Common Law – Common Mistakes

The Dismal Failure of Whistleblower Laws in Australia,
New Zealand, South Africa, Ireland and the United Kingdom

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ABSTRACT

Cardinal de Richelieu's (1585-1642) famous utterance: "Secrecy is the first essential in the affairs of the State", is the starting point for this paper. As a general proposition governments require an informationally subjugated populace to rule. In the context of business-centred cultures, the rule qualifies to what is called information asymmetry. Governments deny or frustrate access by the people to policy intelligence while at the same time sponsoring a veritable information bazaar for business to prosper on domestic and overseas markets. From this proposition we can ladder up to why governments cannot afford to have effective whistleblower legislation. These assertions are theoretically developed and then tested in a comparative review of whistleblower legislation in five common law countries: Australia, New Zealand, South Africa, Ireland and the United Kingdom. The focus here is on the question can we performance test disclosure protection laws? The paper concludes with some of the features of reform deemed necessary if the whistleblower mode of ethical dissent is to survive.

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Introduction.

The world has shifted enormously in the last twenty years. The issue of fighting corruption has now been internationalized with bodies such as the World Bank, OECD and Transparency International actively promoting the priority of official probity across all countries (World Bank 1999, 2000; OECD 1999; Transparency International 2001) Foreign aid agreements are now more and more peppered with anti-corruption conditions. The transition economies, countries of the former Soviet Union, now have the opportunity to reconstruct their societies according to democratic principles.

What will happen when the demand comes from these countries for guidance on disclosure policies? I fear the worst. The debate about what constitutes effective whistleblower legislation is yet to be had, yet it is now more urgent then ever. What occurs at the moment in the absence of this debate is a high level of mimicry from country to country in the construction of whistleblower laws. If the copied law is flawed [the central proposition of this paper] then that flaw becomes a transmissible condition. This is unfortunately the case. The UK law was followed to a substantial extent in the South African statute and the Irish Bill. The New Zealand Act is a copy of the South Australian Act and the new Bill currently before the Australian Parliament is a copy of the statute in the Australian Capital Territory.

There are other examples. The point is that we have not engaged the issue of what constitutes effective whistleblower legislation, and whether those constituents can have international relevance. More seriously, we have not engaged the issue of *when* should countries enact whistleblower laws. Are there, in other words, core infrastructural prerequisites needed to be in place before the enactment of disclosure statutes? The purpose of this paper is to consider these questions.

The Sermon in Prague

[1] The title mainly refers to the commonality in the construction of whistleblower laws, not the common law in the judicial sense of the phrase. However I would like to wave across my title the other view suggested in the words; that the common law has been a source of protection for freedom of expression when statute law was non-existent. A recent judgment referred to freedom of expression as being "bred in the bone' of the common law (R v Central

One of my enduring memories of the 10th International Anti-Corruption Conference in Prague last year was all to do with whistles. Although this was not a conference specifically about whistleblowing, somehow the whistle became the dominant icon. All delegates received a whistle with a card attached which read:

> There are situations in your life when you cannot remain silent.
> You simply have no choice.
> You must blow the whistle.

If delegates were worried about the absolutist tones of this moral directive they could lighten up by having their photo taken in front of a giant whistle set up in the foyer. They could then wander into, what felt like to me, a religious meeting cleverly masquerading as the official whistleblowing workshop. Here a mixed-race congregation could hear earnest and well-meaning "missionaries" from the United States, South Africa and the United Kingdom bear witness to the curative powers of whistleblowing and the trans-cultural imperative of speaking out.

I felt that part of the message that the speakers were giving out was, to keep the metaphor rolling, a mixed blessing. There was a dangerous sub-text to the whistleblower sales pitch. Why dangerous? Because the messages went out without health warnings on them. Hearing these non-conditional promos were delegates from one-party dictatorships (eg Singapore), transitional economies (eg Bulgaria and Slovenia) wobbling out of rights-hating communist rule, parliamentary democracies where dissent is a life threatening condition (eg Turkey, Zimbabwe) and countries struggling out of yesterdays filled with genocidal horror (eg Rwanda).

Being the sole heretic at the workshop I tried to argue that whistleblowing is really only a suitable style of dissent and outspokenness in democratic systems of governance. It has been crafted in these systems and bears the ideological imprinting of liberalism and the rule of law. In less democratic countries the more suitable strategies would be armed and subversive struggle. I take the view that the promotion of whistleblowing in non-democratic countries is as irresponsible as the promotion of radical feminism in the streets of Riyadh. Having said that I would not want to be heard as saying that whistleblowing in liberal democracies is unproblematical. Of course it is. I am talking degrees here.

Whistleblowing should not be introduced into a country's dissent repertoire until certain structural preconditions are met. Outside those circumstances whistleblowing is a swim in shark-infested waters. Death to person, as distinct from death to career and psychological health (to name two common consequences of disclosing in the West), awaits those men and women of good conscience who disclose in countries which do not have:

- Free and diverse mass media
- Free elections.
- Simple and cheap electoral candidacy processes.
- Reduction in the power of political party machines.
- FOI that is effective, speedy and cheap.
- Judicial and merit review of official determinations that is effective, speedy and cheap.
- Workable ethical regimes in government and business.
- Racial, gender and other forms of equality.
- Rising standards of living.
- Constitutional guarantees of all the basic freedoms.
- An allowable culture of dissent.
- Non-politicised bureaucracy and military.

This is my shopping list and you may disagree with all or some of its content. I acknowledge its subjective and arbitrary character. I won't defend it. However I would like you to take the methodology behind it seriously. The issue remains, can whistleblowing schemes *outside* a set of structural preconditions be effective in protecting disclosers and leading to reform?

Paradoxically, once these preconditions have been realized there is no longer any need for whistleblowing. To some, my argument could look like a piece of West celebrationism. On that point I would contend that no country, whether it be in the developed or developing world, can claim to be traveling well with these structural preconditions. Again it's a matter of degree.

Those who talk up the whistleblower mode of dissent as a vital trans-national component in the fight against worldwide corruption (Transparency International, World Bank, Open Democracy Advisory Centre in South Africa, and the OECD, to name a few) should stop immediately. Notwithstanding that some of these organisations are heavily committed to democratic institution building, their pitch about whistleblowing is not only socially irresponsible, for the reasons I have outlined, they are also selling defective products.

I refer here to the whistleblower statutes in the countries I am examining in this paper. It is entirely within the realms of possibility that the seriously flawed United Kingdom Act could serve as a model for disclosure protection in the transitional economies of Eastern Europe and the equally flawed South African Act to serve as a model for disclosure protection in counties of Africa. For this to happen would mean a re-visitation of colonialism.

The next question — why are these protection procedures flawed? — goes to the heart of this paper. There are many answers to this question. The one I

wish to focus on concerns *secrecy*. I contend that whistleblowing laws have been born in the house of secrecy. They are defective, in other words, from birth. We should note at this stage that the legislatures that produce the disclosure protection acts are the same ones that produce secrecy laws.

Public Administration as a Covert Operation

Concealment has an unbroken presence in official policy (Lochrie,, 1999). We know it is there, and on occasions we tragically feel its sting as we are rebuked, fined or imprisoned for disclosing in the public interest. Being experiential, our understanding of the sharp protocols of secrecy remains superior to our analysis of its causes.

Cause-sensitive analyses of secrecy hold out the promise of enormous insights into all facets of the whistleblowing phenomenon. Why? Because the link between secrecy and whistleblowing is, I believe, organic. In other words they intercourse *dialectically;* they are conflictual and interdependent at the same time.

In popular consciousness whistleblowing and secrecy are in opposition. That is plain to see. One is wanting to open the doors and windows of power and the other is wanting to keep them closed. Those who set up disclosure-protection programs see the world this way. Below this shallow public perception, at a level to do with system maintenance, is a curious interdependency between secrecy and whistleblowing. Secrecy "needs" whistleblowing:

- to moderate public anger about official concealment
- to control perceptions of organizations
- to maintain preferred hierarchies of power

and whistleblowing surely needs secrecy, because destroying it is its single *raison d'etre.* Curiously every "win" for a whistleblower is a triple-win for secrecy. A whistleblower win (typically a powerful disclosure that is received well in the media and pushes officialdom to at least a promise of reform) is thrice reaped by the state as a public relations exercise. The State reframes the whistleblowing as evidence of openness. A whistleblower win captures the imagination. It is a story of David winning over Goliath. The next day David is inducted into the whistleblower hall of fame, we feel good, and Goliath quietly shambles on.

So I am advocating that we take day trips across the (over?) chartered waters of whistleblowing to venues that offer more insights about secrecy as a structural issue. The largely unexamined predominance of secrecy over

whistleblowing must be subject to a new and powerful curiosity. It is interesting isn't it that the paltry disclosure-protection money that governments spend and the (still) paltry amount of whistleblower research going on around the world are focused on why people disclose, not why they don't (Gorta & Forrell 1995; Zipparo 1999).

Any pondering about causation, particularly in the current international condition of the amplification of secrecy in governances moving to the Right, must, in my view, consider:

- The current revolution in government-business relations.
- The vigorous re-plantation of official British obsessions with secrecy to its former Empire dependencies.
- How the secrecy-shrouded dealings of intelligence and military services have been affirmed as models of public administration.

Let me deal with these three matters in turn.

The contemporary worldwide reconfiguration of government-business relations is a revolutionary movement of commensurate import to the last great revolution – feminism. (which was also about changing relationships).

Australia is a good example of what I am saying here. During the 1990s Australia had one of the largest privatization programs among OECD countries. In dollar terms Australia's privatizations have been second only to the UK. During the first half of 1999 Australia was the world leader in both announced and realized privatizations (Walker & Walker 2000). The shrinkage of the service state and the marketisation of government services means that a huge amount of prior government production and servicing is now conducted according to the disclosure-shy protocols of business (De Maria 2001; 2002). In these circumstances secrecy is amplified.

There is also the issue of historical British influences. One of the many negative inheritances from British history has been their quiet obsession with official secrecy. Richard Crossman, a former British Labour minister, once said:

> Secrecy is the British disease, and it has reached epidemic proportions. No other western democracy is so obsessed with keeping from the public information about its public servants, or so relentless in plumbing new depths to staunch leaks from its bureaucracy. (Robertson 1993:154; Robertson & Nichol 1992).

The epitome of official British concealment is of course the *Official Secrets Act*, rushed onto the statute books in a single day in 1911. The notorious Section 2, which made it a crime for public servants to disclose any information about their jobs, created, according to the Franks Committee, over 2000 potentially criminal acts (Hull 1998; Hooper 1987; Thomas 1991).

The spirit of that Act (revised in 1989) was transported to Australia and other dependencies and reappeared as equally (some would say more) oppressive public servant secrecy provisions in various crimes acts (Terrill 2000:Appendix II).

Bowed over with the enormous weight of this culture of secrecy, the United Kingdom, not surprisingly, was one of the last western countries to cross the line and implement (a heavily compromised) freedom of information legislation.[2]

The third place I think we should look for explications of secrecy is in national insecurity. The evidence is clearly there to show that the secret operations of intelligence and military services continually violate the norms of democratic openness and accountability. They have, and this is where it becomes more disputational, also been long affirmed as models for disclosure management of all forms of public information, including whistleblower laws. These whistleblower laws, in other words, are contaminated with the spirit of secrecy rather than liberated with the spirit of openness. Why else, for example, would these laws refuse protection to whistleblowers if they do not follow extremely rigid and complicated internal disclosure pathways? These laws make it hard to disclose when they should be making it easy. It is little wonder that these laws are chronically under-patronaged and peripheralised by management.[3]

Right now there are major issues and controversies over the extent of intelligence and military secrecy. Some examples:

- In late October a CIA initiated secrecy bill, approved with little debate in Congress, would make it a crime for officials to disclose any information that is "properly classified" (New York Times 2000a). Commenting on the bill, Safire said: "Are we about to adopt the sort of 'Official Secrets Act' that lets British officials decide what news is suitable for the public?" (New York Times 2000b).

- In May 2001 the New Zealand Government introduced, to much community consternation, the *Government Communications Security Bureau Bill.* The

[2] The *Freedom of Information Act 2000 (UK)* received Royal Assent on 30 November 2000. However the right of access will not come into force until January 2005. A provision in the Act requiring authorities to produce access schemes describing information they intend to publish proactively, will be phased in earlier, starting with central government departments in November 2002. This Act is the sixth one drafted since 1976. The other five all failed to progress to law. As at March 2000 over 40 countries have FOI laws. The western country exceptions are: Germany, Luxembourg and Poland. See Privacy International, *World FOIA Survey,* (www.privacyinternational.org/issues/foia/fois-survey)

[3] A recent survey of 136 directors by Ernst and Young found that 73% of respondents have not considered the New Zealand *Protected Disclosures Act* at Board level. A further 81% said that no changes to internal operating systems had been made to accommodate the requirements of the Act. See www.ey.com/global/gcr.nsf/New_Zealand/Survey_results_-_PDA_-_BRC

Bill aims to provide a statutory footing for the Government's spy agency, the Communications Security Bureau (Donald 2001).

- Two weeks after the bombing of the World Trade Centre in New York, the Australian Government introduced the *Criminal Code Amendment (Espionage and Related Offences) Biil.* This provided two year prison sentences for communicating official information and seven year sentences for receiving this information.

The Shayler case exposes the paranoid lengths government will go to keep socially vital information out of the public place. Shayler is an ex-MI5 officer who left the service in 1997. In August of that year the *Mail on Sunday* was supplied with information that MI5 kept files on certain Labour politicians. Almost a year later when Shayler left the UK for France he accused MI5 of failing to prevent a terrorist attack on an Israeli embassy and plotting to kill Colonel Gaddafi, the Libyan leader. A short while later he was arrested in France and imprisoned for four months while the British Government tried unsuccessfully to have him extradited. Shayler kept on singing like a canary. In July 2000, in an article in a British magazine he claimed that MI5 could have prevented the IRA bombing of Bishopsgate. Shayler has now voluntarily returned to the UK to face charges that he breached the *Official Secrets Act.*

The following audit of whistleblower laws in various countries proceeds then on the basis that these statutes have been crafted in a largely un-confronted culture of secrecy, *and that is the predominate reason for their failure.*

The Whistleblower Laws of Australia, New Zealand, South Africa, Ireland and the United Kingdom: An Audit[4]

The following chart sets out those laws (in Ireland's case, the Bill) considered in this paper.

International Whistleblower Laws

Country	Assent
Queensland[5]	
Whistleblowers Protection Act	Assented 1/12/94

[4] There are numerous discloser protection provisions in numerous Acts. The focus here is on stand-alone whistleblower statutes.

[5] Despite valiant attempts in 1991 and 1993, there is still no whistleblower legislation at the Commonwealth level in Australia. There is a minority party (Australian Democrats) Bill before the Parliament now. It is a clone of the whistleblower law in the Australian Capital Territory. In the absence of a national law the state law of Queensland has been used

United Kingdom	
Public Interest Disclosure Act	Assented 2/7/98
Ireland	
Whistleblowers Protection Bill	----------
New Zealand	
Protected Disclosures Act 2000	Assented 3/4/00
South Africa	
Protected Disclosures Act 2000	Assented 1/8/00

How do we evaluate the performance of whistleblower laws? Which are the "good" ones and which are the "bad" ones? As mentioned in the Introduction, there is little to no debate on these questions. There must be something better than the puffery in second reading speeches when ministers introduce their whistleblower legislation into parliament or the braggadocio of whistleblower advocacy groups such as Public Concern at Work, who quote unidentified American sources to claim that the UK Public Interest Disclosure Act is "the most far reaching whistleblower protection in the world" (Public Concern at Work 2002).

Surely missing from the evaluation debate is non-emotional and unbiased assessments of *performance capacity*. Is it possible to construct performance capacity criteria and assess whistleblower legislation accordingly? That is the task ahead.[6] By performance capacity I mean the *statutory potential* to create an impact on the protection and reform agendas, by examination of the *endogenous* features of whistleblower statutes.

It seems to me that the ultimate test of a "good" whistleblower statute is:

- The capacity to protect whistleblowers to the full extent of the available law.

- An effective and *direct* throughput from disclosure to systemic reform.

There are two broad methodological pathways into these areas. The first focuses on the whistleblower process (Marquart & Roebuck 1985; Miceli, Near & Schwenk 1991; Rothschild & Miethe 1999: Miethe & Rothschild 1994; Near & Jensen 1983; Near & Miceli 1986; Miceli, Roach & Near 1988; De Maria 1999). The second, the one presented here, has an internal focus,

[6] This project builds on my earlier work. See W. De Maria, "Public Disclosure Laws in Australia and New Zealand: Who Are They Really Protecting"? *Alternative Law Journal,* Vol.

interrogating the construction of laws and administrative protections with a view to the question: Do the laws and administrative procedures provide a *capacity* to meet the broad aims of protection and reform (Dworkin & Near 1987; Price 1992; Allars 1992; Feerick 1992; Minahan 1993; Cripps 1994; De Maria 1997; Vickers 1995, 2000; Lewis 1995, 1998; Miceli, Rehg & Near 1999; Lewis, Ellis, Kyprianou & Homewood 2001).

The frailty in this approach is that in the absence of judicial reasonings about these Acts and Bills one must do the best one can with statutory interpretation. I am resigned to the possibility that errors of statutory interpretations have been made and welcome news of my errors.

Whistleblower Laws: Performance Criteria

> We must not make a scarecrow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape, till custom make it
> Their perch and not their terror.
>
> William Shakespeare, *Measure for Measure*

What follows is an examination of the four whistleblower Acts and one Bill, according to 27 performance criteria, presented in four categories:

- **Working features**
- **Scope**
- **Legal protections**
- **Services**

There will no doubt be disagreement over the inclusion and exclusion of various criteria. While important, it seems to me that the main debate should be on the question: can we assess whistleblower laws by applying performance criteria to their legal construction? If so, how do we do it?

Performance Criteria

Working Features

- Independent Authority
- Disclosure pathways
- Detriments specified
- Disclosure threshold
- Duty to Investigate
- Compulsory review of Act
- Annual report to Parliament

Scope

- Sector Penalties
- Who May Disclose
- Private Sector coverage
- Media Protection
- Involuntary Protection
- Previous Wrongdoing
- Application to Politicians
- Application to Military Intelligence
- Extra-Territorial Application

Legal Protections

- Civil & criminal Indemnity
- Secrecy breach indemnity
- Injunctive relief
- Adverse Employment Appeals
- Defamation indemnity

Services

- Compensation
- Counselling
- Relocation
- Entitlement to damages
- Whistleblower feedback
- Fighting fund

Table 1: Whistleblower Laws – Working Features

Country	Independent Authority	Disclosure pathways	Detriments specified	Disclosure characteristics	Duty to Investigate	Compulsory review of Act	Annual report to Parliament
Queensland							
Whistleblowers Protection Act	No	Mandated	Yes	Procedurally correct and made in good faith	No	No	Yes
United Kingdom							
Public Interest Disclosure Act[7]	No	Mandated	No	Level 1: Procedurally correct and made in good faith[8] Level 2: Level 1 + belief substantially true	No	No	No
Ireland							
Whistleblowers Protection Bill	No	Mandated	No	Procedurally correct and made in good faith	No	No	No
New Zealand							
Protected Disclosures Act 2000	No	Mandated	No	No protection if disclosure false or in bad faith	No	Yes	No
South Africa							
Protected Disclosures Act 2000	No	Mandated	Yes	Level 1: Procedurally correct and made in good faith[9] Level 2: Belief substantially true	No	No	No

[7] Not a stand-alone statute. Insertion into *Employment Rights Act 1996*.

[8] Level 1 = Disclosures to employers, other responsible persons, Ministers of the Crown.
Level 2 = Disclosures to prescribed persons and disclosures "in other cases".

[9] Same as footnote 8.

Working Features

- **Independent Authority**
- **Disclosure pathways**
- **Detriments specified**
- **Disclosure characteristics**
- **Duty to Investigate**
- **Compulsory review of Act**
- **Annual report to Parliament**

There is one initial point that should be made. The efficacy of the legislation is seriously hampered by the low levels of public trust in politicians and institutions of state. This is a disturbing transnational phenomonon that has been understood and researched for many years now. The point is that disclosure protection legislation, which can offer an enormous benefit to the community, must constantly articulate itself within what sociologists have long called the legitimacy crisis of the West. That is why it is essential that the construction of whistleblower legislation renders protection simply and efficaciously.

And, as importantly, the community does not see the legislation as attempts by the State to domesticate dissent. The legislation examined here falls short of those goals. For example the UK Act is very complex (Vickers 2000:441). Drawn up by lawyers, it, like most of the disclosure statutes, is beyond the grasp of ordinary people. Lawyers are needed to interpret the Act. This moves the locus of power from community groups, trade unions and professional associations to law firms and legal centers.

The first seven benchmarks refer to internal or working features of disclosure protection legislation. They are seen as important (necessary?) for the optimum performance of whistleblower legislation.

An *independent authority* with disclosure reception, investigatory and educative powers is vital because it articulates a message of political commitment to the anti-wrongdoing agenda. It also gives the statute a clear, stand alone identity by encasing it in an administrative "home". None of the legislation examined here enjoys such an advantage. All are Acts without agencies; simply statutes on a Minister's portfolio list. Tasmania has produced some of the most impressive draft legislation centred around independent authorities.[10]

[10] See *Public Interest Disclosure Bill 1995 (Tas),* Part 2: Public Interest Disclosure Agency; *Public Interest Disclosure Bill 1997 (Tas),* Part 2: Public Interest Disclosure Commissioner and Tribunal. Neither Bill survived the political process.

All Acts mandate the *disclosure pathways* that whistleblowers must travel if they seek protection. Preference is unambiguously given to internal pathways. The provisions that establish these pathways are usually the most authoritarian features of the laws. Why is this so? One answer is that these requirements mirror the law of confidence and thus provide immunity against breach of confidence if one discloses to one's employer (Vickers 2000:436). In the construction of the narrow pathways however one can feel the heavy hand of the state. One can talk about the State *supervision* of disclosers. Revealed is a powerful official perception about whistleblowers and their reports. 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 rein.

In the United Kingdom and South African Acts, disclosures to employers (always 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.[11] 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![12] What does this say about the preferential attitude to the narrow path-keepers *vis-a-vis* the strayers? Vickers sees in these requirements "A concern for procedural correctness [that] can seem to overshadow the public interest…" (Vickers 2000:440).

While it makes good administrative sense to direct allegations to the relevant work unit this can be done in a more flexible way and at the same time escaping from the numerous frailties of the internal disclosure model.[13] Why can't unions, advocacy groups, NGOs, professional bodies and international authorities such as Transparency International be the *first* port of call for the discloser?

Only two of the five instruments *specify* the outlawed *detriments* (reprisals). As Table One shows these are the Queensland and the South African Acts. The listing and specification of detriments makes the issue of reprisal less ambiguous. Without such specification there is a greater risk of perpetrators not knowing that they have broken the law. Lack of specification can also facilitate administrative and judicial write-downs of managerial attacks on whistleblowers. It can also compromise investigations of reprisals.

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[11] S43 © and S6(1) respectively. See Vickers 2000:436.

[12] S43(G) and S9 respectively.

[13] The priority to internal whistleblowing in the five schemes takes a bizarre turn in the UK Act when a disclosure is protected when it is made to the alleged wrongdoer! (Vickers 2000:436). I suspect the alleged wrongdoer is in no need of extra information about his or her bad practice. This irresponsibly drafted section leaves the whistleblower in a very vulnerable position.

The four Acts and the Irish Bill all express common requirements about what *constitutes a protected disclosure*. These are that the disclosures be made to the correct authority and that they be made in good faith. There is a third requirement in the UK and South African Acts requiring, in some circumstances, a belief that the allegations are substantially true. I have already expressed my reservations about the procedurally correct requirement. In a nutshell it is nothing more than managed dissent.

On the universal good faith requirement one must ask, why? We don't impose that requirement on police informants and those who report anonymously, even maliciously[14], why whistleblowers? On the assumption that the truth is being reported, informants disclose important and socially useful information for all sorts of reasons (eg revenge) that should not necessarily diminish its evidentiary quality. I suspect the good faith requirement is an additional ethical high jump deliberately 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. Having said that research shows that there is a very small percentage (3%) of malicious reporting of self-defined whistleblowers (Rothschild and Miethe 1999:119).

Lewis does not go as far as I have in seeking the abandonment of the good faith test. He does however question why the onus of proving good faith is on the whistleblower. He suggests it should be the employers' responsibility to demonstrate that the whistleblower disclosed in bad faith (Lewis 1998:326). The requirement of a belief in the substantial truth of an allegation places a heavy forensic burden on the whistleblower who may only have a small glimpse of a wrongdoing picture.

All the schemes make general reference to the wrongdoing that can be disclosed (eg maladministration). So a wrongdoing (as defined) must have happened or is about to happen for protection to flow. These laws diminish their social importance by not protecting the public interest dissenter or the person who brings information into the public arena for a public reason. To my knowledge only one common law Bill has ever extended whistleblower protections to dissenters[15] and the subject rarely get attention from academic commentators.[16]

This requirement is even more onerous when we consider the next point. None of the Acts, or the Irish Bill, put any stipulations in their laws to require

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[14] In *Re a companies application* [1989] 3 WLR 265, the court found that the discloser served the public interest even though it was made in malice. Reference to this case is found in Vickers 2000:437.

[15] *Public Interest Disclosure Bill 1995 (Tas)* (abandoned).

[16] For support for the inclusion of people who speak out in the public interests not necessarily on material incidences of wrongdoing, see Vickers 2000:443.

authorities that receive disclosures to exercise an *investigative duty*. Nor is there any requirement that such investigations meet quality controls (timeliness, resource sufficiency, 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 & Jan 1996]. Research also shows that a major reason why people won't disclose is that they do not trust authorities to do the right thing with their allegations [Gorta & Forrell 1995; Zipparo 1999]. Whistleblower statutes should be responding to this body of research.

Only the New Zealand law has a built-in statutory requirement for a *review of the Act*. While such reviews can take place by subsequent parliamentary or administrative decision, an actual requirement in the Act regularizes that process and guarantees that it will occur. Why is this important? All the whistleblower Acts considered here have been through fairly similar bureaucratic and parliamentary formation processes. That just means that they are legal. The extent of community ownership of these particular laws I suspect is very low. This is partly because the Acts have not followed periods of community anger as was witnessed in the passing of race and gender discrimination laws in the countries considered. It's a complex issue but surely concerns the fact that most people don't disclose, so why would they wish for this type of legislation? I think that the general community temperament with whistleblower laws is similar to the attitude to foreign aid bills. They are a "good" thing but hardly central to one's life.

If this is an accurate observation then it is a grave community detachment. Grave because whistleblower legislation, like statutes that guarantees free speech, surely are part of the preservation of democracy. Given this, it is important to involve communities in reviews of their whistleblower laws. Beefing up the extent of public deliberation will go a long way in challenging the contradictory attitude people have towards whistleblowers (heroes or snitches). It could also have the potential to change the community focus to secret state issues. Finally it will also tackle fairly comfortable and translucent relationships between dominant whistleblower advocacy groups and sponsoring departments.

Finally in this section is the question of parliamentary accountability through *annual reports to parliament*. The Queensland Act is the only one that stipulates that a responsible minister must, on a regular basis, report to parliament on the workings of the whistleblower law. This performance criterion is connected to the previous point about compulsory review, and the same arguments apply.

Table 2: Whistleblower Laws – Scope

Country	Sector Penalties	Who May Disclose	Private Sector coverage	Media Protection	Involuntary Disclosure Protection	Disclosure of Previous Wrongdoing	Application to Politicians	Application to Military Intelligence	Extra-Territorial Application
Queensland									
Whistleblowers Protection Act	No	Public officers	Limited[17]	No	Yes	Yes	Yes	unspecified	No
United Kingdom									
Public Interest Disclosure Act	No	Workers[18]	Yes	Maybe[19]	No	Yes	unspecified	No	Yes
Ireland									
Whistleblowers Protection Bill	No	employee	Yes	No	No	No	unspecified	unspecified	No
New Zealand									
Protected Disclosures Act 2000	No	employee[20]	Yes	No	No	No	unspecified	Yes	No
South Africa									
Protected Disclosures Act 2000	No	employees[21]	Yes[22]	No	No	Yes	No	unspecified	Yes

[17] Anybody (other than public officers) may disclose:

- Substantial and specific dangers to the health and safety of a person with a disability
- Substantial and specific dangers to the environment
- A reprisal taken against another person.

[18] Includes contract-based workers, medical personnel of NHS and medical boards and people who are or were on work experience.

[19] The London-based whistleblower advocacy group, Public Concern at Work (PCAW), claims that the UK Act protects media whistleblowers. There is no specific mention of this in the Act (see s 43 G). If PCAW is correct then protection is contingent upon eight conditions being satisfied (see s43 G).

[20] Includes former employees and homemakers.

[21] Excludes private contractors

[22] Must be employer-employee relationship.

canvass and includes public servants, contract-based employees, medical personnel in the National Health Scheme and Medical Boards and those on or were on work experience. It does not cover members of the public, police and military intelligence. In the Irish Bill "employees", as defined in the *Terms of Employment (Information) Act,* can make protected disclosures. The New Zealand Act goes a step further and allows protection for current and former employees and homemakers. The South African Act allows for the protection of all employees bar private contractors.

While the coverage is fairly extensive in all the schemes, the employment bias excludes whole classes of people; consumers, students, retirees, unemployed, prisoners, and physically and intellectually handicapped people not in employment.

Impressively, *private sector* coverage is provided for in all the schemes. The most restrictive is the Queensland law that only allows for such disclosures when there are allegations of substantial dangers to the environment and 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.

One of the strongest criticisms one can bring to bear on these schemes is their failure to protect *media whistleblowers*. None of the schemes appear to protect media whistleblowers.[24] 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 oft-stated objection to protecting media whistleblowers is that journalists can run the story with a slant, pander to conspiracy theorists, oversimplify complex matters and be a magnet for the vexatious. All these are true. However they do not outweigh the public's right to know where the corruption and wrongdoing is.

If a person's allegations are defamatory, without factual justification or made for a motive other then the public interest, he or she is simply denied protection according to the procedures set out in the schemes for assessing *bona fides.* These assessments could be done during a period when the court has granted a temporary injunction against the continuance of reprisals spurred on by a media disclosure.

No, the real reason why governments wont protect genuine media whistleblowers is to do with control. The whistleblower following internal reporting pathways,

[24] As mentioned above, The UK whistleblower advocacy group, Public Concern at Work, says that the UK Act does protect them. Vickers also sees media protection in the Act, but adds "…it will be rare for this to be protected under PIDA". (Vickers 2000:440).

mandated in all the schemes, is at the behest of complex bureaucratic processes, over which he or she has 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 his or her allegations and make up their own mind.

How do the whistleblower schemes rate on the *protection of involuntary disclosures*? These are a class of disclosures made under administrative or judicial compulsion. Examples are:

- Evidence given in courts and tribunals.
- Testimony to parliamentary committees.
- Testimony to royal commissions.
- Disclosures to government auditors.
- Disclosures to government regulators.

The countries examined here have had long had very specific disclosure protection laws in place to preserve the quality and quantity of information flowing to its parliamentary, justice and regulatory services. The protection powers in these laws are quiet formidable (eg contempt of court). In these circumstances whistleblower protection (as envisaged in the schemes examined here) is a second line of defence for the involuntary discloser. However these systems commonly break down because disclosure protection is peripheral to evidence gathering. In these circumstances whisleblower protection is a first line of defence against reprisals. However the Queensland statute is the only one that provides protection for involuntary disclosures.

Retrospectivity is preserved in all the schemes bar the Irish Bill and the New Zealand Act. Retrospectivity is a challenging concept. On one hand it allows for the disclosure of past wrongdoing. However that wrongdoing would have to be of an extremely serious nature to warrant the re-routing of scarce investigative resources from current matters. There is also the issue of the quality of corroborating evidence on matters in the past. Disclosure protection in these circumstances is not as vital as it would be with current or forecasted wrongdoing. Either the whistleblower or the reprisers are probably out of the system by the time the disclosure is made. However it is still an important provision in whistleblower legislation as it at least allows for investigation of past wrongdoing.

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 that stage in our history when the collapse of trust in the integrity of our leaders is now a central feature of 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."[25] 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.

Another major area not specified is the application of the laws to military intelligence. From the discussion at the beginning of the paper it is obvious that the exclusion of the military intelligence whistleblower from protection is a major omission. The New Zealand Act is the only one that provides for disclosures on military intelligence matters.[26] The UK Act is the only one that specifically excludes such disclosures from protection.[27] The other schemes are non-commital.

The South African and the UK laws provide extra-territorial coverage for disclosures. This is to be admired and makes sense in a globalising world in which transnational groups (eg European Union) are establishing their own regulatory and disciplinary regimes.

[25] S1, *Protected Disclosures Act 2000 (SA).*
[26] S12, *Protected Disclosures Act 2000 (NZ)* provides special arrangements for the disclosure of wrongdoing in military intelligence.
[27] It does this by stating that a disclosure is not protected if in making it the person commits an offence. The clearest offence here would be a breach of the onerous *Official Secrects Act.* See S43(B)(3).

Table 3: Whistleblower Laws – Legal Protections

Country	Civil & criminal Indemnity	Secrecy breach indemnity	Injunctive relief	Adverse employment appeals	Defamation indemnity
Queensland					
Whistleblowers Protection Act	Yes	Yes	Yes	Yes	Yes
United Kingdom					
Public Interest Disclosure Act	Unspecified	No	No[28]	Yes	No
Ireland					
Whistleblowers Protection Bill	Civil indemnity only	Yes	No	Yes	No
New Zealand					
Protected Disclosures Act 2000	Yes	No	No	Yes	No
South Africa					
Protected Disclosures Act 2000	No	No	No	Yes	No

[28] Only interim relief (eg re-employment upon dismissal, pending tribunal hearing). Applicants for interim relief must establish that they have a good chance of success.

Legal Protections

- **Civil & criminal Indemnity**
- **Secrecy breach indemnity**
- **Injunctive relief**
- **Adverse Employment Appeals**
- **Defamation indemnity**

Five performance criteria to do with the *legal protections* offered in the legislation are applied here to the protection schemes.

The South African law is the only one that provides no c*ivil & criminal indemnity* to the whistleblower. Dual indemnity is provided in the Queensland and New Zealand schemes, and only civil indemnity in the Irish Bill. These can be powerful protections, and their absence in whistleblower legislation diminishes the integrity of the schemes.

The schemes have a mixed record with respect to indemnification from prosecution (or the cancellation of the claim for protection) for disclosing material the subject of a *secrecy* order or enactment. The only law that provides a general indemnity is the Queensland Act.[29] The Irish Bill contains a specific and very important protection from contravening the *Official Secrets Act (IRE),* but no other. The UK law (not surprisingly) and the New Zealand and South African schemes provide no protection whatsoever for disclosing material classified as secret. These are major weaknesses in these schemes, if for no other reason than a huge class of information is blocked from entering the public arena.

Injunctive relief, as a restrain order, is only available in the Queensland scheme. As a temporary form of compulsion it is available in the UK scheme ("interim relief") 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 then reprisals. If management can get in first and significantly reprise (eg 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.

Whistleblower laws can be formulated to ease this burden by:

- Reversing the onus of proof to make management prove that the adverse response was not related to the disclosure.
- Replacing the notion of single cause with a proximity principle (similar to what is in USA whistleblower laws). If the disclosure and the retaliation shared a reasonable timeframe then the adjudicating authority is entitled to the *prima facie* view that the disclosure caused the retaliation.

The Queensland law is the only one of the schemes examined here that gives absolute protection in defamation. Enough said!

Table 4: Whistleblower Laws – Support Services

Country	Compensation	Counselling	Relocation	Entitlement to damages	Whistleblower feedback	Fighting Fund
Queensland						
Whistleblowers Protection Act	No	No	Yes	Yes	Yes	No
United Kingdom						
Public Interest Disclosure Act	Yes	No	No	No	No	No
Ireland						
Whistleblowers Protection Bill	Yes	No	No	No	No	No
New Zealand						
Protected Disclosures Act 2000	No	No	No	No	No	No
South Africa						
Protected Disclosures Act 2000	No	No	Yes	No	No	No

Services

- **Compensation**
- **Counselling**
- **Relocation**
- **Entitlement to damages**
- **Whistleblower feedback**
- **Fighting fund**

In the final section six performance criteria are applied to the schemes to evaluate the level of service available.

The UK Act and the Irish Bill are the only two that provide a right to *compensation*. These are important provisions because otherwise the compensation-seeking whistleblower must take his or her chances in the usual avenues available in other laws or the common law.

There is no *counselling* as a lawful right available in any of the schemes. The declaration of a statutory right to rehabilitative counselling for the whistleblower and her or his family, and to services that redress the whistleblower's damaged career, would be an enormous step in the right direction for the State. It would be an important official acknowledgement that disclosure-based trauma can be long-lasting and highly infusive into core relationships (De Maria & Jan 1994:45).

Relocation provisions are only available in the Queensland and South African laws. Like the absence of statutory rights to counselling, this reflects the system's lack of interest in whistleblowers. It again displays the priority it gives to the disclosed information rather than the messenger.

Only the Queensland scheme provides a statutory *right to damages* arising from reprisal injury to the whistleblower's psychological and physical health and career.

Again the Queensland scheme is the only one that builds a statutory duty into its scheme that requires the whistleblower to be given timely and regular feedback about the progress of investigations into her or his allegations of wrongdoing.

Once the steam starts rising from a whistleblower-management conflict we usually know who will win because of the gross disproportion of resources available to the organisation. All the schemes examined here walk away from this issue. What is needed is a statutory limit on the amount of human and physical resources that each party is allowed to commit to conflicts that erupt after a disclosure has been made.

Conclusion

The paper has argued that a dangerous trend is visible in the international fight against corruption. Nations which are yet to achieve democratic governance and the

rule of law are being encouraged to push whistleblowing up to their anti-corruption front lines. This issue prompted the central questions of the paper:

- What constitutes effective whistleblower legislation, and
- can those constituents have international relevance?

Whistleblowing was reconceptualised as an artifact of secrecy. It was noted that the legislatures that produce disclosure protection acts are the same ones that produce secrecy laws.

The paper set forth the proposition that it may be possible to establish the *performance capacity* of whistleblower laws. Performance capacity, in this context meant the *statutory potential* to create an impact on the dual agendas of whistleblower protection and systemic reform examining the structural features of whistleblower statutes.

To this end 27 performance criteria were presented and applied to the protection schemes of Australia, New Zealand, South Africa, Ireland and the United Kingdom. The results of this application were then presented. It is noted that these results are based on a somewhat arbitrary choice of performance criteria. They are, in other words, not as important as the methodology, which seeks to establish internationally relevant criteria for the assessment of whistleblower protection laws.

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