



# Common law – common mistakes?

## Protecting whistleblowers in Australia, New Zealand, South Africa and the United Kingdom

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### Abstract

**Purpose** – The paper aims to respond conceptually, rather than empirically, to policy ignorance. It seeks to examine certain aspects of whistleblower protection offered in the common law countries of Australia, New Zealand, South Africa, and the UK.

**Design/methodology/approach** – The paper provides a four-country comparison of whistleblower protection laws against 13 characteristics gleaned from the international literature on whistleblower legislation. This analysis is informed by considerations of the common law and corruption and critical state theory.

**Findings** – The conclusion reached is that the whistleblower laws established in the common law countries of Australia, New Zealand, South Africa, and the UK variously contain serious structural deficiencies, particularly with respect to the scope of protection and the construction of corruption. The concern is that whistleblowers seeking protection under these inadequate programs will be hurt and there will be negligible impact on the profile of corruption.

**Research limitations/implications** – The major weakness in the analysis was the subjective and arbitrary way the disclosure management characteristics were selected to assess the disclosure laws of Australia, New Zealand, South Africa, and the UK. Future research should seek more objective indicators of performance as well as a consideration of exterior indicators such as the impact of disclosure policies on corruption.

**Practical implications** – If the findings here are validated in subsequent research, then governments should urgently review their current whistleblower policies in order to improve disclosure protection.

**Originality/value** – A conceptual framework informed by considerations of corruption, the common law and critical state theory was used to put whistleblower protection in a wider context where state interest competed with the needs of whistleblowers.

**Keywords** Whistleblowing, Common law, Australia, New Zealand, South Africa, United Kingdom

**Paper type** Research paper

Glen Chase, a senior accountant with the Northern Cape Transport Department in South Africa, was charged in August 2004 with gross insubordination and fired for whistleblowing to the media about the misappropriation of state funds. Chase had previously disclosed this information to various corruption watchdogs without response (*Independent Online*, 2004). Anwar Rizvi, an interpreter with the British Home Office, was sacked on 21 November 2004 for revealing to the *Sunday Times* corruption in the processing of asylum seekers to the UK (*Sunday Times*, 2004). Five nurses spent 13 months challenging sub-standard health care at two Sydney hospitals, only to be bullied out of their employment in 2003 (Faunce and Boslin, 2003). Warwick Pyne, a



senior investment advisor with the New Zealand Bank ASB, made allegations of financial impropriety against his employer to the Consumer Institute. As a result, he claimed he was micro-managed to the point that stress forced him onto medication (Stock, 2004) – four separate whistleblowers with a common tale of reprisals. Other commonalities are of interest here. The whistleblowers disclosed in countries that have all enacted whistleblower protection legislation. The countries; South Africa, the UK, Australia and New Zealand, are part of the international common law community.

The paper provides a four-country comparison of whistleblower protection laws against norms proposed by the author. In this paper whistleblowers are concerned citizens, totally or predominantly motivated by the public interest, who initiate with free will, open disclosure about significant wrongdoing to a person or agency capable of investigating the disclosure, and who suffer accordingly.

The focus in the paper is on a select group of countries shaped by British common law and Westminster governance traditions. It is very early days in the debate about what is “good” and “bad” disclosure policy. Perhaps these shared governance traditions deposit a set of common values about the State, citizenship, and corruption. If this cross-country effect is operating, the implications are highly significant. These shared values could actually determine the question – what makes whistleblower protection laws effective or flawed? A flawed whistleblower policy established in common law country A and transferred to common law country B is simply transferring the flaw, internationalizing the flaw in fact. The hope is that from a highly subjective methodological start, sound, empirically-strengthened analyses will emerge that will help future administrations choose nationally-appropriate solutions to the serious policy issue of disclosure protection.

I first set whistleblowing into its new international context. Then I define the leading concepts, common law, corruption and critical State theory. I argue that these concepts flow under the surface of whistleblower protection policies in the countries reviewed, shaping (contorting?) their respective official responses to disclosure in the public interest. With that framework in place, I selectively review the disclosure policies of the four common law countries. It should be emphasized that the common law countries examined here have a range of disclosure protections available in various laws, codes and regulations. My analysis only focuses on stand alone whistleblowers legislation.

### **Whistleblowing: an international newcomer**

The imperative for administration to be driven by the principles of ethical governance has globalized rapidly in the last 20 years. Quite a number of multilateral instruments are now in place to pursue that end[1]. Trans-border bodies such as the United Nations, World Bank, Organization for Economic Cooperation and Development, World Trade Organization, European Union, the European Bank of Reconstruction and Transparency International are actively promoting official probity and anti-corruption strategies across all countries in their respective jurisdictions (Biallas, 1998; Stapenhurst and Kpundeh, 1999; OECD, 1999a; Caiden *et al.*, 2001; Henning, 2001; Transparency International, 2003, United Nations, 2003). The transition economies, countries of the former Soviet Union, are also embracing opportunities to reconstruct their societies according to democratic principles and be cooperatively involved in international anti-corruption programs (Stability Pact Anti-Corruption

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Initiative for South Eastern Europe, 2000; Transparency International Russia, 2001; United States Embassy Slovakia, 2001). Similar developments are occurring in Africa (Holloway, 1999), Asia (Jayawickrama, 1998; Quah, 1999; ADB-OECD, 2001 and South America (Adelman, 2000), as foreign aid agreements and development contracts are now more and more peppered with anti-corruption conditions (Hyden, 1995; Levine, 2001; De Maria, 2004b).

Paralleling the internationalization of the fight against corruption in public administration is the internationalization of whistleblowing. The facilitation and protection of such disclosures is becoming a well-established administrative goal, mainly for government, but increasingly for the business sector. From a strong but localized start as an American initiative[2], protected whistleblowing has spread far, particularly in the last decade, heavily promoted now as a central anti-corruption strategy (OECD, 1999b; Johnson, 2002, ch. 5; World Bank, 2003; United Nations, 2003). For example the Council of Europe and member nations of the Organization of American States (OAS) require their member nations to pass whistleblower protection laws as part of respective conventions against corruption (Devine, 2000). Similarly, Article 32 (2) (a) of the newly endorsed United Nations Convention Against Corruption requires signatory nations to: "Establish procedures for the physical protection [of whistleblowers]" (United Nations, 2003).

However, all is not well in the international diffusion of whistleblower policies (De Maria, 2005). Administrations new to the technology of disclosure protection have been known to uncritically embrace existing models, or more worrying, have had these models thrust upon them in the context of development aid transfers. Voluntary or forced cross-country mimicry of whistleblower laws is starting to happen, as if the issue of diversity, cultural and otherwise, was not worth considering (Schwartz and Ros, 1995, pp. 322, 344). The UK law, for instance, was followed to a substantial extent in the South African statute, the new Japanese law and the languishing Nigerian Bill (Joint Ad Hoc Committee, 1999; Uys, 2000; Ekeanyanwu, 2004); countries with very different histories. The New Zealand Act is a copy of the South Australian Act. The Israeli whistleblower law which protects corporate and government workers, has been conceptually influenced by the disclosure laws in the UK and South Africa, and a disclosure protection act, similar to that of South Africa, has been proposed for Ghana (Martens and Crowell, 2003; *Ghanian Chronicle*, 2003). Additionally, there are calls for western style whistleblower laws to be introduced to India (*The Hindu*, 2003; *The Indian Express*, 2003).

These observations would not be so significant if the presently constructed disclosure policies were working. While no common criteria for judging the effectiveness of whistleblower protection programs exist, arguably, use of those programs is a central marker. Why is it that these programs throughout the world have such low take up rates? As an example, disclosure protection has been in Australia since 1993, yet only one case has ever been fully litigated, and then the whistleblower-plaintiff failed in his bid for protection[3]. Further, in the four-year period from the enactment of the South African Protected Disclosure Act, on 1 August 2000, only two matters have, to date, got to the courts[4]. Two experienced whistleblower researchers in the UK have recently referred to the British law as one in which employer's interests arguably predominate. Their conclusion is that the law

does not adequately protect whistleblowers. They have called for an 11-point plan to reform the Act (Lewis and Homewood, 2004).

We do not know why these programs have low take up rates. We do know, however, that in almost 25 years of whistleblower research, not one study is prepared to conclude that whistleblowing has a long-term impact on the profile of corruption (De Maria, 2004a). We also know that whistleblowers suffer career and health-shattering reprisals when they report wrongdoing (Parmerlee *et al.*, 1982; Near and Miceli, 1986; De Maria and Jan, 1994; De Maria, 1999; Alford, 2001; Near *et al.*, 2004). Despite that, whistleblowing is becoming a popular strategy in the worldwide anti-corruption agenda. We need to know a lot more about this reporting strategy and the geo-political contexts that drive it.

The paper starts in this direction by looking at the leading concepts used in the paper. It then applies these concepts to the disclosure programs of four common law countries; Australia[5], the UK, New Zealand and South Africa.

### *The leading concepts*

The thesis of the paper can be stated simply. Whistleblowing protection legislation in common law countries has been developed according to a narrow concept of corruption and an expansive concept of corruption's so-called universalist nature.

*Common law effect.* Common law countries are basically those that have been colonized at some time by Britain. As a result they all practice a variety of common law, as opposed to its main alternative, civil law, practiced in the countries of continental Europe and many other parts of the world. Common law has developed since antiquity a number of philosophical orientations. The following are relevant for the purposes of this paper:

- A case (or fact) centered approach to justice, as opposed to a civil law interest in the application of first principles to the facts.
- An adversarial, as opposed to an investigatory system for arriving at the truth.
- High level of individuality in the construction of key concepts (Spigelman, 2004).

One would expect whistleblower laws cast in this common law "furnace" to marginalize first principles, raise conflict over factual interpretation to a judicial principle and reinforce an individualist construction of corruption. We will see, in the following section that this is indeed what happens. Without exception these laws demand that the road to whistleblower justice is paved with provable and collaborative "facts", not first principles. This emphasis pits the under-resourced whistleblower against the might of the State, which is usually not shy to exercise its informational dominance. These laws, again without exception, allow for robust testing of the whistleblower's allegations. One also sees in these laws constructions of corruption that are both individualistic and universalistic.

Corruption is usually understood in the laws considered here as the malpractice of individual rogue citizens (although rivers of ink write the counter narrative about the "systemic" nature of corruption). This common law approach to malfeasance validates disclosure policies that aim to eradicate essentially discrete acts of non-systemic wrongdoing through individual reporting by people with limited or no familial or other non-employment ties to the wrongdoer. As evidence, we can point to the fact that no whistleblower law anywhere in the world offer protection to disclosers as a class or

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group of people. Individual citizens reporting on individual (but possibly repetitive) wrongdoing to individual investigators – that is the hallmark vision driving the current batch of disclosure programs worldwide.

The other view implicitly embedded in the protection laws is universalism. This gives a rationale to the current (and highly problematic) transfer of such laws from one country to another. Universalism is one of five anti-corruption approaches that Michael (2004, p. 1068) has identified. Through the universalist approach corruption is seen as a worldwide phenomenon, thus making anti-corruption responses (which includes whistleblowing) universally applicable and replicable. The high level of standardization between the four laws considered here will confirm that approach. Other practical outlets for this approach include all the anti-corruption treaties mentioned in note 1. The common law effect is at work value-constructing the whistleblower laws. It does this in tandem with the State.

*Critical state theory.* It is important to recognize that we are not just dealing with common law countries. They are also common law states. Neocleous, an emerging British writer in State theory, argues that the State is not some neutral vehicle protecting the public interest, as liberal theory would have it. Instead, it is a subject within itself with its own State interests to pursue (Neocleous, 2002, pp. 91-92). He restates the traditional maxim, *salus rai publicae suprema lex* (the security of the State is the supreme law) (Neocleous, 2002, p. 93) to emphasize the sovereign (and inscrutable) nature of State power. Neocleous focuses on official secrecy as part of the ritual of State power. Social control is another important aspect of State power and one that carries insights into how this power is realized through disclosure protection programs, which after all are instruments of State.

Thus, two streams flow under the whistleblower laws. The common law effect is one of cross-country standardization that mocks cultural relativism and critical state theory positions these laws in the service of the State. In the next section I seek the evidence for both propositions.

### **The whistleblower laws of Australia, New Zealand South Africa, and the UK**

Four whistleblower statutes are presented according to 13 characteristics gleaned from the international literature on whistleblower legislation (Dworkin and Near, 1987; Massengill and Petersen, 1989; Devine, 1990; Westman, 1991; Allars, 1992; Feerick, 1992; Cripps, 1994; Vickers, 1995; Lewis, 1995, De Maria, 1995, 1997; Lewis, 1995; Miceli *et al.*, 1999; Lewis, 2001; Vickers, 2000; Dehn, 2000; Callahan and Dworkin, 2000; Lewis, 2002). These characteristics are clustered in three categories: working features, scope and legal protections (Table I). In the working features cluster there is: disclosure pathways, disclosure threshold and duty to investigate. In the scope cluster there is: sector penalties, who may disclose, private sector coverage, media protection and application to politicians. Finally, in the legal protections cluster there is: civil and criminal indemnity, secrecy breach indemnity, injunctive relief, adverse employment appeals and defamation indemnity.

#### *Working features*

The first three features refer to internal or working features of the respective national disclosure protection laws. They all mandate the disclosure pathways that whistleblowers must travel if they seek protection. Preference is unambiguously

**Table I.**  
Whistleblower laws –  
working features

Country	Disclosure pathways	Disclosure characteristics	Duty to investigate
Queensland Whistleblowers Protection Act	Mandated	Procedurally correct and made in good faith	No
UK Public Interest Disclosure Act	Mandated	Level 1: Procedurally correct and made in good faith Level 2: Level 1 + belief substantially true	No
New Zealand Protected Disclosures Act	Mandated	No protection if disclosure false or in bad faith	No
South Africa Protected Disclosures Act	Mandated	Level 1: Procedurally correct and made in good faith Level 2: Belief substantially true	No



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given to internal pathways. The provisions that establish these pathways are usually the most authoritarian features of the laws. In the construction of the narrow pathways one can feel the heavy hand of the State. One can talk about the state supervision of disclosers (McLaren *et al.*, 2002). A powerful official perception about whistleblowers and their reports is revealed. Whistleblowers, when viewed positively, are usually seen as well meaning, ethically consistent and organizationally-focused. In the hands of the State these qualities can be patronized, ignored or contradicted. Not such an easy thing to do with their messages, which are usually dangerous to those in power. All this leads to an official response of keeping the would-be whistleblowers on a tight administrative rein.

In the UK and South African Acts, disclosures to employers (the preferred disclosure pathway) are protected if one condition is met in the UK Act and two conditions are met in the South African Act. However, disclosures to the media, if they are indeed possible under these two Acts, are protected if six conditions are met in the UK Act and seven in the South African Act. Vickers sees in these requirements “[a] concern for procedural correctness [that] can seem to overshadow the public interest . . .” (Vickers, 2000, p. 440). Media exposes of corruption are clearly not in the “interest” of the State (Neocleous, 2002, p. 93) unless they can be put to advantage (hence, the leaking of information by State apparatchiks). Thus, the State has no “interest” in protecting the media whistleblower.

The four Acts have standard requirements for what constitutes protected disclosure. For all it is a two-pronged stipulation; good faith reportage to “correct” authorities. There is a third requirement in the UK and South African Acts making protection, in some circumstances, contingent on the disclosures being “substantially true”. Again we see in operation the common law’s fixation with facts and the heavy footprint of the State. These common forensic requirements impose inflexibilities and heavy evidentiary burdens on the would-be whistleblower. It is as if the whistleblowers are “outside” the State and deserve not to be treated as concerned citizens but threats to good order.

The “truth” requirements in the UK and South African Acts appear oppressive and unconscionable burdens for the whistleblower that may only have a small glimpse of a wrongdoing picture. In addition the “good faith” requirement exposes whistleblowers to investigations about their motivation, which can quickly degenerate into psychiatric harassment (McDonald, 2002). The good faith requirement is an additional ethical high jump imposed on whistleblowers by the State in return for protection. The state is very much caught up in the contradiction with which we view those who make public interest disclosures. We do not impose good faith requirements on police informants and those who report anonymously.

Making protection contingent on whistleblowers reporting to State agencies, rather than extra State entities such as NGOs, pressure groups, professional associations and unions, raises a special problem. It gives the State excellent forewarned intelligence about corruption; what are the allegations, against whom and by whom. What if the State agencies are themselves corrupt, incompetent, over-worked, or lacking jurisdiction? Together, these requirements appear to be another example of the State management of dissent (Herman and Chomsky, 1988; Chomsky, 1992).

None of the Acts put any stipulations in their laws to require authorities that receive disclosures to exercise an investigative duty. Nor is there any requirement that such investigations meet quality controls, such as timeliness, resource sufficiency, and

whistleblower involvement. These are critical omissions. Research has shown that a major source of whistleblower grievance is the failure of authorities to conduct competent, and timely, investigations into their claims (De Maria, 1994; De Maria and Jan, 1994). The common law States continue to exercise unaccountable sovereignty in this area. The analysis now moves on to consider the width of protection offered in the selected countries (Table II).

*Scope*

One indication of how the common law authorities have constructed corruption in individualist terms is how punishments are designed for those who reprise whistleblowers. None of the schemes countenance sector penalties; that is, organizational punishments meted out to work sites which employed both the reprised whistleblower and reprising colleagues. Theoretically, sector penalties are work-wide punishments for breaches of duty of care to the whistleblower-employee, or worse, vicarious involvement in whistleblower attacks. These punishments can take the form of time-limited reductions in CEO remuneration, time-limited budget control on forecasted non-essential service expenditure and compulsory ethics training.

The only meaning we can get out of this failure to “see” in system terms is that the disclosure-reprisal phenomenon continues to be understood in individualist not collective terms. The only person who acts “individually” is the whistleblower. Against her or him is the might of the organization. Research on this point is now so common it is clichéd. Still, it has now put organizational complicity beyond doubt (Near and Jensen, 1983; Near and Miceli, 1986; Perrucci *et al.*, 1989; Rothschild and Miethe, 1999); De Maria, 1994, 1997).

There is great variation in the laws as to who may disclose. In the Queensland law, only public servants can be protected whistleblowers. In the UK Act “workers” can obtain protection but not members of the public, police and military intelligence. The New Zealand Act goes a step further and allows protection for current and former employees, contractors, members of the New Zealand Armed Forces and homemakers. The South African Act allows for the protection of all employees except private contractors.

The coverage is variable in the schemes and there is an employment bias operating in the statutory determination of who shall be protected. The effect is the exclusion of whole classes of people: consumers, students, retirees, unemployed, prisoners, and

Country	Sector penalties	Who may disclose	Private sector	Media	Politicians
Queensland Whistleblowers Protection Act	No	Public officer	Limited	No	Yes
UK Public Interest Disclosure Act	No	Worker	Yes	Maybe	Unspecified
New Zealand Protected Disclosures Act 2000	No	Employee	Yes	No	Unspecified
South Africa Protected Disclosures Act 2000	No	Employee	Yes	No	No

**Table II.**  
Whistleblower Laws –  
scope



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physically and intellectually handicapped people not in employment. These are groups deemed marginal to the interests of the State (Arapoglou, 2004; Kieselbach, 2003; Abrahamson, 2003).

Impressively, private sector coverage is provided for in all the schemes. It is clearly in the interest of the State to have a corruption-free private sector. The most restrictive scheme is the Queensland one that only allows for such private sector disclosures when there are allegations of substantial dangers to the environment and to people with disabilities. The South African Act confines private sector disclosures to the employer-employee relationship. It remains to be seen how government-business enterprises (GBEs) will be interpreted in these schemes. There is a danger of them slipping out of the jurisdiction with “special” definitions of themselves as neither government nor public sector (OECD, 1999a; De Maria, 2001a,b; Roberts, 2004).

One of the strongest criticisms one can bring to bear on these schemes is their failure to protect media whistleblowers (Callahan and Dworkin, 1994; Vickers, 2000, p. 440). This is really where we see the common law States exercise extreme defensiveness. The media is often the only door open to the whistleblower determined to expose wrongdoing (Tiffen, 1999; Transparency International Croatia, 2001). It is common knowledge that governments often will only move on allegations once they have been aired in the media (Stapenhurst, 2000). Perhaps the real reason why governments will not protect genuine media whistleblowers has to do with control. The whistleblower following internal reporting pathways, mandated in all the schemes, as already mentioned, is at the behest of complex bureaucratic processes over which he or she has little knowledge, no say and no influence. Investigation processes can take forever, there is always the likelihood of corrupt interventions in that process, and the final outcome may be a confidential report read by a small group of senior public servants or police. On the contrary, the whistleblower briefing a journalist, particularly on matters where the government has acted illegally, incompetently or breached the public trust, is a grave threat to power. Millions of people stand to read, hear or watch the allegations and make up their own minds.

The failure of all the schemes, bar the Queensland statute, to specifically mention that the laws cover disclosures about politicians is a serious failing. While such allegations may be possible and protected under these laws, the missed opportunity in specifying this sends out signals of political immunity at a stage in our history when the collapse of trust in the integrity of our leaders is now a central feature of the governance relationship between politicians and the people. The South African legislation, and I suspect the UK Act, only allows disclosures regarding the conduct of “employees” or “employers” to be made by “employees”. This means that only the politician’s personal staff can make disclosures about him or her, and only if the relationship between the politician and the staffer is an employer-employee one.

#### *Legal protections*

Finally, in this brief section on legal protections in the four schemes, we see the common law effect clearly at work (Table III). First, a high level of mimicry is again visible as the shared legal traditions work against the whistleblower and in favour of the State. The South African law provides no civil and criminal indemnity to the whistleblower. Dual indemnity is provided in the Queensland and New Zealand

**Table III.**  
Whistleblower laws –  
legal protections

Country	Civil and criminal indemnity	Secrecy breach indemnity	Injunctive relief	Adverse employment appeals	Defamation indemnity
Queensland Whistleblowers Protection Act	Yes	Yes	Yes	Yes	Yes
UK Public Interest Disclosure Act	Unspecified	No	No	Yes	No
New Zealand Protected Disclosures Act	Yes	No	No	Yes	No
South Africa Protected Disclosures Act	No	No	No	Yes	No

schemes. These can be powerful protections, and their absence in whistleblower legislation diminishes the integrity of the schemes.

The schemes have a poor record with respect to indemnification from prosecution for disclosing material that is the subject of a secrecy order or enactment. The only law that provides a general indemnity is the Queensland Act. The UK, New Zealand and South African schemes provide no protection whatsoever for disclosing material classified as secret. These are major weaknesses if for no other reason than a huge class of information is blocked from entering the public arena. The States that we are considering here are, we need to remind ourselves, States of secrecy (Neocleous, 2002; De Maria, 2004a).

Injunctive relief, as a restraining order, is only available in the Queensland scheme. As a temporary form of compulsion, “interim relief” is available in the UK scheme to order, for example, re-employment of the whistleblower, sacked upon disclosure, pending a tribunal hearing. Applicants for interim relief must establish that they have a good chance of success. The other schemes provide no injunctive relief at all. These are critical omissions from the laws because protection needs to be delivered at a quicker pace than reprisals. If management can get in first and significantly reprise (e.g. dismissal) it often puts them at a significant strategic advantage. The dismissed worker, heavily traumatized, now must focus on the prospect of a jobless future. All energy to expose the wrongdoing gets dissipated to this cause.

Thankfully, all the schemes provide mechanisms for appealing adverse decisions of management made in response to damaging disclosures. None of the schemes, however, respond to the difficult task of the whistleblower in proving causation. The complex nature of human resource management makes it extremely difficult for whistleblowers to demonstrate that the adverse decision was the exclusive result of the disclosure.

The Queensland law is the only one of the schemes examined here that give absolute protection in defamation. This is a serious omission, given that it is the strategy of choice for the cashed-up wrongdoer (Pring and Canan, 1996). Many whistleblowers, and those contemplating disclosure, have been intimidated back into silence by the issue of a writ alleging defamation (Martin, 2002).

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## Conclusion

The globalization of the fight against corruption has been joined recently by the internationalization of whistleblowing. Disclosure schemes are multiplying through government-government policy mimicry and attachment to other agendas (e.g. foreign aid). Their official and populist endorsements are not based on hard evidence of what constitutes effective disclosure management. This issue prompted the central question of the paper: What makes whistleblower protection programs effective?

We are really at the very beginning of an answer to this complex question. What was attempted here was a preliminary response around the concept of the Common Law State. A total of 13 characteristics of whistleblower protection, gleaned from the literature, were applied to the operating schemes in four common law countries. One thing that emerged clearly was how similar the schemes are. This was explained by the common governance traditions shared by those countries, as well as the active mimicry between these countries. The clearest example of this was the copying of the UK law into South Africa and thence onto Nigeria.

To that we can add that this mimicry replaced democratic deliberation. In all countries reviewed, the level of community engagement over whether, and what disclosure policies to have, was degraded in favour of privileged contacts between small numbers of key government officials and stakeholder NGOs who stood to gain from the passage of such legislation. This observation is particularly true of the UK and South Africa experiences.

The other thing that was argued, without any strong conclusion, was that the laws were engineered in ways that would not compromise State interests. The conclusion reached was that, as a result, these schemes variously contained serious structural weaknesses with respect to the scope of their coverage and level of legal protection offered. Across the board failure to protect media whistleblowers comes to mind here.

The major weakness in the analysis was the subjective and arbitrary way disclosure management characteristics were selected. Another weakness was the focus on the internal features of the protection programs. More of this is of course needed but it should be augmented with work on exterior indicators (impact on corruption, whistleblower satisfaction, nil reprisals). This combination of internal and external features could be developed into performance criteria that would allow assessments at the highest policy levels of the capacity of whistleblower legislation to reduce the overall profile of corruption and at the same time protect those who bring their evidence of wrongdoing into the public arena.

At an operational level, work on external indicators could focus on the compatibility of disclosure protection policy to important cultural realities such as the informational relationships between citizens and their respective governments. At another level again, indicators could be trialled to assess the quality of investigatory responses to disclosure and the impact on whistleblowers lives after protected disclosures have been made. Protected disclosure in the public interest is here to stay. From the whistleblowers point-of-view, lives, jobs and relationships are at risk. From the point-of-view of governments and organizations, timely reported of corruption is clearly in their interest. We have a long way to go to get this policy right from both perspectives.

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## Notes

1. See for example: United Nations Convention Against Corruption; Inter-American Convention Against Corruption; OECD Convention for Combating Bribery of Foreign Public Officials in International Business Transactions; Council of Europe's Criminal Law Convention of Corruption and the Civil Law Convention on Corruption; African Union Convention of Preventing and Combating Corruption; and the United Nation Convention Against Trans-national Organized Crime.
2. America was the first to enact whistleblower protection laws. By the late 1970s the issue was being canvassed in policy circles (Bureaucracy Task Force, 1978). The State of Michigan introduced the first whistleblower law in 1981. By 1985 such legislation was pending in a dozen states and Congress was considering a national scheme (Dworkin and Near, 1987, fn 4, p. 245).
3. *Berry v. Ryan* [2001] ACTSC 11 (22 February 2001).
4. *Grieve v. Denel Pty. Ltd; Communications Workers Union & Itshegetseng, S v. Mobile Telephone Network Pty. Ltd.* Both cases were decided in 2003.
5. In the absence of a Commonwealth of Australia law, the Queensland law will apply.

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#### **Further reading**

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