

ILLUSIONS OF WHISTLEBLOWER PROTECTION

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Introduction

There are many variations of the whistleblower story. The venue could be the public service, the police, a private corporation, a church or a school. It could involve contracts being awarded to insiders, or the problem could be bribery, private use of company goods, favouritism in appointment and promotion, environmentally damaging practices, production of shoddy goods or any of a host of other issues usually fitting under the categories of corruption and hazards to the public and environment. Reporting the problem to the boss, to a higher-level manager, to an internal hotline, to an outside agency or to the media are all possible scenarios. Rather than being unsuspecting, some employees are aware of taking a risk, though seldom do they realize how big the risk is. As well as rumours, ostracism and questioning of the employee's performance, other reprisals include threats, petty harassment, reprimands, referral to psychiatrists, demotions, forced transfers, assignment to onerous or trivial duties, dismissal and blacklisting. The fate of the whistleblower is often not an attractive one.¹

One response to whistleblowing is to condemn it as treason or disloyalty. Another is to blame the whistleblower for making unfounded allegations. The focus here, though, is on responses that accept that whistleblowers deserve protection because many of them provide a service to society. The next step is to ask how best to protect whistleblowers.

The most common approach to whistleblower protection is the establishment of formal procedures, including grievance committees, ombudsmen, auditors-general, anti-corruption agencies, courts and whistleblower laws. This general approach can be called "official channels."

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¹ Alford, F. C., *Whistleblowers: Broken Lives and Organizational Power*, Cornell University Press, Ithaca, 2001; De Maria, W., *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia*, Wakefield Press, Adelaide, 1999; Dempster, Q., *Whistleblowers*, ABC Books, Sydney, 1997; Glazer, M. P., and Glazer, P. M., *The Whistleblowers: Exposing Corruption in Government and Industry*, Basic Books, New York, 1998; Hunt, G. (ed.), *Whistleblowing in the Health Service: Accountability, Law and Professional Practice*, 1995; Hunt, G. (ed.), *Whistleblowing in the Social Services: Public Accountability and Professional Practice*, Arnold, London, 1998; Miceli, M. P. and Near, J. P., *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*, Lexington Books, New York, 1992; Miethe, T. D., *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job*, Westview, Boulder, 1999; Vinten, G. (ed.), *Whistleblowing—Subversion or Corporate Citizenship?*, Paul Chapman, London, 1994.

The emphasis on official channels as the most appropriate way of protecting whistleblowers is revealed in several ways:

- political debates about whistleblower laws and their introduction in many jurisdictions;
- the large amount of money allocated to bodies accepting public disclosures compared to other areas such as education, research, training or advocacy;
- attention to official channels in the media;
- attention to official channels by researchers into whistleblowing;
- attention to official channels by whistleblower advisers.²

My argument here is in two parts: first, official channels do not work very well and cannot be expected to; second, a much more productive approach is to promote the development of understanding and practical skills for survival in organizations. The implication is that official channels provide an illusion of protection and distract attention from much more effective avenues for intervention. I focus on whistleblower legislation, the approach that receives most attention; many of the conclusions drawn about it apply to other official channels.

Weaknesses of Whistleblower Legislation

Beginning in the 1990s, whistleblower laws have been enacted in most Australian states and territories, though not at the Commonwealth level. Such laws have a longer history in the United States, while Britain's law is quite new. The stated purpose of these laws is to protect whistleblowers from reprisals and more generally to encourage timely and responsible public disclosures to promote honesty in government. Few of the laws apply outside the public sector. Here I will first assess whistleblower laws at a theoretical level and then look at actual performance.

A fundamental problem with whistleblower laws is that they usually come into play only after disclosures have been made and reprisals have begun. Many employees make disclosures in good faith, not thinking of themselves as whistleblowers. As a result, they have seldom gathered sufficient evidence about the alleged problem to withstand a concerted cover-up. Not anticipating any adverse reaction, they may not be in a position to document reprisals. As a result, invoking whistleblower laws is seldom a practical proposition.

Another problem is that there are many subtle ways for employers to undermine employees without providing clear-cut evidence of reprisals. Rumours and ostracism are two of the most common responses encountered by whistleblowers but are virtually impossible to document. Petty harassment is also potent. It might mean such minor things as unavailability of a company car, awkward rosters, slowness in processing

² Devine, T., *The Whistleblower's Survival Guide: Courage Without Martyrdom*, Fund for Constitutional Government, Washington, 1997.

claims, or requests for excessive documentation. Ostracism itself can cause the equivalent of petty harassment, as a worker is denied access to everyday information needed to do the job efficiently.

At a more serious scale are job reassignments that reduce or increase work demands, either setting up the employee for failure or making the job tedious; in both cases it is often easy to camouflage the changes as necessary due to changes in the work environment or to a more general organizational restructuring. Ironically, it can be more difficult for an employee to deal with subtle undermining than with a more obvious attack such as demotion or dismissal. Subtle harassment can lead some employees to blame themselves whereas blatant attacks are more readily understood as reprisals.

Another problem with whistleblower laws is that they typically pit a lone employee against a powerful organization. The organization can pay for expensive legal advice and has little to lose by making the case as protracted as possible. Individuals in the organization have little at stake; indeed, many of them may have moved on in the years it takes for a case to run its course. On the other side, the whistleblower is often alone in pursuing the case, sometimes without any income and seldom with dedicated backing from an organization.

Whistleblower laws put the focus on whistleblowers and what is done to them. An unfortunate feature of this focus is a relative neglect of the original issue about which the employee spoke out. Whistleblower laws do not and perhaps cannot require an investigation into an employee's allegations. During the drawn-out process of assessing whether reprisals have occurred, the original issue is not addressed. For a dismissed whistleblower, "success" usually comes in the form of a settlement, not a reinstatement; success in terms of organizational reform is not part of the agenda of whistleblower laws.

These shortcomings of whistleblower laws are so systemic that it is worth asking why anyone would bother with them at all. Three types of explanations can be labelled sincere, symbolic and cynical.

Undoubtedly most of those who promote whistleblower laws are completely sincere. This includes many whistleblower activists whose sincerity cannot be doubted, given that they themselves are victims of reprisals. But sincerity of intent is no guarantee of effectiveness in execution. The flaws in the vehicle—whistleblower legislation—are seen as unfortunate weaknesses, due to poor drafting, inadequate resources or ineffectual implementation.

A different explanation is that whistleblower laws are a form of symbolic politics,³ serving to give the appearance of political action without any substantive change in institutional dynamics. Symbolic politics is deployed when popular pressure becomes strong. A law gives the appearance of

³ Edelman, M., *The Symbolic Uses of Politics*, University of Illinois Press, Urbana, 1964.

government concern even though it may not lead to any change in behaviour. For example, governments can placate concerns about crime by passing laws even though there is little evidence that longer prison sentences form a deterrent to violent crime or that more than a tiny proportion of corporate crime is ever prosecuted.

Thoms,⁴ using a Weberian analysis, argues that

Whistleblower legislation strives to control the agenda of whistleblowers and to contain their disclosures to channels which are under the purview of the state. Under regimes of authorized whistleblowing, the potential for criticism and review of the operations of the state by the public it is said to serve are virtually non-existent.⁵

The cynical explanation of whistleblower laws is that they are intended to encourage employees to speak out, revealing their identity and, rather than protecting them, instead making them easier targets for attack. This explanation is espoused by a few disillusioned whistleblowers.

These explanations are actually compatible. Promoters of whistleblower laws may be quite sincere but the laws in effect can serve to give the illusion of protection. They may also lead employees to believe, mistakenly, that they are protected and thus to become easier targets than if the laws did not exist.

At a broader theoretical level, it can be argued that effective whistleblower laws would be incompatible with hierarchical social structures. There is considerable evidence that various forms of abuse and corruption are found in all aspects of life and that those with more power are especially susceptible.⁶ A whistleblower is, in essence, a person who believes that truth should prevail over power: a successful whistleblower brings down corrupt people in high places purely by exposing information. An often-cited analogy is to the emperor with no clothes. If all politicians, executives, clergy, trade union officials and others who abused their positions—or even just cheated on tax—could be brought down simply by exposure, their ranks would be severely depleted. From this point of view, whistleblowers are a potential threat to nearly everyone in powerful positions and thus need to be domesticated.

These theoretical considerations thus lead to the prediction that whistleblower legislation will not be effective in practice. Assessing this prediction involves two stages: examining actual laws (as opposed to ideal laws) and looking at implementation of actual laws.

⁴ Thoms, C., *The Advent of Whistleblower Legislation: A Sociological Analysis*, Master of Letters sub-thesis, Australian National University, Canberra.

⁵ *Ibid.* at 83.

⁶ Kipnis, D., *The Powerholders*, University of Chicago Press, Chicago, 1981; Simon, D. R. and Eitzen, D. S., *Elite Deviance*, Allyn & Bacon, Boston, 1982; Sorokin, Pitirim A. and Lunden, W. A., *Power and Morality: Who Shall Guard the Guardians?*, Porter Sargent, Boston, 1959.

William De Maria⁷ has made the most incisive scrutiny of Australian whistleblower laws. He shows that these laws are riddled with weaknesses. For example, he analysed the Victorian *Whistleblower Act 2001* using 24 performance standards, such as having an independent authority, a duty to investigate, private sector coverage, injunctive relief and counselling services for whistleblowers.⁸ Although he thinks this is the best whistleblower law in Australia so far, he nonetheless concludes that imperatives of government secrecy are given fuller expression in the act than any commitment to openness or protection.

It is worth highlighting the law's coverage of whistleblowers who disclose to the media. De Maria⁹ comments:

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

The "common knowledge" about the value of the media as an ally of the whistleblower is revealed in manuals giving advice for whistleblowers.¹⁰ The law's failure to protect whistleblowers who go to the media is a clear indication that the law is oriented to domesticating dissent rather than empowering the whistleblower or putting priority on action against wrongdoers. To take advantage of the law requires that the whistleblower pursue official channels that keep the matter of concern under wraps, with no alert given to wider constituencies that might apply pressure for action. Given that the procedures involved may take months or years while the problem remains unchallenged, this provides a perfect method to minimize challenges to organizational hierarchies.

De Maria¹¹ has also looked at whistleblower laws, both proposed and implemented, in other Australian states and in several countries, reaching similar conclusions. Indeed, he finds that whistleblowers acts are copied, in large part, from one jurisdiction to another, usually perpetuating the same sorts of shortcomings.

⁷ De Maria, W., *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia*, Wakefield Press, Adelaide, 1999.

⁸ De Maria, W., "The Victorian Whistleblower Protection Act: Patting the Paws of Corruption?", paper given to the Staff Seminar, Department of Business Law and Taxation, Monash University, 03/05/02.

⁹ Ibid.

¹⁰ Devine, T., *The Whistleblower's Survival Guide: Courage Without Martyrdom*, 1997; Martin, B., *The Whistleblower's Handbook: How to Be an Effective Resister*, Fund for Constitutional Government, Washington, 1999.

¹¹ De Maria, W., "Common Law—Common Mistakes: The Dismal Failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom", paper presented to the International Whistleblower Conference, University of Indiana, 12–13 April 2002.

Even an ideal law on the books means little unless it is implemented forcefully and conscientiously. In Australia, there have been many disclosures made under the various whistleblower acts but not a single prosecution of anyone who has acted against a whistleblower. In South Australia, members of Whistleblowers Australia have for years urged the government to act in relation to a particular case, so far unsuccessfully. It is beyond belief that the laws have completely deterred reprisals, since reports of reprisals are received regularly by Whistleblowers Australia. Instead, it appears that agencies responsible for implementing the laws do not see it as their role to initiate prosecutions. Rather, the laws are allowed to operate as symbolic deterrents.

For example, in the case of the Education Testing Centre at the University of New South Wales, it was reported that the internal whistleblower had suffered serious reprisals. The major impetus to reform seems to have been media reports about the problem following official investigations. Ironically, investigating agencies in this case seem to have had their main impact via the media while at the same time the state's *Protected Disclosure Act* gives protection only if the whistleblower does not go to the media.

In many cases, the agency that receives protected disclosures refers them back to the organization concerned. In other words, an employee concerned about wrongdoing makes a disclosure to an outside body, in an attempt to promote independent scrutiny, only to find that the matter is referred back to the employer. In one sense this is understandable: an outside body seldom has the resources or detailed knowledge to get to the bottom of an internal matter. This practical limitation reflects the theoretical point that whistleblower laws are inadequate because they operate after the fact. They also point to the fundamental point that it is unrealistic to expect a law to undermine powerful organizational hierarchies.

A common response of whistleblowers to these shortcomings has been to press for *better* whistleblower laws. For example, Whistleblowers Australia¹² has produced a leaflet, "Whistleblowers of national significance," using four prominent whistleblower cases to argue for better legal protection, in particular the establishment of an independent agency to receive disclosures. Yet this may be a futile hope, given the theoretical and practical shortcomings of even the best laws.

Whistleblower laws are only one avenue for handling disclosures and protecting whistleblowers. Other official channels include hotlines, auditors-general, ombudsmen and courts. De Maria and Jan,¹³ in the most comprehensive survey of whistleblowers carried out in Australia, found that whistleblowers reported that less than one in ten approaches to official

¹² Whistleblowers Australia and Whistleblowers Action Group, "Whistleblower Cases of National Significance", 2001 (brochure).

¹³ De Maria, W. and Jan, C., "Behold the Shut-eyed Sentry! Whistleblower Perspectives on Government Failure to Correct Wrongdoing", (1996) 24 *Crime, Law and Social Change*, 151-166.

bodies provided any benefit, and in some cases they reported being worse off as a result. This is compatible with the practical advice by Devine¹⁴ concerning official channels in the United States, which is basically that extreme caution is advised, with no channel providing a secure avenue for redress. Even the much-touted *False Claims Act*, which can result in large pay-outs to successful complainants, is far from an easy road. These assessments can be explained, in a general way, in the same way as the shortcomings of whistleblower laws: it cannot be expected that any formal procedure could be enacted and implemented that would enable single individuals, backed solely by the truth, to reliably win against powerful organizational elites.

Skills for Challengers

Rather than assuming that the solution to wrongdoing lies in official channels, an alternative approach is to look at a wider range of options, with a focus on empowerment. Concerning a range of options, it is revealing to ask, who is given power? When a person makes a disclosure to an agency, it is the agency that then takes the running, giving more power to officials in the agency. When a person takes a matter to a court, power is given to lawyers and judges. In general, official channels give power to bureaucrats and lawyers and do little to develop alternative sources of power.

The concept of “power” is a notoriously contested one and the speak of “empowerment” can be ambiguous. More precision is possible by talking of skills that are useful to an employee who might need to deal with a problem at work. Conveniently, there is a fair degree of consensus among those who give advice to whistleblowers.¹⁵ Here are some of the key skills:

- **Collecting data.** Whistleblowers are repeatedly reminded to collect lots of documents—more than they would imagine are ever necessary—and to make copies and keep them in safe places. “Collecting data” sounds straightforward but actually involves a considerable degree of understanding and skill. Employees may only realize too late that they should have collected documents about the employment performance, including statements from supervisors and co-workers, to protect against attacks on their competence. For those who decide to disclose anonymously—in other words, to leak—certain skills are valuable for avoiding detection.¹⁶
- **Writing coherent accounts.** It is immensely valuable to be able to write a concise, informative, unemotional account of an issue, in order to make others aware of the issues quickly and efficiently. Such an account

¹⁴ Devine, op. cit.

¹⁵ Ibid.; Lennane, J., “What Happens to Whistleblowers, and Why”, in Woldring, Klaas (ed.), *Business Ethics in Australia and New Zealand: Essays and Cases*, Thomas Nelson, Melbourne, 1996, 51–63; Martin, op. cit.

¹⁶ Hager, N. and Burton, B., *Secrets and Lies: The Anatomy of an Anti-Environmental PR Campaign*, Craig Potten, Nelson, 1999, 240–247.

can be used as an introduction to a fuller disclosure to an agency or to introduce a person's story to co-workers, media or outside action groups. All too often, whistleblowers are so close to the issue that they cannot readily explain it to outsiders: potential supporters are put off by receipt of a centimetre-thick pile of documents. One of the reasons that media attention is so useful to whistleblowers is that journalists know how to write a compelling story.

- ***Understanding organizational dynamics.*** Many whistleblowers say, down the track, that initially they were naive: they trusted "the system" and did not realize that their disclosures would result in such savage reprisals. Basically they did not understand organizational dynamics. It is commonplace for people to believe that the world is just,¹⁷ reprisals against conscientious, honest employees simply do not fit this picture. Whistleblowers are likely to think of organizations as administrative systems, hence their trust in official channels. An alternative perspective is to think of organizations as systems of power, indeed of bureaucratic organizations as analogous to authoritarian states.¹⁸
- ***Building support.*** In order to have a chance of bringing about a change in an organization, it is necessary to gain support, in effect to create an alliance. This can include co-workers, unions, outside agencies and community groups. The skills relevant here are close to what is involved in community organising,¹⁹ but both inside and outside organizations.
- ***Using the media.*** Media coverage is frequently a key source of support for whistleblowers. Understanding the dynamics of the media, such as news values and journalists' expectations, often can make the difference between favourable and unfavourable coverage, or whether there is any coverage at all. Large organizations have units to handle public relations but few employees have, or have access to, equivalent skills.
- ***Self-understanding.*** Understanding one's own motivations, aspirations, capabilities and vulnerabilities is immensely valuable for anyone, especially those who are taking a risk in an organization. Potential whistleblowers are commonly advised to assess their motivations: being driven by envy or resentment is not a good basis for effective action. Wyatt and Hare²⁰ argue that shame is a central dynamic in organizations and that understanding and separating oneself from shaming is a key to survival.

¹⁷ Lerner, M. J., *The Belief in a Just World: A Fundamental Delusion*, Plenum, New York, 1980.

¹⁸ Weinstein, D., *Bureaucratic Opposition: Challenging Abuses at the Workplace*, Pergamon, New York, 1979.

¹⁹ Alinsky, S. D., *Rules for Radicals: A Practical Primer for Realistic Radicals*, 1971; Fisher, R., *Let the People Decide: Neighborhood Organizing in America*, Random House, New York, 1984.

²⁰ Wyatt, J. and Hare, C., *Work Abuse: How to Recognize and Survive It*, Schenkman, Rochester, 1997.

These skills provide a firm foundation for any employee wanting to take action concerning problems in an organization. This list no doubt could be augmented and refined, but for the purposes here it is only necessary to point out that it is a potentially powerful but relatively neglected option compared to use of official channels. Table 1 lists a number of differences between the use of official channels and skill development.

	<i>Official channels</i>	<i>Skill development</i>
<i>Assumption about justice</i>	Provided by official bodies	Achieved through social action
<i>Locus of action</i>	Official bodies	Employee
<i>Importance of evidence</i>	Great	Great
<i>Role of media</i>	Nonexistent or incidental	Potentially large
<i>Links to others in the same situation</i>	Not necessary or common	Important
<i>Biggest costs</i>	Lawyers; agency staff time	Employee's time
<i>Timing</i>	After blowing the whistle	Preferably before taking action
<i>Learning spin-offs</i>	Official bodies learn how to handle cases	Employees learn how to take action

Table 1: Use of official channels and skill development, as options for whistle-blowers, compared on a number of dimensions

This table indicates the big differences between the options of using official channels and developing skills. Both options are built on collection of evidence. In the official channel option, this is where the role of the employee begins and ends; the evidence is turned over to official bodies, which thereafter take the running. In the skill development option, the employee retains a much larger responsibility in choosing how to use the evidence, including how to understand what is happening, whom to consult, how to build support and how to promote change in the organization.

At the moment, governments invest millions of dollars into official channels; corporations invest a much smaller but still significant amount. In contrast, investment in skill development for dealing with organizational wrongdoing is minimal. In New South Wales, the Independent Commission Against Corruption puts effort into increasing managers' and employees' awareness of the *Protected Disclosures Act*. This can be considered a type of education, but oriented to using official channels.

Most relevant skill development occurs through practical experience. When employees discover a problem and speak out about it, they may subsequently undergo a crash course in understanding the dynamics of

organizations, collecting evidence, building support and learning how to contact the media, this “course” consisting largely of the lessons provided through the “school of hard knocks”. Experienced organizational activists—some labour organizers qualify here—can be sources of advice, as can whistleblower groups. When outside groups—such as environmentalists—are concerned about an organization, they may be able to provide assistance in developing skills. In general, developing skills to deal with organizational wrongdoing is unsystematic, sporadic and, for many employees, an unknown continent.

Skill development and use of official channels both rely on collecting data, but they also have a number of connections not mentioned so far. Skills in self-understanding, writing accounts, building support and using the media can be quite useful even for those who decide to use official channels. For example, well-written letters or tactical media coverage can be effective in pushing along an official investigation. Those who pursue official channels, especially those who are actively involved in their cases, often develop a number of the skills mentioned here, skills that can be employed in later organizational struggles. Nevertheless, there are some significant differences, notably that skills developed through using official channels are typically oriented to those channels in an attempt to redress reprisals, whereas skills developed prior to any disclosure can be used in a preventive and proactive fashion.

Conclusion

Reading about whistleblowers can be depressing: their experiences are traumatic, the way they are treated is grossly unfair and their success rate in leading to reform in organizations is extremely low. It is an additional source of disillusionment to find that official bodies—despite the good intentions of most of those who work in them—are so seldom helpful. But there are a few signs of hope.

First, the very concept of whistleblowing is only a few decades old. Abuses of employees are as old as organizations, as is the visiting of reprisals on those who expose problems. The naming of a problem is often a large step towards dealing with it. There has been an increasing recognition of whistleblowing in English-speaking countries in the past decade, especially due to media stories, aided by Hollywood portrayals such as *The Insider*, the story of tobacco company whistleblower Jeffrey Wigand.

Second, whistleblower legislation, though it may serve primarily as a form of symbolic politics that gives only the illusion of protection, nevertheless reflects social expectations that something be done about organizational abuses. In many countries there is no whistleblower legislation and virtually no recognition of whistleblowing as a course of action. For all their weaknesses, official channels offer an acknowledgement that whistleblowing is legitimate and socially valued, raising expectations of action and justice.

Third, whistleblowers and their supporters are sharing their insights and experiences. Books and articles provide a valuable resource. There is an ever-larger amount of material on the web, providing information and contacts. In Australia, Britain and the United States, there are organizations whose members are whistleblowers, providing mutual help and support. The sharing of information and experience provides a rich form of learning that is especially powerful because of the personal trauma of whistleblowing. In years gone by, most whistleblowers would have been likely to suffer in silence, often blaming themselves. This still occurs, but it is now more common for workers to search the web, find relevant information and contacts and plot a course of action with a better chance of success.

As workers develop better skills, they will have higher expectations of official channels. A well-informed and well-connected employee will not turn to official bodies unless they promise better prospects than what individuals can achieve through their own efforts. Why make a protected disclosure when a leak or a well-planned campaign is safer and more effective? This suggests that the best way to improve the performance of official channels is to develop workers' understanding and skills.

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