even present any substantive discussions on the issue. A couple of examples might illustrate this point. A recent book on ethics by two philosophers, Julian Baggini and Peter Fosl, *The Ethics Toolkit*<sup>37</sup>, provides an accessible and engaging compendium of concepts, theories, and strategies that encourage students and advanced readers to think critically about ethical behaviour. They argue that moral philosophy should guide action. Their book has no mention of codes of ethics or whistleblowing systems.

The second example is the *Journal of Applied Philosophy*. It has one article and a 2004 book review on codes of ethics, but nothing on whistleblowing.

Many other examples can be quoted. A search for “whistleblowing” in the Springer range of some 35 or so professional journals produced 290 articles. None was in a philosophy journal, of which Springer has a half dozen or so. Typically philosophy departments at universities and colleges will offer two or three courses in ethics. It is unlikely that they will cover whistleblowing in any depth. As one contribution toward establishing this overarching “mother”, therefore, we need to convince our philosopher

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<sup>36</sup> T. Beauchamp, J. Childress (6<sup>th</sup> edition), *Principles of Biomedical Ethics*, Oxford University Press, Oxford, 2008.

<sup>37</sup> J. Baggini, P. Fosl, *The Ethics Toolkit*, Blackwell, London, 2007.

colleagues that speaking out against wrongdoing has perhaps the greatest potential of all activities in reducing unethical behaviour.

So where do the teachers of ethics in engineering, business, pharmacy, etc., and most importantly, moral philosophy, go to find out about whistleblowing? And obtain basic information and teaching materials? They can, of course, keep their eyes open for new articles in the law and the business journals. And for any new books on the topic from other disciplines.

They can also draw on the whistleblowing NGOs. The only how-to-blow-the-whistle books with any depth are those put out by the whistleblowing support groups – PCAW (Public Concern at Work), GAP (Government Accountability Project), POGO (Project on Government Oversight), etc. In a sense, these whistleblower support groups are “mother.” Each teacher and ethics officer in the work force, however, has to interpret what he or she discovers. The result could be many different interpretations of whistleblowing systems that are taught.

They can draw on the International Whistleblowing Research Network. The majority of members are researchers and teachers in law or administration. There are a sufficient number of other disciplines to make sure that a multi-disciplinary balance can be achieved. The network does not have the resources, or remit, to fill a complete mother role. However, it can and does even now, work towards filling some roles – the cross discipline and cross country interchange of ideas and methods.

### **11. The Voluntary Agencies as Mother?**

Reading the complaint handling cases on the PCAW website ([pcaw.org.uk](http://pcaw.org.uk)), a reader is struck by the high degree of competence and insight shown by PCAW staff. Many whistleblowing NGOs offer similar assistance. The same reader will also note the frequency with which PCAW and others intervene in the problem. It is often direct assistance - more than advice. The question then arises whether this intervention should be provided by a public body, such as the Netherlands Commission discussed below. Such a body can provide support, but also, for those whistleblowers that they meet face to face, handle the wider issue of doubtful whistleblower claims. An obvious benefit is bringing greater certainty to the validity of the whistleblower allegation, and for those that are genuine, helping ensure that the wrongdoing is investigated and stopped - a benefit that could overcome the dismissal of many claims under current systems.

It should also be readily apparent that increased advisory and regulatory capacity will increase whistleblower efficacy. Nielsen<sup>38</sup> that the whistleblowers can assist in this process - by blowing the whistle in ways that helps regulators understand the key issues; and that assists regulators to prosecute wrongdoers. The voluntary agencies or an independent agency can also assist whistleblowers in this process.

## 12. A Separate Support Body?

For this writer, the overriding question is in the administrative effectiveness of the steps between the whistleblower speaking out and the ultimate resolution of the problem. I will argue that a separate body would be advantageous; also that it be independent but part of the disclosure and investigative process. The whistleblower must be able to use it as a support and as a second avenue of appeal. This writer has repeatedly argued in submissions to legislative enquiries that organisations with internal whistleblowing systems cannot always be expected to handle whistleblower complaints honestly. There are too many examples of respected institutions which, on becoming aware of wrongdoing within their ranks, have attempted to cover up the wrong. Such an oversight body could have several functions – of support and advice, of preliminary investigation, of supervision of the overall process, of fostering research, of undertaking its own research, and publishing relatively widely. The creation of such a body also places the whistleblowing emphasis on the administrative processes of dealing with a whistleblower's complaint, not on the effectiveness of the whistleblowing legislation.

Such a body would of necessity be national, but it, along with the current contributors, and the International Whistleblower Support Network, would endeavour to maximise leaning across international boundaries.

A support institution would also ensure that if the whistleblower is reluctant to report internally, the accusation can still surface and be investigated. Research tells us that the majority of whistleblowers speak out internally first. If no action is taken, this body would give the whistleblower an alternate location to which to appeal. The external body would also be an initial screen that if satisfied ensures that the complaint goes to a regulator and is investigated.

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<sup>38</sup> R. P. Nielsen, *Whistle-Blowing Methods for Navigating Within and Helping Reform Regulatory Institutions*, in *Journal of Business Ethics*, vol. 112, n. 3, 2012, 385-395.

A related question to be answered is how and to what extent this whistleblower body should assist the whistleblower. Whistleblowers will tell you of the sometimes insurmountable personal conflicts that they face when they come across wrongdoing. Examples are seen in a study of the emotional difficulties faced by nurse whistleblowers in Australia<sup>39</sup>. Even a little imagination, however, will tell you that if you are a single individual contemplating exposing a fraud by a large company or government agency, you will be very aware of the power and resources that this large organisation can bring to bear against you -resources far in excess of those that you can command.

Of interest, therefore, is the recent establishment of an independent advice centre of the Government of the Netherlands - the Commission for Advice and Information on Whistleblowing (CAVK). It came into being on 1 October 2012. The decision established CAVK on an interim basis. After 2 years it will be evaluated, and the legislation strengthened on the basis of the evaluation. The CAVK does not have a mandate to investigate, although an extension of its activities to embrace investigative aspects of whistleblower exposures is currently being considered - an extension of responsibilities that would seemingly negate its initial screening and supporting role. Its current task is to give information and advice to potential and actual whistleblowers in both the public and the private sectors on how to raise concerns, and how to avoid juridical difficulties and pitfalls. Whistleblowers may approach it before they go to their line managers. It will check whether there are ways to raise the matter internally and if not it will assist the whistleblower to prepare the issue to be brought to an external agency. It also provides information and advice to employers. The centre aims to play an important role in preventing escalation of a dispute. Whether the Commission has any impact on sorting out the doubtful whistleblower from the genuine one remains to be seen, but it would seem reasonable that in their early interviews, Commission personnel will distinguish the difficult “whistleblower” from the genuine article. They will also be able to distinguish the genuine employee with a personal grievance. Such an initial screening is possible by ascertaining, at least to a preliminary extent, the existence of a wrongdoing. This role could be taken on by a voluntary support agency, or by an official or semi-official organisation.

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<sup>39</sup> K. Peters et al., *The Emotional Sequelae of Whistleblowing: Findings from a Qualitative Study*. *Journal of Clinical Nursing*, vol. 20, 2011, 2907-2914.

### 13. Summary

Is continuing as we have done in the past the best approach? In other words, each person from any discipline undertaking their research into whistleblowing as they see it best from their own professional perspective, and publishing under the auspices of that discipline? I argue no. That approach leaves the individual whistleblower, the ethics officer in the workplace, and the multiplicity of teachers of ethics across our universities and colleges, to do their own searching, and to pull together their own package of information. That package will vary widely, with a corresponding multiplicity in the practices their listeners and readers adopt. I argue that the ideal “mother” is moral philosophy – for it is already “mother” to a large number of ethics related activities. I recognise the reluctance, however. And possibly the limited ability of that discipline to undertake some of the more rigorous quantified research. But I assert that such teaching in ethics classes and the associated research, writing and consulting will introduce large numbers of students to whistleblowing practices, and in the long run, have a beneficial impact on ethical behaviour in our organisations and institutions.

Failing or even in addition to that option, I argue for a multi-fold solution. Each discipline need widen the awareness of its responsibilities. That awareness extends to human resource managers or corporate governance specialists in devising whistleblowing policies and procedures. The whistleblowing support and network groups (PCaW, GAP, etc.) would be “mothers”, supported by the International Whistleblowing Research Network. But at the core, to the extent that the volunteer mothers are unable or unwilling to provide assistance to whistleblowers, the creation of a semi government support agency, if you like, an ombudsman, in addition to the regulatory bodies, would be the first line of support for people wondering whether to speak out against wrongdoing.

Such practices will help ensure that the research is multi-disciplinary, that spreading the more effective practices reaches all fields, and that effective speaking out against wrongdoing becomes a routine, and successful, aspect of our social structures.

# Whistleblowing and Hierarchical Bureaucracy: Re-Thinking the Relationship

Rodney Smith \*

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## 1. Introductory Remarks

In recent decades, empirical research work on whistleblowers has far outstripped theoretical work on understanding the relationship between organisations and whistleblowing. Major empirical studies have contributed to a much better understanding of how and why employees report wrongdoing, how and why the outcomes of reporting vary, and why some whistleblowing laws and policies are more effective than others<sup>1</sup>. These studies tend to focus on individuals – employees, whistleblowers, non-reporters and managers – rather than organisations. The research window into the organisations within which whistleblowers operate is almost always organisation members' responses to survey questionnaires. As Terry Dworkin and Melissa Baucus, among others, have observed, these questionnaire responses can only provide limited information about organisations and their whistleblowing processes<sup>2</sup>. Survey studies typically repeat a few organisational measures – size, the length and accessibility of whistleblowing policies, the presence or absence of specific reporting channels and of dedicated investigation and

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<sup>1</sup> See, for example, A. Brown (ed.), *Whistleblowing in the Australian Public Sector*, ANU E Press, Canberra, 2008; M. Miceli, J. Near, T. Dworkin, *Whistle-Blowing in Organizations*, Routledge, New York, 2008.

<sup>2</sup> T. Dworkin, M. Baucus, *Internal v External Whistleblowers: A Comparison of Whistleblowing Processes*, in *Journal of Business Ethics*, 1998, n. 17, 1282-1283.

support officers – that were introduced in the early 1980s<sup>3</sup>. These items provide useful information but they give limited purchase on broad questions about whether some types of organisational structures and cultures are more conducive to good whistleblowing outcomes than others. Where accounts of empirical whistleblower studies address these broad questions, they do so in a brief and speculative fashion<sup>4</sup>.

The gap left by the absence of serious and systematic study of the role that organisational characteristics play in whistleblowing has been filled by the oft-repeated claim that the problem for whistleblowing and whistleblowers is “bureaucracy” or “bureaucratic hierarchy”. The claim that bureaucracy is bad for whistleblowing has largely been taken for granted, as has its implicit corollary that different organisational forms of some kind would produce better whistleblowing processes and outcomes. This article challenges the claim that bureaucracy and whistleblowing are inevitably opposed and argues that we need to think more rigorously about the relationship between different organisational forms and whistleblowing. It begins by outlining the critique of bureaucratic organisation found in the whistleblowing literature. It identifies three problems with this critique. First, bureaucracy is a persistent and pervasive form of organisation. If bureaucracy and successful whistleblowing are mutually exclusive, then the prospects for whistleblowing as a way of combatting corruption and promoting integrity seem remote. Second, when bureaucratic organisation is examined systematically, its core characteristics include many features that promote and support whistleblowing, along with others that hinder it. Third, this mixed result for bureaucracy is also found in other types of organisation. Rather than being unquestionably better alternatives to bureaucracy for whistleblowers, the other available modes of organisation present problems of their own. This point is developed systematically using the grid-group framework drawn from the work of Mary Douglas. The paper concludes that more research is needed to test arguments about the advantages and disadvantages for whistleblowing of different organizational forms.

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<sup>3</sup> See, for example, M. Miceli, J. Near, *Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-Blowing Decisions*, in *Personnel Psychology*, 1985, n. 38, 525-544.

<sup>4</sup> See, for example, J. Near, M. Miceli, *Wrongdoing, Whistle-Blowing, and Retaliation in the U.S. Government: What Have Researchers Learned from the Merit Protection Board (MSPB) Survey Results?*, in *Review of Public Personnel Administration*, 2008, n. 28, 277.

## 2. The Critique of Bureaucracy

The critique of bureaucracy in the whistleblowing literature began with the emergence in the 1970s of the simple dichotomy of the good whistleblower versus the evil organisation. In this critique, organisations are commonly personified as unitary actors who act on a range of negative motives. In a recent example, Tina Uys writes:

Organizations typically regard whistleblowing as a form of betrayal. They believe that whistleblowing is a deviant act, which threatens the profitability of the organization and tarnishes its reputation. They therefore tend to deal with whistleblowers as traitors by punishing those who engage in this kind of activity<sup>5</sup>.

In some of this literature, the nature of the organisation does not seem to matter. To protect themselves, organisations of whatever type respond in the same negative way toward whistleblowing and whistleblowers<sup>6</sup>. Typically, however, bureaucracy is explicitly or implicitly identified as the specific organisational source of whistleblowers' tribulations. Three of the many available examples are presented here to illustrate this point.

The first is the widely cited American whistleblowing study by Myron Peretz Glazer and Penina Migdal Glazer, who characterise whistleblowers' relationships with their organisations as follows:

ethical resisters were considered a danger by the organization for which they worked. By protesting internally and then going to the Congress or the press, these employees revealed that their principles commanded their loyalty far more strongly than did management. From their superiors' perspective, the resisters had not uncovered serious breaches of policy but rather had involved themselves in actions against the very bureaucratic hierarchy that had hired them and provided good salaries and the accoutrements of a respected position. ... In seeking to regain the initiative by totally rejecting the allegations and undermining the resisters' credibility, managers used the formidable power available to them<sup>7</sup>.

Whistleblowers who pursue their concerns suffer from a series of escalating responses that reveal bureaucracies in liberal democracies to be no different from those in Soviet Russia:

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<sup>5</sup> T. Uys, *Rational Loyalty and Whistleblowing: The South African Context*, in *Current Sociology*, 2008, n. 56, 905.

<sup>6</sup> See, for example, C. Alford, *Whistleblowers: Broken Lives and Organizational Power*, Cornell University Press, Ithaca, 2001, 98.

<sup>7</sup> M. Glazer, P. Glazer, *The Whistleblowers*, Basic Books, New York, 1989, 133.

[The whistleblowers' wife] was reacting against a powerful bureaucracy which could exile her husband, punish him with no work, seek his dismissal because their efforts had led to his collapse. The abuse of policy troubled her deeply. Like the Soviet government, the U.S. federal bureaucracy could, without the least human compassion, effectively label a dissenter a danger who had to be removed for the sake of government safety<sup>8</sup>.

The themes of inevitable and one-sided conflict between “ethical resisters” and “bureaucratic hierarchy” are firmly established in passages such as these.

The second example closely follows the approach of the first. Brian Martin, an Australian whistleblowing scholar and activist, writing with Will Rivkin, begins his advice to whistleblowers from the starting point of an unavoidable hierarchical conflict between “dissenters” and their “managers” and “employers”. Martin and Rivkin also characterise bureaucracy in general as “analogous to an authoritarian state”. “In a typical bureaucracy”, they argue, “control is exercised by elites through a hierarchy, with little or no popular participation in organizational governance”<sup>9</sup>. Later, they write that “From the point of view of bureaucracies as authoritarian political systems, a whistleblower is analogous to a lone dissident openly opposing a repressive regime, as in the case of some Soviet dissidents”<sup>10</sup>. Individual managers may try to act well in response to whistleblowing; however, the interests of the organisation will push those managers to reject whistleblowers’ reports and punish whistleblowers. Hierarchical power relations give them the means to achieve this. The key difference between bureaucracy and authoritarian states is that the former cannot usually resort to physical violence<sup>11</sup>.

In the final example, the American whistleblowing scholar Robert Jackall identifies five features of contemporary organisations that work to prevent successful internal reporting. First, a “fantastically complicated division of authority” makes it “difficult to ascertain responsibility for

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<sup>8</sup> Glazer and Glazer, *op cit.*, 158.

<sup>9</sup> B. Martin, and W. Rivkin, *The Dynamics of Employee Dissent: Whistleblower and Organizational Jiu-Jitsu*, in *Public Organization Review: A Global Journal*, 2004, n. 4, 222.

<sup>10</sup> Martin and Rivkin, *op cit.*, 231.

<sup>11</sup> Martin and Rivkin, *op cit.*, 223. See also A. Evans, *Dealing with Dissent: Whistleblowing, Egalitarianism and the Republic of the Firm*, *Innovation: The European Journal of Social Science Research*, 2008, vol. 21, n. 3, 272. Alford, *op cit.*, 134, notes the common visibility of guns when whistleblowers are removed from their places of work.

wrongdoing in large bureaucracies”<sup>12</sup>. Second, organisational codes of ethics, rather than providing clear ethical guidance, are written in such a way as to allow the “constant doublethink, doublespeak, backing and filling, and systematic obfuscation” necessary to protect the organisation’s interests<sup>13</sup>. Third, “rules of etiquette and protocol” prevent subordinates who try to report wrongdoing from being heard<sup>14</sup>. Fourth, social networks within hierarchies protect wrongdoers: “When one chooses to point out the wrongdoing of colleagues, or especially that of superiors, one inevitably jars these intricate affiliations...”. Support is unlikely from colleagues who will not want to cause trouble because they have succumbed to “the time-serving laziness endemic in all bureaucracies”<sup>15</sup>. Fifth, organisations operate within a wider society whose own ethical standards are confused<sup>16</sup>.

If bureaucratic hierarchy prevents successful whistleblowing, the solution must be to find non-bureaucratic alternatives. After presenting the conventional critique of bureaucracy and whistleblowing, Stewart Clegg concludes that “democratic, participative organizations ... tend to function better in response to criticism than do those that are hierarchical, authoritarian systems...”<sup>17</sup>. He provides no evidence for this claim in relation to whistleblowing, perhaps because there is none available. In a 2008 summary of decades of empirical findings on whistleblowing in the United States public sector, Marcia Miceli and Janet Near also speculate that “[o]rganizations that are less rigid and more innovative (e.g., learning organizations) may be less threatened by whistle-blowers and more willing to cease and desist from wrongdoing”. The evidence to support this theory is, however, missing:

Because bureaucracy ... is built on the foundational premise of managerial authority to make decisions, organizations may still resist tolerating or even encouraging dissent. Despite frequent calls for greater organizational flexibility, openness to dissent, and new ideas, there is little empirical

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<sup>12</sup> R. Jackall, *Whistleblowing and Its Quandaries*, in *The Georgetown Journal of Legal Ethics*, 2007, vol. 20, n. 4, 1133.

<sup>13</sup> Jackall, *op cit.*, 1133-1134.

<sup>14</sup> Jackall, *op cit.*, 1134-1135.

<sup>15</sup> Jackall, *op cit.*, 1135.

<sup>16</sup> Jackall, *op cit.*, 1135-1136.

<sup>17</sup> S. Clegg, *Power Relations and the Constitution of the Resistant Subject*, in J. Jermier, D. Knights and W. Nord (eds.), *Resistance and Power in Organizations*, Routledge, London, 1994, 314.

research documenting what happens to organization structure and performance if dissent is permitted<sup>18</sup>.

In another recent overview of whistleblowing studies, the same authors acknowledge that, in the absence of evidence, it is hard to say much about the interactions between organisational type and successful whistleblowing<sup>19</sup>. The idea that whistleblowing will be improved once bureaucracy is overcome remains a seductive one not because of a body of evidence but because the case against bureaucracy seems so damning.

### 3. Problems in the Critique of Bureaucracy

The critique of bureaucracy that characterises much of the whistleblowing literature draws on wider and long-standing criticisms of bureaucracy within the public management literature. In turn, bureaucracy has been defended in general terms by scholars such as Charles Goodsell and Paul du Gay<sup>20</sup>. This article will not repeat the larger defence of bureaucracy against its critics. Instead, it focuses on three problems with the critique as it relates specifically to whistleblowing.

### 4. The Resilience of Bureaucracy

The first problem stems from the fact that bureaucracy is a resilient and ubiquitous form of organisation. As Kenneth J. Meier and Gregory C. Hill point out, “bureaucracy will not only survive in the twenty-first century but will flourish”<sup>21</sup>. Despite the long-standing criticisms of bureaucratic hierarchy, widely applicable organisational alternatives have not emerged. If bureaucracy crushes whistleblowers, and there are no viable alternatives to bureaucracy, then encouraging organisation members to blow the

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<sup>18</sup> Near and Miceli, *op cit.*, 277.

<sup>19</sup> Miceli, Near, Dworkin, *op cit.*, 119-120. Their comments echo the summary of the whistleblowing literature that they presented in the early 1990s. M. Miceli and J. Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*, Lexington, New York, 1992, 216-217.

<sup>20</sup> C. Goodsell, *The Case for Bureaucracy*, CQ Press, Washington, fourth edition, 2004; P. du Gay, *In Praise of Bureaucracy*, SAGE, London, 2000; P. du Gay (ed.), *The Values of Bureaucracy*, Oxford University Press, Oxford, 2005.

<sup>21</sup> K. Meier, G. Hill, *Bureaucracy in the Twenty-First Century*, in E. Ferlie, L. Lynn Jr and C. Pollitt (eds.), *The Oxford Handbook of Public Management*, Oxford University Press, Oxford, 2005, 51.

whistle seems self-defeating. Philip H. Jos made a similar point two decades ago with regard to American public sector organisations:

it is both unwise and unfair to rely on whistleblowing as a palliative for an ailing set of accountability mechanisms. The potential costs to the whistleblower, the organization, and to the federal service are quite high. Whistleblowing may reinforce, or at least do little to mitigate, the tendency of after-the-fact, postdecisional accountability to engender rigidity, a preoccupation with hierarchical control, and a search for rationalizations for past mistakes – precisely those reactions that undermine the hope that organizations will be more sensitive to future ethical problems and take ethical issues seriously<sup>22</sup>.

Given the continuing spread of bureaucratic hierarchy, the apparent incompatibility of whistleblowing and bureaucracy raises serious ethical and practical questions about whether whistleblowing should be promoted as a response to wrongdoing.

#### **4. Bureaucracy Has Positive Features for Whistleblowers**

The second problem with the critique of bureaucracy in the whistleblowing literature is that it fails to recognise that the core features of bureaucracy are positive as well as negative for whistleblowing. The classical features of bureaucracy, systematically described by Max Weber<sup>23</sup>, are set out in Table 1, along with the positive implications or effects of these features for whistleblowing. The point of Table 1 is not to imply that bureaucratic forms of organisations contain no negative dangers for whistleblowers (see below) but to emphasise the often-overlooked positive consequences of bureaucracy for whistleblowers.

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<sup>22</sup> Philip H. Jos, *The Nature and Limits of the Whistleblower's Contribution to Administrative Responsibility*, *American Review of Public Administration*, 1991, vol. 21, n. 2, 113.

<sup>23</sup> M. Weber, *Economy and Society*, in G. Roth and C. Wittich, Vol. 2, University of California Press, Berkeley, 1978, 956-963.

*Table No. 1 – Weber’s Features of Hierarchical Bureaucracy and Their Positive Implications for Whistleblowing*

<b>Bureaucratic Features</b>	<b>Positive Implications for Whistleblowing</b>
Laws and regulations set fixed areas of an organisation’s jurisdiction.	Whistleblowers have legal standards against which to judge an organisation’s actions.
Activities of organisational members are defined by established official duties.	Whistleblowers have legal standards against which to judge an organisational member’s actions.
Official positions are the primary full-time responsibility of their incumbents.	Conflicts of interest and role are eliminated or reduced for members of the organisation, including those who receive whistleblowing reports.
Members of the organisation form status groups with a shared sense of professional vocation.	Whistleblowers can expect support from peers for the values of their shared vocation.
Hierarchies of relationship between officials, including the possibility of appeals from lower to higher authority.	Whistleblowers have clear lines of accountability for reporting wrongdoing.
Maintenance of files that act as a record of actions and decisions.	Records exist of the actions or decisions at issue, the whistleblowers’ report and the organisation’s responses.
Specialist training of officials.	Officials trained in ethical awareness and obligations to report wrongdoing and deal with wrongdoing reports. Specialist officials trained to handle whistleblowing cases.
Organisations governed by stable comprehensive knowable rules.	The rules of the organisation regarding wrongdoing and its reporting are identifiable to organisational members and external observers.

*Source: Author’s Own Elaboration*

The argument here is not that a Weberian ideal type bureaucracy necessitates recognition of a role for whistleblowers. Not all bureaucracies are the same and history shows that it is entirely possible for bureaucratic hierarchies to operate without any provision for whistleblowing and to operate in societies that do not value whistleblowing. My contention is that where societies do value whistleblowing, it is compatible with, and indeed well supported by, the key features of bureaucratic hierarchy set out in Table No. 1.

A bureaucracy that works as it should rests on laws, regulations and rules against which the actions of an organisation as a whole and the members who hold roles within it can be judged. The explicit rules that are characteristic of bureaucracy provide certainty for potential whistleblowers about whether or not an organisation or any of its members have transgressed their legitimate roles and committed wrongdoing. The same rules reduce the ability of wrongdoers to defend and rationalise their actions by an ambiguous or contested standard of individual or group morality. They present managers and others who receive reports of wrongdoing with explicit measures against which to assess those reports. Full-time commitment to their official positions within a bureaucracy reduces the likelihood that organisational members will develop conflicts of interest through membership of other organisations with different goals, rules and ethics. A common sense of vocation among organisational members will encourage peer support for those who act to uphold the organisation's purpose and rules.

A well-functioning bureaucracy also provides advantages in the handling of whistleblowing reports. It contains clear lines of hierarchical management through which whistleblowers are authorised to report wrongdoing and those who receive reports of wrongdoing are held accountable for their responses. These whistleblowing procedures will be supported by a trail of recorded decisions and actions that can be referred to later if necessary. The specialisation characteristic of bureaucracies allows them to develop specific roles, filled by trained professionals, for handling whistleblowers' reports. The stable, knowable rules of a bureaucratic organisation allow, where necessary, external audit and watchdog bodies to judge whether the whistleblowing report has been handled properly.

Systematic empirical studies provide support for the claim that the features of bureaucracy, properly applied, are conducive to successful whistleblowing. The "Whistling While They Work" research on the Australian public sector found, for example, that whistleblowing was more likely and more successful where reporting legislation and

procedures existed and were known to employees, where immediate managers and supervisors dealt with reports of wrongdoing effectively and where investigators and case-handlers had specific professional training<sup>24</sup>.

When the characteristics of bureaucracy are viewed against the experiences of whistleblowers recorded in the anti-bureaucratic whistleblowing literature, it becomes clear that there is often something wrong with ascribing those whistleblowers' problems to bureaucracy. A common theme in the stories of suffering whistleblowers, albeit one that has gone largely unrecognised in the anti-bureaucratic literature, is that the managers to whom whistleblowers report often fail to follow proper bureaucratic processes. Instead, those managers pay little or no regard to their formal responsibilities, treat their organisational units as "fiefdoms" and wield power according to their "personal" interests and values<sup>25</sup>. Viewing their positions in this "feudal" fashion<sup>26</sup>, managers fail to adopt the ethos demanded of those working within bureaucratic organisations. Paul du Gay explains this bureaucratic ethos as follows:

The procedural, technical and hierarchical organization of the bureau provides the ethical conditions for a particular comportment of the person. The ethical attributes of the "good bureaucrat" – strict adherence to procedure, commitment to the purposes of the office, abnegation of personal moral enthusiasms, acceptance of sub- and super-ordination, *esprit de corps* and so forth – represent a moral achievement having to reach a level of competence in a difficult ethical milieu and practice<sup>27</sup>.

The problems encountered by whistleblowers often stem from too little managerial commitment to bureaucracy, rather than too much. Bureaucratic hierarchy brings with it difficulties as well as advantages for whistleblowers. Bureaucratic rules cannot, for example, entirely eliminate discretionary power<sup>28</sup>. Discretion is allowed within bureaucratic rules for very good reasons; however, it can be used by officials to disguise or excuse their wrongdoing. It can also be used to mistreat whistleblowers. Where managers have discretionary power over the allocation of tasks,

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<sup>24</sup> Brown, *op cit.*

<sup>25</sup> Alford, *op cit.*, 100-103. Alford argues that managerial misuse of official power for private ends is an unavoidable characteristic of organisations.

<sup>26</sup> Alford, *op cit.*

<sup>27</sup> Du Gay, *In Praise of Bureaucracy*, 44.

<sup>28</sup> J. Dobell, *Public Management as Ethics*, in E. Ferlie, L. Lynn Jr, C. Pollitt (eds.), *The Oxford Handbook of Public Management*, Oxford University Press, Oxford, 2005, 161.

whistleblowers can find themselves constantly being assigned dirty, dangerous or monotonous work<sup>29</sup>. The logic of bureaucratic hierarchy provides its own solutions where these sorts of abuses occur, which typically involve more complex policies and rules. This complexity can create pitfalls for whistleblowers and other officials. Whistleblowers may accidentally exclude themselves from legal protection, for example, because they fail to follow the exact processes for reporting that are set out in the law<sup>30</sup>.

### 5. The Problems of Organisational Alternatives to Bureaucracy

The fact that bureaucracy presents challenges as well as opportunities for whistleblowing does not mean that alternative forms of organisation would necessarily provide more assistance to whistleblowers. As was noted above, alternative organisational forms are often thought to be better simply because they are not bureaucracies. This assumption deserves to be tested. All organisational forms involve power relations of some kind. Replacing bureaucracy with other organisational forms will reshape, rather than eliminate, the ways in which power operates for and against whistleblowing.

In the absence of systematic empirical evidence about whistleblowing in different organisational types, a useful way of theoretically testing the likely impact of different organisations on whistleblowing can be found in the anthropologist Mary Douglas's grid-group theory<sup>31</sup>, sometimes called cultural theory<sup>32</sup> or neo-Durkheimian theory<sup>33</sup>. Grid-group theorists start from a sceptical position with regard to organisational cultures. They do

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<sup>29</sup> T. Devine, T. Maassarani, *The Corporate Whistleblower's Survival Guide*, Berrett-Koehler, San Francisco, 2011, 19-31.

<sup>30</sup> Australian police whistleblower Peter Fox had this experience in 2013. R. Ackland, Shield Laws Leave Whistleblowers, Reporters on Hook, *Sydney Morning Herald*, 5 April 2013, 33.

<sup>31</sup> M. Douglas, *In the Active Voice*, Routledge and Kegan Paul, London, 1982; M. Douglas, *How Institutions Think*, Syracuse University Press, New York, 1986; M. Douglas, *Natural Symbols*, Routledge, London, 2003.

<sup>32</sup> M. Thompson, R. Ellis and A. Wildavsky, *Cultural Theory*, Westview Press, Boulder, 1990.

<sup>33</sup> D. Leat, K. Seltzer, G. Stoker, *Towards Holistic Governance: The New Reform Agenda*, Palgrave Macmillan, Houndmills, 2002, 82-83. The adjective mostly refers to Emile Durkheim's arguments in *The Division of Labour in Society*, Macmillan, Houndmills, 1984, originally published in 1893.

not assume that there is one best culture. For them, all cultures have weaknesses as well as strengths. As Douglas puts it: “Whatever [culture] is under scrutiny, there is always some trouble lurking there”<sup>34</sup>.

Grid-group theory incorporates both the hierarchical organisational culture and its egalitarian alternative discussed earlier in this article. The theory moves beyond this dichotomy to include two further types of organisational culture--individualism and fatalism<sup>35</sup>. These four cultural types are constructed by the two dimensions of grid and group. The grid dimension refers to the strength and extent of rules that govern an individual’s actions and identity. The group dimension is the extent to which an individual’s actions and identity are determined by “personal”, “face-to-face” pressures that come from belonging to a social group. High grid cultures impose explicit and strong rules on individuals that “regulate their interactions, restricting their options”. In low grid cultures, individuals have extensive freedom in their interactions with others; the only rules are those necessary for such free interaction<sup>36</sup>.

In high group cultures, the boundaries between insiders and outsiders are strong. Membership of a group provides the basis for conducting all aspects of life – residence, work, sharing of resources, recreation, friendships and family relationships. In low group cultures, by contrast, individuals construct their own networks, with no social boundaries or loyalties to impede them<sup>37</sup>.

Combining these two dimensions produces four cultural types: hierarchy (high grid-high group); individualism (low grid-low group); egalitarianism (low grid-high group); and fatalism (high grid-low group)<sup>38</sup>. Grid-group theorists claim that these four types cover all the basic possibilities of human social organisation. Douglas makes it clear, however, that the appropriate level of analysis for grid-group theory is not large-scale abstract societies (“Britain”, for example) but the specific effects of cultural types on individual “social accounting”; that is, on the ways in

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<sup>34</sup> Douglas, *Active Voice*, 195.

<sup>35</sup> Alternative typologies are available – see, for example, W. Ouchi, *Markets, Bureaucracies, and Clans*, *Administrative Science Quarterly*, 1980, 25(1), 129-141 – however, they are less comprehensive than Douglas’s. See M. Douglas, *Risk and Blame*, Routledge, London, 1992, 55-82.

<sup>36</sup> Douglas, *Active Voice*, 192, 201.

<sup>37</sup> Douglas, *Active Voice*, 201-202.

<sup>38</sup> Douglas and other grid-group theorists sometimes discuss a fifth type – the autonomous hermit, characterised by opposition to all the other four types – but this type has little or no relevance to organisations and will not be discussed here. See Douglas, *Active Voice*, 204, 231-238; Thompson *et al.*, *op cit.*, 7-10.

which individuals explain and justify their actions in smaller social units<sup>39</sup>. These smaller social units include African tribal societies but also the many specific public, private and community organisations found in places like Britain<sup>40</sup>. Public management scholars such as Christopher Hood<sup>41</sup>, Perri 6 and Gerry Stoker<sup>42</sup>, have taken up this idea and mapped the different organisational forms and cultures that occur within contemporary mature capitalist democracies. A basic schema drawn from their work is presented in Table No. 2.

Table No. 2 – The Grid-Group Typology Applied to Contemporary Organisations

Grid	Group	
	Low	High
High	<b><i>Fatalism</i></b>	<b><i>Hierarchy</i></b>
	Weak social bonds, low co-operation, members act according to imposed rules and directions from above (e.g. call centres).	Strong social cohesion, members bound by imposed rules and directions from above (e.g. police services).
Low	<b><i>Individualism</i></b>	<b><i>Egalitarianism</i></b>
	Weak social cohesion, high individual autonomy with minimal necessary cooperation and rules (e.g. independent contractors).	Strong social cohesion, members act in line with decisions achieved via participatory consensus in name of group (e.g. professional bodies).

Source: Author's Own Elaboration

<sup>39</sup> Douglas, *Active Voice*, 201.

<sup>40</sup> Douglas, *Natural Symbols*, 92-114; Douglas, *Risk and Blame*, 55-82, 187-207.

<sup>41</sup> C. Hood, *The Art of the State*, Oxford University Press, Oxford, 1998; C. Hood, C. Scott, O. James, G. Jones and T. Travers, *Regulation Inside Government*, Oxford University Press, Oxford, 1999; C. Hood, H. Rothstein and R. Baldwin, *The Government of Risk*, Oxford University Press, Oxford, 2001; C. Hood and M. Lodge, *The Politics of Public Service Bargains*, Oxford University Press, Oxford, 2006.

<sup>42</sup> 6 *et al*, *op cit.*, 72-81; P. 6 and E. Peck, *New Labour's Modernization in the Public Sector: a Neo-Durkheimian Approach and the Case of Mental Health Services*, *Public Administration*, 2004, vol. 82, n. 1, 83-108; G. Stoker, *Life is a Lottery*, *Public Administration*, 2002, vol. 80, n. 3, 417-434; G. Stoker, *Transforming Local Governance: From Thatcherism to New Labour*, Palgrave Macmillan, Houndmills, 2004, 70-74.

The hierarchy cell corresponds to the traditional Weberian bureaucracy. Rules and regulations, specialised roles and a chain of command are married to the strong group bonds that develop within a career public service. Individualism is characteristic of the neo-liberal arrangements for the public sector popular from the 1990s. These arrangements weakened both grid and group, through strategies such as contracting out services to competing suppliers and setting targets for public sector managers without specifying how these should be met<sup>43</sup>. Egalitarianism typically marks professionalised institutions, such as hospitals and universities. In these settings, peer expectations provide the standards against which the behaviour of doctors, academics and other professionals in the public sector is justified. Fatalist organisations have hierarchy’s rules and command structures but lack social bonds between public sector workers. Fatalism will develop, among other contexts, where organisations employ casual workers in isolation from each other to carry out tightly defined tasks (for example, in telephone call centres).

Table No. 3 – Grid-Group Theory and Integrity Approaches

Grid	Group	
	Low	High
High	<b>Fatalism</b>	<b>Hierarchy</b>
	Top-down detailed rules enforced by random external audit and investigation.	Top-down detailed rules enforced by internal managers and supervisors.
Low	<b>Individualism</b>	<b>Egalitarianism</b>
	Individuals have discretion to develop their own practices and act responsibly.	Collectively developed expectations about behaviour, negotiated and enforced by peers.

Source: Author’s Own Elaboration

Grid-group theory suggests four broad approaches to integrity and ethics within organisations, which are summarised in Table No. 3. The

<sup>43</sup> Hood *et al.*, *Regulation Inside Government*, 197-198.

hierarchical “compliance” approach to organisational integrity involves top-down rules enforced by supervisors and managers to ensure officials act in accord with ethical standards set for them. It often involves detailed codes of conduct that stipulate expected behaviour, along with education and training to ensure that members of the organisation understand the rules that govern them<sup>44</sup>.

The fatalist approach to organisational integrity shares the emphasis on rules found in hierarchy. It aims to prevent group loyalties from blunting the effectiveness of those rules by introducing “contrived randomness” into the oversight of organisational members<sup>45</sup>. This might involve measures such as randomly moving officials through combinations of locations and tasks, to prevent them from developing the sort of close relationships with colleagues that encourage rule-breaking and turning a blind eye. Fatalist approaches emphasise independent oversight by external bodies with the power to initiate random inspections, audits and investigations<sup>46</sup>. As well as dealing with particular cases of wrongdoing, these external bodies may also be authorised to recommend changes to the internal systems and processes of the organisations in their purview. In most advanced capitalist democracies, the last few decades have seen an expansion of external scrutiny and control of public and private sector activity – the so-called “audit explosion” – followed by moves to increase public reporting of information from internal scrutiny and controls – the “audit implosion”<sup>47</sup>.

Egalitarian approaches involve organisational members meeting as equals to negotiate agreed expectations about their responsibilities and behaviour. Other stakeholder representatives may also be part of these negotiations. These peers are also responsible for dealing with inappropriate behaviour by officials, a process that again typically occurs through negotiation. This approach is common among professional bodies across the public and private sectors<sup>48</sup>.

The individualist approach to organisational integrity leaves individual members to develop and apply their own ethical responses to their organisational roles. Although this approach might appear to fit best with

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<sup>44</sup> J. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*, second edition, Marcel Dekker, New York, 1989, 60-64.

<sup>45</sup> Hood, *op cit.*, 160.

<sup>46</sup> Hood, *op cit.*, 54.

<sup>47</sup> M. Power, *Organised Uncertainty: Designing a World of Risk Management*, Oxford University Press, Oxford, 2007, 42-53.

<sup>48</sup> Hood *et al*, *Regulation Inside Government*, 86.

the competitive, laissez-faire elements of private sector activity, the public management literature repeatedly points to the need for government officials to exercise discretion where supervision is arms-length and the rules are silent or ambiguous (low grid), especially where those officials are isolated from other colleagues (low group). Classic examples of this are police officers and school teachers working on their own in isolated rural settings. The individualist approach is also valued in the narratives of “exemplary public administrators” who resist both grid and group to act according to their own ethical visions<sup>49</sup>.

Grid-group theory suggests that these four organisational cultures will be dynamic, rather than static. As new problems and issues emerge, each organisational type will tend to reinforce its cultural bias. Ethical breaches in hierarchical organisations will lead to the imposition of new, more detailed rules, while the same breaches in fatalist organisations will lead to increased external random auditing<sup>50</sup>. Only a major crisis will lead to deep questioning and reconstituting of the organisation<sup>51</sup>.

## 6. Applying Grid-Group Theory to Whistleblowing

There have been two previous applications of grid-group theory to whistleblowing. In 2008, Anthony J. Evans argued that “... egalitarianism is the only cultural type that faces [sic] the incentives required to blow the whistle”<sup>52</sup>. The “fatalist would keep their head down”, the “hierarchist” would be a “team player”, while the individualist would decide the personal rewards of whistleblowing were not worth the costs<sup>53</sup>. Egalitarianism combines:

two key traits that are required for a whistleblower. Firstly, blowing the whistle requires a degree of empowerment – a willingness to challenge people in authority. This is weak grid. The second key trait is a sense of righteousness – a belief in self-sacrifice for the common good<sup>54</sup>.

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<sup>49</sup> T. Cooper and N. Wright (eds.), *Exemplary Public Administrators: Character and Leadership in Government*, Jossey-Bass, San Francisco, 1992.

<sup>50</sup> Douglas, *How Institutions Think*, 92.

<sup>51</sup> Douglas, *Natural Symbols*, 65-66.

<sup>52</sup> Evans, *op cit.*, 271.

<sup>53</sup> Evans, *op cit.*, 270.

<sup>54</sup> Evans, *op cit.*, 270.

Because whistleblowers are egalitarians, hierarchical responses to whistleblowing are “doomed to fail”<sup>55</sup>. The answer lies in replacing hierarchy with egalitarianism<sup>56</sup>.

Evans’s application of grid-group theory is creative; however, it suffers from two important difficulties. First, Evans’s central claim that whistleblowers are (and can only be) egalitarians does not match his own depiction of whistleblowers. He correctly identifies them as low grid but incorrectly claims them as high group. As he describes it, the “common good” for which whistleblowers are prepared to sacrifice themselves develops not through intimate day-to-day relationships with members of their organisations (high group) but from their own personal conceptions of the greater good (low group). Evans expresses this individual morality in terms such as commitment to the whistleblower’s “higher moral code”, “loyalty to *what [the whistleblowers] deem to be the principles of the organisation*” and “loyalty to *the wider community*”<sup>57</sup>. His whistleblowers are moral individualists committed to their own visions of the common good, rather than egalitarians who draw their morality from understandings developed and shared through interactions with workplace peers.

Second, Evans’s focus is primarily on identifying the traits and outlooks of individual whistleblowers, rather than on exploring the organisational cultures in which they find themselves. This is quite a shift from grid-group theory, which begins with the cultural characteristics of groups and expects that these will define the outlooks of group members. As Kim Loyens points out (see below), each of the four cultural types in grid-group theory is capable of producing and dealing with whistleblowing in its own way<sup>58</sup>. Of the four cultural types, the only one that Evans explores is hierarchy. Rather than systematically applying grid-group theory, Evans’s arguments largely repeat the now familiar “ethical resister versus bureaucratic hierarchy” trope. He says almost nothing about how individualist and fatalist organisational cultures might respond to whistleblowing. He does briefly sketch some possible ways to promote an egalitarian culture within organisations; however, these proposals form an

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<sup>55</sup> Evans, *op cit.*, 272.

<sup>56</sup> Evans, *op cit.*, 276-277.

<sup>57</sup> Evans, *op cit.*, 270. Emphasis mine.

<sup>58</sup> K. Loyens, *Towards a Custom-Made Whistleblowing Policy. Using Grid-Group Cultural Theory to Match Policy Measures to Different Styles of Peer Reporting*, *Journal of Business Ethics*, 2013, 114, 239-249.

eclectic list of egalitarian measures that seem designed to enhance, rather than replace, hierarchical organisational structures<sup>59</sup>.

Kim Loyens's more recent discussion of grid-group theory and whistleblowing avoids the problems in Evans's approach by methodically applying the theory. In doing so, she identifies different features that support whistleblowing in each of the four organisational cultures: reporting when rules are broken in hierarchical organisations; reporting to protect the group from wrongdoing in egalitarian organisations; reporting for individual benefit in individual organisations; and reporting to try to avoid trouble in fatalistic organisations. Each culture also presents reasons not to blow the whistle: reporting wrongdoing may not be specified as a role duty in a hierarchical organisation; group norms in an egalitarian organisation may prevent members from seeing unethical acts as wrongdoing; members of individualistic organisations may judge the costs of reporting to be higher than the benefits; and those in fatalist organisations may keep their heads down to try to avoid trouble<sup>60</sup>.

These arguments do a lot to advance our understanding of how whistleblowing might or might not occur in different organisations. They can be extended by thinking more systematically than Loyens does about the ways in which different organisations are likely to respond to whistleblowing. At this point, it should be noted that Loyens focuses on the apparent tendency of some organisational cultures to produce what might be seen as "bad faith" whistleblowing; for example, the likelihood that whistleblowing in individualist organisations "could become a weapon that is used ... to settle a personal score"<sup>61</sup>. The approach in this article, by contrast, is to focus on organisational responses to "good faith" whistleblowing, in which reporting results from an honest belief that wrongdoing has occurred and is not malicious, dishonest, frivolous or vexatious. As suggested earlier in this paper, whistleblowing can occur in individualistic cultures not just for individual material rewards but also for the individual moral rewards that come with doing the right thing<sup>62</sup>.

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<sup>59</sup> Evans, *op cit*., 276-277. Just as with his description of whistleblowers, the way Evans describes egalitarian culture in these passages often looks more like a description of an individualist culture, with its emphasis on "freedom" and "individual negotiation".

<sup>60</sup> Loyens, *op cit.*, 243-245.

<sup>61</sup> Loyens, *op cit.*, 246.

<sup>62</sup> Rational choice theorists often incorporate a similar combination of material and moral rewards and costs into their individualistic explanations of corruption. See, for example, R. Klitgaard, *Controlling Corruption*, University of California Press, Berkeley, 1988, 71.

Individualists may report wrongdoing in good faith because they are responding to their commitments to their own higher moral codes<sup>63</sup>.

Table No. 4 – The Grid-Group Typology and Whistleblowing in Good Faith

Grid	Group	
	Low	High
High	<b>Fatalism</b>	<b>Hierarchy</b>
	External bodies investigate reports and support whistleblower.	Clear rules for reporting and responding.
	<b>BUT</b>	<b>BUT</b>
	Reporting process may rebound on the whistleblower.	Managerial abuse of power; gaps in the rules and procedures; procedures hard for whistleblowers to follow.
Low	<b>Individualism</b>	<b>Egalitarianism</b>
	Own judgments the basis for reporting; individuals expected to speak up for themselves.	Group norms provide the basis for reporting; openness to hear reports.
	<b>BUT</b>	<b>BUT</b>
	No firm basis for resolving whether the whistleblower is in the right against competing individual claims.	Group supports norms against whistleblower, even when these lack integrity; no way to resolve intra-group conflicts over integrity.

Source: Author's Own Elaboration

The ways in which different organisational cultures are likely to respond to good faith whistleblowing are set out in Table No. 4. Each of the cultures contains a mix of advantages and disadvantages for whistleblowers. As noted earlier in the paper, hierarchical organisations will have rules for whistleblowing but these may allow managerial

<sup>63</sup> Glazer and Glazer, *op cit.*, Chapter 4.

discretion or be hard for whistleblowers to follow. In egalitarian cultures, the desire of the group to protect its norms provides strong grounds for reporting when these norms are violated. At the same time, there is no umpire to resolve disagreements within the group over whether norms have in fact been violated. The result can only be an impasse or a splitting of the group<sup>64</sup>. Moreover, a whistleblower who misjudges the norms of the group may find themselves shunned and expelled<sup>65</sup>. In this context, Evans notes that “the model of egalitarian organizations – the collegiate system – is replete with dysfunctional committees”, while Jos concludes that “professional associations are only sporadically helpful to those who blow the whistle”<sup>66</sup>.

The norms of individualist cultures include a willingness to live with and hear competing ethical views; however, individualism provides no mechanism for resolving conflicts over ethical behaviour. A whistleblower who challenges the actions of another organisational member faces the prospect of that member responding that the actions at stake can be justified by their own ethical framework. Individualist organisations that are focused on outcomes seem particularly susceptible to conflicts of this sort<sup>67</sup>. As with egalitarianism, individualism provides no prospect of an umpire to break such an impasse. Finally, fatalist organisations may be regulated by external bodies to whom whistleblowers can turn when organisational rules are broken. On the other hand, the investigative activities of those external organisations may have unpredictable consequences for the whistleblower, including their identity becoming known within their organisation<sup>68</sup>.

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<sup>64</sup> Douglas, *Natural Symbols*, xxi-xxii.

<sup>65</sup> M. Miceli, J. Near, *The Incidence of Wrongdoing, Whistle-Blowing, and Retaliation: Results of a Naturally Occurring Field Experiment*, in *Employee Responsibilities and Rights Journal*, n. 2, 94.

<sup>66</sup> Evans, *op cit.*, 277; Jos, *op cit.*, 114.

<sup>67</sup> Hood, *op cit.*, 34-35.

<sup>68</sup> L. Annakin, *In the Public Interest or Out of Desperation? The Experience of Australian Whistleblowers Reporting to Accountability Agencies*, PhD Thesis, University of Sydney, March 2011.

## 7. Conclusion

This article has argued for a re-evaluation of the common trope in the whistleblowing literature that pits ethical whistleblowers against hierarchical bureaucracy. Perhaps because bureaucratic hierarchy has been such a pervasive form of organization in the modern era, researchers have assumed that it is the barrier to effective whistleblowing, without sufficiently thinking through this claim.

The argument in this article is not that bureaucracy should be seen solely in positive terms. In that sense, it is not a defence of bureaucracy. Instead, the argument is that bureaucratic hierarchy presents advantages as well as disadvantages for whistleblowers. It can work for or against them. The features of bureaucracy that work in favour of whistleblowing – legal limits to organizational activities, formal duty statements for organizational members, clear rules for reporting, chains of accountability, and so on – have not been sufficiently recognised in the whistleblowing literature.

Moreover, bureaucratic hierarchy is not alone in presenting difficulties for effective whistleblowing. The same is true, albeit in different ways, for each of the other organisational cultures identified by Mary Douglas and her management studies heirs, including the egalitarian culture favoured by some critics of hierarchy. This paper suggests that there is no perfect organisational form for promoting whistleblowing. Trade-offs between different strengths and weaknesses are inevitable in the choice of a particular organisational form. The task that follows from such a conclusion is one of empirical research that better identifies and explains these competing strengths and weaknesses.

# Is the Type of Misconduct Decisive for the Perceived Legitimacy of Whistleblowing? A Study of Municipal Managers' Assessments of Whistleblowing in Cases of Harassment and Corruption

Marit Skivenes and Sissel Trygstad \*

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## 1. Introduction

Norwegian research indicates that employees rarely venture beyond the boundaries of the organization when they choose to blow the whistle on workplace misconduct. Whistleblowing occurs when employees report workplace misconduct to someone who has the power to rectify the matter<sup>1</sup>. Norwegian and international research shows that employees prefer to notify their immediate supervisor first<sup>2</sup>. The Norwegian Working Environment Act (WEA) defines this as an “appropriate procedure” (cf.

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<sup>1</sup> M. P. Miceli, J. P. Near, T. M. Dworkin, *Whistle-blowing in Organizations*, Routledge/Taylor & Francis Group, New York, 2008.

<sup>2</sup> B. Bjørkelo, *Whistleblowing at Work: Antecedents and Consequences*, Thesis (PhD), University of Bergen, 2010. M. Skivenes, S.C. Trygstad, *Whistle-blowers in Norway (Varslere! Om arbeidstakere som sier ifra)*, Gyldendal akademiske forlag, Oslo, 2006, in Norwegian.

S.C. Trygstad, *With a Right to Blow the Whistle...but, Does It Help, and Is It Wise? (Med rett til å varsle...men hjelper det, og er det lurt?)*, Fafo, Oslo, 2010, in Norwegian. W. Vandekerckhove, *European Whistleblowing Policies: Tiers or Tears?*, in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research?* Edward Elgar, Cheltenham, 2010, 15-35.

Section 2-4)<sup>3</sup>, and notifying trade union officials, safety delegates and supervisory authorities is also invariably considered appropriate<sup>4</sup>. The legislator has also stated that notifying supervisory authorities is appropriate, since these will have the competence “to ‘filter out’ less serious reports or else process them in an appropriate manner”<sup>5</sup>. Available research shows, however, that directly notifying supervisory authorities, such as the Labour Inspection Authority, has scant legitimacy among Norwegian employees<sup>6</sup>. Research also indicates that the nature of the matter being reported will have an impact on the assessments made by colleagues and managers of the act of whistleblowing and of the whistleblower. It may appear that those who report “subjective” and relational issues tend to encounter more opposition and negative reactions than those who blow the whistle on more “objective” and fact-based issues<sup>7</sup>. Furthermore, a study of 20 small and medium-sized Norwegian municipalities shows that municipal managers take a far more negative view of external whistleblowing than trade union officials and safety delegates<sup>8</sup>. In this article, we will investigate in more detail whether municipal managers find it less acceptable to notify supervisory authorities about discretionary and relational issues when compared to more objective and less discretionary issues. Our empirical material includes 1 940 municipal managers in large and medium-sized municipalities. The response rate to the survey was just below 40 per cent.

The article will start out with an empirical and theoretical justification for our assumption that there will be differences in acceptance on the basis of the nature of the matter being reported. The next part will describe the methodology and the data, and a presentation of the findings with a discussion of the same. The final part presents a brief conclusion.

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<sup>3</sup> WEA, The Working Environment Act of 17 June 2005 (Arbeidsmiljøloven), in Norwegian.

<sup>4</sup> WEA, *op. cit.*

<sup>5</sup> Ministry of Labour, White Paper, *Ot. prp. no. 84 (2005-2006), Concerning Legislative Amendments of the Working Environment Act (whistleblowing) (Om lov om endringer i arbeidsmiljøloven (varsling))*, Norwegian Ministry of Labour, Oslo, 2006, in Norwegian, 40.

<sup>6</sup> S.C. Trygstad, M. Skivenes, *How Managers in Municipalities Handling of Serious Misconduct (Kommunale leders håndtering av alvorlige kritikkverdige forhold)*, Fafo, Oslo, 2007, in Norwegian. M. Skivenes, S.C. Trygstad, *Public Information, Freedom of Speech and Whistleblowers in Norwegian Municipalities (Åpenhet, Ytring, Varsling)*, Gyldendal akademiske, Oslo, 2012, in Norwegian.

<sup>7</sup> M. Skivenes, S.C. Trygstad, *Whistle-blowers in Norway*, *cit.*, S.C. Trygstad, *op. cit.*

<sup>8</sup> M. Skivenes, S.C. Trygstad, *Public Information, Freedom of Speech and Whistleblowers in Norwegian Municipalities*, *cit.*

## 2. Empirical and Theoretical Justification of the Study

What will be considered as misconduct in a workplace will depend on a number of factors, such as the national model of working life, legislation, type of industry, the organization of work and the individual employees<sup>9</sup>. In whistleblowing research, there is an established consensus that the definition of misconduct should be wide, and the definition which is most often applied includes conditions that are illegitimate, illegal or immoral<sup>10</sup>. The Working Environment Act, which was amended with provisions on whistleblowing in January 2007, has also assumed a wide definition of censurable conditions:

The term “censurable conditions” refers to conditions that violate applicable legislation or ethical norms, for example corruption or other forms of financial crime, risks to the life and health of patients, hazardous products or a poor working environment<sup>11</sup>.

The challenge raised by a wide definition of censurable conditions is that a workplace may encompass a wide range of conditions that may be subsumed under the definition and thus open to whistleblowing. For this reason, Skivenes and Trygstad<sup>12</sup> have argued that a distinction should be made between “weak” and “strong” whistleblowing. Weak whistleblowing refers to employees who report matters that they perceive as censurable and problematic, but without thinking of themselves as whistleblowers for this reason<sup>13</sup>. Research shows that whistleblowing in Norwegian working life is different from what is found internationally in several respects. Norwegian employees blow the whistle more frequently, they achieve more change from doing so, and they are less exposed to retaliation than what is reported in, for example, British and American research<sup>14</sup>. We

<sup>9</sup> M. Skivenes, S.C. Trygstad, *Wrongdoing – Definitions and Contextual Factors*, in A.J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Handbook on Whistleblowing Research*, Edward Elgar, London, accepted for publication.

<sup>10</sup> M. P. Miceli, J. P. Near, T. M. Dworkin, *op. cit.*

<sup>11</sup> Ministry of Labour, *op. cit.*, 7.

<sup>12</sup> S.C. Trygstad, M. Skivenes, *How Managers in Municipalities Handling of Serious Misconduct*, *cit.*, M. Skivenes, S.C. Trygstad, *When Whistle-blowing Works: the Norwegian Case*, in *Human Relations*, 2010, vol. 63, n. 7, 1071-1097.

<sup>13</sup> M. Skivenes, S. C. Trygstad, *How Managers in Municipalities Handling of Serious Misconduct*, *cit.*, M. Skivenes, S. C. Trygstad, *When Whistle-blowing Works: the Norwegian Case*, in *Human Relations*, *cit.*

<sup>14</sup> S.C. Trygstad, M. Skivenes. *Explaining Whistleblowing in the Norwegian Labour Market – Power or Institutional factors?*, in *Administration & Society*, in preparation, resubmitted.

explain this by reference to the distinctive nature of the Norwegian (and Nordic) model when compared to the Anglo-Saxon, whereby Norway has a number of channels for co-determination, influence and communication. Furthermore, Norwegian working life has institutionalized norms that ensure a balance of power and a greater degree of industrial democracy. However, whistleblowing is not entirely risk-free in Norway either. Some of our findings indicate that employees who report issues related to the working environment, such as absenteeism or poor management and harassment, encounter tougher retaliation than other whistleblowers<sup>15</sup>. Some findings also indicate that certain cases of workplace bullying have emerged after whistleblowing<sup>16</sup>. A consequence is, as several studies show, that employees who have faced retaliation during or after a whistleblowing incident tend to be less willing than other whistleblowers to engage in such reporting again<sup>17</sup>. Incidents of retaliation thus have a negative effect on whistleblowing activity.

Our hypotheses and basis for this paper is whether the reason why whistleblowing related to bullying, harassment, poor management etc. tends to have a less favourable outcome for the whistleblower is because these cases often involve subjective experiences in which a clear distinction between acceptable and unacceptable actions is difficult to draw. At least six intrinsic dimensions that influence the assessment of misconduct may be identified<sup>18</sup>:

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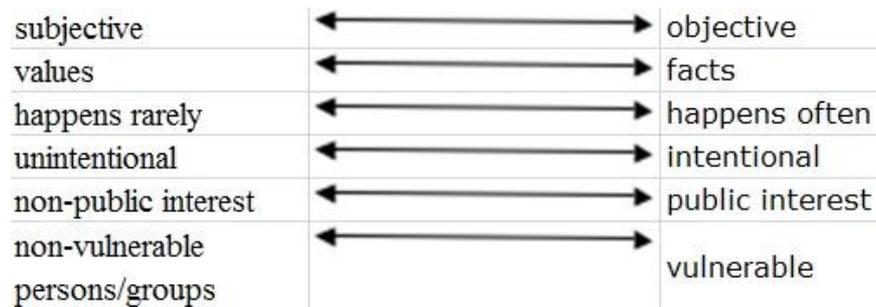
<sup>15</sup> M. Skivenes, S.C. Trygstad, *When Whistle-blowing Works: the Norwegian Case*, in *Human Relations*, *cit.*

S.C. Trygstad, *op. cit.*

<sup>16</sup> S. Einarsen, H. Pedersen, *Handling of Conflicts and Harassment in Worklife* (*Håndtering av konflikter og trakassering i arbeidslivet*), Gyldendal Akademisk, Oslo, 2007, in Norwegian.

<sup>17</sup> S.C. Trygstad, *op. cit.*, S.B. Matthiesen, B. Bjørkelo, M. Nielsen, *Wrongdoing in Norwegian Worklife* (*Klanderverdige forhold i norsk arbeidsliv*), Universitetet i Bergen, Bergen, 2008, in Norwegian.

<sup>18</sup> M. Skivenes, S.C. Trygstad, *Wrongdoing – Definitions and Contextual Factors*, in A.J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Handbook on Whistleblowing Research*, *cit.*

*Figure No. 1 – Misconduct and Assessment Dimensions*

*Source: Authors Own Elaboration*

An act or perception of misconduct can be either subjective or objective. An example of a subjective act/perception of misconduct may be when others do not have the same perceptions of and reactions to the incident or when the matter is private. The other end of this spectrum involves acts that have an objective character in that there is an explicit statement or agreement that the act involves misconduct or goes against a commonly accepted norm, such as stealing. Misconduct may be related to facts, e.g. the amount of money that is stolen, or it may be related to values and norms, e.g. how to be respectful towards a co-worker. The former is often easier to agree upon than the latter. It may also be a consideration whether the misconduct is intentional. Misconduct may also be measured by frequency (whether it happens often, occasionally or only once), and it may be important to consider whether an act of misconduct is of public interest or not, and lastly if it affects vulnerable versus non-vulnerable persons or groups. Thus, Skivenes and Trygstad<sup>19</sup> have pointed out six dimensions that potentially affect the assessment of an alleged act or practice of misconduct and its degree of importance (or seriousness). On a general level, it is expected that subjective perceptions and issues about values are more difficult to agree upon than incidents that are objective and fact-based. In her broad definition of misconduct, Warren<sup>20</sup>

<sup>19</sup> M. Skivenes, S.C. Trygstad, *Wrongdoing – Definitions and Contextual factors*, in A.J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Handbook on Whistleblowing Research*, *cit.*

<sup>20</sup> D. E. Warren, *Constructive and Destructive Deviance in Organizations*, in *The Academy of Management Review*, 2003, vol. 28, n. 4, 622–632.

includes an inter-subjective element. "Employee deviance" is defined as "behavioral departures from norms of a reference group [that] illustrate how one person's behavior has the potential to cause disastrous consequences for not only organisations but also entire industries and society"<sup>21</sup>. Similarly, if misconduct occurs frequently, is intentional and harms vulnerable persons, it is regarded as more severe than when it occurs rarely, is unintentional and harms non-vulnerable persons. Finally, incidents of misconduct that concern non-public interests have a much narrower set of considerations and, as such, have fewer stakeholders.

Subjective versus objective misconduct (or values versus facts) can be related to Sørensen and Grimsmo's<sup>22</sup> distinction between hot and cold conflicts in working life. Cold conflicts include the explicit conflicts of interest between employers and employees, conflicts that tend to be thoroughly organized and regulated by central-level collective agreements, formalized bargaining and legislation. Accordingly, it can be argued that violations of provisions that regulate financial transactions, such as embezzlement, bribery, corruption and theft are classifiable as "cold" misconduct. "Hot" conflicts involve relational and interpersonal matters, and are often much harder to deal with. These conflicts refer to "a personalized identifying element and impinge on self-conceptions, they imply a criticism of 'me as a professional'"<sup>23</sup>. The authors detect such conflicts most frequently in organizations that emphasize empowerment. When the manager withdraws, the boundaries of what we as employees are expected to produce in the exercise of our profession become blurred, in relation to colleagues as well as users. Even our behaviour as an employee can become the object of hot conflicts according to Sørensen and Grimsmo<sup>24</sup>, as we then tend to assume a kind of overseer role in relation to ourselves. This will not necessarily imply that colleagues or others (service users, customers) will share our operationalization of our work remit.

Subjective and objective forms of misconduct are distinguishable in a very specific respect: the possibility to document or even prove that something is censurable tends to be a lot easier when objective issues are involved.

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<sup>21</sup> D. E. Warren, *op. cit.*, 622.

<sup>22</sup> B. A. Sørensen, A. Grimsmo, *Hot and Cold Conflicts at Work (Varme og kalde konflikter i arbeidslivet. Motsetningsforhold i sosiologisk belysning)*, in *Sosiologi i dag*, 1996, vol. 26, n.2, 7–39, in Norwegian.

<sup>23</sup> B.A. Sørensen, A. Grimsmo, *op. cit.*, 9.

<sup>24</sup> B.A. Sørensen, A. Grimsmo, *op. cit.*

Conditions that are classifiable as subjective will be assessed differently by different people – as indicated by our typology of subjective misconduct (see figure 1) – and will often be associated with value judgements. Some may assess a situation as clearly censurable, while others may regard it as more innocent and within the limits of what one should normally be expected to tolerate. Its opposite involves conditions defined as objective, valid and fact-based, and these will also be easier to prove. Harassment and corruption are examples of misconduct that could be seen as subjective and objective respectively. The Labour Inspection Authority describes harassment as follows: “This could, for example, include unwanted sexual attention, intimidation, unwarranted exclusion, withdrawal of responsibilities for no reason, or offensive joking and teasing [...] Furthermore, there is an imbalance of power, for example between an employee and a supervisor, when harassment or bullying occurs”<sup>25</sup>. The Working Environment Act states that harassment is prohibited (Section 13-1 82), cf. Sections 2-3 (2)d and 4-3 (3))<sup>26</sup>. The latter section says: “Employees shall not be subjected to harassment or other forms of improper conduct.” During the revision of the WEA in 2005 the ban on harassment was given even stronger emphasis, and is an area in which employees have a duty of notification.

Corruption, as defined by The Confederation of Norwegian Enterprise (NHO), means “to offer or receive bribes, in the form of money, gifts or services, to induce a person in a position of power to provide advantages to another person in contravention of regulations. Corruption occurs when a person in an office or position of trust, public or private, disregards the responsibility and trust bestowed on the position and abuses the power inherent in this office or position for purposes of achieving a private benefit or reward, or unlawfully seeks to obtain an advantage for the benefit of his or her own organization or enterprise”<sup>27</sup>.

Our two vignettes can be placed on either side along with several of the six dimensions in figure 1. While corruption often will be regarded as an objective, fact-based and intentional act of wrongdoing which may be of great public interest – especially if a public employee is the wrongdoer, harassments can be judged as subjective, value based, unintentional and of

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<sup>25</sup> The Norwegian Labour Inspectorate, [www.arbeidstilsynet.no](http://www.arbeidstilsynet.no) (accessed May 27, 2013), in Norwegian.

<sup>26</sup> WEA, *op. cit.*

<sup>27</sup> NHO, The Confederation of Norwegian Enterprise, [www.nho.no](http://www.nho.no) (accessed May 27, 2013), in Norwegian. Cf. T. Søreide, *Corruption*, Oslo, Cappelen Damm Akademisk, in Norwegian.

non-public interest since it is related to an internal type of wrongdoing. In this article we investigate whether municipal managers deem it to be more or less acceptable to notify the supervisory authorities about subjective issues, such as harassment, when compared to reporting objective issues, such as corruption.

### 3. Methodology

We asked a sample of 5 220 municipal managers from 107 large and medium-sized municipalities to participate in a web-based survey, and 1 935 managers responded. The response rate is thus approximately 38 per cent. The selection of managers is based on a review of web pages and contacts with all municipalities with 10 000 inhabitants or more, a total of 110 municipalities. In 77 of these, we obtained e-mail addresses for virtually all managers, in another 27 we have fairly good coverage, meaning that since we failed to find e-mail addresses for all managers on the Internet we had to assume e-mail addresses by using the manager's name and adding @xx.municipality.no, nav.no or another enterprise. By assuming e-mail addresses in this manner we have far less control of the sample and of whether the managers in question have actually received the questionnaire. In three of the municipalities we have poor coverage and have needed to assume the addresses to a great extent<sup>28</sup>. In total, the reported response rate is therefore a cautious estimate.

The questionnaire contained a vignette describing a manager who is reported to the supervisory authorities. Half of the sample was informed that the matter reported pertained to harassment, while the other half was informed that the matter involved financial misconduct. In an attempt to highlight the respondents' answers we have chosen to describe the situation as a matter to be reported to the supervisory authorities, based on the assumption that managers will attach importance to ensuring that matters reported externally have a basis in reality. We also know that misconduct is only very rarely reported externally (outside the workplace) in Norwegian working life. The vignette that we asked a randomized half of the managers (n=950) to assess ran as follows:

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<sup>28</sup> Three municipalities, Trondheim, Hå and Enebakk, are not included because addresses were unavailable, or comprehensive and time-consuming application procedures were required to obtain access to the e-mail addresses.

The technical services manager harasses one of his subordinates. A colleague blows the whistle on the matter, and it is discussed with the technical services manager, face to face and in a management meeting, but the matter is hushed up and nothing happens. The harassment continues and the colleague who has observed the harassment reports the matter to the Labour Inspection Authority.

The remaining managers in the sample (n=990) received an identical vignette, but the case was now described as one of corruption.

The technical services manager accepts bribes. A colleague blows the whistle on the matter, and it is discussed with the technical services manager, face to face and in a management meeting, but the matter is hushed up and nothing happens. The corruption continues and the colleague who has observed the corruption reports the matter to the National Authority for Investigation and Prosecution of Economic and Environmental Crime.

For each of these cases we asked: “Do you find it acceptable to report the matter to the Labour Inspection Authority/The National Authority for Investigation and Prosecution of Economic and Environmental Crime?” We provided three response alternatives: Yes/No/Don’t know.

For this methodological approach to work, there must be no significant differences between the samples in terms of relevant characteristics. As regards the size of the municipalities and the sectors, there is a near-perfect match<sup>29</sup>. Nor are there any significant differences between the samples as regards gender, education, management level and number of subordinates. This can be seen from Table No. 1.

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<sup>29</sup> See Appendix 1.

*Table No. 1 – Overview of Demographic and Organizational Variables for the Respondents, Seen in Relation to the Vignettes, n=930/889. Percentages.*

		<b>Corruption</b>	<b>Harassment</b>
<b>Variables</b>	<b>Values</b>		
<b>Gender</b>	<b>Women</b>	59	62
<b>Age</b>	25 to 34	2	3
	35 to 44	22	20
	45 to 54	38	38
	55 to 67	37	38
	Over 67	1	1
<b>Education</b>	Upper secondary/vocational	4	5
	Univ. college/university, bachelor's dg.	46	48
	Univ. college/university, master's dg.	49	46
	Univ. college/university, PhD degree	1	1
<b>Type of manager</b>	Technical manager	8	7
	Primarily technical, but with HR resp.	22	21
	Manager with wage and HR resp.	61	63
	Senior manager/Chief Municipal Officer	9	9
<b>Number of subordinates</b>	Less than 10	18	19
	11 to 19	22	20
	20 to 49	32	34
	50 to 99	16	14
	More than 100	12	13

*Source: Author's Own Elaboration*

We can conclude that the managers included in the two samples do not differ in any particular respect. This helps validate the findings presented here, since there are no systematic differences in terms of gender, education or managerial level that could influence the assessments of the vignettes. This does not imply, however, that these types of variables will have no effect on the assessments made within the two samples. This approach permits us to expect that any differences between the samples are caused by unequal assessments of the misconduct.

To make sure that we thoroughly investigate all variables in our sample, we have isolated variables as gender, sector, seniority, age, education, managerial level and municipality size, and examined how managers then assess the two vignettes. For example, how do female managers assess the two vignettes?

The strength of the vignette method is that the participants are presented with identical cases and facts, and design effects and observational biases are eliminated<sup>30</sup>. We have chosen to use a brief vignette. On the one hand, such brief vignettes may cause the respondents to feel that they have insufficient information to form an opinion on the matter. On the other hand, a brief description of the case has the strength of being relevant to managers in various sectors and industries and across national boundaries, and provides the respondents with the latitude to interpret the situation in relation to their own context<sup>31</sup>. It is essential to emphasize that the way in which the managers respond to our two vignettes will not measure how the same managers would have handled an actual whistleblowing situation involving harassment or corruption. However, the study does measure how managers assess a description of a situation that is relevant to their field of work. Another potential objection to the study could pertain to the selection of forms of misconduct, and that the respondents would not perceive them as expressions of “subjective” and “objective” issues respectively. Finally, we have no data that would permit us to measure any changes over time. A clearly strong point of the study, however, lies in its

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<sup>30</sup> H. Soydan, *Using the Vignette Method in Cross-cultural Comparisons*, in L. Hantrais, S. Mangen (eds.), *Cross-national Research Methods in the Social Sciences*, Pinter, London, 1996, 120-128.

T. Wilks, *The Use of Vignettes in Qualitative Research into Social Work Values*, in *Qualitative Social Work*, 2004, vol. 3, n. 1, 78–87.

<sup>31</sup> cf. J. Finch, *The Vignette Technique in Survey Research*, in *Sociology*, 1987, vol. 21, n. 1, 105-114.

H. Soydan, *op.cit.*

large sample of respondents from a sizeable proportion of all Norwegian municipalities and in its stringent investigative design, with a concomitant potential for conclusions that are generally valid and have a large explanatory power. Processing and analysis of the survey data have been made with the statistical program SPSS.

#### 4. Findings and Discussion

Somewhat surprisingly, the findings show that there are no differences between the assessments that the managers have made of the two vignettes, cf. Table No. 2 below.

*Table No. 2 – Overview of Response Distribution for the Vignettes. n=930/889. Percentages.*

	<b>Corruption</b>	<b>Harassment</b>
Yes, reporting is acceptable	82	80
No, reporting is unacceptable	7	15
Not sure	11	5
	100	100

*Source: Author's Own Elaboration*

The findings show that an approximately equal proportion of the managers find reporting to the supervisory authorities to be acceptable – irrespective of the matter at hand. We can also see that a large majority take a positive view of reporting. We see, however, that the proportion that finds reporting to be unacceptable is statistically significant (1 per cent). It is higher among those who assessed the harassment case – 15 per cent of these respondents find the action to be unacceptable -which indicates some difference in how a minority of the sample assess the two vignettes. We also see that the proportion who answered “Not sure” in the corruption vignette is more than twice as large as in the harassment vignette (11 versus 5 per cent). The large proportion that nevertheless reports that this is an acceptable option can be interpreted as indicating that when the matter is sufficiently serious, which corruption and

harassment are by definition because both are illegal according to Norwegian legislation, the distinction between subjectivity and objectivity is eliminated. Consequently, the key issue is that reporting these serious illegal acts externally – to supervisory authorities – is dominantly regarded as an acceptable act of whistleblowing. Seen as a whole, the large proportion of managers who respond that reporting to supervisory authorities is acceptable – approximately 80 per cent – may be an effect of the perception of the cases as being serious. However, perhaps most importantly is that the reporting occurred after the matter had been discussed with the person responsible, as well as the fact that an attempt had been made to address the issue in a management meeting. In other words, the whistleblower had made some attempt to report the matter within the organization, or else acted in accordance with what the law describes as “appropriate” before the matter was taken to the supervisory authorities. Empirical studies show that this kind of internal whistleblowing has legitimacy in Norwegian working life, and it is also the main mechanism by which employees handle misconduct in the workplace.

We have investigated whether any differences in the assessments appear when we isolate the effect of single variables, such as gender, managerial level, number of subordinates, seniority, education, age and size of the municipality. We find that managerial level has an effect. The proportion of senior managers who find reporting of harassment to be acceptable is 65 per cent, while 86 per cent report that it is acceptable to report corruption (the difference is statistically significant on 1 per cent level). Table No. 3 shows the percentages of those who have responded that they find the whistleblowing described in the vignettes as acceptable, by position in the management hierarchy.

*Table No. 3 – Proportion of Managers who Find Whistleblowing to be Acceptable, by Managerial Level. n=930/889. Percent and n.*

Managerial level	Corruption		Harassment	
	Percent	n.	Percent	n.
Technical/professional manager	86	72	91	58
Primarily technical/professional manager, but with HR responsibility	78	209	82	188
Manager with wage and HR responsibility	83	569	80	564
Senior manager/Chief Municipal Officer	86	80	65	79

*Source: Authors' Own Elaboration*

Senior managers/Chief Municipal Officers stand out in assessing it is significantly less acceptable to report harassment than to report corruption. Among the remaining types of managers there are almost no differences between the two groups, managers with wage and HR responsibility and those who are primarily technical/ professional managers but with HR responsibility. The group of technical/professional managers are those who regard reporting harassment to the Labour inspection authority most positively. The difference between the highest and lowest managerial level in our sample is 26 per cent.

We have not undertaken the study on the basis of a specific hypothesis of why senior managers/Chief Municipal Officers stand out in being more negative to reporting of harassment, but three different explanations may be of relevance. First, senior managers tend to be more hands on and have a more direct responsibility for and be more knowledgeable about, financial matters than psychosocial problems related to the working environment. Hence, they may take a more positive view of employees who notify the supervisory authorities in cases of corruption.

Second, senior managers may perceive reports of harassment as a direct critique of the leadership of the organization. Subjective issues that are regarded as hot conflicts are characterized by their impinging on self-image and implying a criticism of the individual in the work

organization<sup>32</sup>. The WEA 2005 states clearly that the employer is responsible for ensuring a good and healthy working environment. The employer has a general obligation to undertake systematic efforts related to prevention and facilitation to ensure that the working environment is fully satisfactory. Reporting of issues pertaining to harassment therefore implies a clear criticism of the management in general and the top management in particular, since the latter exercises the employer's responsibility in the municipal organization on a daily basis. Reporting of harassment may be more related to the exercise of management, or rather deficient exercise of management. Perhaps the occurrence of harassment in the working environment is a type of misconduct that impinges on the senior management's "self-concept", and as such reflects an inability to intervene or an insufficient overview of the situation in their area of responsibility.

Third, there is research showing that senior manager receives more whistleblowing cases than other managers<sup>33</sup>, and thus, senior manager are likely to have more knowledge and insight into different types of misconduct cases. This may lead them to be more sceptical about concerns involving subjective, value- based matters' such as harassment, outside the organization. This may also be related to the dimension of non-public and public interest. If an employee report incidents to the Labour inspection authority this may give rise to supervisory from the authority. Possible violation of the law and reactions will not be withheld from the public. Clearly, more research is needed to explain the senior managers assessments. For example, to investigate if the same differences will occur when studying other forms of value based matters such as insufficient care of patients in need, to examine if harassment stands out as a special case. Further, we should explore if our findings are valid for private sector, and cross-country, and then both in countries with a different and a similar labour marked models as Norway.

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<sup>32</sup> B.A. Sørensen, A. Grimsmo, *op. cit.*

<sup>33</sup> S.C. Trygstad, M. Skivenes, *How Managers in Municipalities Handling of Serious Misconduct*, *cit.*

## 5. Conclusion

Blowing the whistle on corruption and harassment enjoys equal acceptance in our sample of municipal managers, and we have asked a wide range of managers. This indicates that the focus on bullying in Norwegian working life in recent years and the statutory regulations in the Working Environment Act have borne fruit. We constructed vignettes that describe reporting to the supervisory authorities, and the managers have a high degree of acceptance for this. Approximately nine out of ten managers confirm that this is acceptable, and the most important reason is likely to be that the matter had been reported internally in the organization first. We know that following the line of command and providing the organization with an opportunity to rectify the matter is expected in Norwegian working life, and British research reveals the same expectations<sup>34</sup>. Our hypothesis that reporting of subjective issues will meet with less acceptance than objective ones should apparently be rejected. We find that the respondent's position in the managerial hierarchy has an effect. Senior managers are more prone than others to assess external notification of harassment in the working environment as unacceptable. We have related this to the idea that harassment is a type of misconduct that is subjective rather than objective in nature, it is more value-based than fact-based, and its acceptability or unacceptability will therefore be more ambiguous. We have not data to examine why senior managers should be more influenced by the subjectivity of the misconduct, than other managers. When asking whether it is acceptable to report corruption or harassment to the supervisory authorities, we investigate directly whether the presumptively subjective as opposed to objective nature of these forms of misconduct will have an effect on how managers respond. Closer analysis indicates that only few differences can be detected. In other words, we have no evidence to assert that reporting of harassment is less acceptable than blowing the whistle on corruption, even though we have previously undertaken studies indicating that the risk is greater for someone who reports misconduct that is subjective and relational. It should be emphasized, however, that this survey has not studied the effect of various types of misconduct on, for example, the reactions encountered by the whistleblowers during and after they have raised a concern.

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<sup>34</sup> W. Vandekerckhove, *UK Public Attitudes to Whistleblowing*, University of Greenwich, London, 2012.

# Blowing the Whistle on the Union: How Successful Is It?

Wim Vandekerckhove and Cathy James \*

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## 1. Introduction

Whistleblowing – understood as workers raising a concern about wrongdoing in their workplace to persons or organizations that may be able to effect action<sup>1</sup> – has been most extensively studied with a focus on the whistleblower. Mesmer-Magnus and Viswesvaran<sup>2</sup> and Miceli, Near and Dworkin<sup>3</sup> offer valuable reviews of that research.

We can read the conclusions in their reviews as a call for research focussing on recipients – those persons or organizations whistleblowers raise their concern with, hoping they can effect action to stop the wrongdoing. They suggest such research could be more productive in identifying routes for more successful whistleblowing. Whilst most campaigning has focused on protecting whistleblowers – making it safe

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<sup>1</sup> This definition is based on J. P. Near, M. P. Miceli, *Organizational Dissidence: The Case of Whistle-blowing*, in *Journal of Business Ethics*, 1985, vol. 4, n. 1, 1-16, but uses “workers” rather than “organization members” for reasons argued by D. Lewis, A. J. Brown and R. Moberly, *What is Whistleblowing, Why Is It Important, How Should It Be Researched*, in *International Whistleblowing Research Handbook*, Edward Elgar, Cheltenham, forthcoming.

<sup>2</sup> J. R. Mesmer-Magnus, C. Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, in *Journal of Business Ethics*, 2005, vol. 62, n. 3, 277-297.

<sup>3</sup> M. P. Miceli, J. P. Near, and T. M. Dworkin, *Whistle-blowing in Organizations*, Routledge, New York, 2008.

for people to raise a concern, Near and Miceli<sup>4</sup> point out that it is just as important to make whistleblowing more effective, which they define as “the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistle-blowing and within a reasonable time frame”<sup>5</sup>. Vandekerckhove, Brown and Tsahuridu<sup>6</sup> combine these to define successful whistleblowing as raising a concern that results in “managerial responsiveness to the primary concerns aired by the whistleblower about wrongdoing; and managerial ability or willingness to refrain from, or protect the whistleblower against, retaliation or reprisals for having aired those concerns”. In other words, successful whistleblowing is both safe and effective.

In research, one obvious but often neglected type of organisation that may be able to effect action to stop wrongdoing – or recipient where whistleblowers can raise their concern – is a trade union.

Vandekerckhove<sup>7</sup> found that, with the exception of the Netherlands and Canada, trade unions have not been at the forefront of campaigning for better whistleblower protection. Nevertheless, Lewis<sup>8</sup> and Vandekerckhove<sup>9</sup> have argued that trade unions have a positive role to play in developing and implementing internal whistleblowing procedures. Vandekerckhove and Lewis<sup>10</sup> list involving trade unions as a key element in their framework for reviewing guidelines on whistleblowing policies, but found only the guidelines from the British Standard Institute<sup>11</sup> advise organisations to consult with trade unions. Skivenes and Trygstad<sup>12</sup> have used both the high unionisation rate in Norway as well as the fact that

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<sup>4</sup> J. P. Near, M. P. Miceli, *Effective-Whistleblowing*. *Academy of Management Review*, 1995, vol. 20, No. 3, 679-708.

<sup>5</sup> Near and Miceli, 1995, *op. cit.*, 861.

<sup>6</sup> W. Vandekerckhove, A. J. Brown, E. E. Tsahuridu, *Researching “Hearer” and “Protector” Courage: Exploring Managerial Responses to Whistleblowing*, in *International Whistleblowing Research Handbook*, Edward Elgar, Cheltenham, forthcoming.

<sup>7</sup> W. Vandekerckhove, *Whistleblowing and Organizational Social Responsibility. A Global Assessment*, Ashgate, Aldershot, 2006.

<sup>8</sup> D. Lewis, *The Contents of Whistleblowing/Confidential Reporting Procedures in the UK. Some Lessons from Empirical Research*, in *Employee Relations*, 2006, vol. 28, n. 1, 76-86.

<sup>9</sup> Vandekerckhove, 2006, *op. cit.*

<sup>10</sup> W. Vandekerckhove, D. Lewis, *The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines*, in *Journal of Business Ethics*, 2012, vol. 108, n. 2, 253-264.

<sup>11</sup> British Standards Institute, *PAS 1998:2008 Whistleblowing Arrangements. Code of Practice*, British Standards Institute, London, 2008.

<sup>12</sup> M. Skivenes, S. C. Trygstad, *When Whistle-blowing Works: The Norwegian Case*, in *Human Relations*, 2010, vol. 63, n. 7, 1071-1097.

trade union involvement is firmly institutionalised in Norway, to explain the high level of successful whistleblowing in their survey in Norway. Lewis<sup>13</sup> reviews a number of surveys with organisations from different industries in the UK on the involvement of trade unions in developing and implementing whistleblowing policies. Lewis submits that trade unions “have always had an important role as a watchdog and have supported members who ‘speak up’”<sup>14</sup>. Hence, for Lewis, trade unions are not only keen to be involved but internal whistleblowing procedures are also likely to be more influential if trade unions have been involved in developing them and have their support. In the NHS, 99% of 154 surveyed NHS Trusts stated a union was consulted about introducing a whistleblowing procedure<sup>15</sup>. Out of 600 surveyed colleges and universities, 546 (91%) had an internal whistleblowing procedure, and 468 (78%) indicated that a union was consulted about its introduction<sup>16</sup>. A survey by the Industrial Relations Services<sup>17</sup> with 57 public sector organisations and 57 private sector organisations, showed that in the public sector 63% of those that had a whistleblowing procedure had involved a trade union when developing the policy. For the private sector organisations this was 22%, which according to Lewis reflects the fact that public sector organisations are more likely to recognise trade unions than organisations in the private sector<sup>18</sup>.

This paper analyses data from the Public Concern at Work advice line in the UK, to answer the following research questions with regards to blowing the whistle to a trade union:

Who raises a concern about organisational wrongdoing with trade unions?  
How effective is raising a concern with a trade union in terms of successful whistleblowing?

The paper is structured as follows. The next two sections further conceptually clarify the research questions. In the first of these sections we explain that since we are researching whistleblowing to a specific recipient – i.e. trade unions – it is important to specify the position of this

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<sup>13</sup> Lewis, 2006 *op. cit.*

<sup>14</sup> Lewis, 2006, *op. cit.*, 78.

<sup>15</sup> D. Lewis, C. Ellis, A. Kyprianou, *A Survey of Confidential Reporting/Whistleblowing Procedures in National Health Service Trusts*, Centre for Legal Research Middlesex University, London, 2003.

<sup>16</sup> D. Lewis, C. Ellis, A. Kyprianou, *Whistleblowing at Work: The Results of A Survey of Procedures in Further and Higher Education*, in *Education & the Law*, 2001, vol. 13, n. 3, 215-225.

<sup>17</sup> IRS, *Industrial Relations Services Employment Review*, n. 685, 1999.

<sup>18</sup> Lewis, 2006, *op. cit.*

recipient vis-à-vis the organisation: is it an internal or external recipient? In other words, we answer the question whether trade unions are best perceived as internal or as external recipients for whistleblowing. The second clarifying section points out why it is not straightforward that blowing the whistle to a trade union would result in more successful whistleblowing, and thus makes the case for the relevance of this paper. The paper proceeds to describe the data collection for this research, and then offers findings and discussion for each of the two research questions. Finally, we offer some conclusions and stipulate some further research needs based on the limitations of our data.

## 2. Raising a Concern with a Trade Union: Internal or External?

Most of the time we learn about whistleblowers when their stories are published in newspapers, blogs, or radio and tv. However, research shows that whistleblowing is a process that almost always starts with a worker raising a concern inside their organisation, and most whistleblowers never proceed beyond the internal phase. For example, research in Australia showed that 90% of those who had blown the whistle had only done so inside their organisation, 7% had done so to an external agency only after they had raised their concern inside their organisation, and only 3% had blown the whistle immediately to an external agency or the media<sup>19</sup>.

Vandekerckhove<sup>20</sup>, abstracting from current legislative developments in the UK and Australia, posits a 3-tiered model of whistleblowing legislation that further distinguishes two levels of external whistleblowing.

The 3-tiered model describes a balanced approach to the public disclosure of information about organisational wrongdoing and the organisational interests in keeping such information out of the public realm. In its first tier, which is internal, the information does not leave the organisation. In the second tier, the whistle is blown to an agent acting on behalf of the wider society. This second tier would include regulators or other prescribed persons, including the police. What distinguishes these from wider disclosures is that information given to them may not reach the wider public. In this regard, members of Parliament are not necessarily

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<sup>19</sup> A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, ANU E Press, Canberra, 2008.

<sup>20</sup> W. Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in *A Global Approach to Public Interest Disclosure*, Edward Elgar, Cheltenham, 2010, 15-35.

second tier recipients. In most representative democracies they have the powers to control the executive government (ministers and those appointed by government i.e. regulators) but often do this in a way which involves their communications to be in the public domain.

This second tier will only be accessed when first tier whistleblowing is unsuccessful, or in other words, when the organisation fails to correct the wrongdoing for which it carries responsibility, or fails to deal adequately with the concern being raised and the person raising it. Hence, the second tier is an external one, but the public would not know the whistle had been blown to that recipient. Still, this second tier recipient would investigate and take action in relation to the wrongdoing. The possibility of blowing the whistle to a second tier recipient thus serves as a deterrent to the organization.

The third tier also consists of external recipients, but here the information and allegation the whistleblower makes may become known to the general public, for example, via the media. Within the 3-tiered model, third tier recipients function as watchdogs over second tier recipients should these not take action. In short, the principle of the 3-tiered model is not that organisations become directly accountable to the wider society for their practices, but that they are held accountable for dealing adequately with concerns being raised with them and the persons raising them.

In an analysis of European whistleblowing legislation using the framework of the 3-tiered model, Vandekerckhove<sup>21</sup> notes that the second tier can show quite some diversity in terms of operationalisation. An example is the whistleblower protection for Flemish civil servants in the federal state of Belgium. This legislation (from 2005) stipulates that civil servants can raise concerns with their head of department or with the internal auditor of the Flemish Community – both being considered first tier recipients. Civil servants can also go on to raise their concern with the Ombudsman who reports to parliament. The Ombudsman can grant protection, investigate, and advise the relevant minister on action to be taken. Here, the Ombudsman is a second tier recipient, external to the Flemish Civil Service, acting on behalf of the wider society and their interest in good governance, but the whistleblower's information is not known to the public, at least not immediately. The Flemish Ombudsman provides some description of the whistleblowing concerns it has received in its annual report to parliament, which is a public document.

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<sup>21</sup> *Ibid.*

Another example is the Romanian 2004 whistleblower protection law. It covers civil servants, and stipulates that if a whistleblower is being investigated by his or her organisation for disciplinary reasons he or she has the right to demand that the press or a union representative be present at the disciplinary meeting.

So where do trade unions fit with this framework? We submit that raising a concern with a trade union can also be seen as a possible second tier recipient. Trade unions have a collective concern. From a classic antagonistic perspective of labour versus capital, they unify workers across organisations in their pursuit to be protected from capitalist exploitation. Thus from this point of view trade unions are external to any employing organisation.

However, where trade union representatives have consultative or even decision-making powers they have an undeniable presence inside the organisation. Nevertheless, trade union representatives can trigger industry wide campaigns or pressure when issues are not resolved internally – i.e. when the wellbeing of workers as well as organisational viability are not being safeguarded.

Hence trade unions are external recipients that do not necessarily make all the information they possess on an issue public. In this sense, trade unions are second tier recipients. Their uniqueness as second tier recipient lies in their potential to support workers in making their whistleblowing successful at any of the three tiers.

### 3. Trade Unions and Successful Whistleblowing

From the limited research available on trade unions and whistleblowing cited in the introduction of this paper, we would expect whistleblowing to trade unions to be more successful than other routes because of the unique position of trade unions in being able to support their members. In fact, a union may even help a non-member in order to demonstrate their value and recruit new members. Boroff and Lewin write that “unions attempt to secure economic rents for their members [and] at the same time individuals may join unions in order to secure such rents”<sup>22</sup>. However, it remains more likely that non-members will simply not raise their concern with a union at all.

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<sup>22</sup> K. E. Boroff, D. Lewin, *Loyalty, Voice and Intent to Exit a Union Firm: A Conceptual and Empirical Analysis*, in *Industrial and Labor Relations Review*, 1997, vol. 50, n. 1, 50-63. Citation at 54 et seq.

The implication of what Boroff and Lewin write for whistleblowing is that trade unions might be very good at supporting the whistleblower in negotiating a “good deal”: either a good severance payment or remaining at work. Still, for unions to attend to individual whistleblowers might already stretch the notion of what it is that unions do. Addison and Belfield<sup>23</sup> argue that rather than collective voice, it is individual voice that lowers the risk of workers quitting, i.e. individual rights are more valuable than collective representation. The task and value of trade union involvement according to Frieze and Jennings<sup>24</sup> is precisely the protection of whistleblowing workers. Lewis offers an analysis of how perceiving reprisals against whistleblowers as workplace discrimination could leverage union action to protect whistleblowers<sup>25</sup>.

This could, however, jeopardize the other component of successful whistleblowing. More precisely, trade union support for whistleblowers might imply that less attention is given to the concern the whistleblower tried to raise in the first place, resulting in unsuccessful whistleblowing in terms of correcting the malpractice.

#### 4. Methodology

The data used for this paper was collected from 1,000 cases in the Public Concern at Work (PCaW) advice line database. The PCaW advice line was set up in 1993 to help workers who wanted to raise or had raised a concern in their workplace or to external recipients. Since 1993, PCaW has advised over 14,000 whistleblowers. Individuals can call the PCaW advice line free of charge. PCaW advisers ask about the nature of the concern, how serious it is, whether it is on-going, why a caller is trying to raise the concern, who they have raised it with and how it has been received by colleagues or managers. This is in addition to seeking information about the structure of the employing organisation and the nature of the caller’s working relationships. PCaW also advises on the

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<sup>23</sup> J. T. Addison and C. R. Belfield, *Union Voice*, in *IZA Discussion Paper Series*, 2003, n. 862.

<sup>24</sup> J. Frieze, and K. Jennings, *A Trade Union Perspective on Whistleblowing*, in *Whistleblowing at Work*, Transaction Publishers, New Jersey, 2001, 114-127.

<sup>25</sup> D. Lewis, *Providing Rights for Whistleblowers: Would an Anti-discrimination Model Be More Effective?*, in *Industrial Law Journal*, 2005, vol. 34, n. 3, 239-252.

Public Interest Disclosure Act 1998 (PIDA)<sup>26</sup>, the law that protects whistleblowers in the UK.

Each time an individual contacts the PCaW advice line, advisers take notes on the nature of the concern and the unique situation of the whistleblower. This helps PCaW to give further advice when the whistleblower calls back. These notes are then entered on case files in the PCaW database. Thus, for each caller, PCaW has an advisor's narrative of their whistleblowing journey.

For a larger research project we did a content analysis of 1,000 of these narratives, ranging between August 2009 and December 2010, to avoid using case files from on-going cases<sup>27</sup>. We only included entries where the contact with the whistleblower was by phone. We excluded entries where the call for advice came from those other than the whistleblower. We further excluded entries where there was no information on the type of wrongdoing or type of organisation the whistleblower was working for.

The coding method was developed by the first author in collaboration with a number of staff from PCaW (including the second author of this paper). For confidentiality reasons, a PCaW staff member coded the narratives. Between March and July 2012, the first author and the PCaW staff member independently coded the same 90 narratives (these were cleared by PCaW from any identifying content for reasons of confidentiality in relation to the users of the advice line). The two researchers first coded 20 and then 30 narratives to develop the code book. A further 10 narratives were double-coded at three subsequent instances to gain a shared understanding of the coding categories and to ensure consistency. At each instance differences in coding would be discussed and clarified. The PCaW researcher would then go back and recode the narratives already entered into the research database. A shared understanding was reached after the third session. A final double coding of 10 random narratives at the end of July 2012 revealed no differences.

Data entry by the PCaW researcher was finalised at the end of October 2012. The researcher from the University of Greenwich then analysed the data using SPSS. All variables were treated as nominal.

It is important to point out that this data was secondary data. The narratives were written by PCaW advisers for the purpose of giving

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<sup>26</sup> The relevant provisions are now located in Part IVA of *the Employment Rights Act 1996* (as amended).

<sup>27</sup> For more on this project and an overview of the data, see *Whistleblowing – The Inside Story*, Public Concern at Work and University of Greenwich, London, 2003.

advice, not for research purposes. The implication is that not every case included data for all variables.

In 868 of the 1,000 cases we analysed from the PCaW advice line, a concern was actually raised and in 132 cases an intention to raise a concern was expressed. The top five industries from the data were: care, with 134 cases (15.4%); health, with 131 cases (15.1%); education, with 96 cases (11.1%); and charities, with 80 cases (9.2%).

One of the variables we coded was who whistleblowers had raised their concern with. Possible values were: with the wrongdoer, line manager, higher manager, union representative, specialist channel (audit, compliance, hotline), regulator, independent bodies (police, MP, NGO), grievance, media, unknown.

For the purposes of this paper, these recipients were recoded into internal (wrongdoer, line manager, higher manager, specialist channel, grievance), external (regulator, independent bodies, media), and union. Cases where this variable was “unknown” were excluded from the dataset used for this paper.

Following an emerging stream within whistleblowing research that has been gathering data on the multiple recipients whistleblowers raise a concern with we coded the sequence of recipients whistleblowers had contacted<sup>28</sup>. The narratives in the PCaW database made this relatively easy. We coded the first four times a whistleblower had raised their concern. This resulted in the sample presented in table 1.

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<sup>28</sup> M. Donkin, R. Smith, A. J. Brown, *How Do Officials Report? Internal and External Whistleblowing*, in *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, ANU E Press, Canberra, 2008, 83-108.

S. Dreyfus, and A. J. Brown, *Traitors, troublemakers or trailblazers? Preliminary analysis from the World Online Whistleblowing Survey on public attitudes to whistleblowing*, Paper presented at the International Whistleblowing Research Network Conference, London, July 2013.

See also Vandekerckhove, Brown, and Tsahuridu, *op. cit.*

Table No. 1 – Internal/External/Union Characteristics of the Sample

	Internal	External	Union
<b>Attempt1 (n=849)</b>	777 (91%)	57 (7%)	15 (2%)
<b>Attempt2 (n=477)</b>	350 (73%)	108 (23%)	19 (4%)
<b>Attempt3 (n=140)</b>	84 (60%)	50 (36%)	6 (4%)
<b>Attempt4 (n=21)</b>	10 (47.6%)	10 (47.6%)	1 (4.8%)

Source: Author's Own Elaboration

### 5. Findings and Discussion

Who raises a concern about organisational wrongdoing with trade unions? From the 849 cases in our sample, a concern was raised 1,487 times. In only 41 instances (2.7%) was a concern raised with a trade union. When broken down sequentially, we find that 15 out of 849 people (1.8%) raised a concern with a union in their first attempt, 19 out of 477 (4%) raised their concern with a union in their second attempt, 6 out of 140 (4.3%) at their third attempt, and 1 out of 21 (4.8%) at the fourth attempt. One limitation of our data is that it does not include whether or not a whistleblower was a union member.

Table No. 2 shows the breakdown in occupational level of those who raise a concern to the union. Tables No. 3-6 show in which industries people raised concerns to the union.

Table No. 2 – Raising with Union per Occupational Level

Occ. level	% to union at 1 <sup>st</sup> attempt	% to union at 2 <sup>nd</sup> attempt	% to union at 3 <sup>rd</sup> attempt	% to union at 4 <sup>th</sup> attempt
<b>unskilled</b>	1.8	3.2	-	-
<b>skilled</b>	1.3	3.9	5.3	-
<b>admin</b>	4.6	2.6	-	-
<b>professional</b>	-	5	4.7	-
<b>management</b>	2.5	2.9	3.6	20
<b>executive</b>	-	-	-	-

Source: Author's Own Elaboration

As we would expect, no one in an executive position raised their concern with a union. There are however workers in managerial positions raising a concern with a union. This is obviously because this category includes managers at any level below executives. Earlier analysis of this data has shown that managers are also more likely than other occupational levels to be dismissed when raising a concern<sup>29</sup>. This can explain why this category is represented in our findings at all four attempts. Again, it must be noted that our data did not include whether or not whistleblowers were member of a union.

The most likely occupational level to raise their concern with a union at the first attempt is the administrative worker. However, they are the least likely group to raise concern with a union in a second attempt, and none do so at third attempt. Overall, unskilled workers are the least likely to raise a concern with a union, with none of them raising concern to a union at their third attempt. This is despite unskilled workers still making up 7.1% and administrative workers making up 6.4% of those who raise a concern a third time. A possible explanation is that these whistleblowers were not union members.

*Table No. 3 – Raising with Union per Industry at First Attempt*

Industry	N	% of union	% industry	% total cases
health	4	26.7	3.1	0.5
local govern	4	26.7	6.7	0.5
care	2	13.3	1.5	0.2
finance	2	13.3	3.7	0.2
transport	2	13.3	7.7	0.2
manufacturing	1	6.7	3.6	0.1
<b>Total 1<sup>st</sup> attempt</b>	15	100	1,8	1.8

*Source: Author's Own Elaboration*

<sup>29</sup> *Whistleblowing - The Inside Story, op. cit.*

*Table No. 4 – Raising with Union per Industry at Second Attempt*

Industry	n	% of union	% industry	% total cases
health	7	36.8	9.5	1.5
education	4	21.1	7.3	0.8
finance	2	10.5	6.5	0.4
central govnm	1	5.3	33.3	0.2
local govnm	1	5.3	2.8	0.2
retail	1	5.3	6.7	0.2
transport	1	5.3	8.3	0.2
quango	1	5.3	25	0.2
leisure/hosp	1	5.3	10	0.2
<b>Total 2<sup>nd</sup> attempt</b>	19	100.2	4	4

*Source: Author's Own Elaboration*

*Table No. 5 – Raising with Union per Industry at Third Attempt*

Industry	n	% of union	% industry	% total cases
charities	1	16.7	10	0.7
finance	1	16.7	12.5	0.7
central govnm	1	1.7	50	0.7
local govnm	1	16.7	9.1	0.7
health	1	16.7	4.3	0.7
other	1	16.7	7.7	0.7
<b>Total 3<sup>rd</sup> attempt</b>	6	100.2	4.3	4.3

*Source: Author's Own Elaboration*

*Table No. 6 – Raising with Union per Industry at Fourth Attempt*

Industry	n	% of union	% industry	% total cases
care	1	100	14.3	4.8
<b>Total 4<sup>th</sup> attempt</b>	1	100	14.3	4.8

*Source: Author's Own Elaboration*

We can see from the sequential breakdown that overall, trade unions are not the favourite recipient for workers who want to raise a concern about wrongdoing in their organisation. It is also clear that those who do raise their concern with a trade union raise it with others before turning to the union (1.8% at first attempt, climbing to 4% at second, 4.3% at third, and 4.8% at fourth attempt). A possible explanation is that workers turn to a union (as one of other possible external recipients) because of the negative reactions they receive from people in their organisation when raising a concern internally<sup>30</sup>. Hence this finding suggests that union members are like other whistleblowers: they raise their concern first with line managers in the hope that it will be resolved speedily, informally, and satisfactorily.

Where industries are concerned, we do not see a reflection of the top-5 overall in the findings. Transport (7.7% to union) and local governments (6.7% to unions) are the two industries where more than the other industries, whistleblowers raise their concern with the union straightaway. Central government (33.3%), quangos (25%), leisure and hospitality industry (10%), and the health sector (9.5%) stand out as industries where people raise their concern with a union at second attempt (hence after raising with someone else first) or third attempt (respectively 50% and 4.3%) more than the other industries.

Without peaking anywhere, workers in financial services organisations remain a constant throughout the whistleblowing process. They make up 13.3%, 10.5%, and 16.7% of those who raise their concern with a union at respectively first, second, and third attempt.

There might be several explanations for our finding that industry ratios of whistleblowing to the union do not reflect overall industry ratios. One explanation might be that unions are better organised in specific industry sectors (e.g. transport). Or they might enjoy stronger unionisation (e.g. central and local governments). Another possible explanation is that the issues workers raise are at the core of the business the organisations they work for, and that this is why they get fierce reactions “driving” them to the union. Near and Miceli provided theoretical backing<sup>31</sup> for such a hypothesis where they predict that the closer to the core business of an organisation the concern is, the less likely it is internal whistleblowing will be successful.

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<sup>30</sup> J. P. Near, M. P. Miceli, *Whistle-blowing: Myth and Reality*, in *Journal of Management*, 1996, vol. 22, n. 3, 507-526.

<sup>31</sup> Near and Miceli, 1995, *op. cit.*

In order to test this hypothesis, we look at the type of wrongdoing about which concerns are raised with the union (Tables No. 7-10) and whether there is a relation between type of wrongdoing and industry (table No. 11).

*Table No. 7 – Raising with Union per Type of Wrongdoing at First Attempt*

Type of wrongdoing	n	% of union	% wrongdoing	% total cases
financial	5	33.3	3.4	0.6
ethical	3	20	2	0.4
patient safety	1	6.7	1.3	0.1
environment	1	6.7	14.3	0.1
public safety	1	6.7	1.1	0.1
abuse in care	1	6.7	1.6	0.1
multiple	1	6.7	1.3	0.1
other	2	13.3	4.4	0.2
<b>Total 1<sup>st</sup> attempt</b>	15	100.1	1.8	1.8

*Source: Author's Own Elaboration*

*Table No. 8 – Raising with Union per Type of Wrongdoing at Second Attempt*

Type of wrongdoing	n	% of union	% wrongdoing	% total cases
work safety	7	36.8	9	1.5
consum. & comp.	2	10.5	25	0.4
financial	2	10.5	2.6	0.4
ethical	2	10.5	2.5	0.4
multiple	2	10.5	3.8	0.4
patient safety	1	5.3	2.2	0.1
public safety	1	5.3	1.9	0.2
abuse in care	1	5.3	2.5	0.2

<b>other</b>	1	5.3	3.8	0.2
<b>Total 2<sup>nd</sup> attempt</b>	19	100	4	4

*Source: Author's Own Elaboration*

*Table No. 9 – Raising with Union per Type of Wrongdoing at Third Attempt*

<b>Type of wrongdoing</b>	<b>n</b>	<b>% of union</b>	<b>% wrongdoing</b>	<b>% total cases</b>
<b>public safety</b>	2	33.3	12.5	1.4
<b>financial</b>	1	16.7	4.8	0.7
<b>work safety</b>	1	16.7	3.6	0.7
<b>ethical</b>	1	16.7	5.6	0.7
<b>multiple</b>	1	16.7	5.6	0.7
<b>Total 3<sup>rd</sup> attempt</b>	6	100.1	4.3	4.3

*Source: Author's Own Elaboration*

*Table No. 10 – Raising with Union per Type of Wrongdoing at Fourth Attempt*

<b>Type of wrongdoing</b>	<b>n</b>	<b>% of union</b>	<b>% wrongdoing</b>	<b>% total cases</b>
<b>multiple</b>	1	100	33.3	4.8
<b>Total 4<sup>th</sup> attempt</b>	1	100	33.3	4.8

*Source: Author's Own Elaboration*

*Table No. 11 – Industry per Type of Wrongdoing for Concerns Raised with Union*

Type of wrongdoing	n	% of concerns to union	Industry
<b>financial</b>	8	19.5	Financial services (2), education (2), local government, health, manufacturing, transport
<b>work safety</b>	8	19.5	Health (2), central government, retail, transport, quango, leisure/hospitality, other
<b>ethical</b>	6	14.6	Local government (2), central government, care, health, education
<b>multiple</b>	5	12.2	Health (4), care
<b>public safety</b>	4	9.7	Transport, health, charity, local government
<b>patient safety</b>	2	4.9	Health (2)
<b>abuse in care</b>	2	4.9	Care , health
<b>Consum. &amp; comp.</b>	2	4.9	Financial services (2)
<b>environment</b>	1	2.4	Financial services
<b>other</b>	3	7.3	Local government (2), education
<b>Total</b>	41	99.9	

*Source: Author's Own Elaboration*

Financial wrongdoing is particularly critical if it occurs in financial institutions because it is directly linked to their core business of conducting monetary transactions. However, if it happens in other industries, it is also quite likely to be of strategic importance to the survival of the organisation. Hence, following Near and Miceli<sup>32</sup> people who raise a concern about financial wrongdoing are more likely to experience reprisals. This might explain why financial wrongdoing in various industries tops the list of concerns raised to a union. The findings

<sup>32</sup> *Ibid.*

on concerns about public safety, patient safety, and abuse in care can be explained in a similar way, confirming Near and Miceli.

However, the bulk of concerns about financial wrongdoing are, when they are raised with a union, raised at the first attempt, more than other types of wrongdoing (3.4% compared to 1.8% overall, see table 6). A possible explanation for this is that people who want to raise a concern about financial wrongdoing trust no one else.

This would also explain why a concern about environmental wrongdoing in the financial services sector would be raised to a union. Such issues are hardly core business to financial services, hence a more plausible explanation would be a lack of trust that internal whistleblowing would be successful.

Another salient feature in these findings is that while some concerns relate to issues which could be considered core trade union issues, like workplace safety, other issues seem much more remote from the experience and expertise of trade union representatives. An example of this is the concern about environmental malpractice raised to a union, representing 14% of this type of concerns (table No. 7). Another example is the concerns about “consumer, competition and regulation”, where 25% of this type of concern was raised with a union (table No. 8). These findings provide more ground for our suggested explanation that a lack of trust in successful internal whistleblowing is a reason why workers raise their concern with a union.

How effective is raising a concern with a trade union in terms of successful whistleblowing?

We defined successful whistleblowing as the situation where raising a concern results in both the whistleblower remaining free from reprisals (safe) as well as action being taken to investigate and correct the alleged wrongdoing (effective)<sup>33</sup>. The discussion of our findings offered some grounds to argue that workers raise their concern with a union because they see no viable alternative recipient that is safe or effective.

We will now present and discuss findings on how safe and effective raising a concern to a union is. Tables No. 12-15 present our findings on actual responses from managers and co-workers. Absolute numbers are slightly lower because cases where responses were expected rather than actually experienced are not included. Also, findings for third and fourth attempt are not shown here because of low absolute numbers.

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<sup>33</sup> *Ibid.*

Table No. 12 – Actual Responses from Management after Raising Concern (First Attempt)

	Internal	External	Union	
<b>No difference</b>	441	37	13	491
	62.20%	72.50%	92.90%	63.40%
<b>Informal (closer monitoring, verbal har.)</b>	58	3	0	61
	8.20%	5.90%	0.00%	7.90%
<b>Blocking resources (info, means, training, hours)</b>	44	0	0	44
	6.20%	0.00%	0.00%	5.70%
<b>Formal (relocation, demotion, reassign job)</b>	82	8	1	91
	11.60%	15.70%	7.10%	11.80%
<b>Dismissed</b>	63	3	0	66
	8.90%	5.90%	0.00%	8.50%
<b>Support</b>	21	0	0	21
	3.00%	0.00%	0.00%	2.70%
<b>Total</b>	709	51	14	774
	100.00%	100.00%	100.00%	100.00%

Source: Author's Own Elaboration

Table No. 13 – Actual Responses from Management after Raising Concern (Second Attempt)

	<b>Internal</b>	<b>External</b>	<b>Union</b>	
<b>No difference</b>	190	54	17	261
	59.00%	62.10%	94.40%	61.10%
<b>Informal (closer monitoring, verbal harr)</b>	16	3	0	19
	5.00%	3.40%	0.00%	4.40%
<b>Blocking resources (info, means, training, hours)</b>	23	3	0	26
	7.10%	3.40%	0.00%	6.10%
<b>Formal (relocation, demotion, reassign job)</b>	47	17	1	65
	14.60%	19.50%	5.60%	15.20%
<b>Dismissed</b>	40	9	0	49
	12.40%	10.30%	0.00%	11.50%
<b>Support</b>	6	1	0	7
	1.90%	1.10%	0.00%	1.60%
<b>Total</b>	322	87	18	427
	100.00%	100.00%	100.00%	100.00%

Source: Author's Own Elaboration

Table No. 14 – Actual Responses from Co-workers after Raising Concern (First Attempt)

	Internal	External	Union	
<b>No difference</b>	535	45	12	592
	75.50%	88.20%	85.70%	76.50%
<b>Informal (ostracized, bullied)</b>	105	0	1	106
	14.80%	0.00%	7.10%	13.70%
<b>Formal (grievance or other accusation)</b>	62	6	1	69
	8.70%	11.80%	7.10%	8.90%
<b>Both formal and informal</b>	1	0	0	1
	0.10%	0.00%	0.00%	0.10%
<b>Support</b>	6	0	0	6
	0.80%	0.00%	0.00%	0.80%
<b>Total</b>	709	51	14	774
	100.00%	100.00%	100.00%	100.00%

Source: Author's Own Elaboration

Table No. 15 – Actual Responses from Co-workers after Raising Concern (Second Attempt)

	Internal	External	Union	
<b>No difference</b>	254	74	18	346
	78.90%	85.10%	100.00%	81.00%
<b>Informal (ostracized, bullied)</b>	29	5	0	34
	9.00%	5.70%	0.00%	8.00%
<b>Formal (grievance or other accusation)</b>	35	7	0	42
	10.90%	8.00%	0.00%	9.80%
<b>Both formal and informal</b>	1	0	0	1
	0.30%	0.00%	0.00%	0.20%
<b>Support</b>	3	1	0	4
	0.90%	1.10%	0.00%	0.90%
<b>Total</b>	322	87	18	427
	100.00%	100.00%	100.00%	100.00%

Source: Author's Own Elaboration

These findings show clear patterns supporting the suggestion that it is safer to raise a concern with a union than it is to other recipients. At both attempts, raising a concern results in more responses from management than from co-workers, regardless of who the concern is raised with (“no difference” is higher for co-worker responses than for managers – 63.4% vs 76.5% at first attempt, 61.1% vs 81.0% at second attempt). Just looking at the “no difference” group, it is always higher when raising to a union than it is when raising a concern internally, and also always higher than when raising a concern to another external recipient (except for responses from co-workers at first attempt).

If there is any response when raising concern to a union, it tends to be a formal reprisal. Although whistleblowers never report that they received support from managers or co-workers when raising their concern to a union, it is striking that no one who raised a concern to a union was dismissed after doing so. In the UK, victimizing a worker on the grounds of trade union activities is separately outlawed under legislation. What our findings suggest is that raising a concern with a union is regarded as a trade union activity and hence puts extra legal and industrial relations pressures on management.

Tables No. 16-18 present our findings on actions taken with regard to the wrongdoing after raising a concern to a union. Findings for the fourth attempt to raise a concern are not shown because absolute numbers were very low.

*Table No. 16 – Action Taken with Regard to the Wrongdoing after Raising Concern (Second Attempt)*

	Internal	External	Union	
<b>Nothing is done</b>	634	35	13	682
	81.60%	61.40%	86.70%	80.30%
<b>Investigating (no expectations)</b>	62	2	2	66
	8.00%	3.50%	13.30%	7.80%
<b>Investigating (good expectations)</b>	49	18	0	67
	6.30%	31.60%	0.00%	7.90%
<b>Stopped</b>	32	2	0	34
	4.10%	3.50%	0.00%	4.00%
<b>Total</b>	777	57	15	849
	100.00%	100.00%	100.00%	100.00%

*Source: Author's Own Elaboration*

*Table No. 17 – Action Taken with Regard to the Wrongdoing after Raising Concern (Second Attempt)*

	<b>Internal</b>	<b>External</b>	<b>Union</b>	
<b>Nothing is done</b>	286	65	17	368
	81.70%	60.20%	89.50%	77.10%
<b>Investigating (no expectations)</b>	31	7	1	39
	8.90%	6.50%	5.30%	8.20%
<b>Investigating (good expectations)</b>	20	32	0	52
	5.70%	29.60%	0.00%	10.90%
<b>Stopped</b>	13	4	1	18
	3.70%	3.70%	5.30%	3.80%
<b>Total</b>	350	108	19	477
	100.00%	100.00%	100.00%	100.00%

*Source: Author's Own Elaboration*

Table No. 18 – Action Taken with Regard to the Wrongdoing after Raising Concern (Second attempt)

	Internal	External	Union	
<b>Nothing is done</b>	67	31	6	104
	79.80%	62.00%	100.00%	74.30%
<b>Investigating (no expectations)</b>	9	2	0	11
	10.70%	4.00%	0.00%	7.90%
<b>Investigating (good expectations)</b>	6	16	0	22
	7.10%	32.00%	0.00%	15.70%
<b>Stopped</b>	2	1	0	3
	2.40%	2.00%	0.00%	2.10%
<b>Total</b>	84	50	6	140
	100.00%	100.00%	100.00%	100.00%

Source: Author's Own Elaboration

These findings show clear patterns suggesting that raising a concern to a union is not effective, i.e. it does not “effect action”<sup>34</sup> towards investigating or correcting the wrongdoing. A first salient finding is that most of the whistleblowing, regardless of whether the recipient is internal or external, is simply ignored. The second salient finding is that raising a concern to an external recipient is the most effective, at least in terms of the alleged wrongdoing being investigated in a serious way. The third salient finding however – and for this paper the important one – is that a union is the least effective recipient, even less than raising a concern to an internal one. Even when this results in an investigation, the whistleblower does not perceive this as credible.

We offer two possible explanations for this. First, even though unions can be institutionalised in organisations through their representatives, they lack power to signal concerns about wrongdoing to executives. It is likely that this lack of power results from the perception executives have of unions as antagonists or “trouble makers”. It might also be that the executives being contacted are involved in the wrongdoing themselves. A second possible explanation is that unions are not particularly interested in

<sup>34</sup> Near and Miceli, 1985, *op. cit.*

the concern itself. Since they are clearly successful in making whistleblowing “safe” for the whistleblower, correcting the wrongdoing is not their first priority.

There is consensus that the main motive of a whistleblower is to get someone to take action to correct<sup>35</sup>. Other motives – relating to safeguarding one’s professional position or outlook – emerge as the whistleblowing process lengthens and the whistleblower is met with reprisals. The implication of this is that whistleblowers who have raised a concern with a union, and because of that have better prospects in terms of fighting off reprisals, would still be eager to get someone to take action to correct the wrongdoing. Hence the expectation is that they would continue to raise their concern with other recipients after raising to the union. Table No. 19 shows where whistleblowers go on to raise their concern with another recipient after they have gone to a union. Table No. 20 shows the number of whistleblowers who proceed to raise with another recipient in general compared to the ones who do so after raising their concern to a union.

*Table No. 19 – Recipients after Unions (All Attempts)*

<b>Recipient after union</b>	<b>n</b>	<b>%</b>
<b>line manager</b>	2	22.2
<b>higher manager</b>	4	44.4
<b>grievance specialist channel</b>	1	11.1
<b>independent body</b>	1	11.1
<b>Total</b>	9	99.9

*Source: Author’s Own Elaboration*

<sup>35</sup> J. B. Dozier, M. P. Miceli, *Potential Predictors of Whistle-Blowing – A Pro-Social Behavior Perspective*, in *Academy of Management Review*, 1985, vol. 10, 823-836.

M. P. Miceli, J. P. Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*, Lexington Books, New York, 1992.

Table No. 20 – Whistleblowers Raising a Concern Further (After Union Compared to Overall)

	After raising to union (%)	Regardless who raised with (%)
Went on after first attempt	6 (40%)	477 (56.2%)
Went on after second attempt	3 (15.7%)	140 (29.3%)
Went on after third attempt	-	21 (15%)

Source: Author's Own Elaboration

We caution the reader for the low absolute numbers for this finding but still discuss what these suggest. Of those who continue to raise a concern after they have done so to a union, most raise their concern with higher management (table 19). However, this is not different from those who raised with other recipients than a union. Most (3 out of 4) of those who raised with higher management after going to a union did so at their second attempt (raising with a union at the first attempt). Across the sample, higher management is the most used recipient for concerns raised at second attempt (33%)<sup>36</sup>.

From table 20 we can see that workers who raise a concern to a union are less likely than others to continue raising their concern with other recipients. A possible explanation is that whistleblowers are so disappointed with the organisational response they received earlier (or lack of such a response) that they lose hope about getting the wrongdoing corrected and take satisfaction in not suffering from reprisals. The upshot of this is that it is disappointing that unions do not seem able to support a whistleblower in getting the wrongdoing corrected. However, this is merely a possible explanation - we cannot interrogate the data further.

<sup>36</sup> See *Whistleblowing - The Inside Story*, *op. cit.*

## 6. Conclusions

This paper used data from a whistleblowers' advice line to research whistleblowing to unions. After establishing that unions, despite being recognised by management or having a presence and power inside organisations are best perceived as external recipients, we went on to hypothesise that they unions are likely to focus on protecting whistleblowers rather than action to stop the wrongdoing.

Our findings show that trade unions are not the first choice recipient for workers who want to raise a concern about wrongdoing. Workers tend to raise a concern with other recipients first, if they raise their concern at all with a union.

We also found that industry ratios of whistleblowing to a union did not reflect the industry ratios of whistleblowing in general. Partly this was because some concerns (like workplace safety) can be considered core trade union issues. However, other types of concern that were raised with a union (like environmental or consumer issues) are so removed from the often cited traditional union issues, that a more likely explanation for our findings is that workers raise their concern with a union because they lack trust in successful internal whistleblowing.

We then looked into how successful – i.e. safe and effective – whistleblowing to a union was. Our findings showed that it is safer for whistleblowers to raise a concern with a union than it is to other recipients. However, our findings also showed that raising a concern with a union is less effective than using other external or internal recipients. Unions showed to be the least effective recipient, even in terms of the trust whistleblowers had in the quality of the investigation after they had raised their concern with a union.

Finally, we also found that workers who had raised a concern with a union were less likely than others to continue raising their concern to other recipients – even though the wrongdoing was not stopped.

Hence our findings confirm our main hypothesis. Unions are clearly successful in making whistleblowing safe for the whistleblower, but effecting action to correct the wrongdoing seems to remain a lower priority.

There are some limitations to this research that warrant further research to confirm or bring nuance to our findings. First, our data set consisted of people who had called Public Concern at Work for advice on whistleblowing. These tend to be people who experience or expect to experience difficulties when raising a concern. The implication is that there might be a number of whistleblowers who raised their concern

immediately with a union and never felt the need to call the PCaW advice line. These people would not be included in our data set.

A second limitation relates to the sequence in which people raise their concern to different recipients. We were able to code this sequence from the narratives the advisors had compiled when whistleblowers made subsequent calls to the PCaW advice line. Where whistleblowers went on to raise their concern with someone after they called PCaW but then did not call PCaW back after doing so, this would not have been captured in our data. It is possible that this distorted our findings on the number of whistleblowers who go on to raise their concern after they had raised it with the union.

The third limitation is that our data did not include whether or not a whistleblower was a member of a union. Hence we are unable to compare union members with non-members on how they use unions as recipients for the concern they want to raise.

Our findings are relevant to union leaders who want to strengthen union activity because they show the potential further contributions unions can make to a fair workplace and society. The limitations, however, call for further research into the issue. Such research would benefit from using different data – i.e. not from an advice line. Both qualitative and quantitative research collecting data from union awareness about and activity on whistleblowing would be needed.

# Malice and Whistleblowing

Peter Bowal \*

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## 1. Introduction

*The voice of conscience is so delicate that it is easy to stifle it; but it is also so clear that it is impossible to mistake it.*

Madame De Stael, writer (1766-1817)

Two unrelated events are playing out half a world apart as I collect my thoughts for this article. One is the perplexing account of a Norwegian woman, Marte Deborah Dalely, who reported to police – presumably because she sought justice in the matter –that she was sexually assaulted by a co-worker in Dubai, United Arab Emirates. For making the report of criminal activity to the public authorities responsible for enforcing the law, she was herself detained in custody for four days, charged with having extra-marital sex and sentenced to 16 months of imprisonment, three months longer than the perpetrator<sup>1</sup>. After massive outrage was expressed by the international media and after high level Norwegian diplomatic interventions, she was pardoned by Dubai ruler Sheikh

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<sup>1</sup> B. Murphy, *Norwegian Woman gets 16 Months in Jail for Having Sex Outside Marriage after Reporting Alleged Rape in Dubai*, in *National Post*, Postmedia, 2013, <http://news.nationalpost.com/2013/07/21/norwegian-woman-gets-16-months-in-jail-for-having-sex-outside-marriage-after-reporting-alleged-rape-in-dubai/> (accessed September 3, 2013).

Mohammed bin Rashid al-Maktoum<sup>2</sup>. This was an extraordinarily iniquitous case of “re-victimize the victim” and “punish the messenger.” The pardon still left the impression that she remained somehow guilty of a crime for reporting a crime.

The second story broke in June 2013. Some of the world’s largest chocolate companies, including Nestlé and Mars, and their executives<sup>3</sup>, were criminally charged with fixing the price of chocolate in its multi-billion dollar market in Canada<sup>4</sup>. The corporate accused could be fined a maximum of \$10 million each and the individual accused, if convicted, face terms of imprisonment of up to five years<sup>5</sup>.

It is alleged that secret price-fixing meetings were held in coffee shops, restaurants and at industry conventions as far back as 2002. The Canadian competition regulator was only tipped off about the conspiracy by another chocolate company, perhaps Cadbury or Hershey, which sought to take advantage of the Canadian Competition Bureau’s Immunity Program<sup>6</sup>. However, that Program for third party competitors and protections for whistleblowing employees reporting law-breaking in their own companies are only extended by the applicable legislation where “the employee [is] acting in good faith and on the basis of reasonable belief”<sup>7</sup>. The competitor’s whistleblowing report to the regulators, whether corporate or individual, launched a six-year investigation which led to these charges<sup>8</sup>.

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<sup>2</sup> B. Murphy, *Dubai pardons Norwegian Woman Who Was Sentenced to Year in Jail for Reporting Rape*, in *National Post*, Postmedia, 2013, <http://news.nationalpost.com/2013/07/22/dubai-pardons-norwegian-woman-who-was-sentenced-to-year-in-jail-for-reporting-rape/> (accessed September 3, 2013).

<sup>3</sup> Under the Competition Act, RSC 1985, c C-34, s. 65(4), corporate officers and directors are deemed parties and equally liable with their corporate entities, if they “directed, authorized, assented to, acquiesced in or participated in the commission of the offence(s)”.

<sup>4</sup> Competition Act, RSC 1985, c C-34, s. 45(1).

<sup>5</sup> The maximum penalties have been increased since the dates of these alleged offences to \$25 million and 14 years of imprisonment: see Competition Act, RSC 1985, c C-34, s. 45(2).

<sup>6</sup> [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_02000.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html) (accessed July 16, 2013).

<sup>7</sup> *Competition Act*, RSC 1985, c C-34, ss. 66.1 and 66.2.

<sup>8</sup> The Competition Bureau has not identified the chocolate company who brought their attention to the cartel. Many have speculated that it was Hershey, which admitted to one meeting and a planned price increase with the group in 2007, but says it did not go further to participate in the conspiracy. Hershey has indicated that it plans to plead guilty to one count of price-fixing and ask for leniency under the Competition Bureau’s Immunity Program: *Whistleblower Revealed Alleged Cartel*, in *National Post*, June 7, 2013, page A1 and A6. Others note that Cadbury, a major player in the Canadian chocolate market,

What ties these two factually and geographically distinct events together is how the motives of the reporting party might have barred investigation of the reports. A rape victim is understandably upset and interested in justice being brought to bear against the perpetrator. A report of a crime would not reasonably be discounted merely because the informant is a distraught victim. Likewise, one might speculate how something as secondary as good faith of a competitor in the chocolate business seeking immunity in prosecution for a criminal conspiracy, or the motives of an employee making the tip, might have derailed an important and major investigation and prosecution. The motives of a former co-conspirator in reporting its competitors to regulators in return for immunity might be suspect enough to jeopardize law enforcement and justice if a demonstration of good faith was a pre-requisite to criminal process.

Why the legislated need for good faith in this realm of voluntary reporting and not in other scenarios?

Whistleblowing impacts personal reputations as much as it does wrongdoing. Whistleblowers come from all roles inside and outside of organizations with various states of personal knowledge of what they are reporting. Moreover, there may be a sense in organizations that some objective mechanism must be imposed on an inundation of random wrongdoing reports of variable seriousness. That is to say, the recipient of the reports could be readily overwhelmed with unsubstantiated, potentially reputation-ruinous reports and could use a few handy parameters to quickly assess which reports are most worthy of immediate attention. Good faith might be seen as one of these helpful parameters – as an effective delimiting control to achieve this triage objective.

Occasionally, whistleblowing legislation includes another pre-qualification such as “and on reasonable grounds.” This added “reasonable grounds” qualification is found in the *United Nations Convention Against Corruption*<sup>9</sup> and the *OECD Anti-Bribery Convention*<sup>10</sup>, among others. “Reasonable grounds” obviously engages at a conceptual level, and to some extent overlaps, with good faith. Good faith is likely to be confused or conflated with “reasonable grounds.” On the other hand, arguable “reasonable

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has not been charged and may indeed be the tipster under the Immunity Program: J. Gray, *Chocolate Fix: Three Charged in Alleged Pricing Scheme*, in *Globe and Mail*, June 7, 2013, B1 and B4 <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/chocolate-bar-executives-accused-of-price-fixing-in-canada/article12380660/> (accessed July 3, 2013).

<sup>9</sup> Article 33.

<sup>10</sup> Article IX (iii).

grounds” imports another *sui generis* pre-condition to the review and investigation of the report and protection of the whistleblower, *viz.* sufficient, credible proof of the wrongdoing at the time of making the report.

Good faith, while frequently a prerequisite in whistleblower protection statutes, is rarely defined in those statutes. The person or entity responsible for the interpretation and application of the legislation is left to ascribe whatever meaning they choose to the good faith requirement<sup>11</sup>. This “and on reasonable grounds” qualification will not be further analyzed in this article.

The good faith requirement, which derives from defamation law, rests on the negative premise that if the whistleblower’s good faith cannot be demonstrated, either or both the whistleblower or the report is unreliable. Accordingly, it would be unsafe to invest further effort and reputational risk in reports of wrongdoing where good faith is not palpable.

Consider a fictional example of how the malice requirement might operate. Worker X is known to despise her boss Y, with whom she has had conflicts in the past and who two years ago won the promotion X was seeking. X has made two previous allegations against Y about signing authority and getting vendors to drop leftover construction materials at Y’s house. Y, who is a popular and successful division manager, vigorously denied any wrongdoing, snapping, “She’s still upset she did not get promoted last time, and continues to try to undermine my hard work and solid results.” No allegations were followed up.

Yet, X has never reported the serious revenue overstatements and sham sales from their division, which have been orchestrated by Y and in which, to date, she has reluctantly acquiesced and participated in. These accounting frauds have made their division the leader in corporate performance on paper and she also has enjoyed the accolades and bonuses. X knows the mischief will be detected in the next year or two and she reckons it would be best for her to break the news of Y’s corruption. Today, X feels slighted by Y at a meeting, exchanges sharp words with him, and then marches to the executive suite to report Y’s

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<sup>11</sup> Vandekerckhove and Lewis point out that ‘good faith’ has been defined in incompatible ways – for example, by Transparency International similar to ‘reasonable grounds’, by the ICC as different from reasonable grounds, and entailing a motive aspect. See, W. Vandekerckhove, D. Lewis, *The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines*, in *Journal of Business Ethics*, Vol. 108, No. 2, 2012, 253-264.

fraudulent revenue and cost accounting. Facing the CFO, she is flushed and nervous as she anxiously sputters through the allegations. Her story seems contrived. It is also improbable and, if anyone gets a whiff of it, could start a run on the company's stock price. She has no proof and the report comes off as another personal tirade against Y. From this overall context, it appears to the CFO that X's report is *not* made in good faith.

In order for reports of wrongdoing to be investigated at all and for the whistleblower to be protected by confidentiality and against reprisal, the legislation and corporate whistleblowing policies require that reports must be made "in good faith" or "with proper motives". Occasionally, the applicable language sometimes states in the condition in the negative form, such as "without malice". All such variations are legally and practically relevant as the same theme in whistleblowing regulation. Without this legal standard of good faith being met, the whistleblower's report of wrongdoing is not investigated. The theory behind this standard holds that good faith serves a built-in filter for truth, in that it will lead to action upon fewer, but more reliable, reports. Culling bad faith reports spares wasteful investigations of the report of wrongdoing and preserves innocent third parties' reputations. Bad faith whistleblowers are deterred because they will know they will not be protected by confidentiality from reprisal.

Moreover, a bad faith report might even serve as an independent basis for workplace discipline against the whistleblower. This article argues that while the prerequisite of good faith appears designed to minimize mischief, it actually generates more uncertainty and opportunity for mischief than would be the case of presumptive good faith motives on the part of integrity reporters. As a general legal threshold qualification for acting on reports of wrongdoing, good faith ought to be discarded. There are several bases for this rejection of the good faith constraint. These include: definitional inconsistency, burden of proof, asymmetry, probity, and the proxy problem. After first canvassing the global popularity of the good faith standard in whistleblowing legislation, each of these rationales will be analyzed.

## 2. The Good Faith Requirement in Whistleblowing Legislation

In most whistleblowing legislation and corporate whistleblowing policies, a mandatory and minimum standard of good faith on the part of whistleblowers when they report wrongdoing is prescribed<sup>12</sup>. In the recently enacted legislation in my Canadian province, “[t]he Commissioner is not required to investigate a disclosure or, if an investigation has been initiated, may cease the investigation if, in the opinion of the Commissioner [...] the disclosure [...] has not been made in good faith”<sup>13</sup>. The legislation that applies to federal public servants defines “protected disclosure” as “a disclosure that is made in good faith”<sup>14</sup>. The same threshold good faith requirement was, until very recently, found in the United Kingdom legislation<sup>15</sup> in several provisions, starting with section 43F(1): “a qualifying disclosure is made in accordance with this section if the worker ... makes the disclosure in good faith”<sup>16</sup>. The *Enterprise and Regulatory Reform Act 2013*<sup>17</sup> removed the good faith threshold but now allows the tribunal to reduce the compensation by up to 25% if it finds the protected disclosure was not made in good faith<sup>18</sup>. The whistleblower must also now hold a reasonable belief that the disclosure is made in the public interest<sup>19</sup>. Most other domestic European whistleblowing legislation sets a good faith standard or evaluates motives in some similar way<sup>20</sup>.

In the United States, there is no malice or good faith provision in the federal *False Claims Act*, in the Dodd-Frank SEC whistleblower statute, in the *Internal Revenue Code*, section 7623(b), in the Sarbanes-Oxley Act, or in

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<sup>12</sup> An exception is the Australian approach. See, for example, the Commonwealth *Public Interest Disclosure Act 2013*, in effect from July 15, 2013. Division 2 (Public Interest Disclosures), at ss. 25 *et. seq.* does not contain a good faith requirement.

<sup>13</sup> *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c P-39.5, section 19(1) <http://canlii.ca/t/5218w> (accessed July 6, 2013).

<sup>14</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, section 2, <http://canlii.ca/t/lgj4> (accessed July 6, 2013).

<sup>15</sup> *Public Interest Disclosure Act 1996, as amended* (UK, c. 18).

<sup>16</sup> See also, sections 43G(1), 43H(1).

<sup>17</sup> 2013 c. 24, Part 2, Protected Disclosures, received Royal Assent on 25 April 2013.

<sup>18</sup> *Supra*, section 18(4).

<sup>19</sup> Employment Rights Act 1996, c. 18, as amended, section 43B.

<sup>20</sup> See W. Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in D. Lewis, *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research?*, Edward Elgar, Cheltenham, 2010, 15-35.

any state false claims legislation<sup>21</sup>. Under Dodd-Frank regulations, there are inducements to encourage whistleblowers to first report internally. However, malice on the part of a whistleblower will put a damper on the enthusiasm of regulators and prosecutors because malice undermines the whistleblower's credibility as a witness. Good faith is not required for protection under the federal *Whistleblower Protection Act of 1989*<sup>22</sup>, but a 'reasonable belief' standard applies<sup>23</sup>.

Regional and international conventions focused exclusively upon combating corruption are important documents in which to situate whistleblowing protections because national law enforcement authorities are seriously disadvantaged in what they can detect in foreign business operations. These conventions also largely import a standard good faith pre-condition to whistleblower protection.

The United Nations *Convention Against Corruption* recommends signatory countries enact domestic legislation that protect whistleblowers who make only good faith disclosures. Article 33, subtitled "Protection of Reporting Persons" reads<sup>24</sup>:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment *for any person who reports in good faith* and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention [emphasis added]

The OECD Anti-Bribery Convention<sup>25</sup> did not in its prescriptions and commentary mention the role of whistleblowers in detecting and investigating international corruption. It was not until the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public*

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<sup>21</sup> These statutes can be consulted at <http://taf.org/> (click on Resources by Topic). The Sarbanes-Oxley Act whistleblower provisions are at [http://www.whistleblowers.gov/acts/sox\\_amended.html](http://www.whistleblowers.gov/acts/sox_amended.html) (accessed July 6, 2013).

<sup>17</sup> 101st Congress (1989-1990) S.20.ENR.

<sup>23</sup> *Supra*, section 1213.

<sup>24</sup> General Assembly resolution 58/4 of 31 October 2003, *United Nations Convention against Corruption*.

[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) (accessed July 8, 2013).

<sup>25</sup> *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Development, 1997*; adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINA; [http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf) (accessed July 8, 2013).

*Officials in International Business Transactions*<sup>26</sup> that member countries were recommended to enact “appropriate measures ... to protect from discriminatory or disciplinary action public and private sector employees *who report in good faith* and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.” [emphasis added]<sup>27</sup>.

The *Inter-American Convention Against Corruption*<sup>28</sup> likewise invokes good faith as a pre-requisite to whistleblower protection<sup>29</sup>, as does the same Organization of American States’ comprehensive *Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses*<sup>30</sup>. Indeed, the outset of this extraordinary document limits its purpose to the protection of “any person who, in good faith, report[s] or witness[es]” acts of corruption<sup>31</sup>.

The *African Union Convention on Preventing and Combating Corruption*<sup>32</sup>, in Article 5, does not explicitly set a good faith standard<sup>33</sup>. It does, however, mandate “national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences”<sup>34</sup>.

The Council of Europe’s *Civil Law Convention on Corruption* incorporates good faith in Article 9 (Protection of Employees): “[...] for employees who have reasonable grounds to suspect corruption and *who report in good faith* their suspicion to responsible persons or authorities”<sup>35</sup>. [emphasis

<sup>26</sup> Adopted by the Council on 26 November 2009, see *supra*.

<sup>27</sup> Article IX (iii), *Reporting Foreign Bribery*; see also, Annex II, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.

<sup>28</sup> Adopted at the third plenary session on March 29, 1996; <http://www.oas.org/juridico/english/treaties/b-58.html> (accessed July 10, 2013).

<sup>29</sup> Article 18 states: “Systems for protecting public servants and private citizens *who, in good faith, report acts of corruption*, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.” [emphasis added].

<sup>30</sup> Undated; [http://www.oas.org/juridico/english/draft\\_model\\_reporting.pdf](http://www.oas.org/juridico/english/draft_model_reporting.pdf) (accessed July 10, 2013).

<sup>31</sup> Article I: Purpose of the Law.

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[http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf) (accessed July 10, 2013).

<sup>33</sup> See Article 5, subsections 5 to 7, inclusive.

<sup>34</sup> Article 5(7).

<sup>35</sup> Strasbourg, 4.XI.1999 (entered into force on 01 December 1999); <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm> (accessed July 10, 2013).

added]. Likewise, the *Recommendation on Codes of Conduct for Public Officials*<sup>36</sup> suggests “[t]he public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith”<sup>37</sup>. The European Court of Human Rights has also embraced a good faith standard<sup>38</sup>.

On the other hand, the Council of Europe’s concise *Criminal Law Convention on Corruption* makes no reference to a good faith requirement<sup>39</sup>. This is also true for the *Anti-Corruption Action Plan for Asia and the Pacific*<sup>40</sup>, which merely recommends that member countries adopt measures for the “[p]rotection of whistleblowers”<sup>41</sup>.

### 3. Definitional Inconsistency and Confusing Application

While good faith and malice occupy a pivotal place in whistleblowing regulation, what do we know about it? Good faith is a very woolly concept. It is so vague as to be essentially meaningless. In practice, it means different things to different people and even will be applied differently by the same person according to the context. Good faith is undefined by the legislation that mandates it and it is difficult to define as

<sup>36</sup> Adopted by the Committee of Ministers of the Council of Europe on 11 May 2000 (Rec(2000)10);

[http://www.coe.int/t/dghl/monitoring/greco/documents/Rec%282000%2910\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Rec%282000%2910_EN.pdf) (accessed July 10, 2013).

<sup>37</sup> Article 12(6).

<sup>38</sup> *Guja v. Moldova* (No.14277/04, Strasbourg, 12 February 2008); <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016>; and *Heinisch v. Germany* (No.28274/08, Strasbourg, 21 October 2011), where good faith is one of six discrete requirements for protection (accessed July 11, 2013).

<sup>39</sup> Strasbourg, 27.I.1999; <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm> Article 22 (Protection of Collaborators of Justice and Witnesses) states:

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

(a.) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

(b.) witnesses who give testimony concerning these offences (accessed July 11, 2013).

<sup>40</sup> <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf> (accessed July 16, 2013).

<sup>41</sup> See pillar 3.

a principle<sup>42</sup>. Good faith is not easily ascertainable or discernible in most whistleblowing scenarios.

It might be easier to define by reference to bad faith, which is also difficult to define but, like obscenity, may be easy to recognize when it presents in clear cases. Definition and application of the concepts of good faith and malice arise from defamation law, where malice vitiates the defence of qualified privilege. The leading British common law judicial decision which attempted to define malice was *Horrocks v. Lowe*, where Lord Diplock, speaking for the House of Lords, started by describing what malice is *not*<sup>43</sup>.

A defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.

Turning to what good faith *is* defined as, his Lordship continued:

what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, in 'honest belief'. If he publishes untrue defamatory matter recklessly without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true [...] But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is a positive belief that the conclusions they have reached are true. The law demands no more.

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<sup>42</sup> The only exception appears to be the OAS *Model Law*, *supra* at note 20, that feebly attempts to define both good faith and bad faith in the Article 2, as follows:

*Good-faith whistleblower*: any person who informs the competent authority of an act which that person considers could be an act of corruption that is liable for administrative and/or criminal investigation. *Good-faith witness*: any person who for whatever reason is in possession of relevant information about acts of corruption of an administrative and/or criminal nature and is willing to collaborate in its prosecution. *Bad-faith whistleblowing or testimony*: the act of providing the competent authority with information on an act of corruption, knowing that said acts have not been committed, or with falsified evidence or circumstantial evidence of their commission, in order for an administrative and/or criminal investigation process to be opened.

<sup>43</sup> [1975] A.C. 135 (H.L.).

According to this well-accepted definition, good faith attends all disclosures that are made in an honest, non-reckless belief in the truth of the allegations. The fact that the whistleblower is stupid, hasty, rash, improvident, credulous, foolish, unfair, pig-headed, obstinate, careless, impulsive or irrational (or all of those) in arriving at – what is to him or her – an honest belief that the allegations are true does not render the report malicious. It is a subjective standard.

On the other hand, a bad faith or malicious report must be both false *and* made in the knowledge (*scienter*) of that falsity or the reckless disregard for truth. The leading case on good and bad faith whistleblowing in the United Kingdom, where the applicable legislation creates three distinct levels of protection is *Street v. Derbyshire Unemployed Workers Centre*<sup>44</sup>. The whistleblower, Street, came within the third tier of protection in section 43G where qualification for protection is harder to establish. In addition to proving "good faith" under section 43G(1)(a), one must show the disclosure was made in reasonable belief of substantial truth, that the disclosure was not made for personal gain, reasonable belief that one would suffer detriment or that evidence of the subject matter of his complaint would be concealed and "in all the circumstances of the case, it was reasonable for him to make the disclosure" (section 43G(1)(e)). Ms. Street made several different and serious allegations about several individuals but refused to be interviewed or co-operate with the investigations. The investigator exonerated the alleged wrongdoers and described Street "as being at best misguided and at worst malicious. He stated that the allegations were unfounded and possibly required serious disciplinary proceedings to be taken against her"<sup>45</sup>. On appeal, the Employment Appeal Tribunal found Street's disclosures were motivated by personal antagonism, although the only evidence was that she had refused to co-operate in the investigation.

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<sup>44</sup> [2003] UKEAT 0508\_02\_2209; [2004] 4 All ER 839, [2005] ICR 97, [2004] EWCA Civ 964, [2004] IRLR 687 [<http://www.bailii.org/ew/cases/EWCA/Civ/2004/964.html>](accessed on September 6, 2013).

<sup>45</sup> Court of Appeal decision, para 19.

The Tribunal said good faith<sup>46</sup>:

involves the deployment of an honest intention and, just as in public law, actions of a person can be vitiated if a purpose is advanced not in accordance with the [whistleblowing] statute . . . It is not . . . the purpose of the [UK] *Public Interest Disclosure Act* to allow grudges to be promoted and disclosures to be made in order to advance personal antagonism. It is, as the title of the statute implies, to be used in order to promote the public interest. The advancement of a grudge is inimical to that purpose.

The Court of Appeal, citing the *dictum* above, upheld the Employment Appeal Tribunal's dismissal of the whistleblower retaliation claim on the basis that the ulterior and principal motive of personal antagonism vitiated good faith, even in the presence of reasonable belief in the disclosure's truth. Lord Justice Auld added that good faith has a core meaning of honesty, not merely an honest intention<sup>47</sup>. However, in the context of whistleblowing legislation, good faith means more than honesty. Resentment or antagonism will not necessarily be regarded as "negating good faith, if when making the disclosure, the worker is still driven by his original concern to right or prevent a wrong"<sup>48</sup>. In the end, it is not obvious from all this judicial verbiage, how Ms. Street's personal animosity outweighed her "original concern to right or prevent a wrong." Thus the *Street* case demonstrates how challenging, if not arbitrary, good faith analysis becomes.

Pursuant to the *Horrocks* definition and the *Street* analysis under the highly nuanced United Kingdom legislation, one expects the vast majority of reports to satisfy the legal standard of good faith and exceedingly few, flagrant ones to be malicious. Excessive predatory antagonism or mental illness would seem to be the only motivations for someone to advance a verifiably false report that he or she knew to be false or did not care about its truth. Both of these conditions would likely manifest themselves independently of the report.

While extraordinary personal *animus* might drive a malicious report, this legal test does not bind motives to malice. Indeed, personal motives for the report are wholly unrelated to the legal determination as to whether it was made in good faith. The *Horrocks* standard of 'honest, non-reckless belief in the truth of the report' applies without more.

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<sup>46</sup> Employment Appeal Tribunal decision, para 29 – 30.

<sup>47</sup> Court of Appeal decision, para 41.

<sup>48</sup> *Ibid*, para 55.

A chronological paradox is observable in this respect. How can an organization or individual receiving the report know whether it is false without first investigating it? How can one know whether the whistleblower was possessed of an honest, non-reckless belief unless one investigates the basis of such belief? For the recipient to discard the report of wrongdoing at the outset on a unilateral assessment of bad faith means one is doing so without establishing that it is false at all or that, if it is false, it was rendered without an honest, non-reckless belief. In other words, it is logically inconsistent to reject any report of wrongdoing on the basis of good faith without first investigating it for truth and the honest belief of the whistleblower. Individuals responsible for receiving and processing reports will *never* be applying the correct legal test for good faith when they pre-emptively cast aside reports as the legislation and corporate policies permit them to do. To the extent that they do so, they are applying an incorrect legal interpretation of good faith and malice.

#### 4. Burden of Proof

Under the *Horrocks* test it is reasonable to conclude that in practice very few whistleblower reports will qualify as malicious. As a matter of legal policy, it follows that good faith might be implied or presumed in all whistleblower reports. The presumption of good faith can be subject to rebuttal in appropriate cases at the control of the recipient. This would be a rational default position for the good faith issue.

Whistleblowing legislation and corporate whistleblowing policies, which duplicate their corresponding statutes in many respects, create a starting point that each whistleblower's good faith must be at least apparent, if not established. Good faith is *not* presumed. Rather, one might say malice is presumed or implied in whistleblowing regulation, because whistleblowers have the legal burden of establishing their good faith at the outset of their reports.

However, even hostile witnesses in criminal and civil courtrooms and defamation defendants enjoy the presumption that their evidence and their published statements, respectively, were made in good faith. A trial witness motivated by malice will lack credibility, but the fact that one is a hostile or adverse witness must objectively be proved by the trial opponent on a balance of probabilities. Otherwise, all witness evidence is presumed to be credible and made in good faith. Even if a witness is adjudged hostile at trial, the consequence is that, as a matter of evidence,

the evidence is not excluded but the weight of it is discounted by the decision-maker.

Defendants in a defamation lawsuit do not have to prove the good faith of their utterances in order to prevail. It is the plaintiff who has the burden of proving on a civil standard that the defendant's statements were actuated by malice. The law sets out a burden of proof upon whistleblowers that is more stringent than practised in other scenarios of disclosures scrutinized in the legal system.

As has already been alluded to, the recipient of the report may pronounce on a whistleblower's motives without knowing whether the allegations are true or without asking the whistleblower what one's motives were. It is not easy to imagine, in any event, how a report recipient will accurately judge what the whistleblower knows or honestly believes. Would one ask the whistleblower to check off a box on a form that affirms one is making the report in good faith? All whistleblowers would assert they are reporting in good faith and the recipient often has even less to go on to refute such an assertion. Placing the burden of proof of good faith on the whistleblower, even if one was examined about that matter, would yield little more that is of value than presuming good faith at the outset.

## 5. Asymmetry

We have seen that reports of wrongdoing that are contaminated by any measure of malice are assumed to be factually unreliable and less worthy of investigation than reports that are made in good faith. Apart from the assessment and investigation of reports, the malice rule further functions to decisively screen out reports that are potentially damaging to the reputations of putatively innocent individuals and organizations. It should be noted, however, that all allegations, even good faith ones, may damage reputations.

Good faith focuses exclusively on the messenger and diverts all attention from the substance of the message of wrongdoing. Immediate scrutiny of the messenger also perpetuates a sense that the organization and manager receiving the report must find favour with the messenger. The law and policy of good faith is interested in determining whether any whistleblower's report will be taken seriously – and an investigation within a potentially major, resource-consuming investigation– and not addressing the reported wrongdoing itself. As good faith is an internal restraint on whistleblowers, it signals that whistleblowing is to be viewed and handled as an indulgence on the part of the organization.

The good faith test is a concession conferred upon the whistleblower, one that must not be allowed to be abused. Addressing the reported wrongdoing appears to be secondary. One might even say that not being able to demonstrate good faith in one's report is seen as a greater evil or risk than the wrongdoing reported. An absence of good faith will likely be implied if the whistleblower is seen to abuse the 'privilege' of reporting wrongdoing. For example, more than a few reports, or several in close succession, may be seen as motivated by bad faith.

We can conceptualize this asymmetry in terms of meriting and forfeiting privilege. Captive whistleblowers ordinarily owe some measure of confidence to the putative wrongdoer and organization. This duty of confidence is over-ridden by a privilege, granted by public policy that supports both the freedom to disclose and the freedom from retaliation. Many agents possessed of public policy privilege will not exercise that privilege because retaliation remains a likely result. Given that high likelihood of uncompensable losses springing directly from whistleblowing, only when the motivation of malice is added to the mix will whistleblowing become likely. Proving malice reduces to proving the need to strip the whistleblower of this privilege. The very few obvious malice cases are easy to prove – it is all the others that become problematic with a good faith requirement.

Furthermore, there is no corresponding duty of good faith on part of any other person. The manager or organization to whom the report is made possesses no reciprocal duty of good faith in processing of the report or even in attaching bad faith to it. The recipient of the report may be lacking even more in good faith in excluding it or, if it is processed, how it is investigated and acted upon. The recipient of the report may not be a good judge or investigator of what is good faith. Whistleblowing legislation and corporate policies generally do not allow any appeals on the unilateral threshold good faith determination.

Before leaving this section, we reflect on the example of Christiane Ouimet, Canada's first Public Sector Integrity Commissioner, responsible for receiving and processing reports of wrongdoing in Canada's federal public service. Her generously-funded and staffed office only investigated<sup>7</sup> of 228 reports in the less than three years in the job. Moreover, it was confirmed by the federal Auditor-General<sup>49</sup> that Ouimet

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<sup>49</sup> [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201012\\_e\\_34448.html#hd3d](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201012_e_34448.html#hd3d) (accessed July 24, 2013).

bullied, berated and intimidated her office staff, and retaliated against them, leading to an attrition rate of 50%<sup>50</sup>.

## 6. Probity

This rationale for dispensing with the good faith requirement questions the accuracy of the premise for its existence. As already pointed out, bad faith is legally a very narrow thing, and (as will be discussed below) much of what is actually used to ignore wrongdoing reports is unrelated to bad faith. Rather, a myriad of reasons to ignore the wrongdoing can be coloured as “he can’t be serious” bad faith motives of the whistleblower.

This probity point is simple: the lack of good faith does not “prove” that the allegations are baseless. Malice or an inability to prove good faith does not necessarily mean there is no wrongdoing or that it ought to be excused. The premise that good faith reports are more factually reliable than reports tainted with some malice is unfounded and unproven.

In terms of personal *animus*, precise intentions are impossible to accurately gauge. Often whistleblowers do dislike to some degree the wrongdoer and under current legislation have no protection even though a modest dislike is not likely to diminish the reliability of the report. Some whistleblowers will dislike people who commit serious wrongs *per se*. They may seek resolution simply because the wrongdoing occurred, which may look like vengeance. Often any *animus* that arises only does so *after* the wrongdoing, wholly in response to the wrongdoing. This is a natural human response and should not be seen as a failure of good faith.

As has already been mentioned, the good faith requirement focuses attention entirely on the messenger and not at all on the message, which is where the focus, as a matter of policy, should be. If a malicious whistleblower’s report discloses actual wrongdoing, the issue of malice is essentially moot. If the whistleblower is mendacious or malicious, which social science research reveals is rarely the case, or even reckless, and there is no (or immaterial) wrongdoing, the lack of corroborating evidence in most cases will soon be manifest. The malicious, false report is itself wrongdoing and would constitute sufficient grounds for termination or other employment discipline. If employees who act maliciously toward others are consistently disciplined by employers, a strong signal will be

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<sup>50</sup> N. N., *Christiane Ouimet Explain Yourself*, in *The Globe and Mail*, February 11, 2011 <http://www.theglobeandmail.com/commentary/editorials/christiane-ouimet-explain-yourself/article565676/> (accessed July 24, 2013).

sent through the organization that this behaviour will not be tolerated. General standards of policy and law – such as requiring good faith – should not be set to the rarest of scenarios, such as the vilest of employees with the most corrupt motives.

## 7. The Proxy Problem

The proxy problem refers to the reality of intentionally or inadvertently invoking the element of good faith to summarily reject legitimate wrongdoing reports on other, unarticulated grounds. In practice, good faith may serve as a proxy justification to disqualify reports that ought to be investigated and acted upon.

This proxy problem arises from the natural human aversion to being told about problems which must be addressed and effectively managed. Ours is an age of good news stories and moving from success to success. Investor and public relations departments, not to mention management generally, operate full time in the business and expectation of marketing positive images, where bad news must be ignored, suppressed or glossed into some version of the good. Anyone who has ever served in a position of responsibility knows the powerful inner revulsion with which serious problems are greeted. Problems and wrongdoings are easily taken as a reflection of our management failure and they may, should they become well known, threaten our reputations, careers and other interests, not to mention the interests of our organizations.

Resources must be marshalled, difficult decisions must often be made, relationships will be strained and new risks will be taken. It is a natural instinct, therefore, for most people in leadership positions to want to ignore or minimize reports of serious wrongdoing when they are brought to their attention, unless their very position or organization is threatened by the allegations. Adapt this to whistleblowing and the human tendency of managers to avoid dealing with real unpleasant and disruptive issues/problems that are brought to their attention. They are hired and rewarded for other successes. As Sinclair observed: “[i]t is difficult to get a man to understand something, when his salary depends upon his not understanding it!”<sup>51</sup>. If functional gatekeepers are intrinsically motivated to avoid dealing with problems, the good faith requirement may be a handy

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<sup>51</sup> U. Sinclair, *I, Candidate for Governor: And How I Got Licked*, Farrar and Rinehart, New York, 1935, reprinted Los Angeles: University of California Press, Los Angeles, 1994, 109.

tool to achieve that objective. Managers and other recipients of wrongdoing reports may be inherently inclined to over-assess bad faith. Whistleblowers often have less power than the people to whom they report wrongdoing and the people whose wrongdoing they report about. Another means to apply established, formal power over the less powerful whistleblower is to take the position that the whistleblower was merely not acting in good faith in making the report. In this way, the good faith requirement can easily serve to cancel out the bottom-up organizational power that whistleblowing is intended to confer.

How and when the report is lodged may be perceived as a good faith issue. Poorly articulated or documented complaints may be seen to be malicious on the basis of those deficiencies alone. It is easy to say that someone is not acting in good faith merely because the report is unwelcome, arrives at an inopportune time, or identifies wrongdoing by someone the recipient admires and respects personally. Consider the many human communication variables, any one of which can vitiate a whistleblower's good faith from the perspective of the recipient of the report. Here are only a few of the obvious ones:

- when the report was made – bad timing; too busy
- how the report was made – immoderately expressed; anxious, hostile tone
- insufficiently documented or substantiated – “you can't prove it”
- report is frivolous
- misplaced 'team' structure – “go back and work it out”
- perception of the alleged wrongdoer – the more powerful, popular or unimpeachable in eyes of the report recipient – “how dare you say that about ...”

One might pause and reflect on the last of these factors. There are many examples on offer to show how a good reputation can trump or subvert an allegation of wrongdoing and paralyze regulators. Bernie Madoff had a good reputation as a stock broker, investment advisor and asset fund manager, as well as a community builder, friend of the rich and powerful, and prominent philanthropist<sup>52</sup>. He was also a criminal multi-billion dollar

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<sup>52</sup> N. N., *The Madoff Case: A Timeline (March 12, 2009)*, in *Wall Street Journal*, [http://online.wsj.com/article/SB112966954231272304.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB112966954231272304.html?mod=googlenews_wsj) (accessed July 26, 2013).

ponzi schemer who is now serving 150 years in prison<sup>53</sup>. Financial analyst, Harry Markopolos, tried in vain to get the attention of American Securities Exchange Commission regulators to prove that Madoff could not mathematically and legally realize the gains he claimed to earn. Through numerous attempts over a decade, Markopolos failed to get enforcers to seriously investigate Madoff's frauds. His book chronicles the many exasperating efforts he and his team made to alert the government, the industry and the media to this massive fraud<sup>54</sup>.

In Canada, Russell Williams was a decorated military pilot in the Canadian Forces. He held the rank of Colonel and commanded the flagship Canadian Forces base Trenton, Canada's largest and busiest military airbase. He had been entrusted to captain VIP flights for Queen Elizabeth II, Prince Philip, the Governor General, the Prime Minister of Canada and national cabinet ministers. His public reputation and acclaim was to give way to a dark side. He was also a serial criminal over many years. Within two weeks of receiving a medal for 22 years of "faithful service to the Canadian Forces and Canada," Williams was charged with two counts of first-degree murder. A few months later, he pled guilty to two murders, abductions, rapes, and 82 home break-ins<sup>55</sup>. Like Bernie Madoff, Williams' good reputation was cover for a despicable criminal.

My last example is the true, recent story about an academic administrator responsible for an annual budget of almost \$20 million. She was the last party to sign a three-way contract. She later changed her mind about the contract. She scratched out her signature on the original document and hid it without telling any of the other two parties. After work under the contract had commenced, she maintained publicly that she had never agreed to the contract, suggesting at the same time that other parties were to blame for the problem. At best, she panicked and did not know how best to deal with this matter. The institution continued to cover for her and refused to produce the original contract. A Freedom of Information request produced the altered original contract. This tampering and

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<sup>53</sup> R. Lenzner, *Bernie Madoff's \$50 Billion Ponzi Scheme*, in *Forbes*, December 12, 2008, [http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in\\_rl\\_1212croesus\\_inl.html](http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html) (accessed July 26, 2013).

<sup>54</sup> H. Markopolos, *No One Would Listen: A True Financial Thriller*, Wiley, Hoboken NJ, 2010, 376.

<sup>55</sup> T. Appleby, *Two Life Sentences for Sex Killer Williams's 'Despicable Crimes.'* in *The Globe and Mail*, Timeline: Col. Russell Williams, *Canadian Broadcasting Corporation*, 2010. <http://www.cbc.ca/fifth/2010-2011/abovesuspicion/timelinewilliams.html> (accessed July 26, 2013).

concealment of a signed contract arguably constituted several crimes. It also clearly violated the university's ethics policy. A full, documented package with this evidence was prepared by one of the contractual parties who sent it to her institutional superiors for their consideration.

The response was equally unsettling. The university's lawyer wrote the party (who remained a university employee) a stern, menacing letter, the upshot of which was "she has an excellent reputation." No effort was wasted on dealing with the substance of the allegations. This academic administrator was not only entirely shielded from any discipline and accountability in an integrity-critical public workplace but she was soon promoted to the executive suite. Soon all evidence of this incident officially disappeared, as the ill-fated original document completely disappeared from university records. It was replaced by a clean copy, likely mechanically altered, that evinced no sign at all that the academic administrator had ever seen or touched it, much less signed it. The cover up was complete, and demonstrated the lengths to which institutions and managers create a palace guard to protect their own in the face of overwhelming evidence of critical misbehaviour.

These three cases illustrate how popularity and reputation present as formidable forces to defeat objective inquiry into alleged wrongdoing. If reputation does not entirely thwart an investigation into the allegations, it may slow and complicate the investigation.

## 8. Conclusion

While they sometimes suffer a bad reputation, whistleblowers may be the most effective monitors of wrongdoing in society. In a major North American study published in 2007, more than 200 of the largest corporate frauds occurring between 1996 and 2004 were examined. Only 6% of the frauds were detected by the SEC, while only 14% were detected by auditors. The most important sources of fraud detection were the media (14%), industry regulators (16%), and whistleblower employees (19%)<sup>56</sup>. Another recent English study showed that workers usually report internally and 60% of their reports do not receive any response at all from management and overall they believe nothing is done about the wrongdoing 74% of the time<sup>57</sup>. What may be even more telling from this study is the observation that organisations are better at handling wrongdoing than they are at dealing with whistleblowers<sup>58</sup>, a cautionary point perhaps to guide the good faith issue. Despite the urge to contain and control whistleblowing, as through mechanisms such as threshold good faith requirements, the better practice might be to unshackle the whistleblowers.

Corporate and government bureaucracy is pervasive and eternal. Whistleblowers are not equal to the strength and durability of bureaucracy. Organizations and managers will always be able to find ways to silence and defeat whistleblowers who, in turn, can rarely (if ever) be fully protected in the real world. It seems, therefore, that the benefit of the doubt on the good faith issue ought to go to the whistleblower. Given the persistent instinctive force of both regulatory non-compliance to gain advantage and to cover it up or gloss it once it has been brought to the attention of management, more disclosure is better than less.

Good faith and motives are, at best, themselves social constructions of reality. Legally, good faith is about honest, non-reckless belief. Bad faith is about lying, trumping up allegations or fabricating evidence, which are arguably much rarer occurrences than the wrongdoing which is reported. Effective enforcement of the criminal law<sup>59</sup> and civil law of employment,

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<sup>56</sup> A. Dyck, A. Morse and L. Zingales, *Who Blows the Whistle on Corporate Fraud?*, in *Journal of Finance*, vol. 65, n. 6, 2010, 2213-2253.

<sup>57</sup> Public Concern at Work, *Whistleblowing: The Inside Story*, Public Concern at Work and University of Greenwich, London, 2013.

<sup>58</sup> *Supra*, 27 to 30 inclusive.

<sup>59</sup> For example, section 140 (public mischief) of the *Criminal Code of Canada*, RSC 1985, c C-46, <http://canlii.ca/t/522v7> (accessed July 26, 2013).

such as cause for discipline and dismissal, can usually take good care of that at the end of the investigation and outcome. Thus, presuming good faith in reports would be a superior approach to the current practice of putting the whistleblower's motives to the test in every case, at the outset of the report. Legal and factual doubt about good faith propagates uncertainty in whistleblowing, especially as it renders the motives and character of the whistleblower the first issue in the process. Policy should not place priority on shades of good faith where the overall primary objective of whistleblowing is to get wrongdoing addressed and stopped. The front-end focus on good faith offers a convenient, if hazardous, escape route to address the substance of the allegation quickly or at all. Reports must be assumed to be true and made in good faith until an independent, objective investigation establishes otherwise.

The annoyingly persistent, gadfly, troublemaking whistleblower is a myth. Social science literature informs us that whistleblowers are usually reflective, troubled, deliberative, anxious, and would 'rather walk than talk'<sup>60</sup>. The volume of reports might be better addressed by competent and effective management.

Whether it is a matter of reporting a sexual assault, a chocolate cartel, a division manager who insists on overstating earnings and understating costs, an unresponsive, abusive high-ranking Public Sector Integrity Officer, a Ponzi schemer, a decorated military commander who is also a serial criminal, or a deceitful academic administrator who has no regard for signed contracts – the good faith and motives of the whistleblower are genuinely the least of the organization's practical concerns.

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<sup>60</sup> M. P. Miceli, J. P. Near, *When Do Observers of Organizational Wrongdoing Step Up? Recent US Research on the Factors Associated with Whistleblowing*, in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure*, Edward Elgar, Cheltenham, 2010, 74-90.

# Cross-border Concerns: Perils and Possibilities

Richard Hyde and Ashley Savage \*

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## 1. Introduction

Whistleblowing laws tend to be territorial. However, concerns disclosed by whistleblowers can cross national boundaries, affecting members of the public in more than one country and requiring a response by regulators and governments in multiple States, particularly where the worker operates in an industry that is globalised and operates transnationally. Two examples of such industries are explored in this piece, aviation and food. One can easily think of others. Surface transportation, such as shipping and road haulage, energy production and financial services are all capable of posing risks to the public in countries throughout the world. The need to address a concern, in order to reduce the risk to the public, whilst protecting the whistleblower from suffering detriment or dismissal raises particular issues in cases involving these transnational concerns. This article attempts to outline these issues, and consider how they can be best addressed, in the long term, by policymakers and, in the more immediate future, those advising whistleblowers.

The article begins by outlining the existence and prevalence of cross-border concerns, before considering the special issues that they raise for whistleblowers and their advisors. The authors then examine two case studies to illustrate the issues faced by those who wish to disclose a cross-border concern. We conclude by providing policy guidance intended to ensure that cross-border concerns are handled in a consistent manner that

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enables issues to be raised and adequately addressed, ensuring that both the public and whistleblower are protected.

## 2. The Need to Raise Cross-Border Concerns

Society is increasingly globalised, with multinational companies and complex international supply chains providing goods and services for consumers throughout the world. Means of transportation criss-cross the globe, passing over and through multiple jurisdictions whilst travelling between different points on the earth's surface. This transnational network can pose risks to individuals in multiple jurisdictions, meaning that those who wish to avert those risks may require that either a national authority different from the one governing the jurisdiction within which they are situated, or numerous national authorities, take action.

Information from employees is important to regulators who are not able to establish at all times whether businesses are complying with their regulatory obligations. Information derived from inspections provides a snapshot of compliance by businesses; information from consumers tends to relate to visible non-compliance. Staff are present at all times, and have greater information about business practice. Where the non-compliance is in a different jurisdiction, regulators are particularly unable to access information about non-compliance.

Whistleblowers need regulators to act. When making a disclosure, whistleblowers want regulators to address the risk to the public which led to their disclosure. If a disclosure is not addressed, then the act of communication by the whistleblower does not achieve full value, as it does not lead to a change in practice that results in a reduction in risk to the public. Therefore, where a regulator in a third country is best placed to address the concern, it is necessary for the information to be communicated to that regulator, either directly, or transferred by a national regulator to a regulator in a third country. If there are barriers to making an effective disclosure, these should be lowered so that disclosure of non-compliance is encouraged. Where the act of whistleblowing results in action to ensure compliance with regulatory requirements, this may have the effect of encouraging future disclosures from those who have information valuable to regulators<sup>1</sup>.

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<sup>1</sup> For further consideration of why whistleblowers may choose not to disclose see M. Miceli, J. Near, T. Dworkin, *Whistleblowing in Organizations*, Routledge, New York, 2008

The authors are currently in the process of conducting a large scale project to examine the responses of regulators to whistleblowing disclosures. The aim of this project is to determine whether or not regulators are effectively dealing with whistleblowing concerns and, if they are not, whether this presents a barrier to the expression rights of individuals. As part of the evidence gathering process, freedom of information requests were used to ask questions about the sharing of disclosures by regulators<sup>2</sup>. Whilst analysing the data produced by this research it became evident that data obtained from whistleblowing disclosures is often shared with regulators in other jurisdictions<sup>3</sup>. The theoretical need for cross-border concerns reflects the empirical reality.

Between 2007 and 2010 the Civil Aviation Authority shared concerns with the aviation authorities in France, Ireland, Spain, Switzerland, Tanzania and the United States. In one case, sharing of information led to a legal case in Ireland. In the food sector, data demonstrated that information about concerns is shared between local and national regulators, and between national bodies. This information can relate to food contaminated with dangerous microorganisms, or which does not comply with hygiene standards.

Such sharing poses interesting questions for those interested in whistleblowing, and may suggest a need for either more direct disclosures to non-national bodies in a position to address concerns or for greater governance of the sharing of information derived from disclosures made by whistleblowers, or both. The need for further exploration of cross-border concerns is a central theme of this article, which seeks to consider some of the issues faced by a whistleblower who takes the risk of making a disclosure.

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and A. Brown (Ed.), *Whistleblowing in the Australian Public Sector*, Australian National University, Canberra, 2008.

<sup>2</sup> For further information detailing the methodology as well as preliminary findings see: A. Savage, R. Hyde, *Using Freedom of Information Requests to Facilitate Research*, in *International Journal of Social Research Methodology*, forthcoming doi: 10.1080/13645579.2012.742280; A. Savage, R. Hyde, *Local Authority Handling of Freedom of Information Requests: Lessons from a Research Project*, in *Web Journal of Current Legal Issues*, vol. 19, n. 2, 2013, <http://ojs.qub.ac.uk/index.php/webjcli/article/view/240>.

<sup>3</sup> Between 2007 and 2010 the Civil Aviation Authority shared 18 concerns with foreign regulators. The Food Standards Agency shared 76 out of 82 concerns, although some were shared with a local authority within the jurisdiction, and between 2008 and 2011 notified European partners of 1505 breaches of food regulation (European Commission, RASFF 2012 Annual Report [http://ec.europa.eu/food/food/rapidalert/docs/rasff\\_annual\\_report\\_2012\\_en.pdf](http://ec.europa.eu/food/food/rapidalert/docs/rasff_annual_report_2012_en.pdf)).

### 3. Issues Facing Whistleblowers and their Advisors

Four issues must be considered by whistleblowers, and those advising them, when deciding where to disclose a concern that crosses boundaries; protection of identity; protection of employment; protection of expression; and other legal risks from disclosure.

#### *Protection of Identity*

Where an individual discloses a concern to a regulator it is important for that regulator to take steps to prevent identifying details from disclosure. Regulators must ensure that the information that they hold (which will often, although not always, include information about the identity of the whistleblower) is used in a way that does not reveal the identity of the whistleblower<sup>4</sup>. Whilst regulators in receipt of a consumer complaint may approach a business with the information and ask for action to be taken to bring the business into compliance<sup>5</sup>, a more subtle approach must be taken when responding to information derived from whistleblowing, in order to prevent direct and indirect revelation of the identity of a whistleblower. A regulator sharing information should take steps to monitor the transfer of information and ensure that steps are taken to maintain confidentiality.

#### *Employment Protection*

In the United Kingdom, workers who raise concerns may complain about detriment or dismissal using Part IVA of the Employment Rights Act 1996 (as amended). The worker must be employed under a UK contract and must take into account the different levels of protection offered by PIDA depending on the person to whom a disclosure is made. Whilst PIDA initially envisages disclosures should be made internally, in order to qualify for protection disclosures to regulators prescribed by the Secretary of State need not satisfy as stringent a test as those made to other bodies,

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<sup>4</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, article 17 requires data shared within the EU is appropriately protected and article 25 requires that information shared outside the EU must only be shared with a party that provides an adequate level of protection of the information.

<sup>5</sup> R. Hyde, *Responding to Incidents of Food Borne Illness: An Empirical Study*, PhD Thesis, University of Nottingham, Nottingham, 2013, 136.

such as the media. This has the effect of privileging disclosures made to the regulators listed in the prescribed persons list<sup>6</sup>. The regulators listed do not include regulators in a foreign jurisdiction. The burden to be discharged by a whistleblower in order to demonstrate that he or she has made a protected disclosure is greater if a transnational disclosure is made. The logic of the stepped disclosure regime pushes the UK worker towards making a disclosure to the national regulator, even where the regulator abroad may be equally, or better, placed to address the concern raised. If the UK regulator has no plausible connection with the concern, then the disclosure may not be protected, as the whistleblower cannot show reasonable belief that “the relevant failure falls within any description of matters in respect of which that person is so prescribed”<sup>7</sup>.

#### *Protection of Freedom of Expression*

Workers and their advisers need to be mindful as to the jurisdiction in which they are making the disclosure. The following section identifies that there are differences in the expression rights available whether the worker is making the disclosure in the United Kingdom or in the United States. Where an individual has the opportunity to make a disclosure in either jurisdiction workers or their advisers need to be acutely aware of the differences<sup>8</sup>.

In the United Kingdom, citizens are protected by article 10 of the European Convention on Human Rights (ECHR). The Convention is incorporated into the Human Rights Act 1998 (HRA) (UK). Article 10 provides the right to freedom of expression subject to restrictions in accordance with the law and necessary in a democratic society<sup>9</sup>. Any restrictions must be judged on proportionality grounds. Upon entering a work relationship, citizens agree to a contractual limitation of their expression rights. However, this restriction is not absolute and will be dependent on the nature of the employment, the substance of the

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<sup>6</sup> Public Interest Disclosure (Prescribed Persons) Order 1999 schedule 1 (as amended).

<sup>7</sup> See *Dudin v Salsbury District Council*(2003) ET 3102263/03.

<sup>8</sup> It should be noted that there are additional available protections for employees working in the financial sector. See further Sarbanes-Oxley Act 2002 111 Stat 745 and Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 124 Stat 1376.

<sup>9</sup> The categories of information which justify restriction are listed in article 10(2).

information communicated and the circumstances in which the communication was made<sup>10</sup>.

To date, the European Court of Human Rights (ECtHR) has dealt with very few cases involving whistleblowing. *Guja v Moldova* involved the head of the press department in the Moldovan Prosecutor General's Office<sup>11</sup>. He leaked two letters to the press alleging that the Moldovan Parliament had exerted pressure on the Prosecutor General to discontinue criminal proceedings against four police officers. When Guja was dismissed he sought reinstatement and eventually applied to the ECtHR for relief. The Court developed a new framework for assessing whistleblowing cases, suggesting that the public interest in the information, the channels available for disclosure, the authenticity of the information, the detriment to the employer, the good faith of the employee and the sanction applied to the employee should be taken into account to determine whether the treatment of the whistleblower was proportionate.

The ECtHR found in favour of Guja noting that he did not have an appropriate official avenue to raise his concern. The Court was keen to stress that the action taken to dismiss Guja could have a "serious chilling effect" on other employees raising concerns in the future<sup>12</sup>. Whilst the ECtHR are not bound to follow the precedent set by *Guja v Moldova*, the framework for considering whistleblowing claims was used to determine the subsequent case of *Heinisch v Germany*<sup>13</sup>. The applicant, who worked in a home for the elderly, had repeatedly raised concerns relating to staffing levels. Heinisch became unwell and subsequently made a criminal complaint regarding the issues in the home. She was then dismissed, the organisation citing her repeated illness as a justification. The ECtHR upheld her complaint, identifying that whilst conducting the proportionality test it must weigh up the employee's right to freedom of expression "by signalling illegal conduct" or wrongdoing on the part of the employer against the latter's interests<sup>14</sup>.

In the United Kingdom, Section 6 of the HRA 1998 provides that public authorities, including courts and tribunals are required to act compatibly with Convention rights. It is therefore submitted that the aforementioned

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<sup>10</sup> See generally, *Vereniging Rechtswinkels Utrecht v Netherlands* (Application no 11308/84), *Glaserapp v Germany* (Application no 9228/80) *Rommelfanger v Germany* (1989) D & R 151, *Ahmed v UK* [1998] ECHR 78.

<sup>11</sup> (2008) (Application no 14277/04).

<sup>12</sup> *Ibid.* [95].

<sup>13</sup> (2011) (Application no. 28274/08).

<sup>14</sup> *Ibid.* [65].

case law offers an additional layer of protection to whistleblowers, alongside the protection afforded by PIDA. Section 6 HRA 1998 is beneficial to employees working in public authorities but can also be beneficial to employees working in private organisations. Section 6 allows for ‘indirect horizontal effect’ meaning that an employee can take a private employer to the employment tribunal and may argue their claim on art.10 grounds. The tribunal will need to take into account relevant decisions of the ECtHR by virtue of s.2 HRA 1998. This means that whistleblowers who choose to disclose in the UK may receive additional protection by virtue of the ECtHR’s analysis.

The current position in the United States is different. Whilst it has been argued by academics that the First Amendment of the United States Constitution offers considerable scope for protection, perhaps going beyond that afforded by the ECtHR, public employees are in a weak and uncertain position. The First Amendment prohibits Congress from making laws prohibiting the free exercise of speech. In comparison to art.10 ECHR, the First Amendment does not categorise a list of restrictions. Instead, the Supreme Court has developed an extensive body of case law determining what speech should be protected and in what circumstances. The Court has also extended the reach of the First Amendment to include Federal and State governments and public officials. Because there is not an equivalent provision to s.6 HRA 1998 it should be noted that courts are not obliged to consider the expression rights of a private employee in a case against their employer unless the state has passed law prohibits employees from expression or requires employers to sanction expression<sup>15</sup>.

The key case regarding whistleblowers expression is *Garvetti v Ceballos*<sup>16</sup>. The respondent, Ceballos, was a district attorney who was contacted by a defence attorney concerned about accuracy of an affidavit used to obtain a search warrant critical to a pending criminal case. Examining the affidavit Ceballos found a number of inaccuracies which he raised with his supervisors who rejected the concerns, so and the case proceeded to trial. At trial Ceballos was called to give evidence for the defence. Post-trial Ceballos claimed that he suffered retaliatory action for raising his

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<sup>15</sup> See *Hudgens v National Labour Relations Board* 424 US 507 and E. Volokh, Freedom of Speech and Workplace Harassment in 39 *UCLA Law Review*, 1992, Vol 39, 1791, which notes at 1816 that “private employers may certainly regulate their employee’s speech because they are not bound by the 1<sup>st</sup> Amendment” but this “does not mean that the government may force the employer to do it.”

<sup>16</sup> 547 U.S. 410.

concerns and, after unsuccessfully filing a grievance, sued his employer. The case reached the Supreme Court where emphasis was placed on Cellabos' position as a public servant. Similar to the ECtHR jurisprudence, the court identified that his expression rights were restricted as a consequence of him entering public employment. The court identified that public servants can enjoy a level of free speech protection in the course of their employment and as private citizens. However, the court held that the communication in question was pursuant to Cellabos' job role and therefore could not be given First Amendment protection. In justifying their reasoning the court focussed heavily on the distinction between Cellabos as a private citizen and as a public employee.

The reasoning in *Garvetti* is significant. It identifies that public employees in the United States are unlikely to obtain First Amendment protection if they uncover wrongdoing as part of their employment duties. Furthermore, where servants have professional obligations to report wrongdoing they are unlikely to obtain protection. Whilst the ECtHR recognises contractual limitations on expression rights it does not make as clear a distinction between the individual speaking as a private citizen or public employee. If the ECtHR were tasked with considering Cellabos' position, his expression rights would most likely be upheld using the *Guja* framework because the position of employment and detriment to the employer are only two considerations in a detailed analysis which places considerable importance on the public benefit of the speech communicated and the potential "chilling effect" of speech restriction. United States citizens working in the United Kingdom, without a UK contract of employment (and thus no PIDA protection) could still enforce art.10 claims before the UK courts. In contrast, UK citizens working for US public authorities would struggle to obtain First Amendment protection and those working for private organisations would not have access to First Amendment protection unless the matter to be decided by the courts involves a law which is in conflict with the protection.

#### *Potential Risks of Disclosure*

If a whistleblower makes a disclosure in a different jurisdiction, he or she must be aware about the risk of infringing laws in both jurisdictions. Data Protection and Breach of Confidence are two areas of important concern. Workers and their advisors must be aware that the data protection regimes in Europe and the United States are fundamentally different. A disclosure made from a European organisation to a United States

organisation is likely to lead to a breach of the law without careful consideration of the legal provisions. Moreover, with regard to breach of confidence, workers and their advisors need to have a good understanding of the differences between the UK and US approaches, failure to do so is likely to result in a breach of the confidentiality agreement. The main issues are briefly outlined below.

### *Data Protection*

As identified above, the European Union has a Data Protection Directive. In the United Kingdom, the Data Protection Act 1998 was specifically drafted to be consistent with the Directive. The Act has eight principles which relate to the fair and lawful processing of data. In particular the eighth principle identifies that personal data cannot be transferred to a country outside the European Economic Area unless that country or territory ensures an adequate level of data protection. This so called 'third country disclosure' makes the situation very difficult for whistleblowers who wish to raise a concern to a regulator outside of the EEA.

The United States does not currently have a comprehensive data protection law which is consistent with the Data Protection Directive. To attempt to address these concerns the EU negotiated with the United States to develop the "Safe Harbor Principles". The EU must enter into an agreement with the US organisation identifying that it can meet the principles before information is shared. This effectively means that a whistleblower would need to identify whether the US regulator or enforcement agency has an agreement in place before disclosing the information.

The directive also has detrimental consequences for information sharing between regulators. By preventing information sharing where the third country regulator does not meet the threshold, the Data Protection Directive and associated national implementing legislation has the potential to impede regulators attempts to share information. Therefore, it is essential that an agreement to safeguard data is entered into in order that information sharing can take place and the concern addressed.

*Breach of Confidence*

Individuals who enter into employment will most likely agree to a confidentiality clause as part of signing an employment contract<sup>17</sup>. Those who do not agree to an express term still owe an implied duty of confidence to their employer. Whistleblowers are at risk of breaching this confidence if they disclose information. In the United Kingdom there is a defence to a breach of confidence action where it can be argued that the disclosure was in the public interest. For example, *Lion Laboratories v Evans and Others* provides that publication of confidential information would be acceptable in situations where it could be proved that there was a serious and legitimate interest in the information being put into the public domain<sup>18</sup>. In *Beloff v Pressdram* the court expanded this test providing situations whereby it may be acceptable to breach confidence: “breach of the country’s security, or in breach of the law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity”<sup>19</sup>.

In the US, trade secrets are protected by State law. However, most state laws on the subject are the same, with 47 states adopting the Uniform Trade Secrets Act. This provides that the actual or threatened misappropriation of a trade secret may be subject to an injunction. However, trade secrets protection is unlikely to prevent a whistleblowing disclosure, as federal courts have held that “disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees”<sup>20</sup>. Despite the restriction in this dictum to former employees, a court is unlikely to treat a disclosure by a current employee differently<sup>21</sup>.

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<sup>17</sup> It is recognised that public servants may have additional responsibilities not to disclose by signing the Official Secrets Act 1989. The common law offence of Misconduct in Public Office has been increasingly used to prosecute individuals who leak information.

<sup>18</sup> [1985] Q.B. 526, 534.

<sup>19</sup> [1973] 1 All ER 241, 260.

<sup>20</sup> *McGrane v Readers Digest* (1993) 822 F.Supp 1044, 1052 S.D.N.Y.

<sup>21</sup> *Lachman v Sperry-Sun Well Surveying Company* (1972) 457 F.2d 850 (10<sup>th</sup> Circuit CA) provides that the court, in a contract suit, “will never penalize one for exposing wrongdoing.” Many states have also recognised a common law public policy exception for whistleblowers, see further National Whistleblowers Center website [http://whistleblowers.nonprofitsoapbox.com/index.php?option=com\\_content&task=view&id=743&Itemid=161](http://whistleblowers.nonprofitsoapbox.com/index.php?option=com_content&task=view&id=743&Itemid=161) (accessed August 23, 2013).

#### 4. Cross-Border Concerns in the Aviation Sector

The regulation of civil aviation provides multiple avenues for agency co-operation, as well as creating jurisdictional hurdles. Workers could be ground and maintenance staff based in a fixed location observing concerns with aircraft flying to another jurisdiction, airport security staff, baggage handlers and others. Pilots and accompanying flight crew together with the cabin crew regularly cross borders. Where an international flight crosses jurisdictional boundaries, it is vital that regulatory authorities work closely, sharing information which could have significant value to regulatory agencies across jurisdictions. Whether it be the Air India crash in 1985 where 329 people lost their lives due to failures to detect explosive devices hidden in luggage<sup>22</sup>, the Colgan Air Flight 3407 which crashed as a result of pilot fatigue<sup>23</sup> or the horrific outcome of the 9/11 attacks, regulation of the aviation industry presents a myriad of challenges.

In the United Kingdom, all forms of civilian air travel are regulated by the Civil Aviation Authority. In the summer of 2012, the authors made a Freedom of Information Act (UK) request to the CAA asking whether concerns were being referred to foreign aviation authorities and subsequently whether the concerns were monitored by the CAA. The responses indicate that many of the outcomes of whistleblower concerns passed to regulators based outside of the domestic jurisdiction have been recorded as ‘not known’<sup>24</sup>. The CAA requests to be kept informed by the recipient authority but the matter is not followed up if updates are not provided. Whilst it is positive to see that information is shared between the CAA and other regulatory agencies across the globe, the lack of further monitoring of what happens to the information is troublesome. Referrals place reliance on the recipient to deal with the concern effectively; if they do not address the issue the whistleblower will not be aware of the inaction and will be deterred from making further disclosures, perhaps to another aviation authority or to the media. The lack of monitoring also brings the protection of any whistleblower into question, inspection or enforcement action could take place without the

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<sup>22</sup> Anno, *On this Day, 23rd June 1985*, no date, [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/23/newsid\\_2518000/2518857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/23/newsid_2518000/2518857.stm) (accessed August 23, 2013).

<sup>23</sup> M. Wald, *Pilots set up for fatigue, officials say*, in *New York Times*, 14<sup>th</sup> May 2009, A25.

<sup>24</sup> 14 out of a total of 18 referrals were not tracked by the CAA.

whistleblower being aware that the concern has been referred or that the recipient authority will take action which will expose their position.

As a member of the European Union, the United Kingdom is part of a European-wide regulatory scheme governed by the European Aviation Safety Agency (EASA). The agency is tasked with the audit and review of national aviation regulators. Considerable emphasis is placed on the need to share information between aviation authorities both in the European Union and beyond. In 2011 the EASA signed a Memorandum of Co-operation with the International Civil Aviation Organisation (ICAO). The ICAO is a UN mandated organisation tasked to promote high standards in aviation safety and to harmonise regulatory and inspection procedures. The agreement stipulates the conducting of “regular dialog on safety matters of mutual interest” and providing mutual access to databases containing information relevant to safety<sup>25</sup>. Article 6 of the treaty deals specifically with the protection of confidentiality. Article 6 (1) allows for a party to the agreement to designate portions of information which it considers to be exempt from disclosure. Further provisions deal with the handling of classified information and allow a party to verify the protection measures put in place by the other party.

An EU system is currently in place for the reporting of “occurrences” which if not dealt with could lead to an accident<sup>26</sup>. Pilots, designers of aircraft, those involved in the ground-handling of aircraft (such as de-icers or baggage handlers), maintenance engineers and airport managers are all required by EU legislation to report occurrences<sup>27</sup>. Other employees may be “encouraged” by member states to voluntarily report<sup>28</sup>. The responsibility for the collection and storage of this data rests with the Member State which can designate the task to the national aviation authority, an investigatory authority or an independent body established for the purpose. National databases must be compatible with EU software and data shared on the European Central Repository. The system is supported by the European Co-ordination Centre for Accident and Incident Reporting Systems.

The Directive which governs occurrence reporting has a number of measures relevant to whistleblowing. Article 8 identifies that, regardless of the classification or serious incident, the names and addresses of

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<sup>25</sup> See EU-ICAO Joint Committee Decision 2013/310/EU [2.1].

<sup>26</sup> For a list of occurrences which trigger reporting see Directive 2003/42/EC on occurrence reporting in civil aviation Annex I and II.

<sup>27</sup> (Directive 2003/42/EC, article 4.

<sup>28</sup> Ibid.

individual persons shall never be recorded. Whilst it may be seen that the provision offers a degree of protection to whistleblowers, it is submitted that there are policy reasons for encouraging confidential rather than anonymous reporting. In the United Kingdom it would be difficult for a worker to prove that they were dismissed or suffered detriment as a result of their disclosure if they are unable to prove it was they who raised the concern with the Civil Aviation Authority. Confidential reporting also allows for those responding to concerns to go back to the whistleblower for further information. If the contact details of whistleblowers are being obtained but are held separately to the national occurrence reporting system, problems may still arise.

Aviation authorities must ensure that there a link between the contact details stored and the occurrence reported and that any subsequent updates make it onto the database. Article 9 relating to voluntary reporting requires that information obtained must be “disidentified”. This is defined in Article 2 as “removing from reports submitted all personal details pertaining to the reporter and technical details which might lead to the identity of the reporter, or of third parties, being inferred from the information.” It is suggested that whilst this provision, in principle, may provide a layer of protection for whistleblowers, it is problematic. The success of “disidentifying” information will be largely dependent on the organisation where the worker is based. If the person works for a large organisation with 1000 people “disidentification” may protect the identity of the whistleblower. However, if the employee works in an office with only three other people it is not likely to work. Regardless of any “disidentification”, the concern itself may identify the whistleblower. Moreover, it should be noted that those who have mandatory reporting obligations will not have their contact details recorded but there is no provision to disidentify the information.

Most interestingly, Article 8 of the Directive identifies that: “In accordance with the procedures defined in their national laws and practices, Member States shall ensure that employees who report incidents of which they may have knowledge are not subjected to any prejudice by their employer”. It is extremely difficult, if not impossible, for the Civil Aviation Authority to comply with this provision. Part IVA of the ERA 1996 offers a means of obtaining compensation for detriment and dismissal suffered as a result of raising concerns. Neither PIDA nor any other available UK legislation offers statutory powers to the CAA to take any action if a whistleblower suffers prejudice. Although they can take enforcement action against the air industry for safety issues, they cannot prevent an employer from taking reprisals against a whistleblower.

Workers with UK contracts can obtain statutory protection under s.43F ERA 1996 for raising their concerns to the CAA, which is designated as a “prescribed person”. Workers in the United Kingdom could potentially raise concerns with the Federal Aviation Administration and receive protection as a wider disclosure under s.43G ERA 1996 but would face more stringent evidential requirements than if they made their disclosure to the CAA. In contrast, in the United States, section 42121, Aviation Investment and Reform Act for the 21st Century, 2000, provides sector specific protection from discharge or discrimination to those employees who make a disclosure to the Federal Aviation Administration. The section does not require an employee to have a United States employment contract, nor does it specify that the company or organisation must be based in the US. It instead refers to “airline employees”. This may be seen as advantageous for those who do not have a UK employment contract and who wish to raise their concerns and obtain protection for doing so. However, the provision is limited to disclosures made to the Federal Aviation Administration.

This section has identified that information sharing is taking place between aviation authorities and that information obtained from whistleblowers is being shared. The use of an online reporting system is beneficial for the wide scale monitoring of aviation safety occurrences, however, by entering the concern onto the system it is suggested that there is considerable proximity between the whistleblower, the concern and the intended recipient. Direct referrals from one aviation authority to another seem to be advantageous, yet the value of the concern is potentially diminished where referrals are not monitored further. In relation to the United States and United Kingdom, employees from both jurisdictions would be best placed to raise concerns to their home aviation authority in order to obtain employment protection. This may not be the best place to go to get the concern addressed.

## 5. Cross-Border Concerns in the Food-Sector

The food sector is increasingly globalised and the recent “horsemeat scandal” is an illustration of this<sup>29</sup>. Meat was slaughtered in Romania, processed in France, packaged in Ireland and sold in the UK, where it was discovered to be horse rather than beef. Both businesses, through supply chain management, and regulators, face the challenge of ensuring that the regulations of the country, or countries, where the food is to be placed on the market are complied with. One method of ensuring that regulation is complied with is through encouraging whistleblowing by those who are aware of the conditions in which food is prepared. For this reason food businesses need to have dedicated policies and procedures for overseas whistleblowers, allowing them to report concerns to executives in the businesses home country<sup>30</sup>. However, whistleblowers may choose not to use such systems, and instead to report to regulators. Such regulators then need to be able to share information with each other in order that the data reaches the regulator best able to address a concern.

A challenge for a potential cross-border whistleblower in the food sector is the complex topography of the regulatory landscape. The powers to investigate and address breaches of food safety and hygiene regulation are widely distributed in the US between Federal, State and Municipal authorities. At the Federal level, the Department of Agriculture is responsible for the regulation of Meat, Poultry and Egg products and the Food and Drug Administration responsible all other food. In the UK responsibility lies with both national and local authorities and, in two-tier local authority areas, different local authorities are responsible for food safety and hygiene and food standards. In the EU supra-national authorities have responsibility for food regulation across the 28 member states. It is challenging for the whistleblower to identify which body is best placed to address their concern, particularly in circumstances where they are not ordinarily subject to that regulatory regime. This is also a challenge for those regulators that wish to share information with regulators in a foreign state.

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<sup>29</sup> See BBC News, Horsemeat Scandal BBC, 2013, <http://www.bbc.co.uk/news/world-europe-21457188> (accessed July 8, 2013) and the FSA, Horsemeat Timeline, Food Standards Agency, 2013, <http://www.food.gov.uk/enforcement/monitoring/horsemeat/timeline-horsemeat/#.UdqmgKx-4qw> (accessed July 8, 2013).

<sup>30</sup> Katy Askew, Talking tech: Horsemeat scare shows need to improve tests, traceability, just-food.com, 2013, [http://www.just-food.com/analysis/horsemeat-scare-shows-need-to-improve-tests-traceability\\_id122229.aspx](http://www.just-food.com/analysis/horsemeat-scare-shows-need-to-improve-tests-traceability_id122229.aspx), (accessed July 8, 2013).

Powers necessary to address a concern are distributed between different authorities. In the UK, the power to seize and destroy food that poses a risk to the public is held by local authorities, except where the food is found in a slaughterhouse or cutting plant, where the power is held jointly by a local authority and the FSA. Where food poses a risk to the public in more than one local authority, information must be shared between authorities. In the UK, there are arrangements for the sharing of information about health risks derived from concerns expressed by whistleblowers. This can be shared between local authorities through the use of a Food Alert for Action, where authorities need to take some action, or Food Alert for Information, where steps have been taken to ameliorate the risk to consumers, issued by the FSA<sup>31</sup>. Before a Food Alert for Action or for Information can be issued, information must be transmitted from the receiving authority to the Food Standards Agency, which has the responsibility for transmitting the data to third parties<sup>32</sup>.

The EU has adopted a unified system to share information. Information is shared through the Rapid Alert System for Food and Feed ("RASFF") database<sup>33</sup>, which contains detail about food which poses a risk to consumers. In the UK the FSA is responsible for uploading data on to the database, including information derived from whistleblowing disclosures.

The sharing of information between the EU and US is governed by bilateral arrangements made between the Health and Consumer Protection Directorate General of the European Union (DG-SANCO) and the US Food and Drugs Administration (FDA)<sup>34</sup>. The agreement provides that information about food risks may be shared between the DG-SANCO and the FDA, although information may be withheld where disclosure would compromise "national security; commercial, industrial or professional secrecy; the protection of the individual and of privacy; or the [Regulators] interests in the confidentiality of their proceedings".

Under these bilateral agreements, the information is shared at a national and supra-national regulator level, and therefore not necessarily shared directly between the receiving regulator and the regulator able to respond

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<sup>31</sup> For information about Food Alerts see FSA, Alerts, Food Standards Agency, 2013 <http://www.food.gov.uk/enforcement/alerts/> (accessed July 9, 2013).

<sup>32</sup> Food Standards Act 1999 section 6(1)(b).

<sup>33</sup> RASFF, DG-SANCO, no date, [http://ec.europa.eu/food/food/rapidalert/index\\_en.htm](http://ec.europa.eu/food/food/rapidalert/index_en.htm), (accessed August 23, 2013)

<sup>34</sup> See FDA, FDA - DG SANCO Implementation Plan, 2005, <http://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm107560.htm> (accessed August 23, 2013).

to the concern. The concern will have to be transmitted through the national sharing channels on both sides of the Atlantic in order to reach the regulator best placed to address the concern. In particular, the information must be uploaded onto the RASFF database in order to be shared with the FDA, and must be actively shared with the US authorities by DG-SANCO. Sharing is not mandatory except where “food or feed which has been the subject of a notification under the rapid alert system has been dispatched to a third country”<sup>35</sup>. A person making a disclosure to a food regulator in the UK about a risk in the US is not guaranteed that the authorities in the US best placed to address the concern will have access to the data. This may lead to some delays whilst the information is transmitted, preventing immediate action to address the concern.

Further, the agreement between the FDA and DG-SANCO does not provide for arrangements for monitoring the use of information transferred by the national bodies. There is no requirement for reporting the steps taken in response to a shared concern. Therefore, as seen above in the consideration of information sharing in the aviation sector, the originator of the information becomes remote from the concern shared.

Given the delays arising from information sharing arrangements, a potential whistleblower may wish to make a disclosure directly to the regulator in the country where he or she is not located. However, this may prejudice the protection of the consumer, both from unintended disclosure and from dismissal or detriment. For a UK whistleblower, a disclosure to a US regulator would be a third step disclosure. Therefore, in order for the disclosure to be a “protected disclosure”, and for any dismissal or detriment to give rise to a remedy, the conditions in section 43G ERA 1996 must be satisfied. As noted above, these conditions are more stringent than the requirements of section 43F, which apply when the disclosure is made to a local authority or to the Food Standards Agency. Whilst a disclosure to an international regulator may be protected under PIDA, protection will be harder to secure than for a disclosure to a national regulator.

In the US, State and Federal Whistleblowing Protection Acts contemplate disclosure to a governmental agency within the national jurisdiction before protection can be afforded. At a State level, for example, the Maine Whistleblowers Protection Act provides protection to an employee who makes a disclosure to a public body, which is limited to the executive or

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<sup>35</sup> See Regulation 178/2002 article 50(4). Sharing of concerns will take place where food has been exported to the US, but may not if the supply chain is more complex.

legislative branches of state government or to regional or municipal bodies. A disclosure to an international regulator would not be protected under the Maine Act. At a federal level, the Food Safety Modernisation Act only gives protection to disclosures made to “the employer, the Federal Government, or the attorney general of a State.” A disclosure to an international regulator would not fall within the scope of the protection. Therefore, in the US a disclosure to a regulator outside the jurisdiction will not give the employee protection in the event that they suffer dismissal or detriment.

Further, whilst both US and UK food authorities have policies in place to protect the identity of confidential sources<sup>36</sup>, there may be authorities that are best placed to address the concern that do not have such procedures in place. If the whistleblowing concern is one which can best be addressed by a regulator without arrangements in place to protect the whistleblower, it may be that the disclosure is not made for fear that the whistleblower will suffer detriment. Alternatively, the investigative steps taken by one of the regulators may be better suited to exposing the non-compliance, perhaps via laboratory tests available to the regulator. In such cases the protective framework found in national law may mean that the whistleblower is incentivised to make the disclosure to the regulator not best placed to deal with the non-compliance.

In cross-border cases in the food sector, the potential whistleblower must balance the ability of the recipient to address the concern with the ability of the recipient to protect the identity of the whistleblower and, in the event that the identity is discovered, to enable the whistleblower to obtain a remedy for resulting detriment or dismissal. As can be seen, this balance is particularly difficult to strike in the food sector, with a complex architecture governing the sharing of information between regulatory bodies possibly impinging on the expeditious sharing of information in order that concerns can be addressed. This must be balanced against the benefits in terms of employment protection if the individual discloses to a regulator within his or her own jurisdiction.

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<sup>36</sup> See, e.g., FDA, Investigations Operations Manual, 2012, <http://www.fda.gov/downloads/ICECI/Inspections/IOM/UCM150576.pdf> (accessed July 9, 2013), [5.2.9] and FSA, Whistleblowing Policy, 2012, <<http://www.food.gov.uk/enforcement/regulation/whistleblowing#.UdwI8ax-4qw>> (accessed July 9, 2013).

## 6. Conclusion

Having briefly examined the need for cross-border concerns, and shown, in sections two to four, that situations of cross-border risk cause particular problems for whistleblowers and their advisors, four preliminary recommendations are advanced. These recommendations are intended to address some of the issues identified above, and to help whistleblowers and their advisors when they seek to make disclosures where the risk may arise overseas.

First, whilst some memoranda of understanding governing information sharing do exist, regulatory bodies who are not in a position to share information through Memorandum of Understanding mechanisms should give consideration to entering into such memoranda. These memoranda would allow a level of common procedure in information sharing to be adopted. This will lead to more concerns being addressed, as information should reach the regulators able to deal with them.

Second, and relatedly, the regulators sharing information should put in place procedures to monitor the use of information that has been shared. Such monitoring allows regulators to identify whether the information has led to action to abate the risk, and to keep the whistleblowing informed about the results of his or her disclosure. Monitoring can be put in place on an ad hoc basis, or incorporated into a MoU governing information sharing. The latter is preferable, as it creates a stable and clear method for providing feedback on the use and effect of information derived from whistleblowing disclosures.

Third, greater automation in sharing should also be considered. By increasing the accessibility of information about regulatory non-compliance the chances that the problem will be addressed are improved. The EU has already begun to seek technological solutions to data sharing through systems such as RASFF. However, this system does not extend beyond the EU, and therefore cannot be accessed by street-level regulators in non-EU countries who may be best placed to address the concern. Therefore further developments may need to take place in this area. A database solution that perhaps provides a model for information sharing is the THETIS database<sup>37</sup> created pursuant to the Paris Memorandum of Understanding on Port State Controls<sup>38</sup>. Here, a number

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<sup>37</sup> See Paris MoU inspection database, [http://www.parismou.org/Inspection\\_efforts/Inspections/Inspection\\_database\\_search/](http://www.parismou.org/Inspection_efforts/Inspections/Inspection_database_search/) (accessed July 9, 2013).

<sup>38</sup> See in particular Annex 3.

of maritime countries, both inside and outside the EU (in particular the Russian Federation), provide information about possible regulatory violations by maritime transportation in order that States where the vessels may dock can take necessary action. The information uploaded may be derived from whistleblowers.

Sharing information through such technological solutions can lead to concerns about the protection of the identity of whistleblowers, particularly where information is widely available. This concern could be addressed by the receiving authority not uploading identifying information onto the database. However, this may impede the ability of the regulator in a third state to address the concern, particularly if further information is required in the course of the investigation. The EU Prum Decision seeks to ameliorate such difficulties in the context of DNA data sharing through the use of a two-step process<sup>39</sup>. The first step is data matching, which shows whether information held by a third state may be of interest because it matches a crime scene stain or sample taken from a person. The second step is the provision of information about the person who provided the sample to a third state body interested in it. A similar two – step procedure could operate in the sharing of whistleblowing concerns. Regulators who need to take action to address the concern could contact the uploading regulator to access further information that they hold, perhaps including information about the whistleblower, which will only be disclosed where the uploading authority are satisfied that identifying information will be protected.

Finally, whistleblowers should not be potentially disadvantaged because they raise the concern with a regulator in another jurisdiction, particularly where that regulator is best placed to address the concern. As seen above, under UK legislation disclosures to non-national regulators are treated as third step disclosures, requiring the whistleblower to demonstrate, amongst other things, that he or she believed the information contained in the disclosure was substantially true and that it was reasonable in all the circumstances to make the disclosure to the recipient. Similarly, disclosures by a worker in the US will not be protected if they are not made to a regulator in that country. In order to address this problem, which may have the effect of deterring disclosures to the regulator best placed to address the concern, whistleblowing protection laws should protect disclosure made to foreign regulators. In the UK the prescribed

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<sup>39</sup> Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

persons list made under section 43F(2) should be amended to include regulators performing substantially the same functions as the domestic regulators listed in schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 1999.

Inevitably in this article it has not been possible to examine the situation of all cross-border whistleblowers. Indeed, its primary recommendation is that further research is needed in this important area, both with regard to information derived from whistleblowers and information sharing in general. With the increasingly internationally integrated regulatory environments, the need to share information, including concerns about wrongdoing, is rising. This must be done in a way that allows concerns to be addressed and risks to be abated, whilst protecting the person making the disclosure. This article is the beginning, not the end, of the consideration of this task.

# The Whistleblower Protection Act Burdens of Proof: Ground Rules for Credible Free Speech Rights

Thomas Devine \*

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## 1. Introduction

While linguistically a term of professional jargon, no concept is more significant than burdens of proof for whistleblowers to enforce their rights. As the rules of the game for how much evidence is necessary to win, or lose, they establish the boundary between victory and defeat. A law may have best practice rights for freedom of expression, due process and remedies to eliminate the effects of proven retaliation. But if burdens of proof require an unrealistically high evidence bar, they are a fatal Achilles heel for any given case, and for the law's legitimacy.

The United States experience with burdens of proof illustrates how high the stakes are for each side in whistleblower cases. Along with a hostile whistleblower protection agency, the U.S. Office of Special Counsel, frustrations with burdens of proof for the whistleblower protection provision of the Civil Service Reform Act ("CSRA") of 1978<sup>1</sup> led to the

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<sup>1</sup> Pub. L. No. 95 - 454, 5 U.S.C. § 1101 (1978), codified in scattered sections of U.S. Code. The amended text of the 1978 law, which was amended in 1994 to replace "mismanagement" with "gross mismanagement, is codified as follows:

"Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority - ... (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of - **A**) any disclosure of information by employee or applicant which the employee or applicant reasonably believes evidences - **(i)** any

passage of the Whistleblower Protection Act of 1989<sup>2</sup>. Those two Achilles heels were blamed for the CSRA's counterproductive track record: only four whistleblowers had formally won their cases out of some 4,000 complaints<sup>3</sup>. If there were any doubt about the stakes, in November 1988, after Congress adjourned, President Reagan vetoed the Whistleblower Protection Act of 1988, temporarily frustrating a unanimous congressional mandate<sup>4</sup>. His primary reason, based on objections from Attorney General Richard Thornburgh, was that the burdens of proof were too favorable to employees to effectively maintain discipline in the workplace<sup>5</sup>. Congress reacted by unanimously re-enacting the burdens again by March 1989, and newly-elected President Bush signed the legislation into law<sup>6</sup>.

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violation of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences – **(i)** any violation (other than a violation of this section) of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

5 U.S.C. § 2302(b)(8) (2000).

<sup>2</sup> Pub. L. No. 101 – 12, 103 Stat. 16 (1989), (codified at 5 U.S.C. §§120 – 122 (1994 and Supp. III 1997)).

<sup>3</sup> R. Vaughn and T. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent*, 51 *Administrative Law Journal* 531, 534 n. 16 (Spring 1999).

<sup>4</sup> Memorandum of Disapproval of S. 508, Pub. Papers 1391, 1392 (Oct. 26, 1988).

<sup>5</sup> *Ibid.*

“Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority – ... (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of – **A)** any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences – **(i)** any violation of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences – **(i)** any violation (other than a violation of this section) of

This article traces the evolution of U.S. burdens of proof for whistleblowers, and details their current boundaries. The WPA burdens of proof have been adopted in a majority of Intergovernmental Organizations, including the United Nations and the World Bank. Nearly all national laws, however, skip this cornerstone for legitimate protection. The U.S. experience is a valuable lesson learned about the importance of fair rules for the bottom line in whistleblower cases. If free speech rights are at the mercy of arbitrary or unfair standards for the quantum of evidence necessary to win, those rights easily can become false advertising.

## 2. Components of Whistleblower Protection Act burdens of proof

The three WPA tests for the burden of proof standard include – 1) a causal link that does not require animus to prove a violation of whistleblower rights. 2) the realistic “contributing factor” test for a whistleblower to meet the burden of establishing a *prima facie* case; and 3) a reversed burden of proof requiring “clear and convincing evidence” for an employer as an affirmative defence to prove it acted for independent, innocent reasons even if whistleblowing was a contributing factor. Each is considered below.

### *Eliminating the Motives Test*

Under the Civil Service Reform Act an employer did not violate §2302(b)(8) unless the challenged personnel decision was “in reprisal for” whistleblowing. The WPA replaced that phrase with “because of” protected activity<sup>7</sup>. The same substitution also applies to protection for witnesses in OSC or Office of Inspector General (“OIG”) investigations, as well as for those who refuse an order to violate the law<sup>8</sup>.

The impact is that animus, the employer's punitive or vindictive intent, no longer is necessary. Decisions on personnel actions may not be based on

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any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

<sup>5</sup> U.S.C. § 2302(b)(8) (2000)

<sup>6</sup> Pub. L. No. 101 – 12, 103 Stat. 16 (1989), (codified at 5 U.S.C. §§ 1201 – 1222 (1994 & Supp. III 1997)).

<sup>7</sup> n. 3, *supra*.

<sup>8</sup> 5 USC 2302(b)(9)(B) – (D) (1994& Supp. III 1997) ).

whistleblowing disclosures, regardless of the presence or absence of retaliation. This eliminates the common employer defence that there are “no hard feelings,” but it is no longer realistic to work with a dissenter after what was said. In the WPA legislative history Congress specifically overruled federal court precedent that required proof of an intent to punish as unduly restrictive<sup>9</sup>. In the aftermath, all that is necessary to prove a violation is a causal link<sup>10</sup>.

*Easing the Employee’s Burden of Establishing a Prima Facie Case: the “Contributing Factor” Standard*

A primary barrier for whistleblowers under the 1978 statute was their inability to meet the burden of proof for a *prima facie* case. If they fail to pass this preliminary test, the case is over. In the absence of statutory direction, the Board consistently adopted the test in *Mt. Healthy v. Doyle*<sup>11</sup> for First Amendment relief, which initially meant an employee must prove that protected speech played a “substantial” or “motivating” factor in the contested personnel decision, and gradually increased to requiring that retaliation was the “predominant” motivating factor.<sup>12</sup> This effectively meant that an employee’s preliminary burden was to prove the ultimate bottom line — retaliation was the dispositive factor when challenging termination or other actions.

New standards in the WPA<sup>13</sup> replaced the former burdens with a more realistic test, both for a *prima facie* case and for the agency’s affirmative

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<sup>9</sup> See S. Rep. No. 100 – 413, at 15 – 16 (1988).

<sup>10</sup> In 2012 as part of the Whistleblower Protection Enhancement Act (“WPEA”), Pub. L. 112 – 199, 126 Stat. 1465 – 76 (2012), Sec. 101(c), Congress restored the requirement for retaliation, for which animus or intent to punish is a prerequisite, in one circumstance – where an action is taken after an employee engages in otherwise protected speech as part of a job duty.

<sup>11</sup> 429 U.S. 274 (1977).

<sup>12</sup> *Id.*, at 287; see also *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986); H.R. Rep. No. 100 – 274, at 27 (1987); S. Rep. No. 100 – 413, at 13 – 14 (1988); 135 Cong. Rec. 4509 (1989) (statement of Sen. Levin); 135 Cong. Rec. 5035 (1989) (Joint Explanatory Statement, item 7) In the joint House and Senate Explanatory Statement on the legislation, Congress emphasized unequivocally that it “specifically intended to overrule existing case law, which requires a whistleblower to prove his protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” 135 Cong. Rec. 5033 (1989).

<sup>13</sup> 5 U.S.C. §§ 1214(b)(4)(B)(i) (OSC litigation) and 1221(e)(1) (Individual Right of Action).

defence. Now the Board must conclude a *prima facie* case has been established when an appellant “has demonstrated that a disclosure described under § 2302(b)(8) was a contributing factor” in the challenged personnel action which was taken or is to be taken against the employee, former employee, or applicant. Although there is no specific statutory definition of “contributing factor,” Congress left no ambiguity about its intent. During floor speeches and consensus legislative histories, the primary sponsors repeatedly defined the burden as follows—“any factor, which alone or in connection with other factors, tends to affect in any way the outcome . . . ”<sup>14</sup>. In effect, the change lowered the bar for a *prima facie* case from proving that whistleblowing was the decisive factor, or essentially winning the whole case in order to proceed, to merely proving that whistleblowing was relevant for a personnel action.

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<sup>14</sup> 135 *Cong. Rec.* 4509 (1989) See *id.* at 4518 (statement of Sen. Grassley); *id.* at 4522 (statement of Sen. Pryor); *id.* at 5033 (explanatory statement of Senate Bill 20); *id.* at 4522 (statement of Rep. Schroeder). This is the verbatim identical definition Senator Levin gave for a “material factor” in the original version of Senate Bill 508. 134 *Cong. Rec.* 19,981 (1988) A concurring letter from Attorney General Thornburgh did not challenge that interpretation: “A ‘contributing factor’ need not be ‘substantial.’ The individual’s burden is to prove that the whistleblowing contributed in some way to the agency’s decision to take the personnel action.” 135 *Cong. Rec.* 5033 (1989).

This resolution affirming the 1988 level of proof reflected the strength of congressional support for whistleblowers, because it was a principal reason for President Reagan’s veto of the bill. The only difference between the 1988 and 1989 version of the WPA on this issue was to insert the word “contributing” in front of “factor,” which in 1988 had been unqualified initially in §§ 1214(b)(4)(B)(1) and 1221(e)(1).

Although the change satisfied the concerns of Attorney General Thornburgh about possible abuses, all parties agreed that it merely was a more precise synonym for what Congress had intended all along. “Contributing” refers to the relevance of evidence, not its significance. As amplified in the Explanatory Statement, “This is not meant to change or heighten, in any way, the standard in S. 20, which is that the disclosure must be ‘a factor’ in the action. The word ‘contributing’ is only intended to clarify that the factor must contribute in some way to the action against the whistleblower.” 135 *Cong. Rec.* 5033 (1989) When defining “contributing factor” Congress specified that the definition literally applied to the term “factor as well.” *Id.* See also the explanation of Senator Levin, the primary congressional negotiator with the White House for the 1989 consensus: “I believe this was clear in the original statutory language. To me, there was no doubt that a factor in an action is something that contributes to that action. Indeed, my dictionary defines a ‘factor’ as ‘one of the elements contributing to a particular result or situation.’” 135 *Cong. Rec.* 4509 (1989).

*Raising the Employer's Reverse Burden of Proof for an Affirmative Defence: Clear and Convincing Evidence*

The final step in the *Mt. Healthy* standard is an affirmative defence for the employer. The burden of proof shifts, and the employer must demonstrate by a preponderance of the evidence that the personnel action would have occurred anyway in the absence of protected speech<sup>15</sup>. While adopting this standard<sup>16</sup>, the Merit Systems Protection Board (“MSPB”), which is responsible for due process administrative hearings to enforce whistleblower rights, made it even more difficult for whistleblowers in two significant respects. First, after an employee established a *prima facie* case the Board only shifted the burden of production for evidence to the employer. The burden of proof always remained with the employee<sup>17</sup>. Second, in a 1987 decision, *Berube v. General Services Administration*<sup>18</sup>, the Board reversed eight years of administrative precedents and all constitutional law, effectively replacing “would have” with “could have” acted for innocent reasons<sup>19</sup>. By allowing after – the – fact justifications, the Board invited new investigations to rationalize prior reprisals, and made it nearly impossible for whistleblowers to prevail. There is a skeleton in nearly everyone’s closet if the government looks hard enough. Congress’s final amendment to the legal standards cancelled *Berube* and completed codification of a modified *Mt. Healthy* standard more sympathetic to employees by raising the preponderance of evidence burden to a significantly tougher hurdle. Under 5 U.S.C. §§ 1214(b)(4)(B)(ii) and 1221(e)(2)<sup>20</sup>, the Board may not order corrective action if the agency demonstrates through “clear and convincing evidence” that it “would have taken the same personnel action in the absence of such disclosure”. By imposing this test Congress also conveyed an unequivocal message about its intention to reverse prior case law trends. Through the upgrade from a “preponderance of the evidence” standard to “clear and convincing evidence,” Congress intended to place

<sup>15</sup> See *Mt. Healthy*, 429 U.S. at 287.

<sup>16</sup> See *Gerlach v. Federal Trade Commission*, 8 M.S.P.B. 599 (1981).

<sup>17</sup> See *In the Matter of Frazier*, 1 M.S.P.B. 159 (1979), *aff’d*, *Frazier v. MSPB*, 672 F.2d 150 (D.C. Cir. 1982).

<sup>18</sup> 30 M.S.P.R. 581 (1986), *remanded* 820 F.2d 396 (Fed. Cir. 1987), 37 M.S.P.R. 448 (1988).

<sup>19</sup> See *Berube*, 820 F.2d 396, 400 – 01 (Fed. Cir. 1987).

<sup>20</sup> These provisions refer to OSC litigation and Individual Right of Action cases, respectively.

whistleblowing on a legal pedestal<sup>21</sup>.

At least on paper, it succeeded. Under longstanding legal norms, the substitution significantly increases the government's burden. "Preponderance of the evidence" means "more likely than not," or more than 50%<sup>22</sup>. By contrast, "clear and convincing evidence" means the matter to be proven is "highly probable or reasonably certain"<sup>23</sup>. Indeed, since 1899 the standard as articulated by the California Supreme Court is evidence "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind"<sup>24</sup>. For civil service law, the Federal Circuit adopted a definition that the test requires "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable'"<sup>25</sup>. A survey of judges revealed that in practice the standard requires a 70 – 80% quantum of evidence<sup>26</sup>.

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<sup>21</sup> Congress left no doubt that it intended a significant break from prior law. After summarizing the changes in the prima facie test and Mt. Healthy affirmative defense, Senator Cohen emphasized, "Those are important changes. They mark significant changes in existing law." 135 Cong. Rec. 4517 (1989). The Explanatory Statement on Senate Bill 20 again put the intent in perspective.

By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action. 135 Cong. Rec. 5033 (1989) (emphasis added).

At the same time, Congress also made clear that it did not intend to provide self – described whistleblowers with employment immunity. "[T]his new test will not shield employees who engage in wrongful conduct merely because they have at some point 'blown the whistle' on some kind of purported misconduct." *Id.* Senator Cohen again put the changes in perspective. "We do not want to see a situation where individuals who are either mischievous, maladjusted, or have personal agendas try to hide behind this legislation. That is why I think this represents an appropriate balance [...]" 135 Cong. Rec. 4517 (1989)(remarks of Senator Cohen).

<sup>22</sup> *Brown v. Bowen*, 847 F.2d 342, 345 – 46 (7th Cir. 1988).

<sup>23</sup> *Ragbir v. Holder*, 389 Fed. Appx. 80, 2010 U.S. App. LEXIS 16860, quoting *Black's Law Dictionary* 636 (9th Ed. 2009).

<sup>24</sup> *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58, 543 (1899).

<sup>25</sup> *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993), quoting *Buldex, Inc. v. Kason Indus., Inc.*, 861 F.2d 1461, 1463 (Fed. Cir. 1988).

<sup>26</sup> McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 *Van L Rev.* 1293, 1328 – 29 (1982) (presenting survey of 170 federal judges in which 112 assessed CCE as requiring a 70 – 80% quantum of proof, 26 requiring more and 31 requiring less); *United States v. Fatco*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff'd*, 603

There were two primary reasons why Congress attempted to create far more difficult evidentiary standard for acceptance of what could be pretextual excuses to harass. First, as a matter of accountability, there should be heightened scrutiny for an action already established as taken for partially illegal reasons. Second, a government agency has a large advantage in access to evidence and records to create the appearance of a decision on grounds independent of whistleblowing<sup>27</sup>.

A third reason is equally compelling – the “presumption of government regularity.” This doctrine gives the government such a powerful handicap that it could meet the preponderance simple majority standard with a minority of evidence for a pretext. As stated by the Federal Circuit Court of Appeals in *Lachance v. White*<sup>28</sup>, any analysis of whistleblower claims must start from the “presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations [...] And this presumption stands unless there is ‘irrefragable proof to the contrary.’” (citations omitted)<sup>29</sup>.

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F.2d 1053, (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 62 L. Ed. 2d 755, 100 S. Ct. 1018 (1980).

<sup>27</sup> As Senator Levin explained, “Clear and convincing evidence” is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was “tainted.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions. 135 *Cong. Rec.* S2780 (Mar. 16, 1989). *See also* 135 *Cong. Rec.* H747 – 48 (daily ed., March 21, 1989)(explanatory statement on Senate Amendment to S. 20); *Gergick v. General Services Administration*, 43 M.S.P.R 651, 663 n.14 (1990).

<sup>28</sup> 174 F.3d 1378 1381, *Rehearing en banc Denied*, 1999 U.S. App LEXIS 18378 (Fed. Cir. 1999), *cert. denied* 528 U.S. 1153 (2000).

<sup>29</sup> “Irrefragable” means “incontrovertible, undeniable, incontestable, or incapable of being refuted or overthrown”. *The New Webster’s Comprehensive Dictionary of the English Language*, American International Press, New York (1985 Deluxe Edition), at 510. In 2012 again as part of the Whistleblower Protection Enhancement Act, Congress reduced the burden to overcome any government presumptions from “irrefragable proof” to “substantial evidence.” WPEA, *supra* note 11, Section 103. This largely neutralized the presumption’s still – existing handicap.

*Evolution of the Burdens of Proof in Practice*

While the mandate to even the odds appeared clear, the implementation has been far more murky. As a result, both burdens of proof have required subsequent congressional modification since 1989. With respect to the contributing factor test, the Federal Circuit Court of Appeals quickly created an imposing roadblock. In *Clark v. Department of Army*<sup>30</sup>, it threatened to functionally cancel the WPA by holding that an employee fails the contributing factor test if an agency demonstrates it “could have” taken the action for legitimate reasons. Besides scrambling the employee and agency burdens of proof, the precedent restored the *Berube* doctrine permitting after – the – fact justifications for reprisal.

In the 1994 amendments to the WPA, Congress erased the threat from *Clark*. The Act was revised to provide that employees can successfully prove the connection between whistleblowing and prohibited personnel practice through a time lag after knowledge of protected activity, when “the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action”<sup>31</sup>. As a matter of law, the employee establishes a *prima facie* case by passing this knowledge – timing test<sup>32</sup>. The legislative history reaffirms that this standard has been met when an action is taken after protected speech but before a new performance appraisal<sup>33</sup>. In theory, a knowledge/time gap pegged to performance appraisals would have a year’s ceiling between protected activity and alleged retaliation. Recent Merit Board decisions, however, have expanded the period to prevail as a matter of law from 15 months<sup>34</sup> up to two years<sup>35</sup>.

Congress also restored the proper context for attacks on the employee – the agency’s affirmative defence. In its detailed rejection of the *Clark* approach, the Senate Report also restored the proper context for employee and agency arguments. “[The Committee] reaffirms that Congress intends for a[n] agency’s evidence of reasons why it may have

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<sup>30</sup> 997 F.2d 1466 (Fed. Cir. 1993).

<sup>31</sup> 5 U.S.C. § 1221(e)(1)(B) (1994).

<sup>32</sup> *Mason v. Department of Homeland Security*, 116 M.S.P.R 135, 146 (2011); *Gonzalez v. Dept. of Transp.*, 109 M.S.P.R 250, 259 – 60 (2009); *Carey v. Veterans Administration*, 93 M.S.P.R 767, 681 – 82 (2003).

<sup>33</sup> *S. Rep. No. 103 – 358*, at 7 – 8. See also 145 *Cong. Rec.* 29,353 (1994) (statement of Rep. McCloskey).

<sup>34</sup> *Inman v. Veterans Administration*, 112 M.S.P.R 280, 283 – 84 (2009).

<sup>35</sup> *Schnell v. Department of Army*, 114 M.S.P.R 83, 93 (2010).

acted (other than retaliation) to be presented as part of the affirmative defence and subject to the higher [clear and convincing] burden of proof.” The “clear and convincing evidence” standard took on a new life, however. Instead of a composite “highly probable or reasonably certain” standard, the Federal Circuit Court of Appeals and the Merit Systems Protection Board created a formula unique to whistleblower law. They interpreted the general standard to reflect consideration of three factors: “(1) the strength of the evidence in support of the personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any other evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated”<sup>36</sup>.

Unfortunately, this creative formula in practice tended to excuse, rather than enforce, a high standard and led to the acceptance of possible agency pretexts. To illustrate, there has not been a quantum of “clear and convincing evidence” required for each factor<sup>37</sup>. As the Federal Circuit reaffirmed in 2012 in *Whitmore v. Department of Labor*<sup>38</sup> “*Carr* does not impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three *Carr* factors to weigh them each individually in the agency’s favor”. As a result, the evidentiary standard itself has been ignored routinely, except as a springboard for discussion of one or more factors – not all of which must be considered<sup>39</sup>. Indeed, with respect to the strength of evidence against a whistleblower, that factor has been assessed under the modest preponderance of the evidence standard instead of the WPA clear and convincing test<sup>40</sup>.

Hostile judicial activism also transformed the other two factors into barriers for protection instead of objective criteria. For example, early precedents deemed irrelevant an institutional motive to retaliate. The conflict had to be personal. That meant the whistleblower would lose under this criterion unless the same official accused of misconduct

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<sup>36</sup> *Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 115 (1998); see also *Rutberg v. Occupational Safety and Health Review Comm’n*, 78 M.S.P.R. 130, 141 (1998).

<sup>37</sup> *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, 77 (2010).

<sup>38</sup> 680 F.3d 1353, 1374 (Fed. Cir. 2012).

<sup>39</sup> *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 – 52 (1995), *aff’d*, 96 F.3d 1367 (Fed. Cir. 1996); *Brewer v. Department of the Interior*, 76 M.S.P.R. 363, 370 – 71 (1997); *DeGraaf v. Department of Veterans Affairs*, 73 M.S.P.R. 224 (1997); *Charest v. Federal Emergency Management Administration*, 54 M.S.P.R. 436, 437 – 43 (1992).

<sup>40</sup> *Scott v. Department of Justice*, 69 M.S.P.R. 211, 221 – 22 (1995); *Braga v. Department of the Army*, 54 M.S.P.R. 392, 399n.6 (1992), *aff’d* 6 F.3d 787 (Fed. Cir. 1993)(Table).

participated in the retaliation. Institutional motive was not on the table, and attacking high level agency officials would not suffice<sup>41</sup>. As the MSPB analyzed in *Fisher v. Environmental Protection Agency*<sup>42</sup>,

There also is no indication that any official that may have been involved in the decision to suspend the appellant had any motive to retaliate against him because of his disclosures... [W]e note that the disclosures address the actions of agency heads and other top – level agency managers, both within and outside the appellant’s agency, and only tangentially address the actions of the officials that were involved in the appellant’s disciplinary action. We discern no indication from the record, apart from appellant’s speculation, of the existence of any motive to retaliate against the appellant on the part of the agency officials who were involved in his suspension.

The third factor was similarly limited. Adopting restrictive doctrines from related precedents on discriminatory penalties, the Federal Circuit and MSPB rejected disparate treatment claims unless the comparator employee was in an identical or nearly identical job and was charged with “substantially similar” violations<sup>43</sup>. The Board held that “[f]or other employees to be similarly situated [...] all relevant aspects of the appellant’s employment situation must be ‘nearly identical’ to those of comparative employees”<sup>44</sup>. To indicate the scope of the limitation, that factor has been interpreted to require that the comparator “was alleged to have engaged in all of the misconduct the respondent was charged with”<sup>45</sup>. Further, the comparator had to have a nearly identical position, or even be in the same work unit<sup>46</sup>.

In short, through restructuring a longstanding legal doctrine the Federal Circuit and MSPB transformed the WPA provision designed to heighten the agency’s burden for independent justification into a vehicle to enable pretexts. Frustrated with this defiance of intent, the U.S. House of Representatives passed the Whistleblower Protection Enhancement Act of 2007<sup>47</sup> that codified the traditional definition to replace the factors:

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<sup>41</sup> *Carr*, 185 F.3d at 1323; *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R 615 (2009).

<sup>42</sup> 108 M.S.P.R 296, 306 – 07 (2008).

<sup>43</sup> *Casias v. Department of the Army*, 62 M.S.P.R 130, 131 – 32.

<sup>44</sup> *Span v. Department of Justice*, 93 M.S.P.R 195, 202 (2003).

<sup>45</sup> *Carr*, *supra*, 185 F.3d at 1323.

<sup>46</sup> *Brown v. Department of Treasury*, 61 M.S.P.R 484, 490 – 93 (1994); *Catau v. Department of Health and Human Services*, 13 M.S.P.R 230, 232 (1982).

<sup>47</sup> <http://www.opencongress.org/bill/110 - h985/show>; H.R. 985, Whistleblower Protection Enhancement Act (110<sup>th</sup> Cong., 1<sup>st</sup> Sess.).

“ ‘[C]lear and convincing evidence’ means evidence indicating that the matter to be proved is highly probable or reasonably certain”<sup>48</sup>.

While the final version of the WPEA passed five years later did not contain a definition, the Federal Circuit and the Board may have been paying attention. Recent case law, while not rejecting the *Carr* factors, largely has restored Congressional intent by rolling back earlier decisions that had severely diluted agency burdens. In a May 2012 decision, *Whitmore v. Department of Labor*<sup>49</sup>, the Federal Circuit consolidated and expanded agency burdens within the *Carr* framework. In overview, the court recognized that the “clear and convincing” standard is “reserved to protect particularly important interests in a limited number of civil cases” and cited the WPA legislative history that Congress intended this principle to govern the Whistleblower Protection Act<sup>50</sup>.

*Whitmore* applied this premise to the government’s burden on the weight of evidence factor, requiring that whistleblowers be allowed to present all material witnesses and evidence to rebut the conclusion – independent of the agency’s initial preponderance of the evidence burden to uphold actions in the absence of a retaliation defence.

If considerable countervailing evidence is manifestly ignored or disregarded in finding a matter clearly and convincingly proven, the decision must be vacated and remanded for further consideration where all the pertinent evidence is weighed...[Excluding material witnesses from the retaliation claim] prevents whistleblowers from effectively presenting their defences, and leaves only the agency’s side of the case in play. This can have a substantial effect on the outcome of the case<sup>51</sup>.

The Federal Circuit also restored a more realistic framework to evaluate retaliatory motive, recognizing the relevance of an institutional animus. In *Whitmore* it favorably cited earlier MSPB precedents holding that general attacks on agency leadership “would reflect poorly” on field staff; and those high-level officials who propose or decide actions against whistleblowers are threatened by disclosures of misconduct in lower ranks<sup>52</sup>. *Whitmore* solidified those gains and expanded the scope of motive to all those affected directly or indirectly by the consequences of a

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<sup>48</sup> *Id.*, Sec. 3(b).

<sup>49</sup> 630 F.3d 1353 (Fed. Cir. 2012).

<sup>50</sup> *Id.*, at 1367 – 68.

<sup>51</sup> *Id.*, at 1368, 1371.

<sup>52</sup> *Id.*, at 1371, citing *Phillips v. Dep’t of Transp.*, 113 M.S.P.R. 73, 83 (2010); and *Chambers v. Dep’t of the Interior*, 116 M.S.P.R. 17, 55 (2011), respectively.

whistleblower's disclosure<sup>53</sup>. The court further explained that the high agency burden is necessary due to its inherent advantage in defending innocent intentions.

When a whistleblower makes such highly critical accusations of an agency's conduct, an agency official's merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment. Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate<sup>54</sup>.

Finally, in *Whitmore* the court explicitly rejected earlier narrow holdings on discriminatory treatment compared to similarly situated employees who had not blown the whistle.

We cannot endorse the highly restrictive view of *Carr* factor three adopted by the AJ in this case. One can always identify characteristics that differ between two persons to show that their positions are not "nearly identical", or to distinguish their conduct in some fashion. *Carr*, however, requires the comparison employees to be "similarly situated" – not identically situated – to the whistleblower. To read *Carr* factor three so narrowly as to require virtual identity before the issue of similarly situated non – whistleblowers is ever implicated effectively reads this factor out of our precedent...<sup>55</sup>.

The court's overarching principle to restore proper boundaries for this factor was accepting and emphasizing a broad handicap for whistleblowers in applying the clear and convincing standard. It emphasized that "even where the charges have been sustained and the agency's chosen penalty is deemed reasonable, the agency must still prove by clear and convincing evidence that it would have imposed the *exact same penalty* in the absence of the protected disclosures...Perhaps the most helpful inquiry in making this determination is *Carr* factor three, and its importance and utility should not be marginalized by reading it so narrowly..."<sup>56</sup>. It applied that principle to hold that those with equivalent responsibilities who engage in the same type of misconduct (uncivil

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<sup>53</sup> *Id.*, at 1371.

<sup>54</sup> *Id.* (citations omitted).

<sup>55</sup> *Id.*, at 1367.

<sup>56</sup> *Id.*, at 1374 (emphasis in original).

behavior and workplace violence) are similarly situated<sup>57</sup>. On balance, *Whitmore* did not erase the balancing test for the clear and convincing evidence standard. Indeed, it reaffirmed that the defendant agency does not need to produce evidence for each factor<sup>58</sup>. If the decision's principles are enforced consistently at the administrative level, however, whistleblowers will have the fair fight Congress intended when defending themselves against agency pretexts.

### *Restoring the Right to a Full Hearing*

An unintended side effect of the agency's reverse burden of proof actually made it an obstacle to the employee's due process rights for an administrative day in court. The Board, with Federal Circuit approval, began a practice of presuming that the whistleblower passed the contributing factor test and established a *prima facie* case of retaliation. It then would start the hearing with the agency's affirmative defence that it would have acted anyway in the absence of protected activity. When agencies prevailed in that defence, employees would lose without ever getting a chance to put on their own cases proving retaliation<sup>59</sup>.

This created several unacceptable side effects. First, it meant whistleblower cases would be completed without a ruling whether the employee disclosed evidence of government illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. This prevented a public record of alleged government misconduct, the whole purpose for whistleblowing. Second, it meant that the whistleblowers were thoroughly and often viciously attacked when they asserted their rights, without any chance to present evidence that their rights had been violated. Acting on their rights was prolonging expensive conflict for years, for a hearing where they would be attacked with a likelihood they could not fight back.

Congress rejected this "disturbing trend of denying employees' right to a due process hearing and a public record to resolve their WPA claims"<sup>60</sup>. In the WPEA it neatly solved the problem. An agency may not present its

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<sup>57</sup> *Id.*, at 1373.

<sup>58</sup> *Supra* note 38.

<sup>59</sup> *Fellhoetler v. Department of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009); *McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R 594, 612 (2011).

<sup>60</sup> *S. Rep. No. 112 – 155 to Accompany S. 743*, 112<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2012), at 23; *see also H. Rep. 112 – 508, Part 1*, 112<sup>th</sup> Cong., 2d. Sess. 5 (2012).

affirmative defence unless the employee first has established a *prima facie* case<sup>61</sup>. While the problem has been solved, it is a significant lesson learned for all whistleblower laws that include a reverse burden of proof.

### *Expansion of the Doctrine*

Since 1989, the Whistleblower Protection Act burdens of proof have become the precedent followed generally by Congress in other contexts. The standards have been implemented in 13 corporate whistleblower statutes that cover nearly the entire private sector<sup>62</sup>. In October 2012 President Obama even included them as the standard to adjudicate rights under Presidential Policy Directive 19, executive action that created whistleblower protection for employees in the intelligence community or others alleging retaliatory security clearance actions that denied them access to classified information necessary to do their jobs<sup>63</sup>. Internationally, the WPA burdens of proof have become the norm for whistleblower policies at Intergovernmental Organizations. (“IGO”) In 2005 the United Nations began a pattern of adopting modern whistleblower policies with the burdens of proof as a cornerstone. Encouraged by a U.S. appropriations prerequisite for funding IGO’s, the trend since has spread to the World Bank and African Development Bank<sup>64</sup>.

The WPA test has not been included in any national whistleblower laws outside the United States. Indeed, few national whistleblower laws have

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<sup>61</sup> WPEA, *supra* note 11, sec. 114, *Scope of Due Process*.

<sup>62</sup> Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(3); Federal Rail Safety Act (U.S. rail workers) 49 USC 20109(c)(2)(A)(i); National Transportation Safety and Security Act (U.S. public transportation) 6 USC 1142(c)(2)(B); Consumer Product Safety Improvement Act (U.S. corporate retail products) 15 USC 2087 (b)(2)(B), (b)(4); Sarbanes Oxley Act (U.S. publicly – traded corporations), 18 USC 1514(b)(2)(c); Surface Transportation and Assistance Act (U.S. corporate trucking industry) 49 USC 31105(b)(1); American Recovery and Reinvestment Act of 2009 (U.S. Stimulus Law) P.L. 111 – 5, Section 1553(c)(1); Affordable Care Act, sec. 1558(b)(2); Food Safety Modernization Act (U.S. food industry) 21 USC 1012(b)(2)(C) and (b)(4)(A); Dodd Frank Act (U.S. financial services industry) sec. 1057(b)(3); National Defense Authorization Act of 2013, P.L. 112 – 139, sections 827 – 28, (112<sup>th</sup> Cong., 2d Sess.).

<sup>63</sup> U.S. White House, Presidential Policy Directive 19 (October 10, 2012), <https://www.fas.org/irp/offdocs/ppd/ppd-19.pdf> (accessed August 11, 2013).

<sup>64</sup> UN ST/SGB/2005/21, sections 5.2 & 2.2; WFP ED 2008/003, sections 6 and 13; World Bank Staff Rule 8.02, sec. 3.01; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.7; Foreign Operations Act, Section 1505(11).

any burdens of proof. The concept is beginning to take root, however. There is some form of reverse burden of proof in Croatia, Luxemburg, Norway, Slovenia and the United Kingdom. The G20 and Parliamentary Assembly of the Council of Europe also have recommended the reverse burden<sup>65</sup>.

### 3. Conclusion

Over the last 25 years, codifying modern burdens of proof has become the most significant cornerstone, and sometimes controversial issue when enacting U.S. whistleblower laws. When Congress considered diluting the WPA reverse burden to “preponderance of evidence” from “clear and convincing evidence” in a political compromise for access to WPEA jury trials, thirty three law professors protested<sup>66</sup>. In the end, whistleblower rights advocates ended up rejecting court access because the price of partially restoring antiquated legal burdens of proof was too high.

As new whistleblower laws are adopted at an accelerating pace, fair burdens of proof are a cornerstone that should be built into the any credible law’s structure. Fair rules of the game are a necessity for rights to be free speech breakthroughs, rather than traps that end up rubber stamping retaliation. The public policy and personal stakes for whistleblowers are too significant for arbitrary judgments of how high an evidence bar employees must overcome to defend themselves successfully. Even with unbiased tribunals, it is unrealistic for whistleblowers effectively to defend their rights if they do not know how much and what type of evidence is necessary to win.

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<sup>65</sup> P. Stephenson, M. Levi, *The Protection Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees who Make Disclosures in the Public Interest*, Council of Europe, Strasburg, 2012.

<sup>66</sup> Letter from Robert Vaughn, *et. al.* to Representative Edolphus Towns *et. al.* (September 7, 2010) (available at [www.whistleblower.org](http://www.whistleblower.org)).

# Towards “Ideal” Whistleblowing Legislation? Some Lessons from Recent Australian Experience

A. J. Brown \*

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## 1. Introduction

Whistleblower protection is increasingly recognised as important for the detection and rectification of wrongdoing in and by organisations, as well as for enforcement of citizen and worker rights<sup>1</sup>. However the form of the legal protections and regimes needed to achieve these objectives remains contentious. On one hand, international recognition of the importance of whistleblowing through multi-lateral agreements such as the United Nations Convention Against Corruption (UNCAC) and G20 Anti-Corruption Action Plan has created a demand for best-practice legislative models. There has been a new focus on comparative analysis of existing laws and the extraction of key principles to guide such legislation<sup>2</sup>. On the

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<sup>1</sup> Whistleblowing is used throughout this paper to mean the “disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action”: M. P. Miceli, J. P. Near, *The Relationships among Beliefs, Organisational Position, and Whistleblowing Status: A Discriminant Analysis*, in *Academy of Management Journal*, 1984, vol. 27, n. 4, 687-705 at 689. However it must be noted that the term is also often used to mean other forms of witness or complainant, as discussed in part 2.

<sup>2</sup> For statements of such principles, see e.g. D. Lewis, *Employment Protection For Whistleblowers: On What Principles Should Australian Legislation Be Based*, in *Australian Journal of Labour Law*, 1996, vol. 9, 1-27; P. Latimer, *Whistleblowing in the Financial Services Sector*, in *Univ. of Tasmania L. Rev.*, 2002, vol. 21, 39; D. Banisar, *Whistleblowing – International*

other hand, the search for “ideal” or “model” laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose legislation (sometimes inaccurately called “stand-alone”); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation<sup>3</sup>.

This article seeks to aid understanding of the ways in which different policy purposes, conceptual approaches and legal options can be combined in the design of better whistleblowing legislation. It takes as a starting point, and seeks to demonstrate, that notwithstanding international interest, there is no single “ideal” or “model” law that can be readily developed or applied for most, let alone all countries. This is due to the diverse and intricate ways in which such mechanisms must rely on, and integrate with, a range of other regimes in any given jurisdiction. Nevertheless, recent scholarship makes it more feasible to recognise the different purposes and dimensions of whistleblowing laws, and to make more informed legislative choices in accordance with international principles.

This article examines this process through a study of Australia’s recently passed *Public Interest Disclosure Act 2013 (Cth)* [henceforward *PID Act*] governing whistleblowing in Australia’s federal (Commonwealth) public sector. At state level, Australia has a long history of special purpose legislation of this kind, dating back to the 1990s (Table No. 1).

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*Standards and Developments*, Background paper written for Transparency International, 2009, also in I. E. Sandoval (ed), *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, World Bank Institute for Social Research, UNAM, Washington DC, 2011. <http://ssrn.com/abstract=1753180> (accessed August 20, 2013); A. J. Brown, P. Latimer, J. McMillan, C. Wheeler, *Towards Best Practice Whistleblowing Legislation for the Public Sector: the Key Principles*, in A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, ANU E Press, Canberra, 2008, 261-288; A. Osterhaus, C. Fagan, *Alternative to Silence: Whistleblower Protection in 10 European Countries*, Transparency International, Berlin, 2009.

<sup>3</sup> See B. FASTERLING, *Comparative legislative research*, in A. J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Whistleblowing Research Handbook*, Edward Elgar, Cheltenham, forthcoming 2014.

Table No. 1. *Australian Whistleblowing / Public Interest Disclosure Acts, in order of most Recent Reform (Public Sector Only).*

No.	Jurisdiction	Current Act	Original Act
1	Commonwealth (Federal)	<i>Public Interest Disclosure Act 2013</i>	<i>Public Service Act 1999 (s. 16) (continuing)</i>
2	Victoria (State)	<i>Protected Disclosures Act 2012</i>	<i>Whistleblowers Protection Act 2001</i> [replaced]
3	Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i>	<i>Public Interest Disclosure Act 1994</i> [replaced]
4	Western Australia (State)	<i>Public Interest Disclosure Act 2003</i> [amended 2012]	<i>Public Interest Disclosure Act 2003</i>
5	New South Wales (State)	<i>Public Interest Disclosures Act 1994</i> [reformed 2010, 2012]	<i>Protected Disclosures Act 1994</i>
6	Queensland (State)	<i>Public Interest Disclosure Act 2010</i>	<i>Whistleblowers Protection Act 1994</i> [replaced]
7	Northern Territory	<i>Public Interest Disclosure Act 2008</i>	<i>Public Interest Disclosure Act 2008</i>
8	Tasmania (State)	<i>Public Interest Disclosures Act 2002</i> [amended 2009]	<i>Public Interest Disclosures Act 2002</i>
9	South Australia (State)	<i>Whistleblowers Protection Act 1993</i>	<i>Whistleblowers Protection Act 1993</i>

Source: Author's Own Elaboration

However, despite recommendations by federal parliamentary committees since at least 1994<sup>4</sup>, it took almost 20 years for this first, comprehensive national-level whistleblowing law to be passed. Legislative design commenced with policy commitments by the incoming Labor government in 2007, leading to a bipartisan 2009 parliamentary inquiry chaired by the Attorney-General who later saw the Bill through (Hon Mark Dreyfus QC)<sup>5</sup>. Design was thus able to draw on experience with existing regimes, as well as comprehensive empirical research by the author and others<sup>6</sup>. The process was nevertheless protracted, requiring introduction of a private member's Bill in 2012 – the fourth in a decade – to put pressure on the Government to complete the task<sup>7</sup>, along with critical review of its Bill (March 2013) by stakeholders and two further parliamentary committees<sup>8</sup>. This led to substantial amendments in the

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<sup>4</sup> Senate Select Committee on Public Interest Whistleblowing, *In the public interest: Report of the Senate Select Committee on Public Interest Whistleblowing*, Commonwealth of Australia, 1994 (hereafter SSC 1994).

<sup>5</sup> House of Representatives Standing Committee on Legal And Constitutional Affairs, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*. Canberra: Commonwealth of Australia, 2009 (hereafter LACA 2009).

<sup>6</sup> A. J. Brown, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation*, Commonwealth, NSW and Queensland Ombudsman, Canberra, 2006; A. J. Brown, (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness management in public sector organisations*, ANU E Press, Canberra, 2008; P. Roberts, A. J. Brown and J. Olsen, *Whistling While They Work: A Good Practice Guide for Managing Internal Reporting of Wrongdoing in Public Sector Organisations*, ANU E-Press, Canberra, 2011. For evidence of the impact of the research, see LACA, op cit, p.x and seriatim; Queensland Parliamentary Debates (Hansard), 16 September 2010, Government Printer, Brisbane; Commonwealth Parliamentary Debates (Hansard), Canberra, 26 June 2013, 4110; Hon Mark Dreyfus QC MHR, Attorney-General, Media Release, 26 June 2013, <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Secondquarter/26June2013-Whistleblowerlawspassed.aspx> (accessed August 20, 2013).

<sup>7</sup> *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth), drafted by the author and introduced by Independent MP Andrew Wilkie, a former national intelligence whistleblower, in October 2012: See A. Wilkie, *Axis of Deceit: The Extraordinary Story of an Australian Whistleblower*, Black Inc, Collingwood Vic, 2004.

<sup>8</sup> See submissions and reports, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Public Interest Disclosure Bill 2013*, Canberra, 28 May 2013, [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=spla/bill\\_2013\\_public\\_interest\\_disclosure/index.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill_2013_public_interest_disclosure/index.htm) (accessed August 20, 2013); Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013*, Canberra, 13 June 2013.

final instrument, which was passed with strong multi-party support on 26 June 2013<sup>9</sup>.

The result is a body of extrinsic material throwing light on the choices made, influenced by debates over the effectiveness of different approaches. Recently, Vaughn has suggested four main different “perspectives” at work, influencing the legal standards and protections evident in whistleblowing laws: (1) an employment perspective; (2) an open-government perspective; (3) a market or regulatory perspective; and (4) a human rights perspective<sup>10</sup>. As shown in Figure 1<sup>11</sup>, these perspectives also relate to one another in a variety of ways: some embody greater concern with individual rights, and others with a greater concern for institutional reform; while some are likely to address the public sector, and others the private sector. These perspectives do not simply label aspects of whistleblower laws, but emphasize differing justifications, and distinct bodies of law containing their own theories and assumptions, as well as different criteria for success and failure.

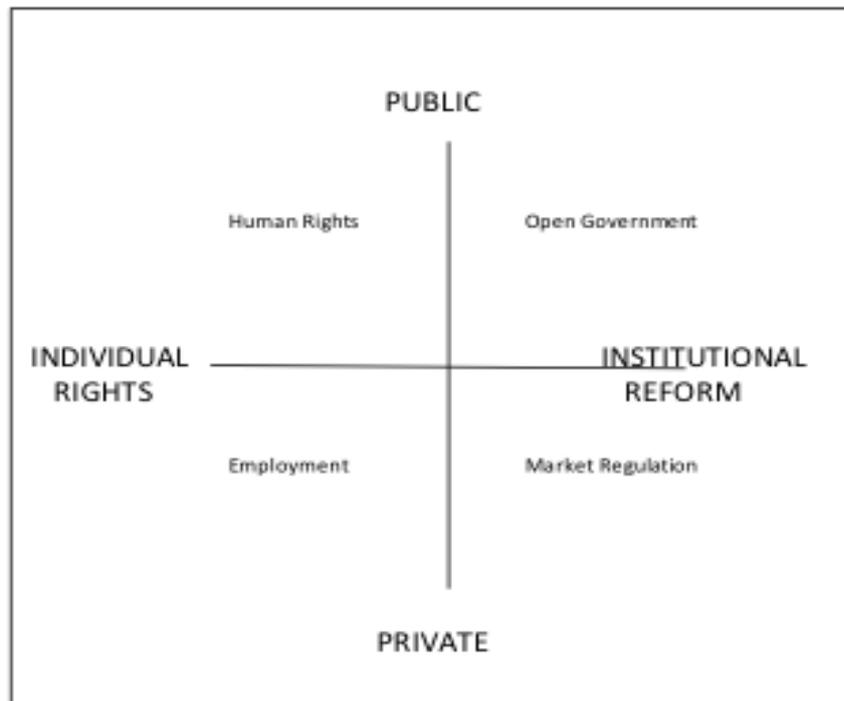
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<sup>9</sup> See Commonwealth Parliamentary Debates (Hansard), 26 June 2013, Canberra, 4106-4117.

<sup>10</sup> R. G. Vaughn, *The Successes and Failures of Whistleblower Laws*, Edward Elgar, Cheltenham, 2013, at chapter 15.

<sup>11</sup> *Ibid.*

Figure No. 1. *A Matrix of Perspectives on the Nature of Whistleblowing Provisions*



Source: Vaughn 2013, chapter 15.

Elsewhere, the path to the new Australian law is discussed in terms of four different approaches which largely confirm Vaughn's picture: an "anti-retaliation", remedial or organizational justice approach (focussed on creating and protection individual rights, especially employment rights); an "institutional" or structural approach (focussed on the role of whistleblowing in organisational behaviour and regulation); a "public" or media-based approach (focused on recognising the value of free speech and open government); and a "reward" or bounty approach (focused on incentivising, by compensating, whistleblowers and the private legal market to make whistleblowing work)<sup>12</sup>.

<sup>12</sup> T. Dworkin, A. J. Brown, *The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws*, in *Seattle Journal for Social Justice*, 2013, vol. 11, n. 2, 653-713.

This article reviews the final outcome in terms of the first three of these approaches – the fourth being one which Australia is only just beginning to seriously consider.<sup>13</sup> It should also be noted that the new law deals only with reporting of wrongdoing within federal public sector organisations and programs, and not the private or civil society sectors, with law reform in the latter sectors also seen as long overdue.<sup>14</sup> The first part of the article examines basic questions of the coverage given by the legislation – in particular, which individuals are able to gain its benefits, or, who is a “whistleblower”, in legal terms? This includes an indicative new schema of how whistleblower protection can be defined relative to other forms of complainant, witness or citizen protection. Continuing the search for a clearer understanding of the interface between different areas of law bearing upon whistleblowing, the article then deals in turn with how the new Act incorporates each of the “anti-retaliation” or remedial approach; “institutional” or structural approach; and “public” or media-based approach. History suggests that unless these disparate strategies are recognized and reconciled, effective whistleblowing regimes may remain elusive, with no individual approach providing a solution.<sup>15</sup> In particular, it seems important that the approaches not be viewed as alternative or competing, in a lurch for better solutions, without evaluating why the previous effort did not work, or whether the strategies might be brought together. The key question is thus whether, or how, these different strands can be woven together in a more complementary fashion – and whether this integration itself can point the way to an “ideal” method of designing effective whistleblowing laws.

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<sup>13</sup> For evidence of the growing sympathy toward incorporation of the “bounty” or reward approach, see LACA 2009, *op cit*, 82-84; Dworkin and Brown, 2013, *op. cit.*, 701-703. At the time of writing, an Independent federal Senator (Nick Xenophon) has also announced his intention to introduce a further private member’s Bill that may in part introduce this model: see R. Williams, *The price of speaking out: Laws governing private sector whistleblowers are full of gaps*, in *Sydney Morning Herald*, 10 August 2013, <http://www.smh.com.au/business/the-price-of-speaking-out-20130809-2rngk.html> (accessed August 10, 2013).

<sup>14</sup> Australia’s limited corporate whistleblowing provisions are currently contained in Part 9.4 AAA of the *Corporations Act 2001* (Cth). A review of these provisions by the federal Treasury and Attorney-General’s Department in 2009-2010 was never completed: see Attorney-General’s Department, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, October 2009.

<sup>15</sup> Dworkin and Brown, 2013, *op. cit.*

## 2. The Basics: Who is a Whistleblower?

### 2.1. Context

Before examining each of the three approaches, the basic comprehensiveness of a whistleblowing law in any particular jurisdiction or sector is determined by three issues: the range of reportable wrongdoing; the range of institutions about whom the whistle can be blown; and the range of individuals who can benefit from the processes and protections in the Act. This third issue is especially basic, and also often the most complex. On one hand, the thrust of the social science definition of “whistleblowing”, of this article, and of most whistleblowing legislation, is based on the whistleblower as someone with an “insider’s knowledge”<sup>16</sup>: “the whistleblower is presumptively an insider who acquires knowledge that the community does not have”<sup>17</sup>. History and research show that it is the internal position of the individual in the organisation that is most likely to make them aware of internal wrongdoing, but can also place them under pressure to stay silent, or expose them to unfair outcomes if they speak up<sup>18</sup>. The modernisation and codification of whistleblower protections, in most jurisdictions, is thus predicated on the special value of information held by employees and other organisational insiders about wrongdoing; and the challenges of overcoming organisational disincentives to, and negative consequences of, revealing that information – whether internally, to regulatory agencies, or publicly. The question of who should benefit from the law, thus goes to the heart of the intersection between employment law and other legal dimensions, including open government and protection of citizen rights more generally. While employees may lie at the heart of the whistleblowing definition, what of organisational or industry members or workers who are not employees? What of employees in other organisations or sectors, beyond those to which the whistleblowing regime applies? What of individuals in no employment or work relationship, but who might be considered “insiders” in other ways, including by virtue of their vulnerability – such as clients or customers who are medical patients, aged care residents or prisoners? Further removed again, but nevertheless

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<sup>16</sup> Evidence of the then Commonwealth Ombudsman, John McMillan: LACA 2009, *op. cit.*, 25.

<sup>17</sup> Evidence of Professor Tom Faunce, LACA 2009, *op. cit.*, 37.

<sup>18</sup> A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector*, 2008, *op. cit.*, 9-10; see LACA 2009, *op. cit.*, 36-37.

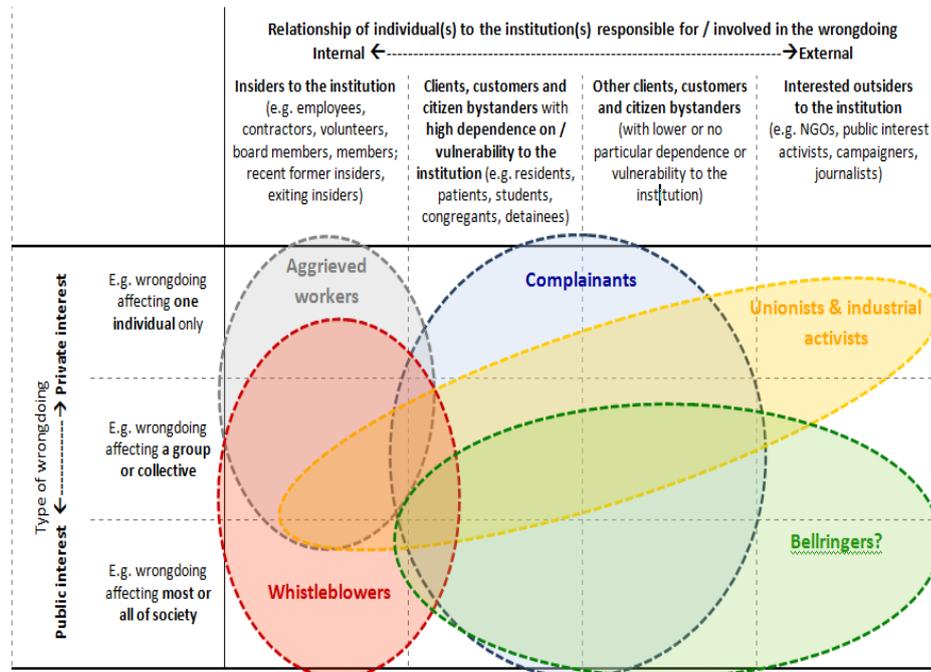
*potentially* deserving legal protections from reprisals, are customers, clients or independent citizens who become aware of wrongdoing but have no such internal relationship – especially in countries unlike Australia, where basic citizens’ rights to complain, and other forms of public interest activism, are generally separately supported by the rule of law.

To clarify this, Figure 2 sets out some of the range of persons who may disclose wrongdoing by or within an institution, and should be entitled to protections *of some kind* – whether whistleblowing or otherwise. Any such diagram can be indicative only, and is likely to be contentious, depending on who may be seeking to include or exclude themselves from a particular label. In particular, the term “whistleblower” is often associated with a range of people with special or privileged information regarding the operations of agencies, who then campaign for justice or change in respect of that organisation, who are not “insiders” in an employment, official or organisational sense. Elsewhere<sup>19</sup>, the term “bellringers” is suggested as one which could be used to describe these important categories, in a manner that relates but differentiates them from “whistleblowers” – as suggested in Figure 2. As shown, there are also always likely to be individuals who fit into more than one, or even all of these groups. There are also likely differences between one culture or nation and the next. Nevertheless, a clearer conception of the range of persons involved can help focus attention on the different legal mechanisms that might best be used to achieve protections – and protections of different kinds – rather than assuming that any one law should be used to protect all.

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<sup>19</sup> M. Miceli, S. Dreyfus, J. Near, *Outsider “Whistleblowers”: Conceptualising and Distinguishing “Bell-ringing” Behaviour*, in A. J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *International Whistleblowing Research Handbook*, Edward Elgar, Cheltenham, forthcoming 2014.

Figure No. 2. An Indicative Guide to Classifying Whistleblowers, Complainants, Witnesses and Victims of Organisational Wrongdoing



Source: Brown, Lewis, Moberly, Vandekerckhove (forthcoming).

2.2. PID Act

How comprehensive is Australia’s *Public Interest Disclosure Act 2013* (Cth) on these three basic issues? First, the range of wrongdoing covered makes the Act very comprehensive by comparison with equivalent legislation elsewhere. The definitions of “disclosable conduct” whose disclosure triggers the Act are broad to the point of all-encompassing<sup>20</sup>. Second, the range of federal public sector institutions and programs covered are also comprehensive – with three significant exceptions. On one hand, the

<sup>20</sup> *PID Act 2013 (Cth)*, s 29. NB s 31 also provides that conduct is not *disclosable conduct* if it “relates only to” a policy of the Government, or amounts, purposes or priorities of expenditure relating to such a policy, “with which a person disagrees”; however this exception is to be found in other legislation, and is, in fact, more narrowly worded than most (i.e. “relates only to”, cf “relates entirely or in substance to a disagreement in relation to a policy”: *PID Act 2012 (ACT)*, s. 7(2)(b)).

categories of public officials and agencies about whom disclosures may be made extend well beyond federal departments, to include all federal companies, authorities and entities; federal contractors and sub-contractors; and the employees of federal contractors and sub-contractors, in respect of those contracts<sup>21</sup>. The exceptions are judicial officers, in respect of judicial as against administrative functions<sup>22</sup>; and more problematically, elected members of the federal Parliament<sup>23</sup>. Further, wrongdoing relating to “intelligence agencies” can only be subject to a public disclosure under the scheme in extremely limited circumstances, as will be discussed below. These are gaps for which solutions are yet to be found.

The Act is also comprehensive in terms of who may seek protection, but with interesting new implications for how a “whistleblower” is defined. Previously in Australia, it is important to note that no less than five different approaches have been taken; the PID Act adds a sixth (in a federal country with only nine legal jurisdictions). These approaches include: (1) a relatively narrow, traditional definition of public officials and officeholders; (2) a wider range of officials plus contractors, employees and even volunteers; (3) “any person” or “any natural person”, including all of the above but also any client or citizen; and (4) combinations of these, depending on what wrongdoing is involved<sup>24</sup>. The fifth approach, recently developed in the Australian Capital Territory, is a two-track one in which “any person” is entitled to the general legal protections, but specific procedural requirements and protections are only triggered for disclosers who are “public officials”<sup>25</sup>.

The sixth approach provided by the PID Act is a new “deeming” provision. In the main, the Act follows the second of the previous approaches, being triggered by disclosures by a very broad definition of “public official”, including not only employees and other officeholders of agencies and entities, but “contracted service providers” (including sub-contractors), and their employees or officers in so far as they provide

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<sup>21</sup> *PID Act 2013 (Cth)*, ss 29 and 30.

<sup>22</sup> *PID Act 2013 (Cth)*, s 32.

<sup>23</sup> *PID Act 2013 (Cth)*, ss 29, 30, and 31(b).

<sup>24</sup> For (1), see NSW; (2) Tasmania; (3) SA s.5(1); Vic s.5; WA s.5; NT s.7; (4) Qld ss.19, 20.

<sup>25</sup> *PID Act 2012 (ACT)*, s.10; with “public official” defined very broadly to mean public employees, contractors, employees of contractors, or volunteers “exercising a function of the public sector entity”, as well as any person prescribed by regulation. See s.15 for one such differentiation.

services “for the purposes (whether direct or indirect) of the Commonwealth contract”; together with any individual who “exercises powers, or performs functions, conferred on the individual by or under a law of the Commonwealth”<sup>26</sup>. This decision reflected evidence to the 2009 parliamentary inquiry that to be effective, the legal regime should be “focussed and structured” on whistleblowers as insiders: “tailored to the problem and the challenge” of whistleblower protection, while “bearing in mind that it is not the whole picture”<sup>27</sup>.

However, the parliamentary inquiry also received evidence that any member of the public should be able to make a public interest disclosure<sup>28</sup>. Accordingly, it recommended an ability to “deem” other persons to be a public official, so triggering the protections<sup>29</sup>. Consequently, any person may be determined by an authorised officer to be a public official for the purposes of the Act, irrespective of whether they are actually one<sup>30</sup>. Importantly, this ability to expand the scope of the Act is not referable to particular classes of people, or dependent upon regulation, but exercisable in the individual case by officers at agency level. The parliamentary committee’s intent was not to expand the legal focus nor the definition of whistleblower beyond “insiders”, to all citizens – rather it recommended this provision as means of making doubly sure that all those with an “insider’s knowledge” of disclosable conduct could be covered, including current or former volunteers to an agency, or “others in receipt of official information or funding from the Australian Government”<sup>31</sup>. In the Act itself, however, the reasons for such a determination are not explicit, beyond a criterion that the individual “has information that concerns disclosable conduct” – and implicitly, either requires or deserves protection in exchange for that information<sup>32</sup>.

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<sup>26</sup> *PID Act 2013 (Cth)*, 69.

<sup>27</sup> McMillan in evidence at LACA 2009, op. cit., 37.

<sup>28</sup> LACA 2009, op. cit., 34-36. As early as 1994, the Senate Select Committee recommended that whistleblowing should be given “as broad a definition as possible to include disclosures by people from within or outside the organization”: see SSC 1994, op. cit., par 2.12.

<sup>29</sup> LACA 2009, op cit, Rec 5, 55.

<sup>30</sup> *PID Act 2013 (Cth)*, 70.

<sup>31</sup> LACA 2009, op. cit., 55.

<sup>32</sup> *PID Act 2013 (Cth)*, subs 70(1), par (a).

### *2.3. Looking Forward*

How many individuals will need the benefit of this “deeming” provision, and its implications for the evolution of whistleblower and wider complainant or “source” protection, will only be known with time. The larger issue confirmed by these choices is that as reinforced by Figure No. 2, all witnesses, informants and complainants in respect of wrongdoing – whether directed at themselves or others – require a base level of protection from victimisation that would prevent them from exercising their rights of complaint, or prevent the proper investigation of the wrongdoing. The second, different issue is how those protections are actually delivered, especially in countries in which basic civil liberties are in question. The variegated approaches in Australia, and diversity of complainant types indicated by Figure 2, reinforce the need for informed debate as to which legal mechanisms are used to secure which protections, for whom. Can any single law provide comprehensive, tailored protections and systems for all these categories – or does the attempt to do so, risk watering down the purposes and effectiveness of such reforms, to the point where none may be effective? The answer lies – as it did in Figure 1 – in recognising that different bodies of law are needed to work towards effective protection across all these categories. Whistleblower protection, or the encouragement and protection of speaking up by organisational “insiders”, is just one part of this matrix, overlapping with others. How this is achieved, legally speaking, is also determined by a range different approaches.

### 3. Anti-Retaliation and Remedies

#### 3.1. Context

The first of the legal approaches introduced earlier, which has been a focus of previous legislative efforts, is the encouragement and protection of whistleblowing using an “anti-retaliation” or remedial model. Most Australian states followed the US in basing their whistleblowing legislation, in part, on this approach. Moreover, for reasons difficult to fathom in hindsight, they typically did so by following the US approach of creating general rights of compensation in the civil courts, even though – unlike the USA – Australia has long had comprehensive systems of tribunal-based employment rights protection. Civil remedies are based on the creation of a tort of victimization, which provides a right to sue for damages in the general courts, for detrimental action taken in retaliation for having made a disclosure under the Act<sup>33</sup>. The only state not to have initially provided this remedy, New South Wales (NSW), did so in 2010<sup>34</sup>. The limits of these remedial avenues have become clear, however. Even the most recent addition, in NSW, provides that recoverable civil damages “do not include exemplary or punitive damages or damages in the nature of aggravated damages”<sup>35</sup>. General problems of cost and risk of adverse outcomes mean there have never been more than a handful of claims, and no known successes<sup>36</sup>. Australian legal firms and services have little specialized experience or expertise in such actions. By contrast, the general law of employment has provided a more convincing basis for compensation for retaliation. Employers have a common law duty, arising from express or implied terms in contracts of employment, to take reasonable steps to ensure that employees in their organization who blow the whistle are not bullied or victimised. As a result, one of the few significant compensation awards was in favour of a NSW police officer whose employer failed to sufficiently support him after he reported

<sup>33</sup> See, e.g., *Whistleblowers Protection Act 1993* (SA) s 9(2)(a); *PID Act 2010* (Qld) ss 42-43; *PID Act 2003* (WA), s 15(1); *PID Act 2002* (Tas), s 20(2); *Whistleblowers Protection Act 2001* (Vic), s 19(1); *PID Act 2012* (ACT) s 41.

<sup>34</sup> See *PID Act 1994* (NSW) s 20(A). In addition, over time, three states have provided an alternative right to seek restitution or damages for victimization through anti-discrimination tribunals: *Whistleblowers Protection Act 1993* (SA) s 9(2)(b); *PID Act 2003* (WA), s 15(4); *PID Act 2010* (Qld), s 44.

<sup>35</sup> *PID Act 1994* (NSW), s 20(A)(3).

<sup>36</sup> See Brown et al., *Best Practice Whistleblowing Legislation...*, 2008, op cit., 271–77.

suspected internal misconduct<sup>37</sup>. Similarly, rights of compensation for work-based injury, which, while ill-matched to whistleblowing situations, have proven to be a more recognizable part of the legal landscape. The confidential settlement achieved in 2012 by a prominent whistleblower, nursing manager Toni Hoffman, was achieved in response to a claim under the *Workers' Compensation and Rehabilitation Act 2003*(Qld)<sup>38</sup>.

The lack of coordination with relevant existing legal systems is confirmed by the difficulties experienced by some courts, in identifying how these different compensation avenues fit together, as well as how they co-exist with the criminal offence of reprisal, for which Australian legislation is also notable. One State court determined that no action for civil damages could be taken against an employer because it could not be held vicariously liable for actions amounting to a criminal offence by its own staff, since these must be presumed to have been taken outside the employer's authorisation<sup>39</sup>; while others have wrestled with the relationship with procedural requirements under workplace health and safety legislation.

### 3.2. PID Act

For federal government whistleblowers, the only provision prior to the recent reform was a prohibition in the *Public Service Act 1999* (Cth) of victimization against many, but not all public servants, if they reported misconduct, with no remedies beyond general grievance rights<sup>40</sup>. On the road to new legislation, it was initially unclear how the anti-retaliation approach would be embedded and enforced. In line with recommendations that Australian laws needed to be better tailored to Australia's own conditions, the 2009 parliamentary inquiry recommended

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<sup>37</sup> See *Wheadon v New South Wales* (Unreported, District Court of NSW, 2 Feb 2001) (ordering the NSW Police Service to pay AUD\$664,270 for having breached its duty of care to the officer); see Brown et al 2008, op cit, at 274.

<sup>38</sup> See *Toni Hoffman Settles Claim for Compensation*, Maurice Blackburn Lawyers (8 March 2012), <http://www.mauriceblackburn.com.au/news/press-releases--announcements/2012/toni-hoffman-settles-claim-for-compensation.aspx> (accessed March 12, 2013); *Dr Jayant Patel Nurse Toni Hoffman and Queensland Health Settle Claim*, COURIERMAIL.COM.AU (8 March 2012), <http://www.couriermail.com.au/news/queensland/patel-nurse-queensland-health-settle-claim/story-e6freoof-1226294131009> (accessed March 12, 2013).

<sup>39</sup> See *Howard v Queensland* [2000] Qd R 223; Brown et al 2008, op. cit.

<sup>40</sup> *Public Service Act 1999* (Cth), 16.

that compensation for federal employees be embedded in the new federal *Fair Work Act* then under design<sup>41</sup>. This was informed by the adoption of employment-based remedies, in some respects stronger than but delivered through the existing workplace relations system, as the basis of the United Kingdom's *Public Interest Disclosure Act 1998* (UK)<sup>42</sup>. By 2012, restructuring of Australia's workplace relations system made it clearer how whistleblowing remedies might be embedded<sup>43</sup>. Under the general protections in Part 3-1 of the *Fair Work Act 2009*, employees (including federal government employees) are protected from any unlawful "adverse action" based upon their workplace rights, including initiation of any process or complaint under a work-related law. "Adverse action" is widely defined and includes dismissal, injuring a person in their employment, prejudicially altering the employee's position and any other conduct that may have an adverse impact upon an employee, either directly or indirectly. Remedies include civil penalty orders and compensation awards, in addition to injunctive relief, restorative orders and criminal penalties. These are enforced by complaint to a Fair Work Ombudsman, and an informal specialist industrial relations tribunal, Fair Work Australia, in addition to the workplace division of the Federal Court. Arguably, the protections already extended to many employee disclosures of wrongdoing – but this was, and is untested in the courts.

The PID Act, influenced by the private member's Bill which preceded it<sup>44</sup>, establishes a dual system in which remedies for reprisal or detrimental action are obtainable by application either through (a) the Fair Work system above, or (b) the Federal Court in its general civil jurisdiction<sup>45</sup>. Sections 22 and 22A of the *PID Act* confirming that public interest disclosures are workplace rights. Damages for unfair dismissal and other adverse actions remain capped in this system, while there are no limits upon damages that can be sought in a general civil claim.

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<sup>41</sup> See Brown et al., 2008, *op cit*; LACA 2009, *op. cit.*, at 104.

<sup>42</sup> See, e.g., Hon. J. McMullen, *Ten Years of Employment Protection for Whistleblowers in the UK: A View from the Employment Appeal Tribunal*, in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research*, Edward Elgar, Cheltenham, 2010, 7-14.

<sup>43</sup> See *Workplace Relations (Work Choices) Act 2005* (Cth); *New South Wales v Commonwealth* [2006] 231 ALR 1; *Fair Work Act 2009* (Cth); *Work Health and Safety Act 2011* (Cth).

<sup>44</sup> See *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth), 41; *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012* (Cth), Schedule Items 1-4.

<sup>45</sup> See *PID Act 2013* (Cth), ss 13-18 and 22-22A.

As a key element of this dual system, the civil claim is also accompanied by a “public interest” costs rule – the first of its kind in Australia, and possibly anywhere. As a result of one late amendment, initiated by the author and supported by the Community and Public Sector Union<sup>46</sup>, a whistleblower who sues for civil damages in the Federal Court cannot be held liable for the respondent’s costs, provided their claim is not legally vexatious and they conduct the litigation reasonably; even though, if they make out their claim, the respondent may be obliged to pay the whistleblower’s costs<sup>47</sup>. In part, this matches the *Fair Work Act* system, where each side must bear its own costs; but goes beyond this in recognizing that the making of a public interest disclosure is more than a private right, and also constitutes a public good. In practice, costs impediments and risks have likely been the single most significant barrier to civil remedies to date. Unlike most employment legislation, none of the state whistleblowing compensation schemes provide any protection for workers from exposure to the legal costs of their employer, should they lose.

### 3.3. Looking Forward

Taken together the provisions represent the most comprehensive protection regime yet put in place for Australian public sector whistleblowers, not least due to the way in which they more intelligently intersect with and combine different areas of law. The emergence of dual compensation paths in the PID Act can be regarded as a simple consequence of history – a combination of replicating existing State approaches *and* reverting to a UK-style employment based approach. However, such a dual approach emerges as potentially advantageous given ongoing development in the categories of those intended to benefit from the law – as discussed above. Employment law remedies are available only where someone meets the definition of an employee, worker or related person within that body of law; whereas a range of individuals whom whistleblowing legislation is intended to encourage, may have relationships with the relevant institutions which stretch or exceed a workplace relationship. Where this is the case, alternative, non-

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<sup>46</sup> See submissions 14 and 19 respectively, at <[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=spla/bill 2013 public interest disclosure/subs.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%202013%20public%20interest%20disclosure/subs.htm)>.

<sup>47</sup> *PID Act 2013* (Cth), 18.

employment based remedies are clearly still needed. Time will tell whether reforms such as the costs rule above are sufficient to make them effective. The PID Act also criminalises reprisals, with an increase in penalties to a maximum of two years' imprisonment, consistently with state laws, also a late amendment<sup>48</sup>. Problematically, as with other Australian laws, the definition of criminal reprisals and civilly-actionable reprisals are the same – raising the problem of whether only reprisals of sufficient seriousness to sustain criminal action can also give rise to civil remedies. Overall, the criminalization of reprisals in Australia has proven more symbolic than substantive, with few prosecutions, and no known successes<sup>49</sup>. The priority given to such offences may have made *real* whistleblower protection more difficult by distracting from, or masking, the reality that the vast bulk of adverse outcomes unjustly suffered by whistleblowers are plainly non-criminal<sup>50</sup>. In partial response, the Act provides that civil remedies are available even if a prosecution for criminal reprisal “has not been brought, or cannot be brought”<sup>51</sup>. A better approach, however, would be to create civil remedies for detrimental action that are entirely distinct from the criminal offence, to make clear that investigations which are unable to find evidence of deliberate, criminal reprisal do not obviate the different question of whether civil and employment duties of care towards a whistleblower have been breached.

This issue also points to the likely battlegrounds now that civil and employment actions may prove more feasible. Section 13 of the PID Act requires that in the case of either criminal or civil case, the “reason, or part of the reason” for the detrimental act or omission must be a “belief or suspicion” that someone had made, might have made or proposes to make a public interest disclosure. The continuing presumption that the act or omission must have been undertaken with the intention of punishing a person for the disclosure is likely to raise questions regarding the burden of proof that should apply<sup>52</sup>. However, it also misses the more fundamental point that such a requirement is not consistent with a more general duty of care to take reasonable steps to provide a safe and supportive workplace. Failures of this duty, not necessarily involving any intention to punish, are the more likely cause of most unfair detriment;

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<sup>48</sup> *PID Act 2013* (Cth), s 19.

<sup>49</sup> Brown et al. 2008, *op cit*.

<sup>50</sup> R. Smith, A.J. Brown, *The Good, The Bad and the Ugly: Whistleblowing Outcomes*, in A. J. Brown (ed.), 2008, *op. cit.*, 129–30.

<sup>51</sup> *PID Act 2013* (Cth), s 19A; following *PID Act 2010* (Qld), sub-s 42(5).

<sup>52</sup> On which, see article by Devine, this issue.

and may be systemic or institutional, more than reflect intention on the part of managers, individually or collectively, to actually cause detriment. In Australia, this issue points to a further way in which different legal approaches might be better integrated, made possible by the institutional or structural approach, described next.

These issues also point to tensions within the anti-retaliation approach. One objective is to encourage whistleblowing and discourage reprisals, by making reprisals legally actionable – but it is only if reprisors can be caught, that any remedies flow, after the damage has been done. This approach may therefore do little to address the root causes of detriment, unless such actions are made so easy that the risk of organizational and managerial liability is very high. If the underlying objective is to ensure organizational justice for whistleblowers, and minimize or prevent detrimental acts and omissions before they occur, then in addition, a more systemic approach is needed.

#### **4. Institutionalising Whistleblowing**

##### *4.1. Context*

The second, “institutional” or “structural” approach, seeks to normalise whistleblowing in organisational and regulatory behaviour by establishing legal requirements for internal and external reporting avenues, and ensuring that investigative obligations are met. It also mandates systems and procedures for the support and protection of whistleblowers from the time of disclosure, rather than waiting for remedies to be pursued after retaliation has occurred. This approach has been prominent in Australia, where it differs from structural approaches in the US and elsewhere by focusing strongly on internal whistleblowing procedures and management obligations, including preventative support, as opposed to creation of whistleblowing channels to independent agencies. From an early stage, Australian regimes have thus been criticized if they failed to detail requirements for internal disclosure procedures, investigative responsibilities, or whistleblower support – and most have done so, in increasing detail<sup>53</sup>.

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<sup>53</sup> Electoral and Administrative Review Commission (EARC), *Report on protection of whistleblowers*, Queensland Government, Brisbane, October 1991, at A11-12; SSC 1994, op cit, pars 4.46, 9.31.

Where some laws originally provided simply that every public agency “must establish reasonable procedures to protect its officers from reprisals that are, or may be, taken against them”, reformed legislation tends to detail the obligations on organizations to recognize and manage disclosures, and requires a lead oversight agency to set standards for organizations’ internal disclosure procedures, and monitor compliance<sup>54</sup>. These frameworks have been informed by the research mentioned earlier, which, based on data from 118 federal, state and local government agencies, showed that agencies who take their responsibilities seriously achieve better outcomes in the management of whistleblowing than agencies that do not<sup>55</sup>. The Australian Standard for organisation-level whistleblower protection programs was incorporated in this research<sup>56</sup>. Thus, in Australia, there are some signs of success from the implementation of structural or institutional approaches, at least in the public sector.

#### 4.2. PID Act

The new PID Act is also based strongly on this approach, albeit in slightly different ways. It requires federal agencies to have “procedures for facilitating and dealing with public interest disclosures relating to the agency”, which must comply with standards set by the principal oversight agency, the Commonwealth Ombudsman<sup>57</sup>. The approach is reinforced by a range of direct requirements as to how disclosures must be handled. First among these is that protection obligations commence with an internal disclosure to any manager who directly supervises the whistleblower, in addition to designated “disclosure officers” or external agencies<sup>58</sup>. Again a product of late amendment, this approach follows that established by two State laws<sup>59</sup>, and requires the regime – if it is to be effective – to be fully institutionalised in the management systems of the organisation. In addition, the PID Act follows these States in establishing

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<sup>54</sup> *Whistleblowers Protection Act 1994* (Qld) s 44; by contrast, see now *PID Act 2010* (Qld) 28, 49, 60; *PID Act 2012* (ACT), 28, 33.

<sup>55</sup> See P. Roberts, *Evaluating Agency Responses: Comprehensiveness and the Impact of Whistleblowing Procedures*, in A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector...*, 2008, *op. cit.*, 233; Roberts, Brown & Olsen, *Whistling While They Work...*, 2011, *op. cit.*

<sup>56</sup> See Australian Standard, *Whistleblower Protection Programs for Entities*, 2003.

<sup>57</sup> *PID Act 2013* (Cth), 59(1) and 74.

<sup>58</sup> *PID Act 2013* (Cth), 26, 34, 60A.

<sup>59</sup> *PID Act 2010* (Qld) 17; see also *PID Act 2012* (ACT) 15.

a dual subjective and objective test for identification of disclosures. The Act is triggered not only when a whistleblower “[honestly] believes on reasonable grounds that the information tends to show” disclosable conduct, but where information *does* “tend to show” such conduct, irrespective of belief<sup>60</sup>. This increases the responsibility on agencies, from junior managers up, to recognise what public employees are reporting even when this occurs only informally, accidentally, or is mixed with other matters or grievances.

Second, agency heads have a statutory responsibility to take “reasonable steps... to protect public officials who belong to the agency from detriment, or threats of detriment” relating to disclosures<sup>61</sup>. This is reinforced by a requirement for agency procedures to include processes for “assessing risks that reprisals may be taken against the persons who make those disclosures”<sup>62</sup>. This requirement follows a precedent set by Australian Capital Territory legislation<sup>63</sup>, and embeds the policy expectation that agencies will put in place pro-active systems for supporting whistleblowers, to prevent or minimise detrimental acts or omissions. Whistleblowers must also be kept informed of the progress of any investigation at least every 90 days; and their consent must be obtained before their identity can be included in any referral of the disclosure within or between agencies<sup>64</sup>. The inclusion of such requirements in the statute, as opposed to standards or procedures, addresses key points at which trust relationships between whistleblowers and their agencies often break down, as indicated by research<sup>65</sup>.

Finally, the system is supported by two independent oversight agencies: the Ombudsman and, in respect of intelligence agencies, the Inspector-General of Intelligence and Security (IGIS), with provision for some coordination between them. This reflects similar strengthening of oversight agency roles at State level<sup>66</sup>. A range of internal agency decisions must be notified to these oversight agencies, including exercises of discretions not to investigate disclosures, to ensure that disclosure systems

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<sup>60</sup> *PID Act 2013* (Cth), 26.

<sup>61</sup> *PID Act 2013* (Cth), 59(3)(a).

<sup>62</sup> *PID Act 2013* (Cth), 59(1).

<sup>63</sup> *PID Act 2012* (ACT), 33(2); and *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth), 34(b), 35(2)(e) and (f).

<sup>64</sup> Sections 52(5) and 44(1), respectively.

<sup>65</sup> See generally Roberts *et al.* 2011, *op cit.*

<sup>66</sup> See *PID Act 1994* (NSW), 20(A)(3) and *PID Act 2010* (Qld), noting that the new oversight role, initially allocated to the Public Service Commission, has been transferred to the Ombudsman: *Public Service and Other Legislation Amendment Act 2012* (Qld).

are working and not being subverted or abused<sup>67</sup>. The Ombudsman is given a back-up jurisdiction to investigate or reinvestigate any disclosure if required, even if it would otherwise lie outside its conventional jurisdiction; and any whistleblower may complain to Ombudsman or IGIS about any breakdown in the process, including failures in support<sup>68</sup>.

### 4.3. Looking Forward

The success of the institutional approach at the federal government level is likely to hinge on the adequacy of these oversight arrangements. While the Act's provisions are consistent with a strengthening of such roles across Australian jurisdictions, the oversight roles are configured firstly as coordination and monitoring roles, and only secondarily as roles that may require active intervention, by way of investigation, in agency affairs. Whether or when the oversight agencies choose to intervene to protect whistleblowers, and how well they do so, given expertise and resources, will be pivotal to agency implementation and broader confidence in the system. Research shows that while public agencies can be good at implementing procedures to encourage whistleblowing and act on the disclosures, they are less proficient in implementing procedures to protect and support their staff<sup>69</sup>. Given frequent calls for a specialist whistleblower protection agency, on the model of the U.S. Office of Special Counsel, implementation poses a significant test for the Ombudsman and IGIS – especially given evidence of past undercapacity and underperformance by oversight agencies, in terms of their readiness to assist whistleblowers<sup>70</sup>.

As a potential part of the solution, the entrenchment of the institutional approach reinforces questions noted in the previous section, about how the anti-retaliation approach might be made more effective – and how the

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<sup>67</sup> *PID Act 2013* (Cth), 44(1A), 48(1), 50A.

<sup>68</sup> See Consequential Amendments 2013, *Ombudsman Act 1976* (Cth), 5A; *PID Act 2013* (Cth), Notes at 42, 46 and 58.

<sup>69</sup> See A.J. Brown, J. Olsen, *Internal Witness Support: The Unmet Challenge*, in Brown (ed.), 2008, op cit, 203; Roberts, 2008, op cit., 233.

<sup>70</sup> See L. Annakin, *In the Public Interest or Out of Desperation? The Experience of Australian Whistleblowers Reporting to Accountability Agencies*, Ph.D. thesis, University of Sydney, March 2011, available at [http://ses.library.usyd.edu.au/bitstream/2123/7904/1/1\\_annakin\\_2011\\_thesis.pdf](http://ses.library.usyd.edu.au/bitstream/2123/7904/1/1_annakin_2011_thesis.pdf) (accessed August 20, 2013).

approaches might be better aligned. Previously, as discussed, the anti-retaliation model was contingent on identifying acts or omissions taken “in reprisal” for a disclosure. Now, delineation of agency systems for preventing and minimising detrimental outcomes could be more easily supported by extending compensation rights to any detriment suffered as a result of the failure of, or failure to follow, such systems. The requirement for direct *intent or awareness* on the part of individual managers that their acts or omissions would negatively impact can now be seen as a less crucial element. Many, if not most chains of events leading to allegations of reprisal stem from negligent, accidental or even unwitting failures in the proper management of disclosures, including collateral impacts such as the failure to take into account the stress impacts of a disclosure process in other management decisions. Extension of the same civil and employment remedies to these circumstances becomes the next, potentially most effective step<sup>71</sup>. It would also strengthen the ability of oversight agencies to implement the scheme, by bolstering the incentives on agencies to take their protection obligations seriously. Moreover, it would lower and simplify the evidentiary threshold that an oversight agency must meet when called upon to review whether or not a whistleblower has suffered unfairly.

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<sup>71</sup> Such an outcome might be achieved by an additional sub-section 13(4): “Notwithstanding subsection (1), a person (including an agency) takes a reprisal against another person for the purposes of section 14, 15 or 16 if the act or omission causing detriment to the other person is the result of: (a) a failure to fulfil an obligation under this Act; or (b) a failure to follow procedures established under this Act; irrespective of whether any particular person knows, believes or suspects that the other person made, may have made or proposes to make a public interest disclosure.” However other formulations might also better achieve the intent.

## 5. Next Steps for Public Whistleblowing

### 5.1. Context

As outlined elsewhere, efforts to strengthen and clarify the role of whistleblowing to the media have been the single most dramatic area of recent Australian reform<sup>72</sup>. The criteria that should govern whistleblowing to the media have been a central concern of law reform since circumstances for “further disclosure” were defined by the *Public Interest Disclosure Act 1998* (UK)<sup>73</sup>. While this has become the archetype of a “three-tiered model” of internal, regulatory, and public whistleblowing<sup>74</sup>, the first legislation to reflect such a model was the *Protected Disclosures Act 1994* (NSW)<sup>75</sup>. Simplified versions of this approach were introduced in Queensland and Western Australia, in 2010 and 2012 respectively<sup>76</sup>.

In Australian debates, it has thus slowly become clear that protection of public whistleblowing is not only necessary from a free speech and open government perspective, but can serve to reinforce the approaches above. In particular, the NSW, Queensland and WA provisions have supported the institutional approach, by providing incentives for agencies and regulators to provide disclosure channels and investigate competently, so as to minimize the number of whistleblowers needing to go to the media. The provisions apply where agencies fail to receive or act on disclosures, fail to keep the whistleblower informed as to the action being taken, or conclude the matter with no action. From these laws, however, it has been less clear how public whistleblowing provisions might support the anti-retaliation approach, for example by legitimizing public disclosure where

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<sup>72</sup> A. J. Brown, *Flying Foxes, WikiLeaks and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, in D. Lewis, W. Vandekerckhove (eds.), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, London, 2011, at 86; A. J. Brown, *Weeding Out WikiLeaks (And Why It Won't Work): Legislative Recognition of Public Whistleblowing in Australia*, in *Global Media Journal (Australian Edition)*, 2011. vol. 5. n. 1, [http://www.commart.uws.edu.au/gmjau/v5\\_2011\\_1/brown\\_ra.html](http://www.commart.uws.edu.au/gmjau/v5_2011_1/brown_ra.html) (accessed September 24, 2013); Dworkin and Brown, 2013, *op. cit.*

<sup>73</sup> See *Employment Rights Act 1996* (UK), 43G, 43H.

<sup>74</sup> W. Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in D. Lewis, (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research*, Edward Elgar, Cheltenham, 2010, 15-35.

<sup>75</sup> *PID Act 1994* (NSW) 19.

<sup>76</sup> *PID Act 2010* (Qld), 20(4); *PID Act 2003* (WA), 7A, as inserted by *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA).

reprisals occur or insufficient safe disclosure avenues exist<sup>77</sup>. Moreover, the criteria for insufficiency of action have remained undefined. In Australia’s most recent innovations, prior to the PID Act, the Australian Capital Territory legislated in 2012 to incorporate both objectives, and in more detail. A whistleblower is entitled to go directly to the media if following the normal institutional pathways would involve a “significant risk of detrimental action” and be “unreasonable in all the circumstances”; or may go to the media if an official authority has “refused or failed to investigate” the disclosure, given no response or progress report in three months, or investigated but proposed no action, notwithstanding the continued existence of “clear evidence” of the disclosed conduct. In either case, to retain protection, the whistleblower also only disclose to journalists what is “reasonably necessary” to achieve action<sup>78</sup>. These ACT provisions thus provided the benchmark for such provisions; along with the alternative private member’s Bill, itself based on the ACT provisions<sup>79</sup>.

### 5.2. PID Act

The PID Act is notable for adopting and entrenching the public whistleblowing approach, or “three-tiered” model<sup>80</sup>. Indeed, it is one of the first national laws to do so, comprehensively, given that unlike other laws such as those applying in the United Kingdom, the Act extends to an attempt to deal with the sensitive area of whistleblowing affecting national security and intelligence interests. While its provisions fail to meet the

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<sup>77</sup> This is notwithstanding long term recognition of the validity of such criteria, including support for public disclosure where “to make a disclosure along other channels might be futile or result in the whistleblower being victimised”: SSC 1994, *op cit*, at par 9.130.

<sup>78</sup> See *PID Act 2012 (ACT)*, s 27.

<sup>79</sup> See *Public Interest Disclosure (Whistleblower Protection) Bill 2012 (Cth)* 31-33 (Austl.).

<sup>80</sup> This was an objective of the 2007 policy commitments: see Australian Labor Party (ALP), *Government Information: Restoring trust and integrity*, Australian Labor Party Election 2007 Policy Document, Canberra, October 2007. For further background, see I. Moss, *Report on the Independent Audit into the State of Free Speech in Australia*, Australia’s Right to Know Committee, Sydney, 31 October 2007; A. J. Brown, *Privacy and Public Interest Disclosures – When is it Reasonable to Protect Whistleblowing to the Media?*, in *Privacy Law Bulletin*, 2007, vol. 4, n. 2, 19-28; Brown et al., 2008, *op. cit.* The 2009 parliamentary inquiry gave broad support to the principles of public disclosure, recognizing that anything short of a three-tiered approach would simply “lack credibility”, but only arrived at a narrow and complex compromise recommendation: LACA 2009, *op. cit.*, at 162–65.

ACT benchmark in some respects, this aspect of the Act nevertheless represents a significant international development – for three reasons.

First, the Act follows its predecessors in supporting the institutional approach, providing that a public or “external” disclosure will retain protection where the whistleblower “believes on reasonable grounds” that a prior investigation is “inadequate”<sup>81</sup>. This mixed subjective-objective test provides more useful guidance than the equivalent Queensland or WA provisions, while being a lower threshold for whistleblowers to meet than the NSW or ACT provisions. It was substantially amended at the Bill stage, after the government’s original Bill proposed a more stringent, objective threshold (that “no reasonable person” could accept that the response was adequate)<sup>82</sup>. As in the ACT, protection for an external disclosure will also only flow in respect of information that is “reasonably necessary” to identify disclosable conduct. However, the PID Act also requires an additional test that the further disclosure must not, on balance, be “contrary to the public interest”, with a range of criteria specified to guide this judgment, including a repetition of the basic public interest objectives of the Act<sup>83</sup>. Whether this test is necessary, or proves to be unreasonable impediment to disclosures, remains to be seen.

Second, the Act provides some support to the anti-retaliation approach, but only in a more limited and indirect way. The only circumstances in which a direct disclosure to the media is protected, without prior internal disclosure, is an “emergency disclosure” concerning a “substantial and imminent danger to the health or safety of one or more persons or to the environment”, where there are “exceptional circumstances” justifying the failure to make a prior disclosure<sup>84</sup>. Such circumstances might include the lack of a reasonably safe disclosure avenue, but this is left to interpretation. For an external disclosure *after* a prior internal disclosure, one element of the public interest test is the extent to which the further disclosure “would assist in protecting the discloser from adverse consequences relating to the disclosure”<sup>85</sup> – providing some indirect recognition that an agency’s failure to support and protect a whistleblower may make public disclosure more justifiable.

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<sup>81</sup> *PID Act 2013* (Cth), s 26(1), Table, Item 2, par (c).

<sup>82</sup> See *PID Bill 2013* (Cth) (March), cl. 37, 38, 39 (deleted from final Act); and cl. 26 “designated publication restrictions” (see section 11A of the final Act).

<sup>83</sup> *PID Act 2013* (Cth), sub-s 26(1), Table, Item 2, pars (e), (f); sub-s 26(3).

<sup>84</sup> *PID Act 2013* (Cth), sub-s 26(1), Table, Item 3.

<sup>85</sup> *PID Act 2013* (Cth), sub-s 26(3), par (ac).

Third, the Act takes a first, albeit limited and compromised step towards recognition that public whistleblowing should be protected even in respect of some national security and intelligence matters. From the outset, the Government policy was to ensure that whistleblowing to the media would only be protected where the public interest in disclosure outweighed “countervailing public interest factors”, including protection of international relations and national security, and provided that no “intelligence-related information” was publicly released<sup>86</sup>. Consequently, no public disclosure will be protected if it contains “intelligence information” as defined by the Act; and any public disclosure relating to any conduct involving intelligence agencies will only be protected, if it meets the above definition of an “emergency disclosure”<sup>87</sup>. This means that unless an emergency arises (and perhaps even if it does), intelligence agency whistleblowers are treated differently from those in all other agencies; if they make an internal disclosure, then irrespective of its subject matter, they cannot take that disclosure public even if the investigation is patently inadequate. In practice, the definition of “intelligence information” is also so broad, that even an emergency disclosure by an intelligence agency whistleblower is probably unprotected. This is because the definition includes *any* information “that has originated with, or has been received from, an intelligence agency”, which would appear to include any information relating to such an agency<sup>88</sup>. On one hand, therefore, a protected emergency disclosure relating to conduct by or within an intelligence agency is technically possible, making the Act one of the first internationally to recognize this possibility. On the other hand, technicalities in the Act also make it difficult to see when these circumstances might realistically apply.

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<sup>86</sup> Commonwealth Government, *Government Response: Whistleblower protection: A comprehensive scheme for the Commonwealth public sector*, Tabled by Senator J Ludwig, Special Minister of State, 17 March 2010. Canberra: Commonwealth of Australia.

<sup>87</sup> *PID Act 2013* (Cth), s 26(1), Table, Item 2, pars (h) and (i).

<sup>88</sup> *PID Act 2013* (Cth), s 26(1), Table, Item 3, par (f); s 41, in particular, par (a) of subsection 41(1).

### 5.3. *Looking Forward*

How well the new provisions will work, in respect of the bulk of disclosure activity, remains to be seen. They reinforce the international problem that a workable solution in respect of the coverage of intelligence agencies is yet to be found – given that in principle and practice, there is no justification for a total carve-out of these agencies from this element of the regime. The practical effect of the provisions is that corruption in an intelligence agency could never be the subject of a protected public disclosure, even though identical corruption in any other agency would be, even where the disclosure raises no issues of operational sensitivity or genuine national security interest. Such inconsistencies have the effect of undermining the credibility of the scheme as a whole, both in intelligence agencies and the wider public sector.

Nevertheless, the form of the legislation is such that even in this difficult area, a more effective balance can be envisaged. With the exception of one paragraph, the definition of “intelligence information” is confined to classes of information whose release could indeed be logically argued to have sufficient, real sensitivity to warrant a presumption in favour of retention<sup>89</sup>. This brings the legislation within a hair’s breadth of compliance with the most comprehensive policy principles to date in this area, the Tshwane Principles (2013), developed by the Open Society Justice Initiative<sup>90</sup>. These principles affirm that governments may legitimately withhold information in defined areas of genuine sensitivity, such as defence plans, weapons development, the operations and sources used by intelligence services, and confidential information supplied by foreign governments that is linked to national security matters; but that non-sensitive information should be subject to the same disclosure systems and tests as other official information. Little amendment would be required, therefore, to make the PID Act “Tshwane compliant”.

More broadly, the issues again point to the advantages of developing a more integrated understanding of the relationship between areas of law. Far from simply representing an exercise of freedom of speech, the statutory recognition of public whistleblowing can reinforce the institutional approach, and help fulfill a more effective anti-retaliation

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<sup>89</sup> See *PID Act 2013* (Cth), s 41, with the exception of par 41(1)(a).

<sup>90</sup> Open Society Justice Initiative, *Global Principles on National Security and Freedom of Information*, June 2013, <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles> (accessed July 2013).

approach. Policy resistance to more effective treatment of sensitive information in the context of whistleblowing appears to stem from a failure to distinguish between general rights of public access to information, and the fact that whistleblowing legislation does not concern information in general, but rather, information about reasonably suspected wrongdoing. Given the underlying public interest in the disclosure of such information, it is questionable whether the less rational forms of blanket carve-out legislated for in respect of intelligence agencies would meet constitutional tests of proportionality, if challenged on constitutional or rights-protection grounds. Again, the legislative choices made in the PID Act demonstrate both the advantages of, and need for, a more integrated approach to the intersections between these bodies of law.

## 6. Conclusion

This article has used Australia’s new *Public Interest Disclosure Act 2013 (Cth)*, governing whistleblowing in Australia’s federal public sector, as a case study in how different policy purposes, conceptual approaches and legal options can be combined in the design of better whistleblowing legislation. The new legislation is not perfect, and whistleblowing law reform in Australia is far from complete. On the contrary, law reform in the private sector is long overdue; while serious consideration is only beginning to be given to legislation which uses a “bounty” or reward approach. Some state whistleblowing laws have been recently reformed, but others have not, and none can be regarded as reflecting every element of known best practice. Further, even the new federal public sector legislation reviewed here, contains significant gaps and problems – particularly when public officials disclose wrongdoing by elected members of Parliament or Ministers, or by intelligence agencies in the event that this needs to go public.

Nevertheless, the long gestation and otherwise comprehensive nature of the new Australian law provides insights into the way in which different legal approaches to whistleblowing can, and should, be integrated. In particular, it is one of the first national laws to seek to integrate divergent approaches to the “anti-retaliation” model of whistleblower protection, including its place in the nation’s employment law system; as well as setting new standards for the role of “public whistleblowing” in such a regime. The law thus provides new departure points, internationally, for efforts to align and reconcile the “anti-retaliation”, “institutional” and

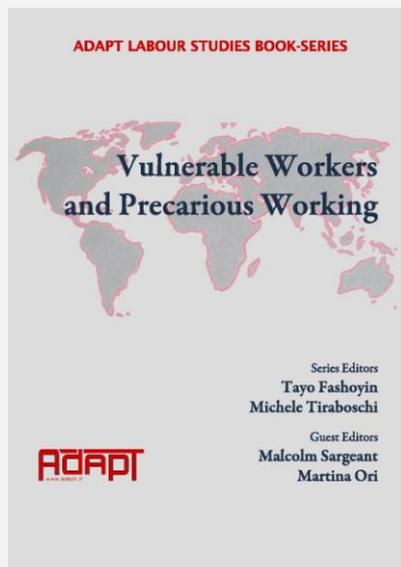
“public” approaches to whistleblowing, in a mutually-reinforcing fashion. As seen through innovations in respect of each, legislative pressures have seen the bringing together of approaches which may have previously been seen as disparate or even competing; or which had previously developed more by accident, than design.

The study also reinforces that notwithstanding international interest, there is no single “ideal” or “model” law that can be readily developed and imported into a jurisdiction such as Australia’s federal public sector. The diverse and often intricate ways in which such legal mechanisms must rely on, and integrate with, a range of other legal regimes in any given jurisdiction, mitigate against such attempts, even when the basic objectives and principles of whistleblowing law reform may be clear. Nevertheless, the experience demonstrates that a more ideal *approach* to law reform is feasible – one which recognises the different purposes and dimensions of whistleblowing laws, and thus makes informed legislative choices in particular contexts. This includes the need for continuing, more informed debate about how legal regimes should be developed to protect the disclosure of wrongdoing not only by whistleblowers, or “insiders”, but other categories of informants, complainants and citizens. Overall, the study shows that better integration can be achieved in most, if not all settings between the different legal dimensions or models of whistleblowing to date. As a result, the new Australian law can be regarded as a significant step in the effort towards achieving not only the rhetoric, but reality of whistleblower protection.

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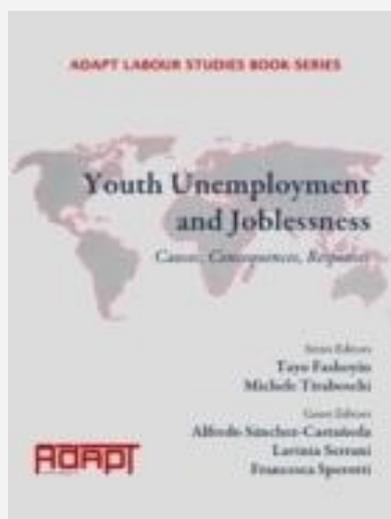
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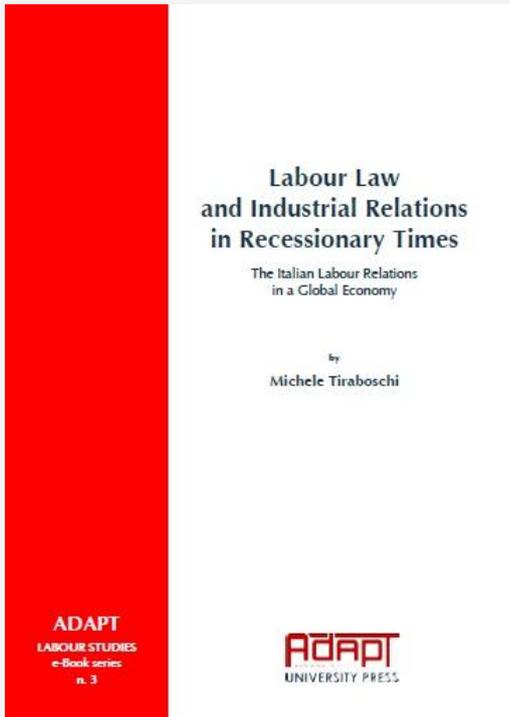


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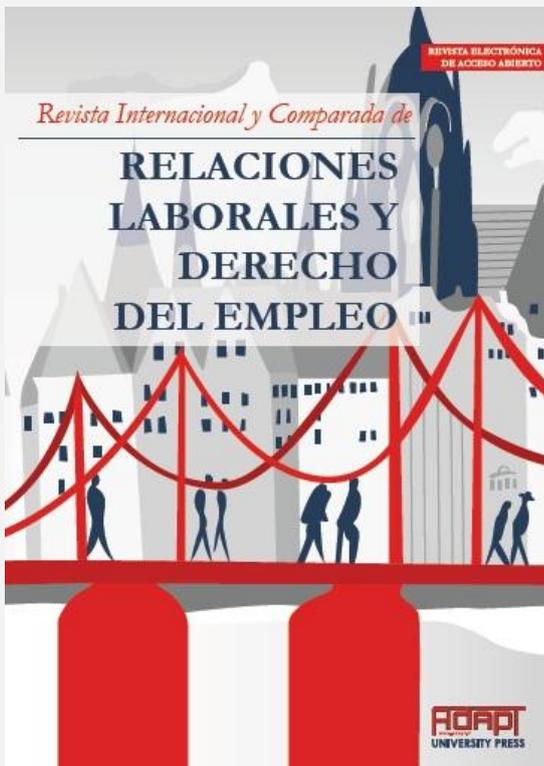
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