Public Service Commission of Canada
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Whistleblowing – a. Bringing an activity to a sharp conclusion as if by the blast of a whistle *(OED)*. b. Raising concerns about misconduct within an organization or within an independent structure associated with it *(Nolan Committee)*. c. Giving information (usually to the authorities) about illegal and underhand practices *(Chambers)*. d. Exposing to the press a malpractice or cover-up in a business or a government office *(US, Brewers*). e. *(origins)* Police constable summoning public help to apprehend a criminal; referee stopping play after a foul in football.

Three Whistleblower Protection Models:

A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom

Sheryl Groeneweg

Comparative Merit Systems Unit
Research Directorate
Public Service Commission of Canada
http://www.psc-cfp.gc.ca/research/

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Canada

Executive Summary

Whistleblowing, the act of raising concerns about misconduct within an organization, is a key element of any governance system's transparency and accountability framework. In light of recent discussions about public servant whistleblowing protections for public servants in Canada, this paper provides a comparative analysis of three whistleblowing models, an Australian case, the United Kingdom and the United States. This paper serves as a primer to governance systems and whistleblowing legislation.

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Introduction

Whistleblowing systems, frameworks, schemes and models abound in diversity and scope in various nations' governments around the world. A 1999 Organization for Economic Co-operaton and Development (OECD) Public Management Policy Brief, *Building Public Trust: Ethics Measures in OECD Countries*, outlines, in part, the international representation of whistleblower protections:

> [r]eporting misconduct by public servants is either required by law and/or facilitated by organizational rules in two thirds of OECD countries. Almost half of these countries offer general protection mainly in their public service framework... (4).

The OECD brief also states that "[c]ountries have either strengthened existing legal measures or established a legal framework for internal control" (4).

The reported increasing rate of concern and consequent adoption of such ethical laws and/or policies on an international scale exemplifies the growing trend of governance in accordance with values and ethics based mandates primarily focusing on the public interest, organizational justice, transparency, efficiency and accountability.

This paper is a primer to three distinct whistleblower protecton models, Queensland, Australia, the United Kingdom, and the United States.

The Queensland, Australian Scheme

The state of Queensland was one of the first governments in Australia to develop and adopt whistleblowing legislation. The *Whistleblowers Protection Act* (WPA) was created as a direct consequence of massive corruption in the Queensland public service throughout the late 1980s and into the 1990s. Chris Walters, a manager within Internal Investigations, Audit and Operational Review Branch in the Queensland Health department sums up this drive to eradicate corruption in his paper "The Viagra Approach to Ethics:"

> [t]he development of an holistic approach to public sector ethics, including whistleblowers' protection, codes of conduct, risk management and fraud control, act as testimony to the fact that the requirement for accountable overt and ethical behaviour in the public sector has been on Viagra over the past ten years.

The Australian government is highly decentralized. How this legislation was made is a direct consequence of the power relationship between the federal government, the state government and the "shadow" public service. In short, the Queensland government was able to be the forerunner in sanctioning such formal ethical measures due to the autonomy afforded of the Australian state governments. Therefore, the passing of the Queensland legislation for whistleblowing protection in 1994, prior to most other similar legislation in the country, including that of the federal government, is not unusual. The new legislation finally ". . . enshrined in statute for the first time the right for Queensland public officials to report knowledge of serious public sector wrongdoing to an authority, without fear of reprisal" (Anderson 4). The Queensland scheme was used to model other state whistleblowing legislation in Australia, including the legislation passed by the federal government, in the *Public Service Bill* of 1999.

The Act

The Act provides a scheme that gives special protection to public interest **disclosures** about unlawful, negligent or improper public sector conduct or, danger to public health, safety or the environment. The emphasis on the word disclosures in the previous sentence indicates a very important distinction in the Queensland Act that does not exist in the U.S. or the U.K. model; a distinction between *the act* of blowing the whistle and the person making the disclosure. By contrast, in the U.S. whistleblowing legislation, and consequent administrative/organizational structure implemented to support the legislation, prioritizes the person from whom the information came more so then the information itself. (See United States Model) A consequence of this is that the legislation in the United States allows for the potential of massive financial remuneration and protection of false claims which only add administrative burdens and detract from the positive aspects of whistleblower protections whereas the Queensland model creates a forum for which dealing with the reported misconduct is acutalized. Peter Anderson, a Principle Project Officer, in the Office of the Public Service Commission summarizes this construct of the Queensland model in his paper "*Whistleblowers Protection Act - Five Years On*:"

> [t]he term 'whistleblower' is not used anywhere in the Whistleblowers Protection Act (sic), other then in the title. The Act only creates legal protections for certain actions and intentions, and not a class of individuals. The legislation only protects the intention of making a public interest disclosure, the making of a public interest disclosure, and all assistance given to an authority responding to a public interest disclosure, and nothing more (4).

He further goes on to write that, "[t]he labelling of a person as a whistleblower is an irrelevant consideration as the legal protections are only invoked by, and limited to the making or intention to make a public interest disclosure. It is the disclosure, not the individual, that is important" (4). One further notable element of the legislation that is distinguishable from the other models is the protections given to those against whom claims are being made. False claims are not tolerated and it is this therefore that detracts pseudo-whistleblowers, i.e., those who use the system for other purposes. The positive consequence of this is that the incidence of disclosures is almost totally limited to legitimate claims. The emphasis on the disclosure rather than the whistleblower is what sets off the Queensland whistleblowing legislation positively in contrast to other models.

Due to the fact that the Act is very broad, several "balancing mechanisms" are inserted which are intended to:

- focus the protection where it is needed;
- make it easier to decide whether the special protection applies to a disclosure;
- ensure appropriate consideration is also given to the interests of persons against whom disclosures are made;
- encourage the making of disclosures in a way that helps to remedy the matter disclosed; and,
- prevent the scheme adversely affecting the independence of the judiciary and the commercial operation of the government owned corporations (Part 2 section 7(2)).

In Queensland, whistleblower protection is given to those who make a public interest disclosure defined in the Act as a disclosure of information by a public officer who has information about "official misconduct"[1] to authorized public entities or agencies. The Act situates a public interest disclosure as a particular type of disclosure defined by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made (Part 2, section 7(3)). For example, disclosures can be instigated by a non-public servant about public sector misconduct only if the person has information about the conduct and the conduct is a reprisal. Also, a public interest disclosure can refer to events that occurred at any time, even an event that occurred before the legislation was passed.

In 1999 the Queensland Criminal Justice Commission (CJC) published a handbook for public servants outlining the legislation called *Exposing Corruption: A CJC Guide to Whistleblowing in Queensland*. The guide, in addition to offering a plethora of useful information for potential

[1] "Official misconduct" is defined in the *Criminal Justice Act* section 32.

whistleblowers, outlines the following criteria by which a **public officer** can make a public interest disclosure as defined in schedule 6 of the WPA:

- official misconduct. . .;
- maladministration[2] that adversely affects anybody's interests in a substantial and specific way;
- negligent or improper management by a public officer, a public sector entity or a public service contractor which has, or is likely to, result in a substantial waste to public funds (the disclosure cannot be based on a mere disagreement over policy that may properly be adopted about amounts, purposes and priorities of expenditure);
- a substantial and specific danger to public health or safety or the environment.

The guide also lists the situations about which **anyone** may make a public interest disclosure:

- a substantial and specific danger to the health or safety of a person with a disability, as defined in the *Disability Services Act 1992*;
- a substantial and specific danger to the environment resulting from committing an offence under legislation listed in Schedule 2 of the WP Act, or from contravening a condition imposed by that legislation; and
- a reprisal taken against a person because of a belief that anybody has made, or may make, a public interest disclosure (see Section 41 of the WP Act).

To be eligible for protection under the WPA, a public interest disclosure:

- must be made with an **honest belief based on reasonable grounds** that the information to be disclosed tends to show the conduct or danger; and
- must be disclosed to an appropriate public sector entity[3] as defined in Schedule 5(2) of the WPA, with an honest belief that the entity has the power to investigate or remedy the matter, or the matter is about the conduct of the entity or any of its officers.

Protections Provided by the Act

The obvious and most important protection provided by the Act for those who make public interest disclosures is making it unlawful for any person to cause detriment to another because of a belief that person has made, or may make a disclosure as defined in the Act. The act or omission causing

[2] "Maladministration" is administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose.

[3] "Public sector entity" described in schedule 5(2) of the WPA is any of the following: a committee of the Legislative Assembly; the Parliamentary Service Commission and the Parliamentary Service; a court or tribunal; the administrative office of a court or tribunal; the Executive Council; a department; a local government; a university, university college, State college or agricultural college; a commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorization for a public, State or local government purpose; a government owned corporation (GOC), but only to the extent indicated under Part 4, Division 5; and, an entity, prescribed by regulation, that is assisted by public funds.

detriment is called a reprisal and is considered a serious offence punishable with a maximum penalty of imprisonment for two years. In the event that action is taken, or not taken, against a person making a public interest disclosure, the Act gives the right to apply for injunctions in the Industrial Commission or Supreme Court to prevent a reprisal from being taken. Furthermore, the right to a civil action claim for damages as a result of a reprisal is provided. This particular portion of the Act is unique in that one can make a public interest disclosure internally and yet still seek the benefits of the civil court system. In the U.S., the benefits of pursuing a civil claim, instead of dealing with the internal public sector mechanisms, sometimes forces the whistleblower to make an either or decision as to how much they can benefit financially in the civil court system rather then be subject to the confines of internal regulations. (See U.S. Model)

In addition to the above-mentioned protections, the following is a list taken from the document *Exposing Corruption: A CJC Guide to Whistleblowing in Queensland*, which identifies the fundamental protections/requirements in the WPA:

- the right to appeal to the Commissioner for Public Sector Equity to be relocated on the grounds that it is the only practicable way for him to her to be protected from a reprisal;
- the right to appeal a decision involving disciplinary action, transfers, appointments or unfair treatment on the grounds that a decision was taken as a reprisal;
- provides a defence of absolute privilege for making a public interest disclosure in any proceeding for defamation (The protections within the Act makes it such that it is not a contravention of any confidentiality requirement to make a public interest disclosure);
- preserves confidentiality by making it an offence for any person involved in the Act's administration to disclose information intentionally or recklessly about a public interest disclosure to unauthroized persons;
- protects innocent people from being the subject of intentionally false or misleading complaints by making this conduct an indictable offence with a maximum penalty of two years' imprisonment;
- requires public sector entities to establish reasonable procedure to protect their officers from reprisals that are, or may be, taken against them by the entity or other officers of the entity;
- requires a "appropriate entity" not to refer a public interest disclosure to another public sector entity, unless it first considers whether there is an unacceptable risk that a reprisal would be taken against any person because of the referral (the unacceptable risk is assessed in part based on consultation with the person who make the disclosure);
- requires that, if asked by a person who makes a public interest disclosure, or an entity who refers a disclosure, the receiving entity must provide reasonable information about action taken on the disclosure and the results;
- requires records of public interest disclosures to be kept by public sector entities i.e., the name of the person making the disclosure, if known, the type of information disclosed, and the action taken; and
- requires public sector entities to report annually on the number of public interest disclosures received and whether they have been substantiated.

The Queensland scheme allows a person who wishes to report misconduct to choose the "appropriate entity" to whom they wish to disclose as long as the entity has the ability to act on the disclosure. If the entity to whom the person has made a disclosure does not deem that the information falls within the context of the legislation, or the entity fails to follow through on their obligations within the Act, the person who made the disclosure is free to disclose the information again and again to the same entity, or go elsewhere to another "appropriate entity" with the information. If the "appropriate entity" fails to act and is incorrect in doing so, by either ignoring the issue or failing do what it is mandated without just cause, legal sanctions can be made against the CEO of that entity. In this way the Act protects a person who is making an honest public interest disclosure, based on reasonable grounds, and does not find action is taken. This rule is balanced, however, with the caveat that frivolous or malicious disclosures are received with a stiff penalty and any person doing so without an honest belief based on reasonable grounds can be prosecuted.

The United States Model

The United States adopted whistleblower protection in the form of the *Whistleblower Protection Act* (WPA) on July 9, 1989. It took further measures to strengthen whistleblower protection laws in 1994 when it enacted Public Law 103-424, which extended protections to employees of government corporations and to employees in the Veterans Administration. The WPA is an anti-retaliation statute prohibiting the federal government from taking reprisals against employees who blow the whistle on public sector misconduct and providing a means of redress for employees. As outlined in the following, the Act provides for a secure internal mechanism for dealing with whistleblowers. In this way, employees can make disclosures of wrongdoing without fear of retaliation.

The American model is based on a multilateral system whereby whistleblowers can petition two government Executive branch agencies for protection against retaliation due to their reporting of "wasteful or illegal" activities. The two agencies charged with upholding the WPA are the Office of the Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). The relationship of the Special Counsel to the Merit Systems Protection Board is that of a prosecutor to a judge. Both of which serve the function of an appellate organization providing a mechanism by which U.S. public service employees' legal rights are upheld. The *Civil Service Reform Act* (CSRA) of 1978 created the MSPB, the Office of Personnel Management (OPM) and the Federal Labor Relations Authority and also the OSC, which, prior to 1994, was a component of the MSPB but has since been endowed with full Executive branch status.

To be a protected whistleblower in the United States federal government, you must make a disclosure to either the Special Counsel, Inspector General of an agency, another employee designated by an agency head to receive such disclosures, or any other individual or organization, i.e., a congressional committee or the media, provided the disclosure is not prohibited by law. A whistleblower may file a complaint with the OSC with respect to most personnel actions allegedly based on whistleblowing ranging from appointments, reassignments to awards and training.

The Office of Special Counsel

The OSC, an independent federal investigative and prosecutorial agency, is the primary agency responsible for implementing the Act. The Office of Special Counsel investigates complaints from people who allege to have suffered reprisals as a result of disclosing information about misconduct. Their primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. The OSC also serves as a safe and secure channel for federal workers who wish to disclose violations of laws, gross mismanagement or waste of funds, abuse of authority, and a specific danger to the public health and safety. In addition, OSC enforces and provides advisory opinions regarding the *Hatch Act*[4], and protects the rights of federal employee military veterans and

[4] The *Hatch Act* regulates restrictions on political activity by government employees.

reservists under the *Uniformed Services Employment and Reemployment Rights Act* of 1994 (web site).

In a March 1999 statement before the Subcommittee on Oversight and Investigations Committee on Veterans' Affairs in the U.S. House of Representatives, Elaine Kaplan, Special Counsel, provides an abbreviated summary of how the OSC prosecutes complaints:

> [w]e have a Complaints Examining Unit known as "CEU," which serves as our intake unit. It is staffed by 14 examiners who conduct preliminary investigations into about 2000 complaints per year.. . . . Through a committee process, where other lawyers and investigators participate, they determine whether a prima facie case has been alleged and whether further investigation is warranted.
>
> In FY 1998, about 20 percent of the whistleblower retaliation complaints filed in the CEU were referred to our Investigation Division for further investigation. The remainder were closed. When a preliminary decision to close a matter has been made, the CEU sends out a preclosure letter to the complainant that spells out the reasons for the decision. The complainant may respond in writing to the preclosure letter and provide additional information within 16 days (3).

If after investigation the Special Counsel determines that there are reasonable grounds to believe that a violation has occurred or may occur, the Special Counsel may bring a corrective action against an agency. In addition, the Special Counsel has the authority to bring disciplinary action against an employee alleged to have committed a violation. The procedures carried out by the OSC are taken as follows from the OSC web site:

> [w]hen the Special Counsel sends the information to the agency, the agency head must conduct an investigation and submit a report to the Special Counsel. The Special Counsel sends the agency report, along with any comments provided by the whistleblower, and any comments or recommendations by the Special Counsel, to the President and the congressional committees with jurisdiction over the agency.
>
> If the OSC does not send the whistleblower's disclosures to an agency head, it returns the information and any accompanying documents to the whistleblower. The OSC sends the whistleblower a letter explaining why the Special Counsel did not refer the information. This letter will let the whistleblower know what other disclosure channels may be available.

A 1997 report on whistleblowing by the Competition Bureau of Canada outlines the historically dysfunctional state of affairs of the OSC:

> [t]he Office of the Special Counsel was widely criticised throughout the 1980s and early 1990s for its ineffectiveness in encouraging whistleblowers to come forward, and protecting them from reprisals. A 1993 report by the U.S. government's General Accounting Office found that most federal employees know very little about their whistleblower rights. The Whistleblower Protection Act of 1989 was intended to improve the effectiveness of the OSC, and to increase protection for

federal whistleblowers generally. For example, under the new provisions, employees can take their own cases to the federal government's Merit Systems Protection Board if they are not effectively pursued by the OSC (6).

Prior to the WPA if a whistleblower filed a complaint with the OSC and the OSC did not seek corrective action from the Board, no further recourse was available, unless the action was directly appealable to the Board.[5] Now, under the WPA, a whistleblower may appeal directly to the Board if he/she first complains to the OSC and the OSC does not seek corrective action on his/her behalf.

Some OSC Statistics

Table 1: Summary of Whistleblower Reprisal Matters

	FY 1997	FY 1998	FY 1999
Matters received	817	691	749
Matters processed by CEU	891	863	741
Matters processed in which OSC had jurisdiction	807	774	670
Matters closed by CEU	673	656	519
Matters referred for full investigation	218	207	224
Enforcement actions	0	1	1
Stays – negotiated	12	8	10
Favourable actions obtained	56	42	36

(A Report to Congress From the U.S. Office of Special Counsel for Fiscal Year 1999, Table 2)

In addition, there were 620 disclosures of alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety made to the OSC (16).

Table 2: Summary of Disclosure Matters

	FY 1997	FY 1998	FY 1999
Matters received	306	331	369
Disclosures referred for investigation and a report under §1213(c)	14	2	15
Disclosure allegations referred to agency Inspectors General	72	65	71
Disclosure allegations closed due to lack of sufficient basis for further action	206	247	349
Remaining disclosures carried over to next fiscal year for completion of review	244	257	209

(A Report to Congress From the U.S. Office of Special Counsel for Fiscal Year 1999, Table 6)

[5] Actions that are directly appealable to the board include: adverse actions, performance based removals or reductions in grade, denials of within-grade salary increase's, reduction-in-force actions, and denials of restoration or re-employment rights.

Merit Systems Protection Board

The responsibilities of the MSPB for whistleblower protections is outlined Under Title 5, Code of Federal Regulations Administrative Personnel, Chapter II, Subchapter A, Part 1209. Specifically, the MSPB deals with appeals or stay requests filed by an employee, former employees, or applicants for employment where the appellant alleges that a "prohibited personnel action"[6] was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. An employee who appeals a personnel action to the MSPB may raise the affirmative defence that the action resulted from a prohibited personnel practice. The CSRA authorized the MSPB to hear appeals of various agency actions such as:

- if a personnel action involves a prohibited personnel practice, regardless of whether the action is otherwise appealable to the board, the employee may file a complaint with the Special Counsel, asking that the Special Counsel seek corrective action from the Board;
- under the WPA of 1989, an individual who alleges that a personnel action was taken, or not taken, or threatened, because of whistleblowing may seek corrective action from the Board directly if the Special Counsel does not seek corrective action on his or her behalf;
- additional jurisdiction issues arise when the employee is a member of a bargaining unit that has a negotiated grievance procedure covering any of the actions that may be appealed to the Board;

(In such instances, the employee normally must pursue a grievance through the negotiated grievance procedure. There are three exceptions to this rule--only one related to whistleblowing--i.e., when the employee alleges that the action was the result of a prohibited personnel practice other than discrimination.) If any of these exceptions applies, the employee has the choice of using the negotiated grievance procedure or filing an appeal with the Board, but may not do both.

If an employee chooses to appeal to the Board, the MSPB must have jurisdiction over both the action and the employee filing the appeal. It is further specified that the appellant must file with the appropriate MSPB regional office, therefore geography becomes an issue when filing an appeal. Within the specified jurisdiction, an administrative judge issues an initial decision. This decision stands final after thirty-five days if nobody has filed a petition for review with the Board. Furthermore, any party, or OPM or the Special Counsel may petition the full Board in Washington to review the initial decision. In fact, Special Counsel corrective and disciplinary actions or actions against administrative law judges, after the initial decision is issued, any party may petition the Board to review the decision. In corrective action cases, the Board can order the agency to take necessary steps to correct the prohibited personnel practices or pattern of such practices. In disciplinary actions, the Board may order the employee's: removal, reduction in grade, suspension, reprimand, debarment from Federal employment of a period not to exceed five years, maximum fine up to $1100.

[6] Term defined by law at §2302(b) of title 5 of the United States Code to denote a list of twelve prohibited personnel practices, including whistleblowing. It is a prohibited personnel practice to take or fail to take, or threaten to take or fail to take, a personnel action because of an individual's legal disclosure of information evidencing wrongdoing ("whistleblowing").

The *1999 Annual Report of the U.S. Merit Systems Protection Board* offers some illustrative statistics concerning whistleblowing.

> There were 510 whistleblower appeals and stay requests decided. Of this number, 241 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 187 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 82 were requests to stay an action allegedly based on whistleblowing (15).

Furthermore, "[o]f the 428 whistleblower appeals decided (241 IRA appeals and 187 appeals of otherwise appealable actions), 252 (59 percent) were dismissed. In the other 176 whistleblower appeals, appellants received relief—through settlement, reversal, or mitigation—in 97 (55 percent)" (16).

Types of Whistleblower Appeals

The United States categorizes whistleblower appeals under the following terms, "otherwise appealable actions" and "individual right of action." They differ primarily in the way in which the appeal reaches the Board. An otherwise appealable action is defined in the MSPB document *Questions and Answers About Whistleblower Appeals* as an ". . . individual (sic) subject to a personnel action that is directly appealable to the Board and the individual claims that the action was taken because of whistleblowing" (7). However, just because the individual has the right to appeal directly to the Board and rather chooses to file a complaint first with the OSC he or she does not forfeit the right to file a complaint with the Board after filing with the OSC if the OSC does not seek corrective action on their behalf. In going first to the OSC to seek protection, the whistleblower leaves him or her a second chance if the OSC does not pursue action on their behalf.

There are four statutes which qualify as an otherwise appealable action. First, the individual is subject to a personnel action that is directly appealable to the Board, i.e., the action was taken because of whistleblowing. Second, the individual may file an appeal directly with the board after the action has been taken. Third, the person must file within thirty calendar days of the effective date of the action, or within thirty calendar days after the date of receipt of the agency's decision, whichever is later. Finally, if the person has been subject to an otherwise appealable action and he/she chooses to seek corrective action from the OSC first, the time limits for appealing to the Board are the same as for an individual right of appeal. "A covered employee who files a whistleblower complaint with the Special Counsel becomes eligible to file an individual right of action appeal with the Board only if the Special Counsel does not seek corrective action on his or her behalf" (MSPB 8). The seven qualifiers for an individual right of appeal are as follows:

- the individual is subject to a personnel action and claims that the action was taken because of whistleblowing, but the action is not one that is directly appealable to the Board;
- in this case the individual can appeal to the Board only if he/she files a complaint what the OSC first and the OSC does not seek corrective action on the whistleblower's behalf;

- an individual who is subject to a personnel action that is directly appealable to the board, and who claims that the action was taken because of whistleblowing, may choose to file a complaint with the OSC rather than appeal to the Board;
- if the OSC does not seek corrective action on his/her behalf, the individual may then appeal to the Board;
- a covered employee who files a whistleblowing complaint with the OSC becomes eligible to file an individual right of action appeal with the Board only if the OSC does not seek corrective action on his or her behalf;
- if the OSC notifies the whistleblower that the office is terminating its investigation, the whistleblower has 65 days from the date of the OSCs written notice, or 60 from the receipt of the notice – whichever is later; and,
- if 120 days passes without notification from the OSC office, the whistleblower may file an individual right of action with the Board anytime after.

Overview

In the opening letter of the 1993 Merit Systems Protection Board report *Whistleblowing in the Federal Government: An Update*, Ben L. Erdreich, Chairman, Jessica L. Parks, Vice Chairman, Antonio C. Amador, Member, all sign the opening letter which states their position on whistleblowing: "[i]dentification and reporting of illegal or wasteful activities is integral to the goal of improving the **efficiency and effectiveness** of the Federal Government" (my emphasis). The report goes on to make further proclamations concerning the mandate and ideological background of whistleblower protections in the U.S. when it once again repeats the phrase that, ". . . employee disclosure of illegal activities, mismanagement, gross waste, or abuse of authority is likely to be an integral part of the Government's attempts to improve **efficiency and effectiveness**" (my emphasis) (1). It is clear from these two quotations that the American system focuses on how whistleblower protections can aide the organization, rather than how the organization can help the whistleblower. While organizational change is a goal of whistleblowing legislation, it is *the* concern of the American government over and above the welfare of the whistleblower. Statements such as: "[o]bviously, if meeting current goals to improve Government operations is going to **depend significantly on employee reporting** of information about fraud, waste, and abuse, employees will need to be more willing to do this now than they were in 1983" (my emphasis), are indicative U.S. government's need to rely on a last resort reporting system like whistleblowing to correct corporate ills (1).

Perhaps it did not originate as such, but indicators such as the above, and the structure of the internal mechanisms for reporting, point to the fact that the U.S. Government has co-opted whistleblowing as a an efficiency tool rather then provide a mechanism for the protection of a federal government employees who feel like they have no other recourse but to expose corruption outside of their department. In a document titled *The Role of the U.S. Office of Special Counsel*, the authority and priorities of the OSC is made clear, "[t]he OSC is not authorized to investigate the allegations reported through its whistleblower disclosure channel" (10). Instead, they go to the head of the agency concerned to investigate. Unlike Queensland, Australia, the misconduct is

secondary to the affairs of the whistleblower; in the end it is a more heavily laden bureaucracy. Furthermore, misconduct, fraud, or abuse of authority does not *necessarily* mean inefficiency or the waste of government funds. The concern with the U.S. system is that the integrity of the whistleblowing regulatory system is a function of how much money is saved and how many people are willing to put their career in a precarious situation in order to make up for a system lacking the will to act proactively. At its core, the U.S. model displays the failure to focus on the spirit of whistleblower protections.

The United Kingdom Model

The British public sector has only recently adopted whistleblower protections in the *Public Interest Disclosure Bill* passed in July of 1999. For public servants specifically, amendments have been made to the *Employment Rights Act* of 1996. The Bill covers those working in both the public and private sectors and it applies to those working in central government as well as in local government. It was introduced as a private member's bill and was supported mainly due to the knowledge gleaned from inquiries into major disasters within the last decade, that workers[7] had, ". . . been aware of potential dangers and/or wrongdoing but had either been too scared to sound the alarm or had raised the matter and it was ignored or they were threatened with the sack" (*Whistleblowing & Government* 1). Not unlike Canada, similar legislation had been introduced prior to the adoption of this bill by MPs Tony Wright, Don Touhig and Richard Shepherd, and had failed. When the Bill was finally passed, the legislation received support from business leaders and trades unions in addition to cross-party support.

In comparison to the other two models outlined in this paper, the British whistleblowing model is the most restrictive in terms of the employee's disclosure rights. In terms of those "allowed" to receive disclosures, the British model is constraining in that one who chooses to blow the whistle must first do so within their own agency or department. The logic behind this is detailed in a speech at a Public Concern at Work conference, Whistleblowing and Government, in February 2000:

> [t]he Code recommends that civil servants should first raise matters of concern internally. This must be right. Indeed, this goes to the heart of the Public Interest Disclosure Act. The majority of concerns about propriety, conduct and legality of certain actions will be resolved in mature discussion within normal line management responsibilities (3).

The more the forum for disclosures is restricted, the less options available to an employee who wishes to come forward. Logically, if the misconduct is occurring in their own department, the risks involved in reporting within the department increase. The U.K. model balances this with making available an appellate body, the Office of the Civil Service Commissioners, however, they primarily exist as a second chance resource.

The Bill

The Bill defines whistleblowing as a "protected disclosure." The "Explanatory Memorandum," a preface to the *Public Interest Disclosure Bill* describes the qualifications for coverage:

> [t]o qualify for protection, the worker making the disclosure must be acting in good faith throughout, and must have reasonable grounds for believing that the information disclosed indicates the existence of one of the defined (sic) problems.

[7] The meaning of "worker" in the Bill is defined in section 43K(1).

Furthermore, if a worker is dismissed or penalized as a result of making a protected disclosure, he/she will be entitled to complain to an industrial tribunal. The industrial tribunal has the power and authority to award compensation or make a re-employment order. In the U.K. model, there is no limit to compensation for employees (this does not include contracted employees) nor is one required, like in Queensland and the U.S., to go to the civil court system in order to seek financial remuneration.

Disclosures qualifying for protection, specifically called a "qualifying disclosure," provides that the worker must reasonably believe that the information tends to show one or more of the following:

- that a criminal offence has been committed, is being committed or is likely to be committed,
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health or safety or any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged; or
- that information tending to show any matter falling within any one of the preceding paragraphs has bee, is being or is likely to be deliberately concealed (section 43B(1)).

Given the above, two mandatory conditions must be met for a disclosure to be protected under the bill. First, the notion of "reasonable belief" must be met, i.e. that one of the above matters is involved. The test of what is "reasonable" is objective and requires that in the circumstances, there were reasonable grounds for it. The judgement as to whether such grounds existed will, if necessary, be determined by the industrial tribunal. Second, the disclosures must be in "good faith." However, the only time this requirement does not hold is when an employee makes a disclosure while seeking legal advice, in accordance with section 43D of the Bill. If a disclosure does not first meet these two requirements, it will not be a "protected disclosure." Also, a disclosure will not be protected if the person blowing the whistle commits an offence such as breaching the *Official Secrets Act*. Unlike the Queensland model, other laws take precedence over the *Public Interest Disclosures Act*.

In addition to the preconditions for making a disclosure stated above, good faith and reasonable belief, two more preconditions apply to disclosures made to the Secretary of State—having been ordered to do so—or a disclosure to persons other then those identified earlier. The additional preconditions are that the worker is not disclosing information for personnel gain and that he or she reasonably believes that the information and any allegation contained in it are substantially true. The provision to allow disclosures to the Secretary of State exist so that the Secretary of State can designate particular regulatory authorities and persons, such as health and safety representatives, as person to whom protected disclosures relating to their responsibilities can be made ("Explanatory Memorandum" 3). The caveat within the Bill that disclosures can be made to entities other then the ones listed above, takes into consideration the requirement that the whistleblower must disclose internally first. This part of the Bill gives recognition to the fact that in limited circumstances, it

may not be reasonable to require a worker to do so. Protections will be given in exceptional circumstance disclosure cases if the at least one of the following are met:

- the worker has previously raised the matter with his employer or with a prescribed body; or
- the worker has not done so because he reasonably believe that he would be penalized if he did; or that evidence would be concealed or destroyed if he did and no relevant regulatory body, to whom he can express his concerns, has been prescribed.

Other issues which are taken into consideration in cases such as this are the person to whom the disclosure is made, the seriousness of the problem i.e., where it is continuing or likely to recur, and whether the employer owes a duty of confidentiality, in relation to that information, to a third party. Finally:

> . . . particular note would also be taken of whether the worker has complied with any whistleblowing procedure authorised by his employer for reporting such concerns and of any action that the employer or regulatory body has taken or might reasonably be believed to have taken since the matter was reported to them (4).

One distinctive feature about the whistleblower protections in the U.K. is the fact that, in addition to covering domestic issues pertaining to whistleblowing, the Bill enforces protection to those who make disclosures about an event outside of the U.K. "For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory" (section 43B(2)).

As stated earlier, it is strictly prescribed to whom one can make a disclosure. The Bill mandates that disclosures must be made to either to the employer or, where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer, or any other matter for which a person other then his employer has legal responsibility, to that other person. In these instances only is a disclosure protected. In addition to that, only under extreme conditions will the Civil Service Commissioners consider the complaint in the event that the whistleblower does not use internal mechanisms.

The Civil Service Commissioners

The responsibility of the Civil Service Commissioners is dictated by the Civil Service Code which came into effect on January 1, 1996 and the *Public Interest Disclosures Act*. What this legislation does is allow for public sector employees to ". . . raise fundamental issues of conscience, to be reported under departmental procedures. When this has been done and the civil servant concerned considers that the response is not a reasonable one, he or she may appeal to the Commissioners" (Civil Service Commissioners 19). In the *Civil Service Commissioners' Annual Report 1999-2000,* whistleblowing disclosures are colloquially described as "approaches." The following is a list of "approaches" considered during 1999-2000:

- completed an investigation of one appeal, which we upheld in part;
- began the investigation of another appeal at the end of the year, work on which is continuing . . . ;
- began enquiries on an approach to us after the matter had not been resolved following a prolonged investigation within the organisation concerned. . . ;
- arranged for one approach to us to be channelled through the appropriate departmental procedure, which we understand has resolved the issue;
- received seven approaches which we concluded did not fall under the Civil Service Code (they were concerns about personnel management issues).

Finally, one of the most interesting statements made in the *Annual Report* is the fact that the Commissioners received three "approaches" from people outside of the civil service with concerns relating to civil service matters which they though breached the Code. However they were unable to act on these matters due to the limitations of the Code and Bill.

Conclusion

While there are many broad similarities between the Australian, U.S. and U.K. whistleblowing models, for instance, the preference for reporting internally rather then reporting to external sources such as the media, etc., there are also major distinctions. The Queensland scheme is the most broad in making many avenues open to employees who wish to make a public interest disclosure, whereas the United Kingdom model is the most restrictive. The United States, being a system predicated on the ideology of freedom of speech, allows for disclosures of any sort even those that are self-serving in nature. In contrast to the American model, the best example of disclosure rights and protections for employees is the Queensland legislation, where employees are allowed many venues to which they can make a disclosure and are also protected against libelous, potentially damaging, claims. The threat of prosecution against those who instigate such claims allows valid instances of misconduct to be the focal point of investigation and no innocent person is caused undue harm. Also, no energy, time or resources is expended chasing after false complaints.

Finally, while analysis can provide qualitative insight, it is difficult to measure comparative effectiveness of whistleblower protection models due to the fact that any comparison must be based on a generic definition of effectiveness. In the instance of whistleblowing protection models, that task is impossible. For example, is a system predicated on more disclosures or are very fewer disclosures more effective? In light of this predicement, the paper serves to showcase the richness of a cross-section of governance systems and sheds some light on the public service cultures in which they were made.

Works Cited

- Anechiarico, Frank and James B. Jacobs. *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective*. Chicaco: University of Chicago Press, 1996.
- Canada. Industry Canada Competition Bureau. *Whistleblowing Study: Models of Whistleblower Protection*. Ottawa. 1997.
- Glazer, Myron Peretz and Penina Migdal Glazer. *The Whistleblowers: Exposing Corruption in Government and Industry*. New York: Basic Books, 1989.
- Kaplan, Elaine. Statement for the Record before the Subcommittee on Oversight and Investigations Committee on Veterans' Affairs. United States House of Representatives, Washington, 11 Mar. 1999.
- Miceli, Marcia P. and Janet P. Near. *Blowing the Whistle: The Organizational & Legal Implications for Companies and Employees*. New York: Lexington Books, 1992.
- Organisation for Economic Co-operation and Development. *Building Public Trust: Ethics Measures in OECD Countries*. Paris. 2000.
- Park, Heungsik. *Theoretical Models of Whistleblowing: An Individual Perspective*. Chungang Journal of Social Sciences, 1998, 11, 7-28.
- Queensland, Australia. Criminal Justice Act 1989.
- Queensland, Australia. Whistleblowers Protection Act 1994.
- Queensland, Australia. *Exposing Corruption: A CJC Guide to Whistleblowing in Queensland*. 1999.
- United States. Merit Systems Protection Board. *Annual Report*. Washington. 1999.
- United States. Merit Systems Protection Board. *Whistleblowing in the Federal Government: An Update*. Washington. 1993.
- United States. Merit Systems Protection Board. *Questions and Answers About Whistleblower Appeals*. Washington. 1999.
- United States. Merit Systems Protection Board. An Introduction to MSPB. Washington. 13 Sept. 2000. <http://www.mspb.gov/foia/forms-pubs/intro.html>
- United States. Office of Special Counsel. Prohibited Personnel Practices. Washington. 19 Sept. 2000. <http://www.osc.gov/ppp1.htm>
- United States. Office of Special Counsel. *The Role of the U.S. Office of Special Counsel*. Washington.
- United States. Office of Special Counsel. *A Report to Congress from the U.S. Office of Special Counsel for Fiscal Year 1999*. Washington. 1999.
- United States. Merit Systems Protection Board. *The MSPB Mission*. 15 Sept. 2000. <http://www.mspb.gov/aboutus/mission.html>
- United States. Merit Systems Protection Board. *About the MSPB*. Washington. 15 September 2000. <http://www.mspb.gov/aboutus/aboutus.html>
- United States. Title 5, Code of Federal Regulations Administrative Personnel, Chapter II, Subchapter A, Part 1209.
- United Kingdom. Civil Service Commissioners. *Annual Report*. London: HMSO, 2000.
- United Kingdom Public Interest Disclosure Bill of 1999.
- Walters, Chris. "The Viagra Approach to Ethics." *Prevention Pays*. Queensland, Australia: Criminal Justice Commission. 2000, No.3, p. 3.