GLOSSARY

Given the difficulty of trying to convey a new way of looking at things in old language **Freedom to Care** ***uses some words which may be unfamiliar. Here are a few:***

Pyramid of Concern: In every unethical organisation there is widespread dissent but the numbers of employees willing to take that forward decreases as the obstructiveness of management and the risks for the employee increase. Whistleblower: Someone who is victimised and labelled as hero or troublemaker for going public with a concern. Thwarted complainant: Someone who raises a concern but is blocked internal to the organisation. Fearful bystanders: The majority in an organisation who are too afraid to act at all on what they know to be wrong. Procedural attrition: The abuse of procedures by management to grind down dissenters. Whistleblower stress syndrome: a state of very low morale and exhaustion forced upon the dissenter by the unethical organisation. Corporate Accountability: The duty and preparedness of an organisation to account honestly, self-critically and constructively for its acts and omissions. Personal executive liability: The legal responsibility of executive managers to face the consequences of their actions in the public sphere.
Unethical organisation: The organisation lacking in corporate accountability and personal executive liability. Public interest: An antiquated legal concept by which a court or government justifies anything it pleases. Openness Presumption: The presumption that anything is disclosable unless a good reason can be provided for keeping it secret. Secrecy Presumption: The presumption that nothing is disclosable unless one can provide a good reason.
Reversing the Onus: Taking the burden of proof off the citizen and placing it on the organisation. Ethical dissenter: Anyone who has the conviction that their organisation is basically unethical. Citizenship in the workplace: The assertion in the workplace of the priority of one's rights and duties as a citizen. Citizenship: The state of having rights and duties as a member of a community. Citizenship discrimination: Unfavourable action by an organisation against an individual because of their assertion of their rights and duties as a citizen.
Punitive compensation: Compensation which is not only meant to provide restitution for the victimised but punish and deter the victimiser.

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The FREEDOM TO CARE Whistle

A WHISTLEBLOWER PROTECTION ACT Would it Work?

This issue
is dedicated to

Ken Saro-Wiwa

Ogoni leader
whistleblower
and global citizen

unnecessary degree of control over the process of investigation.

Resourcing the Whistleblower

The draft bill does not acknowledge the enormous resource problems associated with whistleblowing. In the absence of collective dissent and whistleblower class action, the employee of conscience faces the fully resourced might of the organization alone. Administrative strategies within the bill could allow for the following services, all designed to correct the individual-organisation power imbalance:

DEFENCE FUND ALLOWANCE: To provide for bona fide whistleblowers a sum of money for costs of administering their disclosure and protecting themselves. Photocopying, telephone calls, witness expenses, transport costs, and typing are the sort of services which would be payable under an administrative compensation scheme.

SPECIAL LEAVE: To compensate whistleblowers who must take leave to administer their disclosures and protect their careers, good names and families.

PROFESSIONAL COSTS: To reimburse whistleblowers for legal, medical, and counselling services when such are not provided, or not fully provided, by legal aid and health insurance.

STRESS LEAVE: The ever-tightening compensation laws with respect to access to stress leave make it important that a special provision exists for people suffering from the 'whistleblower stress syndrome'.

REFERENCES

(1) J Griffith (1993) Judicial Politics Since 1920, 162-64

(2) The Independent, 28-06-95, p. 11.

(3) The Australian Senate Select Committee on Public Interest Whistleblowing states: "The whistleblower is a concerned citizen, totally, or predominantly motivated by notions of public interest, who initiates of her or his own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing."

(4) Mathew Goode, Professor of law at the University of Adelaide says of this aspect of the UK bill: "There is a mass of uncertain law on what [public interest defence to breach of confidentiality] might mean, and it varies in context. Why on earth pick up this series of judicial decisions, the meaning of which is in dispute, which date from the last century ... It is certainly a very conservative test."

(5) I Smith, J Wood & G Thomas (1993) Industrial Law, 5th edn.,

INTRODUCTION

This special issue focuses on a proposed new act of parliament to protect from reprisals employees who raise public concerns. Other countries (USA, Australia, New Zealand) have similar statutes already. The British 'Whistleblower Protection Act', was proposed by Tony Wright MP in the summer of 1995, drafted by Maurice Frankel of the *Freedom of Information Campaign* with some advice from Guy Dehn of *Public Concern at Work*. After careful consideration of the only draft we have seen (received when we requested a copy) we find that we have to reject this draft bill. Our deliberations included a seminar at Brachers Solicitors, Chancery Lane, London, on 19th September 1995, attended by our patrons, John Hendy QC and Allan Levy QC, as well as Alan Hannah of Brachers and four other lawyers and members of our board of directors.

Certainly, the drafters are to be congratulated on getting the ball rolling with a clear idea for legislative reform. Although the bill was rather sprung upon *Freedom to Care*, and our initial reaction was one of 'qualified support', the doubts some of us had at the beginning have deepened into an unequivocal rejection of the principles upon which it rests. The bill shows all the signs of hasty drafting in isolation from the real world experiences of 'whistleblowers', many of whom are members of *Freedom to Care*. Apparently the legal profession and the business community have welcomed the draft bill - Is that a good sign?

Freedom to Care commissioned Dr William de Maria to review the bill. He is very knowledgeable in the area and has already reviewed many such statutes. He lectures in the Department of Social Work & Social Policy, University of Queensland, Australia and is the founder of the Queensland Whistleblower Action Group. He was in the UK in the summer of 1995 and held discussions both with Guy Dehn of *Public Concern at Work* and Geoff Hunt of *Freedom to Care*. Although we do not agree with every point made by de Maria, and we do not think the bill is retrievable, we accept the substance of his argument - an argument which is at certain points reflected in our official position in the Open Letter.

We do not believe there is a quick solution to the problem of 'whistleblowing'. Indeed we think it is only a symptom of a much wider problem of a clash between citizenship and contemporary work culture. Supported by our membership and the grant we have received from the Joseph Rowntree Reform Trust we are working towards a more fundamental and longer term programme for change.

Independent Agency

Independent agencies in the whistleblower area are not popular with legislators, who prefer to absorb whistleblowing investigations into existing investigative agency structures. The New Zealand whistleblower bill is the only instrument that provides for such an independent authority. To be effective the agency must be administratively, fiscally and ideologically independent. A tall order perhaps, but anything short of this will not respond effectively[27].

Sector Penalties

Only one scheme gets close to the enlightened vicarious liability provisions in some of the whistleblowing legislation in the USA. Section 36 of the *Public Interest Disclosure Act 1994 (Australian Capital Territory)* provides for convictions for body corporates and fines of up to five times that allowed to be imposed on individuals. The UK bill should have the power to hurt large corporations whose management have been indifferent to whistleblower suffering within their employees' ranks, or who behind the scenes played a part in perpetrating this suffering.

Media Protection

Protection for whistleblowers who expose via the media is currently the big no-go area for the drafters of whistleblower legislation in Australia and New Zealand. It was clearly avoided by the drafters of the UK bill too. Only one statute (in New South Wales) offers protection for media whistleblowers and that protection is so highly conditional that it remains to be seen whether it will work. Still, it is a major step in the right direction.

Corrupt Political Disclosure

Shortening the striking power of whistleblower schemes by making them hard or impossible to reach corrupt politicians serves no public purpose but plays its part in the protection of political wrongdoing. The difficulties encountered by the Nolan Committee point up the need for facilitating public interest disclosures in this sphere.

Absolute Privilege in Defamation

The UK bill offers the vague and hollow direction that no whistleblowers will be "guilty of an offence under any enactment" (Clause 3(1)(b)). Absolute protection in defamation should be offered and spelled out as it is in three Australian Acts[28]. There are some important decisions coming out of British courts that deter public bodies from using the defamation writ to stifle dissent (See 'The Whistle' No. 7, page 4). It would be appropriate to see

the schedule to this Act has occurred, is occurring or is likely to occur; and

(c) which is of such significance that in an action for breach of confidence a court has found, or in the circumstances would be likely to find, that its disclosure was justified in the public interest.

Disclosures to which this Act applies

2. A disclosure of protected information is made in accordance with the provisions of this Act if, and only if -
   (a) the individual making, or proposing to make, the disclosure -
      (i) is not acting in bad faith
      (ii) believes on reasonable grounds that the information is accurate; and
      (iii) has not been paid, or entered into an agreement providing for payment, in return for making it; and
   (b) in any case where the disclosure has been made the individual who made it had, before doing so, taken reasonable steps to draw the matter to which the information refers to the attention of the person to whom any obligation of confidentiality in respect of that information was owed by him unless, in the circumstances, it was reasonable for him to assume that -
      (i) such steps would be ineffective, or
      (ii) the matter was of such urgency as to warrant the immediate disclosure of the information.

Protection for Whistleblowers

3. (1) No individual shall be -
      (a) penalised in relation to any employment, profession, contract, membership of an organisation or the holding of any office; or
      (b) guilty of any offence under any enactment,

   as a result, or in part as a result, of having made or proposed to make a disclosure of protected information in accordance with the provisions of this Act.

   (2) In this Act "penalty" includes -
      (a) dismissal or redundancy;

the risks of doing so. Also, a good deal of wrongdoing is actually without a third party witness - precisely because it is wrongdoing. In the face of pressure from women's groups Queensland has decided to amend the corroboration laws relating to rape and other sexual offences. Under the previous law judges had to warn juries of the dangers of convicting on uncorroborated evidence. Under a revision to the code judges will no longer issue this warning except in special circumstances. Workplace violence against whistleblowers merges conceptually with sexual violence. The relaxation of the corroboration rule for whistleblowers would increase the vindication of disclosure and investigative effectiveness.

Onus & Belief

Reverse-onus is also a useful strategy for assisting whistleblowers to defend themselves against employer reprisals. That is, the onus is on the employer to provide a satisfactory reason for dismissing the employee, and this requirement is already in the EP(C)A i.e. Employment Protection (Consolidation) Act 1978 (sec. 57), and so it is not surprising that it appears in the draft bill. While reverse-onus is absolutely important it is currently inadequate in UK employment law because the fairness of the dismissal is based on reasonableness and not on injustice[23]. In the words of Denning in *Alidair -v- Taylor*, "The tribunal have to consider the employer's reason and the employer's state of mind"[24]. Denning speaks of the employer "honestly believ[ing] on reasonable grounds" and that this was "a good and sufficient reason [to dismiss the employee]". This leaves the way open for a tribunal to decide that although a whistleblower was sacked (or suffered some other detriment) because of a prior disclosure the dismissal was nevertheless fair because it was reasonable in the circumstances. Presumably the circumstances could be the continued disruptive presence of the whistleblower.

Health & Safety

Clause 5(4) opens up the provision and remedies of ss22B and 22C of the EP(C)A to whistleblowers who have suffered detriment short of dismissal. The clause reads like the conferral of a general entitlement. However s22A (which controls ss22B & C) only pertains, on its present construction, to employees who suffer detriment in health and safety cases. If my understanding is correct then whistleblowers outside the health and safety area cannot lodge a complaint with an industrial tribunal until s22B(1) is amended. Clause 5(a) of the bill amends s22B(1) of EP(C)A to clarify the protection to health and safety workers but does not extend it. Yet the protection in s22A is very limited and would not, says Rose, "protect an

in section 75(1).

(2) In calculating the amount of compensation awarded to an individual under subsection (1)(b) the industrial tribunal shall have regard to all the circumstances of the case including those to which a court would have regard under section 4(3) above.

(3) An employee who has suffered a penalty, other than dismissal or selection for redundancy, as a result (or in part as a result) of having made or proposed to make a disclosure to which the provisions of this Act apply may make a complaint in respect of that penalty to an industrial tribunal.

(4) The provisions and remedies of sections 22B and 22C of the 1978 Act shall apply in relation to such a complaint as they do in relation to a complaint under those sections and references in those sections to "any act, or deliberate failure to act" shall be deemed to include a reference to any penalty about which a complaint under section (3) has been made.

(5) In the Employment Protection (Consolidation) Act 1978 -

(a) in section 22B(1) at the end insert "or a penalty (other than dismissal or selection for redundancy) in contravention of section 3(1) of the Whistleblower Protection Act 1995";

(b) in section 64(4), at the end insert "or is one to which section 5(1)(a) of the Whistleblower Protection Act 1995 applies";

(c) in section 72(3), at the end insert "or is one to which section 5(1)(a) of the Whistleblower Protection Act 1995 applies";

(d) in section 77(1), and in section 77A(1), after the words "57A(1)(a) or (b)" insert "of this Act or in section 5(1)(a) of the Whistleblower Protection Act 1995".

(6) In considering a claim under this section, an industrial tribunal may, if it considers that it involves an issue of particular complexity, remit to the High Court (or, in Scotland, to the Court of Session) for determination the question of whether for the purpose of section 1(c) of this Act a disclosure of information was in the circumstances justified in the public interest.

Insurance

6. Any term or condition of a contract of insurance shall be void

have a strong anti-media tradition and are likely to treat media disclosures as breaches of confidentiality, unless a law states the contrary.

Protection for media whistleblowers is a no-go area for most protective legislation of this kind. There are only three states which protect them: New South Wales, Kentucky and Utah. Although it may be argued that media whistleblowing can damage innocent parties (which is true) one suspects that the real problem with it is that the whistleblower has the awful truth and is about to tell anyone and everyone about it!

Other 'external' investigative outlets are also ignored in the draft bill. Trade unions and even authorities with a specific charter to handle the whistleblower disclosures are not mentioned, let alone specified, and this is a serious omission.

Protections

Clause 3 purports to protect people having made or intending to make disclosures of protected information from reprisals, and offers statutory immunity against what are vaguely referred to as 'offences under any enactment'. Reprisals should be spelt out, and the list should include punitive transfers and compulsory psychiatric referral. It should also make reference to unofficial reprisals such as workplace ostracism, increased scrutiny of work, colleague abuse and bullying, denial of work necessary for promotion, physical isolation, removal of work facilities, duty downgrading and overwork.

It remains to be seen whether the bill will be able to shield whistleblowers from the now moderated but still exceptionally strong *Official Secrets Act 1989*, recently referred to as "the best known obstacle to whistleblowing"[18]. I am sceptical - once 'harm' has been proved under the *Act* then no degree of public interest will mitigate severe disclosure penalties[19].

Clause 7 of the draft provides that, "Notwithstanding any statutory provision or rule of law to the contrary" no one who has received whistleblowing information shall be required to reveal their source. Have the drafters forgotten the *Official Secrets Act* here, and if they have not then should they not tell us a little more about the radical legal implications of this clause?

Allied with my concern here is the increasing tendency to accentuate and justify the implied duty of confidence owed to employers by writing contracts in which this duty is an express term (gagging clauses). Where a professional code emphasizing paramount duties to the client, and implying a duty to disclose, conflicts with contractual confidentiality managers will give priority to the contract and often ignore with impunity the provisions

CHAPTER TWO

AN OPEN LETTER - WHY WE REJECT THE BILL

AN OPEN LETTER TO GUY DEHN, MAURICE FRANKEL, MARLENE WINFIELD & TONY WRIGHT MP REGARDING THE WHISTLEBLOWER PROTECTION BILL (Draft 3.0 of 26-06-95*)

Geoffrey Hunt

17th November 1995

This open letter is a summary of the criticisms of the draft Whistleblower Protection Bill (draft 3.0*) which arose in formal consultation with the Board, Patrons and legal associates of Freedom to Care and informal discussion with some of its members and supporters.

In reviewing the draft bill our initial intention was to offer clause by clause criticisms and amendments. We produced a list of these. However, we had to take cognisance of a logical difference between criticisms of principle which undermine the entire bill and criticisms of detail which amend the bill while preserving its jurisprudential foundation. It would be inconsistent to offer both. If FtC were unable to offer an alternative approach, one resting on different principles, then it might seem reasonable to put aside our criticisms of principle and offer constructive criticisms of detail. However, since FtC is now formulating an approach which rests on different principles, and since we must avoid any impression that we endorse an approach which we actually find unacceptable, we have decided that we must put aside criticisms of detail and reject this draft bill.

We realise that this will surprise some and that it might appear unhelpful, and even obstructive. We ask for patience. It is absolutely vital to understand a social situation before carefully formulating a long-term platform of ideas for change. Quick solutions may exacerbate matters.

FtC is grateful to Maurice Frankel, Guy Dehn and Tony Wright for having provided a medium of such clarity on which to sharpen our ideas of the reforms which are necessary. We emphasize that we reject the draft bill not because of disagreement over particular clauses and not because we believe the bill if adopted could not possibly provide some relief to some 'whistleblowers'. We reject it because we believe that the contemporary politico-cultural situation calls for a fundamental re-think and a much bolder approach to the problem of citizenship in the workplace - an approach which would cohere with politico-cultural

administered? Consider:

1. Motivation - whether the disclosure was primarily based on a concern for the public interest;

2. Veracity - whether the disclosure was objectively true;

3. Belief - whether the whistleblower genuinely believed the allegations to be true.

Clause 2 of the bill sets out two tests to determine if a relevant disclosure has been made. The first test (in three parts) focuses on whistleblower motivation. The whistleblower makes a disclosure relevant to the bill if it is made in good faith, with a belief that the divulged information is accurate, and that the information has not been disclosed for the primary purpose of monetary gain. Writers such as Lewis and Goode have expressed concern about the good faith test in the bill. Lewis has said:

> *Individuals must show [in clause 2] that they are not motivated by malice. How relevant is malice if the information is true? If employees have a contractual duty to report, for example, doctors or civil servants, can it be assumed that they are not acting in bad faith.*[12]

Goode makes a similar point about this part of this bill:

> *I do not see what difference it makes if the person is acting 'in bad faith' (whatever that means). Whistleblower protection legislation must start from the premise that if the disclosure is true, there is no need for any further objective test. The objectivity lies in the truth of the disclosure. It does not matter if the disclosure is made in bad faith or for all the wrong reasons, because the public interest lies in disclosure of the truth of those defined categories of information*[13].

Unlike other members of the community whistleblowers, it seems, are expected (and sometimes expect themselves) to act without a mind for their own interests. Yet in the sort of societies we have made for ourselves the pursuit of private interest is the predominant state of affairs - why should whistleblowers be different?

Procedure

The second test goes to procedure. Goode has recently described it as a "silly rule ... a substantial disincentive to genuine whistleblowers"[14]. Here again we unearth the conservative values and preferences of the bill's drafters. The bill stipulates a pre-disclosure stage whereby the whistleblower is expected to make reasonable efforts to draw the alleged wrongdoing to the attention of whomever it is that he or she owes an obligation of confidentiality (i.e. their boss). Two escape clauses are built in. The person does not have to refer the alleged wrongdoing to a superior if in the whistleblower's assessment such action would be ineffective or the

term ethical dissenters (or, in some contexts, 'conscientious employees'). But the real point is that the attention needs to be focused on the unethical organisation not on the individual working in that organisation. Whistleblowers have nothing *fundamental* in common except that they get in serious trouble for 'blowing the whistle' - for making a public disclosure about a workplace concern. And yet it is not the activity of 'blowing the whistle' that is crucial. Ethical dissenters have something fundamental in common - they carry their concerns as citizens into the workplace. It is not an activity, but a status we all have that is fundamental, a status defined by rights and duties.

It is the situation of ethical dissent (in which 'whistleblowing' may even be absent) which merits our understanding not the action and person of the 'whistleblower' , which is easy enough to understand. Consider, for example, the systemically corrupt organisation - what will the bill do for that?

c) Corporate Accountability: A 'whistleblower protection act' in isolation from a coherent panoply of legislative changes is misleading, and could be counter-productive. The most important legislative changes have to do with institutional, administrative, company and business law. Legislation should not put the emphasis on protecting the individual hero/troublemaker but on facilitating, and as far as possible ensuring, the public accountability of the corporate victimiser and the personal liability of organisational executives. We need a lot else besides in a culture of rights: a bill of rights; a judicial system which empowers clients and which emphasizes arbitration, mediation and conciliation; a properly funded and balanced, efficient and effective industrial tribunal system; changes to the libel laws and to the legal aid system, and so on.

The problem for the citizen in the oppressive culture of the organisation/workplace has to be properly understood. For example, the greatest burden that ethical dissenters generally have to face is procedural attrition. This is a long drawn-out manipulative application of the procedures (e.g. send to occupational health for a check-up, demand more and more 'evidence', insist on use of a one-sided grievance procedure) to exhaust and isolate the complainant in the hope s/he will withdraw or resign. What can a whistleblower protection act do here? Nothing.

d) Compensation: FtC accepts the notion of compensation for ethical dissenters who are victimised, but its purpose must be clear. FtC believes that compensation, in whatever legal context it is formulated, be explicitly a punitive expediency addressed to the unethical

a breach of it, save where the public interest clearly demands it and then only to the extent that the public interest requires it[7].

Denning's deference to 'confidence' was mixed with the self-doubt of his brother judge Pennycuick, who said:

... this contention [for a wider interpretation of the public interest as something 'beneficial to the community'] would lay on the court the duty of deciding in any given case where the public interest lies. This is a function inappropriate to the court and indeed incapable of being performed with the precision required in the administration of justice. Different men hold different and often diametrically opposed views as to what is in the public interest and the judge would find himself faced with the duty of permitting or refusing disclosure according to absolutely uncertain criteria.

The bill's architects fail to signal to would-be whistleblowers the severe problems thrown up by the way British courts have considered public interest disclosures and their deep reluctance to disturb confidence. One commentator who appears to be closer to the relevant case law has observed:

The common law has recognised a 'just cause' defence to an action for breach of the duty of confidentiality where the disclosure was made in the 'public interest' and to an appropriate recipient ... [the defence] applies where the matter disclosed is of 'grave public concern', irrespective of whether there has been any wrongdoing by the employer ... However there is much uncertainty as to exactly what might be matters 'of grave public concern' so that their disclosure is covered by the just cause defence, and it might be argued that it is asking too much of the judiciary to determine what it is the public has a right to know[8].

Public Concern at Work states:

Although the case law on public interest disclosure is 150 years old, the courts have not protected those making such disclosures from punishment, and it is this that the Whistleblower Protection Bill will change[9].

But how is it possible to reconcile this with leaving it to the courts to continue to apply this test?

We are now at the heart of a serious flaw in the architecture of the bill. With 150 years of judicial hostility to whistleblowers behind them why have the drafters not bitten the bullet and set out definitional principles which clarify what constitutes disclosure in the public interest, thereby taking the matter away from judicial discretion?

The unsound legal foundation of the draft bill is tied up with the fact that the legal criteria to determine breach of confidence are far from clear. Great

(Regarding the courts, another point: the bill's provision for civil action is a recognition of the weakness of the bill. Why would a bill which offers adequate protection point employees in the direction of the expensive and slow-witted civil courts?)

d) Media disclosure: A recognition of the rightness of disclosure to the media as last resort is crucial. Again this is a sign of a weakness of principle. One should begin from the premise that it is a civil right to speak to anyone, including the media, and then think about qualifications. The gulf between the staid idea of the court determining the public interest and that of the individual conscience in going to the press protected as a right is unbridgeable.

3: ONUS

a) Exhaustion: With the qualifications to rightful disclosure made by the bill the vast majority of conscientious complainants would have been weeded out, leaving a few exhausted ones who, if they have not become financially ruined, divorced and contemplated suicide, are left to face the suffocating incubus of the 'public interest'. This bill is unsympathetic to ethical dissenters and shows little inkling of the overwhelming burden that the ethical dissenter in the workplace has to suffer. The bill is likely to present us with a couple of exhausted heroes or heroines a year - while unethical, unaccountable, undemocratic and corrupt organisations will carry on regardless.

b) Belief: The phrase "believes on reasonable grounds that the information is accurate" in 2(a)(ii) is counter-productive. Who is to establish what is believed on reasonable grounds? (And at what stage?) The employer, the court, both? Experience has shown many times that what is 'reasonable', nay obvious, to even the employee of average conscience often appears entirely unreasonable to the management of an organisation, and sometimes even to many of the 'time-serving' employees who have been socialised into the acceptance as standard practice or normality what is unacceptable for most ordinary people outside the organisation.

What is the point of this qualification? To prevent frivolous applications, no doubt. But in the absence of any realism about the power relations in organisations it works against the ethical dissenter. This should not be a qualification, but might emerge during the process of investigation, in which case striking out might be appropriate.

c) Payment: In 2(a)(iii) we have: "has not been paid, or entered into an agreement providing for payment, in return for making it". Although

envisaged suppression of information. On 22 October she delivered anonymously a photocopy of the memo to 'The Guardian' newspaper, which published it nine days later. She was charged with a breach of the Official Secrets Act and imprisoned for six months.

In commenting recently on the House of Lords decision to affirm the Court of Appeal's rejection of the newspaper's defence of Tisdall, Griffith has said: "The decision ... shows, yet again, how reluctant are the courts to uphold even statute-based protection against government powers when 'national security' is invoked". In fact Griffith goes on grimly to conclude, after reviewing British judicial attacks on public interest dissent during the 1980s, that "..the low level of protest against [these] decisions shows the remarkable extent to which the protection of freedom of speech has ceased to be a political issue in the late twentieth century".

If the current Whistleblower Protection Bill (draft 3.0 of 26 June 1995) had been in force at the time would Tisdall have been saved? Inhabiting these questions is the true test of the bill; will it <u>really</u> protect British citizens who disclose in the public interest? Let these questions suspend themselves over this article as I critically examine the philosophy and structure of the Whistleblower Protection Bill 1995 which was introduced into the House of Commons on 28th June 1995 by Tony Wright, the Labour MP for Cannock & Burntwood[2].

PART ONE: ANALYSIS OF CLAUSES

<u>Protected Information</u>

The bill lays down three seriatim tests for the content of disclosure to achieve the legal status of "protected information". In brief, it must be significant employment-based wrongdoing, as defined (see Chapter One of this issue).

The stipulation that information about wrongdoing must be secured through employment is important because this grounds the concept of whistleblowing. Semantic debates already rage over the meaning of whistleblowing. Are police informants whistleblowers? Kids 'telling on' school bullies to the head teacher - are they whistleblowers? Are disgruntled or concerned ex-employees who publish revealing memoirs (such as 'Spycatcher') rightfully regarded as whistleblowers? It is not a bad thing that the drafters have placed whistleblowing within current workplace wrongdoing. Although one must beware of a statute-controlled and precise definition of whistleblowing, the drafters provide no definition at all. We have to pick up its meaning as we run through the bill. It seems you become a whistleblower in the context of the bill if you hold "protected

lapses?

d) Bad Faith: The discloser is only protected by the Act if s/he is "not acting in bad faith". But at what point is this determined? By whom? On what criteria? Again, this threatens the entire protective intent of the bill. It might be pointed out that it is necessary because it protects the employee against the employer/colleague who is accusing him of some wrongdoing in bad faith e.g. if I am wrongfully accused of sexual harassment at work. Yes, but the absence of bad faith cannot be made a <u>qualification</u>. The presence of significant bad faith has to emerge during the process of determination. Nearly all 'whistleblowers' would find such a qualifying criterion unacceptable because nearly every one of them has been accused of bad faith. The risks of removing this qualification are far outweighed by the benefits. Complete balance favours the status quo. Legislation which is meant to deal with victimisation and discrimination must cut one way more than the other to restore the balance.

e) Confidentiality: In 2(b) we have "any obligation of confidentiality in respect of that information was owed" etc. This is not always clear given the ramifications and breadth, not to say, vagueness of the law of confidence. Will the dissenter worried about some wrongdoing necessarily know what is confidential, in what regard, and to whom confidence is owed? Again, a reversal of the onus is necessary. Consider this: Information is disclosable unless the employer can provide reason for protecting it. This is the way to restore the balance that is important in a society which respects the rights and duties of citizens. We need to challenge the presumption in favour of confidentiality!

f) Internal Channels: In 2(b) we have "in any case where the disclosure has been made the individual who made it had, before doing so, taken reasonable steps to draw the matter to which the information refers to the attention of the person to whom any obligation of confidentiality in respect of that information was owed by him unless, in the circumstances, it was reasonable for him to assume that - (i) such steps would be ineffective, or (ii) the matter was of such urgency as to warrant the immediate disclosure of the information."

Another prior qualification; i.e. the Act's provisions are <u>limited</u> by this condition. One cannot seek protection under this Act if one has not been through internal channels - unless one can provide an ineffectiveness or urgency argument. However, this cannot be settled in advance of the process of investigation and determination - since it is always contested. Anyway, ineffectiveness and urgency are not the