

# WHISTLEBLOWING THE STATE OF THE ART

## THE ROLE OF THE INDIVIDUAL, ORGANISATIONS, THE STATE, THE MEDIA, THE LAW AND CIVIL SOCIETY

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**Whistleblowing** - [a] Bringing an activity to a sharp conclusion as if by the blast of a whistle (*Oxford English Dictionary*); [b] Raising a concern about wrongdoing within an organisation or through an independent structure associated with it (*UK Committee on Standards in Public Life*); [c] Giving information (usually to the authorities) about illegal or underhand practices (*Chambers Dictionary*); [d] Exposing to the press a wrongdoing or cover-up in a business or government office (*US, Brewers Dictionary*); [e] (*origins*) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.

### *Why Whistleblowing Matters*

Whistleblowing matters to all organisation and all people. This is because every business and public body faces the risk that something it does will go seriously wrong. The risk may be that some food you are about to buy is badly contaminated, that the train your family will travel on is unsafe, that the surgeon who will operate on your child is incompetent, that a hazardous substance is being dumped near your home or that your savings or taxes are being stolen. Whenever such a risk arises from the activities of an organisation, the first people to know about it will usually be those who work in or with the organisation. Yet while employees are the people best placed to raise the concern and so enable the risk to be removed or reduced, they are also the people who have the most to lose if they do.

Unless organisations foster a culture that declares and demonstrates that it is safe and accepted to raise a genuine concern about wrongdoing, employees will assume that they face victimisation, losing their job or damaging their career. The consequence is that most employees will stay silent where there is a threat – even a grave one - to the interests of others, be they consumers, passengers, patients, communities, taxpayers or shareholders. This silence can mean that those in charge of organisations place their trust on the systems they oversee rather than on the people who operate them. This means they deny themselves what can be the fail-safe opportunity to deal with a serious problem before it causes real damage.

So whether you are a consumer, an employee who may believe something is going badly wrong or a manager or an employer who wants to run a proper organisation, whistleblowing matters. It helps us to understand how we can deal with such risks and how we can counter the breakdown in communication that subverts accountability in the workplace. That this breakdown can undermine the public interest is clear when we remember that the most successful way the police deter, detect and clear up crimes is through information communicated to them by the public.

Yet in workplaces across the world, law, culture and practice gives a strong message that employees should turn a blind eye to wrongdoing and should not raise their concerns internally or externally.

The consequence of this culture is that it discourages normal, decent people from questioning wrongdoing that they come across in their jobs. It encourages employees to be guided exclusively by their own short-term interests and undermines any sense of mutual interest between the workforce, the organisation and those it serves. While its effect is most damaging and direct in relation to workplace wrongdoing, it also influences the way employees behave when - whether travelling home or shopping at the weekend - they come across crime in their community. Conditioned to turn a blind eye in the workplace, this culture can only encourage them to walk away from their community.

These are the 'big picture' reasons why whistleblowing matters. But to understand how you, your organisation or group can address this issue, we must first consider the position of the individual employee who realises that there is some wrongdoing or threat to the public interest.

## **A HUMAN DILEMMA**

In practical terms, if an employee is concerned about some wrongdoing or risk in the workplace that threatens others, he or she has four options. These are

- To stay silent;
- To blow the whistle internally;
- To blow the whistle outside; or
- To leak the information anonymously.

### ***Silence and Society***

Silence is the option of least risk for the individual employee who comes across wrongdoing in the workplace. It is the default option for many reasons. The employee will realise that their suspicions could be mistaken or that there may be an innocent explanation for the conduct. Where colleagues are also aware of the suspect conduct but are staying silent, the employee will wonder why he or she alone should speak out. Where the wrongdoing seems clear to the employee, they will assume that those in more senior positions have also seen it and are implicated in some way and so will see little reason to pursue the matter internally. In societies where unions are scarce or their independence has been compromised, the employee will be left without help or guidance as to who to approach and how. In organisations where labour relations are adversarial and whistleblowing is unwelcome, the employee will be expected to prove that the wrongdoing is occurring, even though it clearly would be far better if those in charge investigated the matter. Finally, unless employees believe there is a good chance that something will be done to address the wrongdoing, there will be no reason why they should consider risking their own position.

Even if the employee is not deterred by any or all of these reasons, he or she will rightly need to consider their private interests and those of their family before raising the matter. Without any reassurance to the contrary, the employee will fear workplace reprisal – be it harassment, isolation or dismissal. Thus, without guidance and reassurance on what to do, it is inevitable that

most employees stay silent. The reasons that people are now re-evaluating whistleblowing are because the costs of this silence have become too high. It means that

- Consumers, shareholders and communities are left at risk with neither the information nor the opportunity to protect their own interests;
- Unscrupulous managers or employees are given a reason to believe that ‘anything goes’;
- Those in charge are denied the chance to look into concerns about wrongdoing and to avert real problems; and
- Debates and reforms tend to focus on ways to improve the system, rather than on the conduct of the humans who have to make it work.

### ***Whistleblowing and The Employer***

Recognising the damaging effects of this culture, the UK *Committee on Standards in Public Life* recommended steps for organisations to take to reassure and enable staff to raise concerns constructively. One of the reasons the Committee was set up was because of the damage that was being done to public confidence by [a] incidents of wrongdoing which had not come to light before real damage was done (caused or facilitated by silence), and by [b] rumours of misconduct or sleaze that were difficult to effectively refute or substantiate (often caused by anonymous stories that circulated around). While its recommendations on whistleblowing were directed at public bodies, the same message applies to organisations in all sectors.

*“Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation. We observed in our First Report that it was far better for systems to be put in place which encouraged staff to raise worries within the organisation, yet allowed recourse to the parent department where necessary. An effective internal system for the raising of concerns should include:*

- *A clear statement that wrongdoing is taken seriously in the organisation and an indication of the sorts of matters regarded as wrongdoing;*
- *Respect for the confidentiality of staff raising concerns if they wish, and an opportunity to raise concerns outside the line management structure;*
- *Access to independent advice;*
- *Penalties for making false and malicious allegations;*
- *An indication of the proper way in which concerns may be raised outside the organisation if necessary.”<sup>1</sup>*

At the heart of this approach is the recognition that without safe means for concerns to be raised and addressed, the only options employees have are silence or the feeding of a rumour mill that can only undermine public confidence. While these options appear as alternatives, they are in fact linked because though the organisation is kept in the dark the employee’s silence is rarely absolute. This is because in many cases the employee will mention the concern about the wrongdoing to immediate family or close friends (who are unable to do anything but sympathise with the employee’s plight) and through them the unchecked allegation can gain its own demoralising momentum.

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<sup>1</sup> UK Committee on Standards in Public Life, *Second Report*, May 1996, page 22 and *Third Report*, July 1997, p.49.

In formulating its recommendations, the Committee took account of good practice in the private sector where in genuinely competitive markets there has been a growing recognition that the early reporting of suspected wrongdoing was in the organisation's self-interest and a key aspect of effective self-regulation. The reason for this is that as every shopkeeper and small business knows if it suffers wrongdoing or damages its consumers they will likely take their custom elsewhere.

In terms of shifting cultures, an analogy can be drawn with the approach taken by large corporations to feedback from consumers. Businesses in sectors that became more competitive over the past twenty years realised the need to try and build lasting relationships with their customers. Aware of surveys that one dissatisfied customer would tell ten or more people of their unhappy experience, market leaders started to solicit feedback from customers rather than wait for complaints. They found that even if they did not satisfy the particular complaint, the mere fact they had considered it would substantially improve the customer's attitude to the company. This was in contrast to the approach adopted by monopolistic organisations which treated and treat consumers - once the purchase had been completed - as troublesome, if not untrustworthy, complainants.

The approach taken to information from the workforce has been equally negative. The assumption is that employees will only raise personal grievances because they neither recognise nor identify with the well-being of the organisation. This assumption has informed a raft of laws and practices on workplace relationships and so, in turn, inevitably influenced the way employees are conditioned to behave in the workplace. This is not just misguided but self-defeating as information from the workforce is not only readily accessible and free to collect, but it enables the organisation to put a potential problem right before it causes any real damage to it, its reputation or its stakeholders.

The self-interest of organisations in promoting whistleblowing is now being recognised and increasingly employers are beginning to provide safe whistleblowing routes for staff. While many of these are in response to recent legislation, the most effective ones are where the organisation's leaders realise the importance of providing an alternative to (but not a substitute for) line management. This is because without it they give their managers a monopolistic control over the information which goes to those in charge. As with any monopoly, one weak link – be it a corrupt, lazy, sick or incompetent manager – will break the communication chain and stop those in charge getting information which could be critical to the success or failure of the organisation.

There are two other ancillary benefits for the organisation. First, the new approach to whistleblowing reminds everyone at the organisation that they owe a loyalty to the organisation and not just to their manager. Secondly, providing a safe alternative to silence is one of the most effective ways to deter and discourage people from abusing their position and authority.

### ***Whistleblowing outside the organisation***

Where, however, it is not safe and accepted for people to blow the whistle internally, we need to turn to the options that exist for those employees who decide to speak up if they come across serious wrongdoing. Without a safe internal route, one option is to disclose the matter openly outside the organisation - be it to the authorities or more widely.

Such outside disclosures raise ethical and legal issues of confidentiality and secrecy. They also influence the balance of relationships between business, the state and the media. An outside

disclosure will more often than not involve some regulatory intervention and, at worst, unjustified adverse publicity. At the very least this will cause inconvenience and disruption to an organisation that would have dealt with the matter properly had it been told of the concern directly. In such cases where the employer would have addressed the matter responsibly, the value of an external disclosure is questionable because regulators and the media, when they receive such information, will mostly put the facts straight back to those in charge of the organisation. It is clear from this that a workplace where outside disclosures are seen and used as the first port of call is evidence at the least of poor management and weak leadership.

Obviously not all employers are responsible and in such cases an outside disclosure is the only effective way of averting a problem before real damage is done. So outside disclosures must be protected in any effective whistleblowing arrangements. Understood and applied properly, such arrangements allow the authorities to distinguish those organisations that can rightly be given the chance to address such problems themselves from those that cannot. In this way whistleblowing cultures will make regulation more efficient.

Until recently, in most legal systems there has been no protection for an employee who makes an outside disclosure – even if it is in good faith, justified and reasonable. Accordingly, such disclosures have often been made anonymously, raising the difficult issues we address in the next section. Unless your country or organisation wants to encourage anonymous disclosures, you have every reason why both in law and practice you should explain when outside disclosures, openly made, are permitted and protected.

Where a whistleblowing culture exists staff will not fear raising a concern internally and so protecting outside disclosures is something that should cause no fear to any well run organisation. Indeed it will see how such a provision works to its advantage. First, without there being an external body to which staff may safely and openly go, some of its employees will lack the confidence to believe that any internal scheme is a genuine attempt to hear and address such concerns. Secondly, asserting the role of such an outside body (be it a regulator, parliament, shareholders or the wider public) makes real the principle of accountability by reminding everyone through the organisation who is accountable for what and to whom. This can engender a sense of self-discipline across the organisation as people know they can readily be expected to account for their conduct. Finally, the clear acceptance that employees have a safe external route is a powerful incentive for managers to promote and deliver the organisation's own whistleblowing scheme.

### *Anonymous disclosures*

Without safe routes for whistleblowing concerns to be raised openly and addressed properly, anonymous disclosures are the likely alternative to silence. Here it is important to distinguish anonymous from confidential disclosures. An anonymous disclosure is one sent in a brown envelope or a message left on an answer machine, with little or no possibility of identifying the person and so contacting him or verifying the information. By contrast, a confidential disclosure is where the recipient knows the identity of the person but agrees not to disclose it if and when the information is used.

As to the message, anonymity raises real problems as it makes the concern more difficult to investigate, the facts more difficult to corroborate and excludes the possibility of clarifying any ambiguous information or asking for more.

As to the messenger, an anonymous disclosure focuses more attention on and speculation about his identity than open whistleblowing. The result is that anonymity is no guarantee that the source of the information will not be deduced. Where the allegations are serious, those implicated will try all the harder to identify the source and as the net draws in and innocent colleagues are suspected, the pressure on the source to own up becomes intense. In the context of disclosures from the workplace, the identity of an anonymous source is identified far more often than not. When this happens, the fact that the employee acted anonymously will be claimed as a sign of bad faith, shame or dishonesty, and will be used to undermine any suggestion that he or she was acting in the public interest.

As anonymity makes it harder to address the message and can also harm the messenger, it has little to commend it from either point of view. Looked at in a wider sense, anonymity also has little virtue. First, whether anonymous disclosures are made internally or externally, they are tainted by the fact that anonymity will always be the cloak preferred by a malicious person. Secondly, anonymous information can give the organisation that receives it unaccountable and unlimited power over what to do with it. As it is anonymous, it is entirely in the discretion of the body whether to use, ignore or conceal the information. This is because its decision is not open to question by the anonymous informant and because nobody else knows it has the information. For these reasons anonymity fuels mistrust and makes the powerful unaccountable. This explains why it is a common feature in dictatorships.

### ***So what is whistleblowing?***

As this book shows, the word is now used to describe the options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a complaint about one's own treatment. Whistleblowing covers the spectrum of that communication, from raising the concern with managers, with those in charge of the organisation, with regulators or with the public (be it through the media or otherwise). And the purpose of whistleblowing is not the pursuit of some private vendetta but that the risk can be assessed and, where appropriate, reduced or removed.

Whistleblowers stand up to be counted and raise their concerns openly. Thus, they are the opposite to the anonymous informer that authoritarian systems nurture. And they are also different from the confidential or 'off-the-record' sources that journalists will also depend on to inform their stories. This is what we mean by whistleblowing and whistleblowers in this book.

It is also important to remember that people do not have to be victimised to be a whistleblower. Many people all over the world raise concerns about dangers and wrongdoing in the workplace and the issue is dealt with properly and their lives and careers progress unaffected. They too are whistleblowers, though they remain – no doubt to their personal satisfaction - largely unknown. Public perception, however, is informed by those whistleblowing cases that do enter the public domain and so we turn now to the four whistleblowers in this book and consider the issues that their cases raise.

### ***The four whistleblowers***

The most famous of the whistleblowers featured in this book is Sherron Watkins. She gives an exclusive account of her whistleblowing experience at Enron. She was one of three

whistleblowers named as TIME person of the year in 2002/3, an honour normally reserved for world statesmen. As TIME said in its citation, Watkins and her two fellow whistleblowers - Cynthia Cooper who had worked at WorldCom and FBI agent Colleen Rowley -

*“ were people who did right just by doing their jobs rightly – which means ferociously, with eyes open and with the bravery the rest of us always hope we have and may never know if we do”.*

Watkins raised her concerns about the financial problems at Enron with its chairman some months before its collapse. Her internal whistleblowing helped to call a halt to the massive wrongdoing at Enron and to ensure that a cover up was not an option. Importantly in terms of public perceptions, Watkins survived in her job. As she writes - “I recognize that my story is one with a happy ending. I was not vilified, I was not without other means of earning an income, and I was able to remain in Houston and did not have to uproot my family. Congressional reports and external auditors confirmed my allegations. I was named a TIME Person of the Year.”

Harry Templeton, however, had a much harder time. He recounts his efforts to stop a media magnate from plundering the employees’ \$1 billion pension fund. Templeton’s whistleblowing took place in the UK in the late 1980s and few then were willing to give a whistleblower a fair hearing. Templeton was sacked and vilified for his efforts. It was only after Maxwell had drowned in suspicious circumstances and his theft of the whole pension fund was discovered that people realised that Templeton had been right all along. Although Templeton’s career in the print industry had been terminated mid-life, his personal story shows that even when hounded, whistleblowers do not need to become victims.

Moving to our case study from South Africa, an in-house lawyer, Victoria Johnson, took issue with the political leadership of the City of Cape Town over its arrogant approach to the public it had been elected to serve. While she is right to say that the underlying issue - the renaming of streets - was an ostensibly minor one, her principled stand and eventual vindication has helped to establish new standards of accountable governance in the Western Cape. As to her own career, it too has survived, though Johnson has had to endure criticism, soul-searching and anxiety.

Dr. Jiang Yanyong’s role in exposing the Chinese authorities’ impulse to conceal the incidence of SARS shows that the need for whistleblowers exists the world over. In a global economy this may seem obvious, but this incident makes clear that even if one country is trying to create a whistleblowing-friendly culture, the well-being of its people can still depend on a lone individual in another part of the world. As Robin Van den Hende’s account shows, the fact that Dr. Yanyong has been publicly recognised for his role at home is further evidence of a changing culture in the light of China’s long record of opposing any form of dissent.

So, how typical are these four whistleblowers? None of them expected their whistleblowing to be easy or risk-free. Each of them had a strong sense of personal ethics and examined their own consciences against this. Each has retained their self-respect, though Johnson’s is qualified by her remark that her betrayal of her boss has tinged her role with a degree of shame and discomfort. All of them blew the whistle openly (and on this it is notable that Watkins’ initial anonymous reports had come to nothing). Each of the four (and Dr Yanyong with a remarkable insistence) was ready to accept responsibility for their actions – so demonstrating that they practiced what they preached. In each case, they were not denouncers or accusers but witnesses who let the facts speak for themselves, and this too is an essential element of true whistleblowing.

## ***Whistleblowing and The Media***

We turn now to consider the relationship between whistleblowing and the media as each of the four cases throws light on this seminal, if complex, issue. Whistleblowing is a key way to deliver accountability (by which we mean that people are expected to explain their conduct). Where someone in a position of power has been informed about likely wrongdoing, he or she will know that if they ignore the risk and the concern proves well-founded and serious damage is done, the reasonableness of their own conduct will be scrutinised. In the end, whatever concerns there may be about the independence, priorities or interests of the media in any country, the media is an essential way in which conduct is capable of being scrutinised and those in positions of power are expected to account for their actions.

This is not to say that the media should be the first port of call for all whistleblowers because the mere existence of a free media (whether at home or abroad) has a latent, deterrent effect on misconduct. This is clear from the popular maxim people use when they are faced with a difficult decision – namely, “would I be happy to see my action reported in the media?” This valuable and sensible test leads to one of two results. The first is that you only act in a way for which you are ready to account. The second is you decide you do not have to act in such a way as you will use your influence to try and ensure that you will not have to account for your actions. As whistleblowing is the most effective, if not the only, check on this second course of conduct, the symbiotic relationship between whistleblowing and the role of the media is clear.

Sherron Watkins’ case demonstrates this vividly as her internal whistleblowing proved to be the equivalent to a smoking gun. She chose to raise her concern internally, as she wanted to give the company a chance to try and salvage the situation and as she believed Ken Lay – Enron’s chairman - was a decent man. But once she had sounded the alarm so clearly to those in charge of the company, they realised they would be expected to account for their response to her warnings. And so the options of saying that they had no idea things were so bad, of covering up or of scapegoating some middle ranking executives should the company collapse were no longer viable. And when her memos were discovered the media was quick to explain that their existence meant those responsible now had less chance of getting away with it.

So even though Watkins did not blow the whistle to the media, its existence influenced the way Enron responded to her internal whistleblowing. In addition, her internal whistleblowing was all the more well judged if, as some have reported, the power and influence of Enron was so great that there was a strong reluctance in the US media to question the company’s success. This influence and the legal pressures the company could have brought to bear meant it was unlikely whistleblowing directly to the press would have achieved anything. This is not wild speculation as the story about Jeffrey Wigand’s whistleblowing on the tobacco industry - as dramatised in the Hollywood movie *The Insider* - shows. There one of the leading US investigative programmes on TV – CBS’s *60 Minutes* - decided not to broadcast the whistleblower’s story for legal and/or commercial reasons that were irrelevant and unacceptable to the lead journalist, Lowell Bergman. The only way Bergman was able to get the programme aired was by using all his skills as an investigative reporter to blow the whistle on CBS to the *Wall Street Journal* and the *New York Times*.

Templeton’s case raises similar issues. He worked for a media magnate whose power was such that no UK media or journalist (other than the satirical magazine, *Private Eye*) would report Maxwell’s misconduct, nor his misuse of the pension fund - even when it was the reason that Templeton and his colleagues had gone on strike. Equally the political and financial influence of

Maxwell was so great that few, if any, elsewhere were willing to hear what Templeton was saying, preferring instead to accept Maxwell's view that Templeton was just a wild man from the north. With no media outlet prepared to run the story and with no regulatory oversight of pensions in the UK in the late 1980s, Templeton had no option other than fighting the abuse himself.

However, neither Templeton's case nor *The Insider* is a good guide to the general role of the media in whistleblowing as they both involved whistleblowing about the media. This is clear from the other case studies. While Johnson blew the whistle internally on the misconduct of some of the political leadership on the Western Cape, it was not long before the media had picked up the story (a likelihood that seems to be particularly great for those who work in or around political life). The attention the media then brought ensured that the issue would not go away even if Johnson chose or felt pressured not to pursue her concerns in the face of strong opposition. In this way the media proved vital allies in her whistleblowing, even though they were not the first port of call. Their attention helped to separate message from messenger and their interest in and witnessing of the events can only have discouraged any serious attempts to victimise her.

The support Johnson received from the media takes us back, briefly, to Watkins' case as she too benefited from its coverage. When her own position was at its lowest ebb, the media discovered her memos in the congressional documents and she says that their attention gave her a "sense of safety and sanity", even though she felt uncomfortable at being at the centre of a media circus. In the light of this, as Watkins suffered no real reprisal, it is no surprise that whistleblowers who are victimised often talk of the vital support and strength the media has given them. This is due not only to the fact that the media act as a witness themselves but that they highlight – and may help redress - the inequality in bargaining power between the parties if the dispute moves towards legal action.

Dr Yanyong was a classic media whistleblower, who went straight to the press. His public disclosure about the threat of Sars was undoubtedly justified by the gravity and imminence of the risk to human health, and by the cover-up of the facts. However, Yanyong's initial approach to Chinese and Hong Kong media was not picked up or covered but his letter found its way swiftly to the international media which ran the story (thus also enabling the Chinese press to cover it more easily). Without qualifying or distancing himself from his media disclosure in any way, Yanyong also pursued his concerns openly with the Chinese authorities insisting that he should be held accountable for his actions. As with Johnson's case, the fact that there was media interest ensured that the authorities were obliged to deal with the message and would have thought twice before taking any action against the whistleblower.

While one should not generalise from these four cases, they do show that the relationship between whistleblowing and the media is a vital one and one which - beyond the simple point about accountability – is of necessity complex, rich and depends on the specific facts. Even if Watkins had blown the whistle to the authorities – as the post-Enron legislation in the US now encourages and protects - the mere fact that the media was there to scrutinise the way the authorities would have dealt with her warnings would have helped ensure that they did their job diligently, whatever power and influence Enron may have had.

This symbiotic relationship between the media and whistleblowing is discussed in the interview with Chuck Lewis, a leading public interest journalist in the US, which follows this introduction. While emphasising that reporting "benefits magnificently from and is enriched by the views of

insiders”, he recognises the distinction between the whistleblower (or ‘source-plus’ as he calls it) who speaks openly and on the record, from the confidential source whose views inform or inspire a journalist’s story. His description of the pressures that journalists are under and his explanation of why parts of the media dislike dealing with whistleblowers helps explain from a journalist’s perspective why this relationship can be so fraught.

Lewis’s description of these pressures throws light on the practical reality of being a journalist, which was compared by a former US Supreme Court judge to that of “a fragile bark on a stormy sea.” This shows more consideration to the work of journalists than that demonstrated by Lord Hutton, in his report into the death of scientist Dr. David Kelly. Kelly had been the source for the BBC’s questioning of the authority of a British government claim that Iraq’s military threat justified pre-emptive action. In the light of Lewis’ view (which we share) that the media is more inextricably bound to a whistleblower - as its own credibility will be undermined if that of the whistleblower’s is - than it will be to an unnamed source, one can wonder how events would have evolved had David Kelly blown the whistle openly.

Lewis recognises that many people do not want to go anywhere near the media – either as a source or as a whistleblower and in his interview speculates that the occurrence of a true media whistleblower (such as Dr Yanyong) is about one in a million. And he observes that for every one of these, journalists have to deal with a good number of whistleblowers who are “obsessed by their own personal situation and their own individual circumstances.” The problems and distractions these cause impact not only on journalists but on other bodies they deal with across the community (as Brian Martin, of the Australian whistleblowing group remarks, whistleblowers too can be awkward people). In some cases the cause of this obsession is the result of the whistleblowing, but in others it has much to do with the way some individuals respond to the plight, pride and priorities of the human condition and to the fact that modern western society has become so personalised that we are all encouraged to see the messenger rather than the message.

Moving beyond western societies, Lewis remarks on the dangers that investigative journalists, their sources and whistleblowers can face in developing democracies and transitional economies. Where these are real issues their impact goes far beyond whistleblowing, but as Jiang Yanyong’s case shows the international media may be able to provide some essential and effective scrutiny.

While recognising whistleblowing laws as vitally important in any democracy, Lewis rightly cautions against arrangements that draw the whistleblower into an exhausting internal scheme. Not only do such arrangements risk obscuring rather than asserting accountability, they can confuse message with messenger. So to what extent can whistleblowing legislation help?

### ***Whistleblowing and The Law***

In constructing whistleblowing or any other legislation, one has to be clear what one is trying to achieve both as to the big and small picture and one needs to make a call on how the law – which will always be something of a blunt instrument - can avoid doing harm, while being as effective as possible in securing the desired result. To this end, one should consult with key interests and understand and try to meet their legitimate concerns. In the context of whistleblowing, one should also take account of other factors in the country which dictate or influence people’s conduct when faced with questioning or addressing wrongdoing.

In scoping any whistleblowing legislation, we believe one can helpfully look at the experience in other countries and Part 3 of this book contains a review and critique of some of the main legislative schemes. But even if the approach of any country to any particular issue seems sound, one should not assume that its answer will necessarily fit your own country. This is because the role of the law differs so greatly between countries, not only as to the protection it offers, the balances it strikes and how accessible it is, but as to the culture it reflects.

The oldest whistleblowing legislation is the False Claims Act, introduced during the American civil war as the only effective way to deter and detect companies which were selling defective guns and munitions to the warring sides. It provided that the whistleblower is entitled to a cut of any financial savings that the Government secures or recovers as a result of the disclosure. Tom Devine - a leading US public interest attorney – shows that similar US whistleblower laws that enable ‘people who do good to do well’ have brought colossal savings to public finances. While there are moral hazards in such an approach, it is one of the few legislative schemes that is not triggered by the victimisation of the whistleblower.

Aside from such reward-based legislation, the US also has a plethora of different and conflicting provisions that now apply to its whistleblowers, as Devine demonstrates in his contribution to this volume. Despite his profound frustration at the way the laws that apply to government employees have been subverted by the courts, it is clear from the striking examples he offers that Devine and other campaigners have helped US whistleblowers to secure some major victories in the public interest.

While US whistleblower protection has historically focused on government related activities, it seems that some of the national security reforms post 9/11 may perversely undermine much of this basic whistleblower protection. If this proves to be the case, US corporate sector whistleblowers who have, post Enron, been given protection will now be in a stronger position than their public sector counterparts. While it will be interesting to see how this new corporate sector legislation will work in a country where there is no general labour law protecting employees, the simple approach it takes to disclosures contrasts with that in the UK legislation and we now turn to consider the distinct approaches of these two models.

The disclosure regime for US corporate whistleblowers gives them equal protection – and so offers no guidance on - whether they raise the matter with their employer, the authorities or Congress. The UK legislation, however, has a tiered disclosure regime. It starts by providing virtually automatic protection for internal whistleblowing; then, whether or not the whistle is blown internally first, disclosures to the authorities are readily (though not quite so easily) protected. Wider public disclosures, however, have to be justified and reasonable if the whistleblower is to be protected and the UK’s legislation is rare if not unique in that it has protected a number of media disclosures.

As Anna Myers explains in her assessment of the UK’s Public Interest Disclosure Act, while its aims are to protect whistleblowers, it was constructed not to launch a thousand lawsuits but to signal a change in culture where organisations and society would be more likely to address the message rather than shoot the messenger. The disasters and scandals she lists that set the background to the legislation explain why such an approach was felt necessary in the UK. As a matter of practice, the UK disclosure regime has the merit of flagging the desirability that the concern be raised as in the best interest of the organisation and of providing some leverage to help ensure it is then addressed properly. A downside of this approach is that it may encourage

some employees to persist in trying to work the internal system when an external disclosure would be more effective as to the public interest and less exhausting for the employee.

The UK's disclosure regime promotes the idea that unless the employer assures staff that they can safely blow the whistle internally, they are unlikely to warn the employer of any problems. So to avoid the disruption or bad publicity of an external disclosure or the disaster that may follow silence, it's in the employer's interest to make it safe for staff to raise concerns and to deal with them properly. Equally, should the employer wrongly victimise the whistleblower, not only will it draw attention to its own wrongdoing but it will also have to compensate the whistleblower for all his or her losses.

Myers suggests that one main benefit of the UK law has been its declaratory effect, as it has helped shift perceptions about whistleblowing and about ways to deter and tackle wrongdoing. In this respect the approach of the Public Interest Disclosure Act can be seen as a British response to the point Devine makes that at best, the potential of a whistleblower law is to be effective as a last resort. Its approach also chimes with the observation that organisational leadership can be more significant than legal rights in this area as the UK law seems to have had some success at encouraging organisations to reconsider the value of whistleblowing and prompting many leaders to embrace it.

While it will take a generation or more before one can assess whether such an attempt to shift cultural values has had any real effect, the Public Interest Disclosure Act seems to be working reasonably well so far, notwithstanding some teething problems. Myers cites tentative evidence from the public sector that it has impacted on the incidence of wrongdoing and demonstrates that the law has been used successfully by internal and external whistleblowers from both the public and private sectors.

Kirsten Trott's careful analysis of the numerous whistleblowing laws in Australia and New Zealand is of necessity more abstract as there is so little evidence about how they are working in practice. The main reason for this is that the enforcement of the legislation there is a matter primarily for the authorities themselves. While in the UK and the US the whistleblower can initiate a claim of victimisation himself, the laws in Australia are predominantly enforced by criminal or administrative actions brought by the authorities. With legislative schemes that criminalise both the managers who victimise whistleblowers and the whistleblowers who stray beyond the precise statutory protection, it is perhaps no surprise that there have been no prosecutions.

As Trott notes, research needs to be undertaken into the various schemes to see how far they have encouraged Australasian public sector employees to blow the whistle, whether they have discouraged reprisals and to seek evidence whether they have deterred wrongdoing.

While the Australasian legislation focuses on the public sector (following the emphasis of the approach in the US pre-Enron), it is proposed – by contrast - that the draft law in Japan will apply only to the private sector. As Yukiko Miki and Koji Morioka show in their respective chapters, the cultural and social pressures for corporate loyalty in Japan present a real challenge to any whistleblowing scheme. These are so great that, notwithstanding the very strong labour protections Japan provides, hardly any employee has blown the whistle in the past however grave the dangers. It appears that the Japanese law may look for guidance to the UK whistleblowing legislation. With such a strong tradition of corporate loyalty in Japan, the adoption of a legislative scheme based on the mutual interest between employer, employee and the public

interest is both modest and radical at the same time. For this (albeit to many westerners incongruous) reason, Japan may prove well suited to reap the benefits of this approach. However, if new the law were to protect only disclosures about one of several hundred specific criminal offences it is difficult to see how this will embed or build on any mutual interest.

Whatever may happen in Japan and the UK, the potential application of this mutual interest approach to whistleblowing in transitional economies takes one to look at the experience in South Africa. Its Protected Disclosures Act, now in force for over two years, is closely modelled on the UK legislation and it is clear from the chapter by Mukelani Dimba, Lorraine Stober and Bill Thomson that the challenges this approach faces are intense. How can legal protections against reprisals be sustainable where life is cheap and the labour supply plentiful in the context of a 40% unemployment rate? In a country where the recent past has been clouded by the role of *impipis* or state informers, how soon can one fashion a benign approach to whistleblowers? Recognising the wider benefits if the notion of a common or public interest can be made meaningful in a transitional economy, South Africa is now considering whether to widen the legislative scheme beyond the workplace.

Of the four case studies, it is only Victoria Johnson who could have been protected by her country's whistleblowing legislation. Though she did not have to bring a claim, it is clear from her account that its existence helped guide her actions and strengthen her resolve. Had the US legislation for corporate whistleblowers existed in the 1990s, it is at the least possible that Watkins or one of her colleagues would have blown the whistle earlier, either internally or to the authorities. Had they done so only to be victimised, their resulting legal claim would have attracted scrutiny not only of the reprisal but of the alleged wrongdoing and so much damage and distress would have been avoided. The same result may have happened in Templeton's case had the legislation been in force, though what is clear is that he would have been fully compensated for his losses even if it did not stop Maxwell. So, as the case studies show, when one considers the effect any legislation may have one has to view it in the context of the other factors and levers that exist and can be brought to bear on the issue, interests and players.

For this reason, even where any given whistleblowing legislation appears to be strong and clear, employees still need to take real care. As Sherron Watkins remarks "a lot of whistleblowers choose not to seek legal assistance because they have done nothing wrong. I think that a lawyer is really necessary and not someone that the company pays." This is not just because the lawyer can advise on legal rights and obligations, but because he or she can offer tactical advice and can help ensure that the whistleblower keeps sight of the wood for the trees.

### ***Whistleblowing and Civil Society***

Recognising this, civil society groups in Australia, Japan, South Africa, the UK and the US have separately seen the need to offer legal advice to employees on whether and how they can blow the whistle and to offer varying levels of support thereafter. Talking through such conflicts of loyalty with an independent person helps the individual reach an informed decision provided that (as GAP the US not-for-profit organisation urges) the first rule for any whistleblowing organisation - to do no harm to one's client - is adhered to.

As significantly, the existence of a civil society group addressing this issue in any given country can help to tilt the balance so that organisations are less swift to discourage, ignore or suppress whistleblowing. In this way, they can strengthen the hand of prospective whistleblowers even where they have not approached the group for advice. As the experience in the South Africa, UK

and the US shows, a civil society group addressing whistleblowing can also help influence attitudes to organisational accountability and leadership, quite aside from its client work.

Turning to wider cultural issues, civil society is best placed to promote the case that people be encouraged to question rather than simply denounce and to explain why the right to question another's conduct is no greater nor less than the right of others to question one's own. By informing debates about the roles of whistleblowing, accountability and the public interest, civil society groups can provide the context within which honest, decent people can see whistleblowing as a public good and something worth considering. As more people begin to see whistleblowing in this light, those who are tempted to abuse positions of power will think twice as they can no longer rely on the system's pressures on staff to stay silent.

As Part 4 of this book shows, the civil society responses, rightly, reflect the culture, legal tradition and sociology of each country. In Australia there is, essentially, a mutual support group for whistleblowers. In Japan, civil society provides expert advice to employees on whether and how to blow the whistle. This is similar to the approach in the UK and South Africa, though the whistleblowing groups there also train employers, unions and regulators on leadership, openness and accountability. In the US, the group is more whistleblower than whistleblowing and campaigns and litigates on individual cases.

The experience from the US, UK and South Africa is that civil society groups can also exercise real influence over the scope and content of whistleblowing legislation and drawing on that experience these groups are now able to offer support and guidance on initiatives elsewhere.

This book, then, is for activists, employees, leaders, legislators, managers, policy-makers, practitioners and professionals across the public and private sectors. Its review of the state of whistleblowing around the world – North, South, East and West – shows that a critical mass is beginning to accumulate internationally. We hope this book will encourage and help you to join up the dots, linking law and policy with culture and practice, so that you can help chart the right course for your own organisation and society. Only if changing culture matches the good intentions of any law can a safe alternative to silence be created and only then can the principle of accountability take root and begin to work in practice.

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