"Protection for Whistleblowers"

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The phenomenon of whistleblowing has come under increasing moral, social and legal scrutiny in recent years. For example, earlier this year a leader in the London Financial Times concentrated on the topic with specific reference to fraud in the European Commission. It stated: "He was a classic whistleblower who had leaked documents to the parliament supporting the allegations of fraud and mismanagement. .. Like all whistleblowers, Mr. van Buitenen has broken the rules to expose a perceived injustice. He may be a fanatic, but he has also exposed some wrong-doing. The Commission will be blamed for picking on a small man while the powerful commissioners stubbornly refuse to admit their own failings." [1]

However, what does the term 'whistleblower' mean? More particularly without a universally agreed definition of a whistleblower, what does "classic whistleblower" mean? Is Paul Van Buitenen, a Belgian auditor and member of the Green party who was central to the explosive political reaction to European Union fraud a classic? What does he have in common with Stephen Daggett, an escaped, convicted paedophile who blew the whistle on an established paedophile ring in Ashworth (UK) top security mental hospital? With Dr. Andrew Millar, senior research scientist and director of British Biotech who revealed that the company's bullish forecasts did not appear to be in line with the actual progress of drug trials? With Captain Alexander Nikitin who confronted the wrath of the Russian military when he disclosed that the North Sea Russian nuclear fleet was rusting away without regard to international safety protocols. With David Shayler or Richard Tomlinson of British Intelligence MI5 and MI6 who went public on alleged plots and counterplots of their organisations which would have better suited terrorists than a sovereign government?

Indeed, what do any of these European whistleblowers of the 1990s have in common with yet another European, Marc Hodler? At 80 years old he was the longest-serving member of the International Olympic Committee and a part of its powerful ruling executive board. Mr. Hodler is quoted as having said that his life had been shaken since his initial accusations about vote buying for Olympic sites. "These have been the three worst days I have spent in my long career in sport. In times of crisis, you get to know who your friends and who your enemies are."[2] This most unlikely of whistleblowers, an octogenarian Swiss lawyer, may, in effect, have pinpointed the one common element between all whistleblowers, for the phenomenon of whistleblowing is universal and the phenomenon of discrediting whistleblowers is universal.

What is a whistleblower?

[1] *Whistleblowing* Leader Financial Times 7 January 1999.
[2] *Samaranch accepts allegations* The Irish Times 15 December 1998.

In arriving at a reasonable definition of 'whistleblower', there is a further question. If somebody encounters what he or she perceives to be a wrongdoing and discloses it, should this person always be categorised as a whistleblower? If corrective action is taken without any undue pressure on the one who discloses, nothing untoward of an external nature has affected this person. In this circumstance the internal procedures have been effective. This is the desired situation. The whistleblower comes to no harm and the organisation is enhanced. This lack of conflict does not reflect the popular image of a whistleblower. Far more often than not, the person disclosing is at risk, or the disclosure is ignored or denied. It is these individuals, who persist in insisting that something is wrong in the face of adversity, who are most commonly recognised by the term 'whistleblower'.

Three Stages of Whistleblowing.

There are two inevitable stages in the process of whistleblowing. During the first stage, *Causation*, a person perceives an activity as illegal, unethical, or immoral. The whistleblower can choose to ignore this perception, to acquiesce in the conduct of the activity, to participate, to object or to walk away. Over time these five choices are not mutually exclusive as an individual's mind may change as to how to behave at any given time. Irrespective of personal conduct, there may be no option but to proceed to the second stage, *Disclosure*. In organisations regulated by legislation, which includes all companies in democratic societies, there may be strict rules requiring disclosure to the external regulator or auditor. Auditors and other compliance officers are themselves under strict rules of disclosure. In situations of disclosure, the response of some managements is to get rid of the problem, not by sorting out the revealed wrong, but by sorting out the whistleblower. Thus, stage three of the whistleblowing process is *Retaliation.* Disclosure is often by means of confidential information including documents, but even so the whistleblower's identity may not be obvious. Consequently, identification of the whistleblower is a matter of extreme importance to the 'wrongdoer', and preserving anonymity is perhaps of greater importance to the whistleblower.

Why blow the whistle and disclose corruption?

A person may disclose for any of the following reasons or combination of reasons. Depending on one's viewpoint, the whistleblower is considered heroic or heinous. On the positive side one might suggest, principle, legal considerations and for the public good. On the negative side there is disclosure for malicious reasons or as an informer. Finally, there is disclosure by the media.

1. Principle: In the first instance, people have become whistleblowers as a matter of principle because of personally held ethical or moral beliefs. Indeed, in a study tracking sixty-four US whistleblowers over a period of six years these people are referred to as "ethical resisters". They tend to be "conservative people devoted to their work and their organizations." [3]

2. Legal considerations: Second, people may blow the whistle for legal considerations. The individual concerned may be in a regulatory function and is specifically required to obey the law either by dint of their professional obligations or by dint of the terms of their employment. For example, under companies' legislation in most countries, registered auditors are placed under

[3] M.P. and M.G. Glazer, *The Whistleblowers* (Basic Books New Jersey,1989). Quote at 5.

stringent obligations in relation to company audits; furthermore, employees of a company may be required under legislation to inform registered auditors fully and openly not merely on what the auditors require but on what they are entitled to require. International money laundering regulations require disclosure to the relevant authorities by persons engaged in 'property' and money transactions. These are merely examples of the many regulatory provisions now in force in such areas as financial regulation, competition and, of course, the vast area of environmental protection.

One might say that complying with such strict legislation is not particularly onerous on a person. There is a view that law-abiding people believe that the law in its broadest sense should be upheld. Consequently, it should be no great burden to obey the law in these matters. At the other end of the scale, an individual will comply through fear of the personal consequences arising from a failure to uphold the law once the wrongdoing becomes known. Certainly, the forms of legislation mentioned contain criminal sanctions for breach of the law. Yet, on a worldwide basis, we have returned to weekly, if not daily, allegations in the media of institutions and professions which appear to have failed these expectations. It is worth mentioning that in such situations, those who are totally law-abiding and compliant are in danger of being sullied by association.

3. Public good: Finally, on the heroic side, is disclosure for the public good. Depending on viewpoint this individual is either seen as good citizen or do-gooder cum crank. Possibly the finest example was the very courageous action of Christopher Meili, the Swiss security guard, who blew the whistle on the shredding of Swiss archive documents relating to the Holocaust banking accounts. Meili lost his job and suffered significant condemnation for his act. Since Meili had neither prior association with Holocaust victims nor any Jewish connections, his whistleblowing is all the more indicative of a totally selfless act motivated by public interest.[4]

4. Ancillary motives: There are many reasons for blowing the whistle which might be described as "ancillary motives". This could include motivation for personal gain, some malicious end such as revenge, or a destructive falling out of the concerned parties. They do not necessarily involve *male fides*. To give an example from my own country, a family feud among the siblings of a family with major business interests included High Court litigation. Whereas the family settled out of court, during the civil dispute information became public knowledge which implicated current and previous government ministers in the possible receipt of relatively large sums of money. This led to the establishment by the Irish parliament of a judicial tribunal of inquiry. This Tribunal found that payments had taken place but that no political favours had been sought or received in return. The Tribunal also found large deposits of funds in offshore banks presumably for tax avoidance purposes. Parliament has established a follow-on Tribunal of Inquiry to investigate further into what the media has called the "golden circle". It is widely acknowledged that these revelations, affecting senior politicians, and hitherto highly esteemed businesspersons and professionals, are a direct if unwitting result of a vicious row between brothers and sisters of a non-political family.

[4] See *Guard who found Hitler's gold* The Guardian 14 November 1997.

5. Informer: Fifth, there is the informer as whistleblower. This is someone who is, say, a police or regulatory authority's informer. An informer can either be a plant placed in the organisation for that purpose or a member of the organisation who has been 'turned' by the relevant authority. One might think that we are now entering the language of crime and spy stories. However, there is growing evidence of police forces, including the London Metropolitan Police, rooting out corruption in this manner. In another example from home, the Irish parliament has established a separate judicial inquiry into improprieties instigated by building contractors and developers in the planning process. The media is filled with speculation that implicated witnesses have been offered immunity from prosecution in return for complete disclosure to this Tribunal. Further, one of the catalysts for this inquiry appears to have been the posting of a £10,000 bounty for information leading to a conviction for planning corruption.

6. Media whistleblowers: Finally, there is the media as whistleblower. This includes the journalist both as reporter when approached by an initiative of an organisational whistleblower and the journalist as initiating investigator. For example, there have been many highly publicised TV investigative current affairs programmes such as *60-minutes* in the United States or *World in Action* in the United Kingdom where investigative journalists have conducted research based very much on material provided by a company employee. At the more direct level of investigative journalism, many will remember avidly reading reports from the *Sunday Times*(UK) Insight Team whose finest hour may well have been in the early 70s with the Thalidomide revelations which, of course, had worldwide impact.

Is whistleblower protection necessary?

Reference was made earlier to the lament of a recent whistleblower only three days into his ordeal. The following experience from an American study is fairly typical of the long-term impact of whistleblowing. In 1973 Joseph Rose became an in-house attorney for the Associated Milk Producers in San Antonio, Texas. He discovered illegal contributions to the committee to re-elect President Nixon. He reported his findings internally and was rejected. He knew that he could be implicated in a criminal conspiracy as the Watergate saga was unfolding, but, equally, disclosure could lay him open to charges of violating attorney /client privilege. Thirty-five years old with five children and an ill wife, he was dismissed for raising his concerns, losing not only his job and undermining his financial security, but also, he was deliberately isolated in the community where his erstwhile employers had enormous influence. Having acted from ethical and professional considerations, he was shunned by other attorneys and blacklisted across the United States. Some years later he managed to establish a private practice and when a favourable article about him appeared in the *Wall Street Journal* new clients sought him out. In 1987, almost 15 years after his ethical activities, finally, he was offered a job by another corporation.[5]

WHISTLEBLOWER PROTECTION LEGISLATION

When reflecting on whistleblower protection particularly in relation to southern African countries, it is useful to consider the situation in the United States of America and in the United Kingdom. In the absence of domestic precedent, the courts of the English-speaking countries normally follow the judgements of English common law. Even South Africa, which has developed its own

[5] Glazer op.cit. see entry in Index at 285 for specific references to Rose, Joseph.

common law based on Roman-Dutch law, is not immune to the influences of Commonwealth and other common law countries. Throughout the region, when new issues arise in the courts, there is a judicial willingness to examine judgements of countries which follow the English common law tradition.[6]

UNITED STATES

Much of the academic research on whistleblowers is based in the United States and shows that despite Federal and State legislation that should offer protection, the whistleblower remains exposed and isolated. Theoretically there is sophisticated Whistleblower Protection Legislation in the United States. "The protection of whistleblowers has long been a serious problem for the Federal Government. The Civil Service Reform Act of 1978 was expected to provide relief against reprisal for blowing the whistle on mismanagement, waste, fraud and abuse in the Federal Government. Unfortunately, the 1978 act was insufficient in protecting employees, and in 1989, Congress passed the Whistleblower Protection Act of 1989 to further strengthen and improve the protections for whistleblowers in the Federal Government."[7]

Stated very briefly, the Office of Special Counsel (OSC) was established to aid a whistleblower in having his or her disclosure investigated, in preserving anonymity in so far as is possible and, in preventing retaliatory action against the whistleblower. In cases of retaliation the Office of Special Counsel is supposed to aid in proceedings and ensure appropriate remedies and penalties. The history of the office is a recital of failure to fulfil these ends. The first incumbent, Alex Kozinski, "(u)sing the OSC's own manual as a guide, .. taught a course for federal managers on how to fire employees without OSC interference."[8] A witness at the 1993 Senate oversight hearings on Whistleblower Protection, objecting to the reauthorization of the Office of Special Counsel, stated that in the previous year, 11 out of 38 complainants had been the subjects of unauthorised leaks of confidential information and in 1993, 10 out of 21 reported the same finding. Moreover, when the Office of Special Counsel ruled against an employee, in 1992, 20 out of 21 complainants had no idea why and in 1993 the figure was 37 out of 38.[9] This was the evidence of the legal director of the Government Accountability Project (GAP). In 1977, this non-profit organisation was created to protect the public interest and promote government and corporate accountability by advancing occupational free speech, defending whistleblowers and empowering citizen activists.

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[6] The Honourable Mr. Justice Manyarara, retired Judge of Appeal in the Supreme Court of Zimbabwe, *Protection of Sources* Media Law and Practice in Southern Africa Paper 2 (Media Institute of Southern Africa (MISA) 1996) at 2.

[7] March 1993. Chairman's opening remarks at the *Congressional Oversight Hearing on Whistleblower Protection and the Office of Special Counsel* Committee on Post Office and Civil Service U.S. Government Washington 1994 at 1.

[8] Devine and Aplin *Whistleblower Protection – The Gap Between the Law and Reality* 31 Howard L.J. 223 at 231 (1988).

[9] *H.R. 2970, To Reauthorize The Office Of Special Counsel And To Make Amendments To The Whistleblower Protection Act* Committee on Post Office and Civil Service U.S. Government Washington 1994 Evidence of Tom Devine, legal director, Government Accountability Project at 28.

What of the non-federal employee? United States employment legislation is based on the common law "employment-at-will" doctrine. Simply put, this means that, in law, an employer may dismiss an employee for any reason or for no reason at all; equally, an employee may leave an employment for any reason or for no reason at all. Since the employer is very much the dominant party to the employment contract, 'equally' is not really the appropriate word. Nevertheless, this is the situation of the employee in the absence of being able to satisfy a court that other contractual terms exist. It places a whistleblower in a precarious situation unless the disclosure can be classified as a public policy exception to the employment-at-will doctrine. In such a situation the disclosure, and the employee, are protected in law. However, these exceptions vary from state to state and their application is quite inconsistent.[10] In one case where a bank employee was dismissed allegedly because he informed his employer that his immediate supervisor was being investigated for embezzlement in another bank, a Californian court ruled that this was a private not a public interest.[11] Other instances where whistleblowers were denied redress for wrongful or retaliatory discharge under the public policy exception rule include an employee allegedly discharged for refusing to alter federal pollution control reports as ordered[12] and an employee discharged for objecting to, and refusing to participate in, her employer's fraudulent billing of the City of New York for services never performed.[13]

The progress of a Colorado case outlines how difficult it can be for a whistleblower to pursue a legal remedy. A supervisory employee with an advanced degree in mechanical engineering engaged in research projects for the space shuttle programme was fired in 1975, allegedly for repeatedly reporting to his own superiors substandard workmanship, overstated performance claims, misappropriation of materials and budgeting discrepancies which constituted fraud by his employers against the National Aeronautics Space Administration (NASA) and, hence, the US government. A claim in tort for wrongful discharge was filed in 1981: the trial court entered a directed verdict against the plaintiff ruling that Colorado did not recognise a claim for wrongful discharge and that the claim was time-barred. On appeal, the Court of Appeals reversed the verdict and remanded the case for new trial[14] and an application by the defendant company for certiorari was granted by the Colorado Supreme Court. In 1992 the Colorado Supreme Court upheld the decision of the appeal court permitting the retrocative application of a judicial decision because "it involved conduct that was clearly prohibited by federal law, because retroactive application would further the purpose and effect of the public-policy exception to the at-will employment doctrine, and because the equities favored retroactive application in order to avoid penalizing [the plaintiff] for his responsible actions and releasing [the defendant company] from any liability for its alleged tortious conduct."[15] As regards the merit of this particular whistleblower, the Court held that the at-will employee had established a prima facie case of wrongful discharge under public policy exception. There does not appear to be a report of a

[10] Atkins, *The Whistleblower Exception to the At-Will-Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement* 70:3 Denver University L. Rev. 537 at 546 (1993).
[11] Foley v Interactive Data Corp., 765 P.2d 373(Cal.1988).
[12] Trombetta v Detroit, Toledo & Ironton Railroad Co., 265 N.W. 2d 385 (Mich.Ct.App. 1978).
[13] Remba v Federation Employment & Guidance Serv., 559 N.E. 2d 655 (N.Y. 1990).
[14] Martin Marietta Corp. v Lorenz 823 P.2d 100 (Colo. 1992).
[15] *Id.*, at 104.

retrial so it might be assumed that seventeen years after his wrongful discharge the whistleblower and his erstwhile employers settled his action.

Qui Tam[16]

One piece of United States legislation which is extremely favourable to a whistleblower is the Federal False Claims (Amendment) Act, 1986.[17] Sometimes known as the Lincoln Law, this legislation, which first came into force during the Civil War, was directed primarily at war profiteers. Historically the *qui tam* lawsuit originated in the 13th century when private citizens sought to protect the King's interest.[18] It was resurrected in the 19th century[19] by federal lawmakers primarily to combat the supply to the Union Army of arms crates filled with sawdust rather than muskets, and the delivery of allegedly fit mules which were diseased, blind, overpriced or had already been purchased (several times). In the absence of developed systems of federal law enforcement machinery, the lawmakers sought to enlist the help of private citizens to police and prevent such fraudulent activity.[20] The statute was not used very effectively in later years. In the mid-1980s, following some high profile cases of fraud against the federal government, the laws were dusted down. According to the United States Department of Justice, over 2,000 cases have been filed since the amended statute came into effect with in excess of $1.83 billion recovered by the government through *qui tam* civil suits. The two primary areas for recovery are defence procurement and health care.

The *qui tam*, or whistleblower provisions of the False Claims Act, allow private individuals or corporations with knowledge of fraud against the Federal Government to bring an action on behalf of the United States and to receive, if successful, a percentage of the recovery. There is no requirement that the plaintiff be directly involved as a victim of the fraud and tax fraud is excluded. If the Government takes the suit, the relator may be entitled to recover between 15% and 20% of the proceeds of the award or settlement. If the Federal Government declines the action and does not participate the relator may take the action alone and, if successful, is entitled to receive between 25% and 30% of the proceeds. A successful plaintiff may also be awarded costs. The Act penalises the fraudulent body with monetary damages equalling three times the amount of damages sustained by the Federal Government as well as fines of up to $10,000 for each false claim. In order to be recognised as such, the relator must be an independent "original source" of the information and must be able to show that this information could not have been

[16] Much of this section is based on Aron, *Whistleblowers, Insubordination, and Employee Rights of Free Speech* Labor Law Journal April 211 (1992); *The Civil False Claims Act Enlisting Citizens In Fighting Fraud Against The Government* A Report by Getnick, Neil V. and Skillen, Lesley A. for the Civil Prosecution Committee New York State Bar Association , Commercial and Federal Litigation Section New York State May 1996; Bucy, *Where To Turn In A Post-Punitive Damages World: The "Qui Tam" Provisions of the False Claims Act* The Alabama Lawyer November 356 (1997).

[17] Pub.L. 99-562, Oct. 27, 1986, 100 Stat.3153; 31 USCA § 3732

[18] *Qui tam pro domino rege quam pro se ipso in hac parte sequitur...* who sues on behalf of the King as well as for himself.

[19] False Claims Act of 1863.

[20] 1986 United States Congressional hearings as quoted in Bucy op. cit. at 356b.

derived arising from prior public disclosure. The first reported *qui tam* action taken by a non-US citizen for activities taking place outside the US involved a United Kingdom company supplying parts to the United States airforce; the case is reported to have been settled for a sum in excess of £7 million.[21]

The general view is that the *qui tam* bounty provides the financial wherewithal by which fraud can be brought to light. It offers the likelihood of compensation to people who could not afford the risks to their careers and livelihood that becoming a whistleblower frequently entails. Corporations and business people can also be compensated by *qui tam* actions where market share has suffered as a result of fraudulent, anti-competitive and abusive practices in their industry.

UNITED KINGDOM

The United Kingdom parliament has recently put into effect legislation for whistleblower protection. Introduced initially as a Private Member's Bill, the Public Interest Disclosure Act 1998[22] incorporates new provisions in the Employment Rights Act 1996. This statute will have the effect of providing protection to the *bona fide* whistleblower. The necessity to act in good faith and with reasonableness by the employee are positive critical aspects of the legislation. Disclosures should be confined within the organisation whenever possible. Unlike the United States, a disclosure is not protected if personal gain is involved.

There are three aspects of the Act worthy of particular commendation. Possibly the most significant is that, in relation to protected disclosures, the legislation renders void the duty of confidentiality that an employee is deemed to owe an employer, or any other 'gagging' clause express or implied, that may be in a contract of employment. Thus, an employer against whom a protected disclosure is made may not use the traditional weapon against the employee of suing for breach of contract. A 'protected' or 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show the commission of a criminal offence, breach of legal obligation, endangering the health and safety of any individual, damaging the environment and the deliberate concealment of any information relating to these. A disclosure is not protected if the person commits an offence by making it.

Second, the Act protects disclosure of extra-territorial issues. This is particularly significant given the global nature of many employment activities and the awesome power of multi-national companies be they UK indigenous or with corporate headquarters outside the UK. Finally, it establishes an employee's right not to be subject to detriment for making a protected disclosure. This is the *sine qua non* of such legislation. Where detriment is suffered the Act allows for full civil damages. This is a departure from the usual practice in employment law where compensation is capped.

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[21] *TI settles US 'whistleblower' action for £7m* Financial Times 28 July 1998; *Whistleblower reward as British firm settles* The Guardian 31 July 1998.

[22] Public Interest Disclosure Act 1998 (Chapter 23). The authorised Internet version is at www.hmso.gov.uk/acts/acts1998/19980023.htm

The Act is quite clear in relation to the types of wrongdoing about which protected disclosures may be made. Thus, poor management which for the purposes of discussion may be described as incompetent or negligent (both in the non-legal sense) is excluded. There have been recent very high profile problems of UK-based organisations where wrongdoing was not caught because of inappropriate or inadequate management control.[23] The initial failures of management cannot be construed as against the law; however, very often there are people working in organisations who become aware of, for instance, patterns of deliberate neglect and will not be heard internally when they protest or try to highlight problems. Undoubtedly, this is a far more difficult area for which to legislate. Nevertheless, the plight of potential good faith whistleblowers in these types of circumstances should not be ignored.

Some of the thinking behind the Act is to move away from a culture of 'blame' to a culture of 'support'. It is recommended that organisations introduce whistleblowing procedures and policies so as to exclude the possibility of "protected disclosures". At the forefront of encouraging this culture change so that there will be no need for external disclosure is a recently formed registered charity called Public Concern At Work (PCAW). Its objective is to "promote good practice and compliance with the law across the public, private and voluntary sectors by focusing on the accountability of those in charge and the responsibility of those who work. The charity is wholly independent of Government".[24] PCAW is recognised as a legal advice centre by the Bar Council and in the six years since its establishment has successfully advised many whistleblowers. Dealing with 1,500 serious cases, PCAW has been involved in litigation on only three occasions.

There is one significant flaw in the Act worth noting. No protection is provided by the new statute in relation to breaches of the Official Secrets Act. The culture of secrecy and fear of reprisal that this legislation has engendered is all pervasive. For instance, Lord Justice Phillips, when he opened the BSE Inquiry[25], advised that the Head of the Civil Service had given an assurance that civil servants will not be disciplined for giving evidence or help to the inquiry.[26] Surely one is entitled to expect that, of all people, civil servants would be under a duty to cooperate fully with any judicial inquiry and be subject to disciplinary procedures for failing to do so. Given that the BSE crisis is arguably one of the most damaging events of recent years in respect of public health and of the UK economy, the remarks attributed here appear utterly at odds with the aspirations of the Public Interest Disclosure Act. It remains the case that no considerations of public interest can be balanced in defence of a breach of the Official Secrets Act 1989[27] which protects information relating to security, international relations, defence and criminal investigations. However, where public servants are subject to punitive secrecy legislation the culture will never encourage the exposure of corruption. This is equally true for non-government employees. Since access to information is at the root of open government, of

[23] *Public Interest Disclosure Act 1998 (Chapter 23)* Sweet & Maxwell Current Law Statutes Explanatory Background note to legislation referring to Zeebrugge ferry tragedy (the Herald of Free Enterprise) and Barings Bank collapse.
[24] From the preface to reports published by Public Concern at Work established in 1993.
[25] Mad Cow Disease which is known as CJD and fatal when contracted by humans.
[26] *Inquiry Opens with Chairman Seeking to Reassure Whistleblowers."* Financial Times 28 January 1998.
[27] This Act repealed the 1911 Official Secrets Act.

transparency and of accountability, all of which impact on the private sector, a culture of secrecy in the public service is at odds with the entire concept of promoting these ideals.[28]

SOUTH AFRICA

This paper is presented during the week in which the Parliamentary Justice and Constitutional Committee of South Africa's National Assembly is holding hearings on the Open Democracy Bill. There is a whistleblower protection section contemplated in that Bill. I was privileged to spend the latter part of last week in Pretoria and Cape Town, together with Guy Dehn, Director of the UK's Public Concern at Work, meeting with representatives of various South African interest groups of both a public and private business nature discussing these matters.[29] It is pertinent to refer to some of the issues highlighted in relation to whistleblower protection legislation. One of the great strengths of the UK legislation is that it is based on accountability,[30] it covers all forms of employment and, by the manner in which it encourages internal disclosure, it will effectively penalise authoritarian managements who stifle potential whistleblowers. Universal concern was expressed that the South African Bill as it stands only extends protection to the public sector. It also seems that protection for disclosing internally, the key thrust of the UK legislation, may well be absent. Certain statutory entities such as the Public Protector and the Human Rights Commission are specified as bodies to whom a protected disclosure may be made; there appears to be no requirement on these legal persons to act to rectify the malpractice nor is it clear how the whistleblower is to be protected by these bodies. Furthermore, by creating a specific listing of a handful of bodies in the legislation, more appropriate regulators such as, for instance, a transport regulator or an inspector of mines may be excluded. The remedy for victimisation lies in the High Court, a legal process which is extremely costly and extremely time consuming. It has been recommended that redress in the Courts should be considered only as a last resort and that it would be more in keeping with current South African procedures to introduce a more proximate mediator between the whistleblower and the organisation.

Conclusion

In conclusion, it is important to reflect on the impact of retaliation and victimisation on a person who, in good faith, is thrust into the role of whistleblower. It must be one of the most self-destructive processes imaginable.

"The extraordinary stress of spending every waking moment in this world, where reality has been inverted, is bound to inflict enormous damage on the individual's health, mental and physical. The longer the fight continues, the greater is the harm experienced and there is no doubt that it is a devastating and dysfunctional experience. The campaign to discredit may result in individuals suffering periods where there is an almost total erosion of self. After all, how many of us could withstand a continuous devaluing of our person and denial of respect for our achievements and

[28] See generally Martin and Feldman, *Access to Information in Developing Countries* (Transparency International, Berlin, 1998)

[29] The author wishes to acknowledge the cooperation and support of Ms. Lala Camerer of the Institute of Security Studies (ISS) and Mr. Richard Calland of the Institute for a Democratic South Africa (IDASA) who sponsored and organised these meetings.

[30] The United States Whistleblower Protection legislation is based on the constitutional right to free speech.

maintain self-esteem or, indeed, sense of self? No matter how many people say "Hang on in there" and "Don't give up", they are not the ones exposed to institutional anger and an organisation that is ready to pounce on the slightest error. Perhaps this is the ultimate paradox for the whistleblower to deal with: condemned on the one hand for highlighting an error that the organisation will not admit to, and condemned on the other for committing far less serious errors forced by the consequences of this self same condemnation."[31]

As the management abuses continue the whistleblower becomes more and more vulnerable to making mistakes and it becomes less likely that a satisfactory solution will be forthcoming from within. To support the whistleblower in any form the organisation would have to be seen to condemn the actions that were taken by members of management who may well be too senior for even the mildest censure. Justice is neither done nor seen to be done and somehow defending the indefensible becomes the preferred course of action. Inevitably the whistleblower is denied the equity and justice required for the complete restoration of name and reputation. This form of cover-up is seldom recognised as being ethically and morally wrong. The fact that quite often it may also result in defending the commission of illegal acts is a matter of indifference. It seems irrelevant to many top managements that, in their bid to discredit a whistleblower, giving tacit approval to the deliberate distortion of fair procedures not only signals approval of the wrongful activity against the whistleblower. They are also sending explicitly clear signals to their organisation that truth and honesty are not valued. The campaign to discredit and demean the whistleblower, based as it is in lies and deceit, is not only exceptionally injurious to the individual but it is also likely to be very destructive of the organisation.

Without an understanding of these realities there cannot be effective whistleblower protection. Procedures and legislation that are introduced to protect whistleblowers ought to encourage disclosure within the organisation. The organisation is best served by a non-confrontational form of whistleblowing and the whistleblower is best served by ensuring adequate protection to minimise the possibility of retaliation.

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END

[31] Feldman, as quoted in the Dail [Irish Parliament] by Deputy P. Rabbitte T.D. [M.P.] proposer of the Republic of Ireland's Whistleblower Protection Bill 1999. Second Stage. Dail Debates (preliminary) 15 June 1999. 230.
See also Feldman, *Fear of the Whistleblower – the legacy of Auschwitz* The Furrow September 490 (1995).