WHISTLEBLOWING: THEORY AND PRACTICE

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Introduction

Modern administrative systems that face problems of governance, including a legitimation deficit, have usually responded in one or two inter-related ways. Either they have pursued greater openness by revealing more about their operations, or they have sought to create multiple channels for accountability such as the Ombudsman and the ICAC (in the New South Wales case)[1]. Of course these two techniques are related in that the latter two institutions are given privileged access to governmental information in order to investigate complaints. In some cases greater openness has taken the form of freedom of information laws together with greater intrusiveness by the media.

The central difficulty with these methods is that they tend to leave in place a dominant ethos of secrecy within the bureaucracy which, as we shall see, makes access to information and accountability less effective that it might otherwise have been.[2] All governments have secrets, and not even in very open systems is all information revealed to the public. There and not even in very open systems is all information revealed to the public. There and not even in very open systems is all information revealed to the public. There are obvious categories, such as defence, foreign affairs and commercial secrets, as well as current law enforcement issues that remain hidden from view, though the exact parameters of these categories are usually the subject of considerable debate.

It is also clear, and the evidence for this grows daily, that organizational secrecy is often used not merely to cover up embarrassment but to cover up fraud, breaches of the law and other forms of maladminsitration, including waste and incompetence. The question then arises as to whether public officials within bureaucracies who encounter such conduct should be allowed to reveal this to outsiders, and whether, if this is accepted in the public interest, they should be protected against organisational retaliation. The dilemma for the public official is of either being disloyal to his or her employer or of deceiving the public and betraying his or her conscience.[3] This paper considers these questions in the light of the interest in and experience with 'whistleblower' laws. In particular we will consider whether the American experience, which is the most sophisticated and extensive available, shows that whistleblower protection laws actually work.

Clearly it is difficult to devise measures by which laws are actually said to achieve their stated objectives but, in this case, since the laws are supposed to prevent the victimization of those who blow the whistle, it is obviously relevant to consider whether all those who seek their protection actually do so. As a general point it may be asserted at the outset that accountability in developed administrative systems deserves to be taken seriously and that multiple channels of control are usually better than single channels that are prone to disruption or failure. In such a case a

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backup by-pass system is better for the health of the body politic.

One further preliminary: a whistleblower is an American term that refers to persons, whether in the private or public sectors, who discover fraud, waste, abuse of power or criminal behaviour in the organisation and who then reveal this (ie blow the whistle) to outsiders, whether this be the media or not. The emphasis in this paper will be on the public sector experience, though it should be noted that the same phenomenon exists in the private sector.

The interest in whistleblowing

Interest in this subject other than the United States has been greatest in Australia[4]. There have been major papers in Queensland, following the Royal Commission of 1987 into corruption in that state,[5] South Australia has a Whistleblower Protection Bill before the State Parliament, which is likely to be law by April 1993, while the recent Royal Commission into WA Inc in Western Australia recommended such legislation.[6] There is also a Bill before the New South Wales Parliament which has been criticised as not being effective enough[7].

Outside Australia the best account of the subject remains the Ontario Law Reform Commissioner's Report of 1986 which recommended legislation, though nothing has eventuated.[8] The only place outside the United States to pass legislation has been Queensland, which provided limited whistleblower protection for persons helping the Criminal Justice Commission,[9] but only for a limited period.[10]

The existing law

The existing law (both statutory and common law) resists disclosures that are not authorised. In the case of public servants, disclosures may not be made unless authorised nor may such a servant 'comment on any matter affecting the public service or the business of the public service'. If they so act they may be liable to disciplinary action.[11]

At common law an employee is obliged to obey lawful and reasonable orders. Conversely this means that orders that are not lawful need not be obeyed.[12] An employee is not under a legal duty to disclose their own fraud or wrong doing but they may be obliged at common law to reveal the wrong doing of their subordinates if there is a term to that effect in their contract of employment.[13] In reality it would be a very brave public servant who decided to so act; and most unlikely of all in the case of a subordinate, though instances are known.[14]

An intelligence agency is bound by the law and cannot break the law nor can it refuse to reveal information eg the names of agents and thereby thwart a criminal investigation. In *A v Hayden* (1984) 156 CLR 532 a group of Australian intelligence operatives broke into the wrong hotel room during an exercise and assaulted a civilian. They subsequently refused to cooperate with a Victorian police investigation, on the grounds that their identities were a matter of national security. The High Court of Australia said that there is no defence of superior orders; that the identities could be revealed and that any contract between the operatives and the Crown forbidding them from revealing the information could not override the law nor could this be used as an excuse to thwart the processes of the law.

The exception for inequity[15]

Despite the foregoing, the common law recognised that there could be no confidence in inequity (*Gartside v Outram* (1856) 26 LJCh 113, 114).[16] A number of legal cases in England in recent times suggest that the common law will recognise a public interest exception where information is leaked, usually to

the media, but also to relevant external regulatory bodies. To illustrate the point: where an agency covers up acts that might harm the public (eg unsafe medical practices), this information may be revealed to the press (*Belhoff v Pressdram* Ltd [1973] 1 All ER 241, 260(ChD)) as may breaches of a regulatory statute in which case the disclosure to the external regulatory body will be protected (*In re Company's Application* [1989] 3 WLR 265(Ch D)).[17] Even if the information disclosed proves to be baseless, no harm will be done if the disclosure is to a regulatory body that is obliged to keep the disclosed information confidential. The problem with this doctrine is that it involves the operation of a balancing test and the courts do not always support disclosures to the press. If the material shows an egregious abuse of power, such as corruption by the police (*Cork v McVicar*, The Times, October 31, 1984(ChD)), disclosure to the media may be allowed. Equally, if serious flaws in an administrative procedure, such as faulty breathalyser equipment that resulted in the conviction of many people (*Lion Laboratories v Evans* [1984] 2 All ER 417 (CA)) publication by the press may proceed unscathed.

On the other hand, if the material shows a serious defect, even one that may threaten the public, there may be countervailing considerations that compel non-disclosure. This arose in *X v Y* ([1988] 2 All ER 648(QBD)), in which the press published an article that showed that some medical practitioners were HIV positive but the courts refused to allow their names to be published, since it was argued that the AIDS crisis could only be tackled if those with the disease, including doctors, could be assured of complete anonymity.

Similarly, in the Spycatcher cases in Britain and Hong Kong, despite evidence of wrong doing by the intelligence services the balance of the public interest was said to lie against disclosure.[18] As Dickson CJC put in a Canadian case '... in some circumstances a public servant may actively and publicly express opposition to the policies of the government. This would be appropriate if, for example, the government were engaged in illegal acts, or if its policies jeopardised the life, health or safety of the public servant or others....'[19]

The American position

Common law

At common law the American law of dismissal allows for dismissal at will (ie, in Commonwealth terms, summary dismissal) which meant that if employers wanted to retaliate against 'whistleblowers' they were free to do so. However, the 'at will' doctrine is subject to a number of exceptions, the most important of which is very similar to the 'public interest disclosure doctrine' in English law. In a number of cases involving nuclear safety (*English v General Electric Co* 110 L Ed2d 65(US SC, 1970)), and other public health threats, such as the sale of contaminated milk (*Garibaldi v Lucky Food Stores Inc* 726 F2d 1367(9th Cir, 1984)), as well as other forms of conduct where employees refused to violate enactments (*Sterling Drug Inc v Oxford* 743 SW2d 380 (Arkansas, 1988)), the courts carved out a public policy exception such that employees could not be dismissed for refusing to break the law. The problem with this approach was that not all states recognised it (see *Perdue v JC Penney Co* 470 F Supp 1234(SD NY, 1979)) and its effects were, like the English rules on public interest disclosure, uncertain in their operation. Moreover there was neither an agency to provide protection to 'whistleblowers' nor was there a way around the problem that workers might be legitimately dismissed for an unrelated matter.

The move towards statutory protection: the first phase, 1967-1988

Beginning in 1967[20] commentators began to recommend that special statutory provisions be passed to provide for a more reliable form of protection for whistleblowers. These same commentators noted that, as early as 1912, civil servants had been provided protection by statute from disclosing wrongdoing to Congress by petition.[21] The difficutly with this legislation was that such disclosures were not permitted if they were irresponsible and unjustified, and since a civil servant could never be sure of the outcome, even if they acted in good faith, few actually used this legislation for fear of retaliation.

Following these commentaries in the 1970s a number of specialist statutes providing whistleblower protection, especially in environmental matters,[22] were passed, beginning in Michigan in 1981.[23] Subsequently a number of other states passed whistleblower protection legislation.[24] The most important Federal development was the passage of the *Civil Service Reform Act 1978* (CSRA), which created the Office of Special Counsel (OSC) and was the first national legislative protection for whistleblowers on a broad scale. The OSC has an ombudsman-like role of providing an independent channel to whom whistleblowers could go with allegations and it was then left to the OSC to investigate the matter.[25] The Act dealt with violations of any law, rule or regulation together with mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Complaints actuated by malice were not protected, nor was more criticism of government policy. What was sought was actual information. The general conditions allowing for protection on the basis mentioned just above was qualified, since if the matter was specifically prohibited from disclosure by a law, or was specifically to be kept secret in the interests of national defence or the conduct of foreign affairs, the CSRA did not assist the whistleblower. The primary personnel effect intended by the new legislation was that certain types of adverse personnel action were prohibited whilst a complaint was being investigated by the OSC (for up to 15 days which might then be extended by the MSPB). Such adverse action included appointments, promotions, transfers or reassignments, performance evaluations, decisions concerning pay, benefits or awards including education and training, or 'any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade in an agency'.[26]

This legislation had mixed results in the early years of operation. There were many delays in case processing, there was poor communication with whistleblowers, inadequate follow up of agency's responses to the OSC investigations, and under the Reagan regime from 1980 on the budget of the office was cut, despite that administration's drive against waste in government. A related defect was that the operation of the OSC was not independent of the Merit Systems Protection Board (MSPB) on which the OSC was financially dependent.[27] In principle the parallel enactment of the *Inspector General Act 1978* was also supposed to provide further institutional assistance to whistleblowers.[28] The third element in the late 1970s reforms in the United States was the passage of the *Code of Ethics for Government Service Act 1980*[29] which imposed a duty to expose corruption and most importantly required civil servants to 'Put loyalty to the highest moral principles and to country above loyalty to persons, party or government department.'[30] This was a complete turn around from the British position most recently upheld in *Ponting* ([1985] Crim L Review 318), where such higher loyalties were said not to exist in law. In that case a judge directed a jury in an Official Secrets trial that the duty of

the civil servant who leaked documents from the defence department concerning the 1982 Falklands war to a member of Parliament, was to the Government of the day and that there was no overriding duty to the public or the Parliament.[31]

Legally the test in the CSRA was a very strict one. The employees had to argue that the retaliation by the employer for the whistleblowing was for making a report and that this was the reason for the dismissal or other retaliatory action: the so-called 'but for' test.[32] That is, the employee had to show that the sole reason for the action was the whistleblowing and that action had not been taken for some other reason.[33] It was not hard for employers to argue that there were other reasons. One consequence of these strict tests is that many whistle blowers found that their cases were beyond the jurisdiction of the OSC, ie were not eligible for OSC protection and in practice the OSC was the last place whistleblowers approached for help.[34] In practice the CSRA failed,[35] partly because Congress underestimated the scale of the problem: a key assumption in the legislation was that retaliation would be very rare.[36] One American study concluded that between 1979 and 1984 only 16 out of a total of 1500 adverse actions complained of by whistleblowers in the Federal civil service resulted in corrective action on behalf of the employee.[37] The same study concluded that the legislation 'had had no ameliorative effect on employee expectations or experience in regard to reprisals'.[38] One reason for this conclusion is that despite the congressional assumption that retaliation would be rare, in practice whistleblowers feared retaliation in very high numbers, while approximately one quarter actually experienced retaliation or were threatened by it.[39] The consequences of a sustained campaign against whistleblowers was also otherwise serious since many found it difficult to get jobs after they had left the service and many experienced financial problems as a result of the high costs of fighting their case; still others needed medical assistance.[40] Other defects in the legislation included the fact that it explicitly excluded senior officials and any position determined by the President on the grounds that it was necessary and warranted by the conditions of good administration, as well as Government corporations, the CIA, FBI, National Security Agency, the Defense Security Agency and the General Accounting Office[41].

The pre-1980 US empirical evidence[42]

The empirical evidence suggests that for whistleblowers the risks of retaliation are greatest if they reported a matter internally within their organisation or to the press, rather than to an external governmental agency whether state or federal.[43] The reasons for this are that in the case of a purely internal complaint the internal disciplinary system tends to assume that subordinates who complain are disruptive forces and are therefore a discipline problem. One effect of a complaint is to call in to question the supervisory system even if the complaint is not about a superior directly. In the case of external complaints to the media the internal stakes are raised, given the external pressures, and the fact that resistance from those threatened increases. Complaints to external governmental agencies are more often less 'dangerous' to the employee because the agency acts as a counterweight to internal pressures and the external agency may itself be able to impose sanctions on superiors who threaten to employ retaliation.

Despite the anecdotal evidence from individual studies that whistleblowers are not 'trouble-makers or neurotics',[44] it has been suggested that organisations see them as obsessives who are difficult people and who do not fit into the organisation.[45] In practice those who blow the whistle are better educated than those who do not, and are actually more

highly committed to the organisation than their co-workers.[46] It is precisely because such people take the official goals of the organisation more seriously than do their co-workers that they are inclined to report wrong doing. They are in fact an exceptional group, since the American evidence suggests that the vast majority of people who are aware of corruption within organisations do not report it, even though such wrong doing is an open secret within the organisation.[47] One reason for this is that they are relatively junior and vulnerable to pressure. Another reason for low rates of corruption reportage is that such people are weakly committed to the organisation and its goals.[48] On the other hand, in the case of government agencies the existence of an effective external monitoring agency seems to be a major factor in inducing people to blow the whistle, especially if they are likely to be protected by it and there is a perception on the part of the whistleblower that the external agency will be committed to the discovery of wrong doing.[49]

Despite the defects in the American system, there is evidence that in some cases whistleblowing actually produces policy change and in some cases systemic abuses of power were tackled.[50] What is not clear is how often this happens. What is known is that the whistleblowers must be unusually determined, have a supportive political environment to which they can turn (such as a legislative committee that is investigating waste or fraud, or a specialist anti-corruption agency) and be able to rely upon extensive and sympathetic media coverage and on the assistance of pressure groups.[51] Normally, only relatively senior officials with good political contacts and skills are in a position to achieve these results.

The Whistleblower Protection Act 1989[52]

In view of the well known defects in the 1978 legislation, a second attempt was made in 1989 to provide statutory protection for whistleblowers. At one level the legislation is well supported. Opinion poll evidence shows consistently strong support for it, whatever the actual results in practice.[53] The 1989 legislation still requires complainants to approach the OSC but the special counsel now have 120 days to report and must also concentrate on retaliation cases. Thus while personnel discipline is important it is to be overborne by the protection of complainants as a paramount consideration.[54] In practice the cases are complex, but actually are treated seriously. In the first year of operation only 250 complaints were received out of a total work force of 3 million.[55] Whether, in view of the distrust in the Official of Special Counsel, this is a good result is open to question. In the opinion of those in the OSC, the fact that a stay of disciplinary action can now be imposed and that agencies generally take notice of the investigations is an improvement over the 1978 Act.[56] The other major changes are that appeals are now permitted to an administrative law judge and not to the MSPB. The latter was primarily concerned with organisational efficiency and merit, while an administrative law judge is obliged to consider the fairness of the individual case. Lastly, the 1989 Act has altered the legal test of retaliation from one where the whistleblower had to show that the retaliation was the sole factor in the personnel action taken, to a case where it is merely a contributory factor, ie one of several considerations.[57]

Conclusions

It must not be assumed that the whistleblowing experiment has failed. Even if all of the institutions described above were dismantled, the problems of fraud, waste and breaches of the law would remain. In fact insiders are in a unique position and are usually privy to far more wrong doing than any external agency, which can normally only be activated when it receives information

from inside the bureaucracy, though this is often combined by media attention after 'leaks' have occurred. Of course not every person who thinks that they have discovered fraud, abuse and breaches of the law within the bureaucracy are correct in so thinking. Sometimes they are wrong and there are also misguided persons who are the bureaucratic equivalent of the vexatious litigant, a point the advocates of whistleblowing tend to ignore. Still, if a public service is truly serious about stamping out corruption it should strengthen the existing institutions and accept that wrongly made complaints will be rare and are an acceptable price to pay for effective public accountability.

The evidence suggests that the following institutional and legal conditions need to be in place for a 'whistleblower protections' system to work effectively:

(a) Effective external agencies that both provide a channel of communication for whistleblowers and which possess the necessary powers to investigate their complaints. It should be noted that the Criminal Justice Commission in Queensland is obliged to protect sources from harassment and to prevent prejudice to a whistleblower's career. It is also provided in the same legislation that disclosures to the Commission are not a breach of confidence nor are the providers of information liable to any disciplinary action.[58]

(b) It would help, however, if the personnel rules within the civil service were altered to protect 'whistleblowers' from retaliation. No disciplinary proceeding should be allowed to go forward against whistleblowers while other investigations are in train.

(c) An alteration in the civil service laws on secrecy and confidentiality to permit a public interest exception in the case of whistleblowers.

(d) Providing a statutory basis for the media to justify the publication of 'leaked' material from whistleblowers on the basis that it is *prima facie* in the public interest. Unfortunately even in systems with constitutional protection of free speech public officials may be subject to restrictions in what they may say to the media.[59]

(e) On the other side of the fence there is currently no privilege that attaches to the press. This means that a media person who receives material in confidence cannot refuse to disclose it to a court or other legal proceedings such as a Royal Commission.[60] One possibility is to provide that while confidences that also go to the heart of a judicial proceeding must be revealed, journalists and their employers who publish confidential material in good faith about matters of the public interest are protected from adverse legal proceedings. That is, the media could be compelled to reveal information so as not to thwart judicial proceedings, but not be themselves the subject of civil or criminal proceedings in receiving the information. The public interest would include materials concerning the operation of public organisations, not just the civil service, and would extend to private organisations that carry out public functions, eg private laboratories.[61]

This is not of course an ideal solution, since the real target of actions to uncover sources is not the journalist but the source itself. As recent media cases in South Australia suggest, a whistleblower may wish to remain anonymous under current legal conditions and may refuse to release the journalist from the undertaking of confidentiality.

All of this is aside from the question whether the source is correct or not. A whistleblower system does assume that fraud and wrongdoing exists, but not that

all whistleblowers are correct. The American evidence suggests that retaliation still takes place despite the existence of agencies to protect the whistleblower. Whether this means that the experiment has failed or merely means that effective protections are still needed is for others to judge. The US evidence is revealing for another reason. Irrespective of the effects on the whistleblowers themselves, the effects in key areas where abuses were common have been beneficial with major reforms resulting in better levels of public safety.[62]

The public and the government of South Australia ought to give thought to these developments. Of course any such debate must recognise the limits of legal/institutional changes, especially as these seek to change long held attitudes about the primacy of confidentiality in the public service. Ideally any such laws would be coupled with internal efforts to change a predominant 'organisational culture' through education, cooperative committees with external agencies to identify problems, and managerial accountability to prevent the abuses against which whistleblowing is ultimately aimed.

Endnotes

1 Or possibly in South Australia if the Independent Commission Against Crime and Corruption Bill 1992 (No 24 of 1992 read for the first time September 9, 1992) is passed.

2 Whether this will be eroded by the *Freedom of Information Act 1991* (SA) remains to be seen.

3 H Collins, *Justice in Dismissal* (1992) pp 204-205.

4 For other Australian literature see: J McMillan, 'Whistleblowing', in Peter Grabosky (ed), *Government Illegality* (Canberra: Australian Institute of Criminology Proceedings, No 17, 1987) 193-200, J McMillan, 'Blowing the Whistle on Fraud in Government' (1988) 56 *Canberra Bulletin of Public Administration* 118-123; Commonwealth of Australia, *Review of Commonwealth Criminal Law; Final Report* (December 1991) 335-355 (Canberra: Commonwealth Parliamentary Paper No 371 of 1991); J G Starke, 'The Protection of Public Service Whistleblowers - Part 1', (1991) 65 *ALJ* 205-219; J G Starke, 'The Protection of Public Service Whistleblowers - Part 2', (1991) 65 *ALJ* 252-265.

5 For the Queensland material see: *Report of a Commission of Inquiry Pursuant to Orders in Council* (1987-89) (sometimes known after its chairman as the Fitzgerald Inquiry) (Brisbane: Government Printer, 1989) 133-134; *Electoral & Administrative Review Act 1989* (Qld) (No 106) (Schedule: Item 16 as a research matter); G Sorenson, 'Fitzgerald Reform Agenda Under Way in Queensland', (1990) 1 *Public Law Review* 205-216; Queensland, Electoral & Administrative Review Commission, *Report on Protection of Whistleblowers* (Brisbane, October 1991). *Whistleblowers (Interim Protection) Act 1990* (Qld) No 79. The recommended legislation has not been passed, however. See: Queensland, Electoral & Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Protections.* (Issues paper No 20) (Brisbane: Government Printer, June 1992) 9; W De Maria, 'Queensland Whistleblowers: Sterilising The Lone Crusader' (1992) 27 *Aust J of Social Issues* 248-261; John McMillan, 'Legal Protection of Whistleblowers', in Scott Prasser, et al (eds), *Corruption and Reform: The Fitzgerald Vision* (St Lucia: UQP, 1990) 203-211.

6 *The Weekend Australian*, November 14-15, 1992 1, cols 1-3; *Report of the Royal Commission into Commercial Activities and Other Matters Part 2* (Perth: Government Printer, 1992) 4.14 to 4.20.

7 *Whistleblowers Protection Bill 1992 (No 2)* (NSW); J Goldring, 'Blowing The Whistle', (1992) 17 *Alternative Law Journal* 298-300.

8 Ontario Law Reform Commission, *Report on Political Activity, Public Comment & Disclosure by Crown Employees* (Toronto, 1986) See also: H L Laframboise, 'Vile Wretches and Public Heros: The Ethics of Whistleblowing in Government', (1991) 34 *Canadian Public Administration* 73-77.

9 Created by the *Criminal Justice Act 1989* (Qld).

10 *Whistleblowers (Interim Protection) and Miscellaneous Amendment Act 1990* (Qld) s11.

11 *Government Management and Employment Act 1985* (SA), s67(h). The previous legislation repealed in 1985 also prohibited unauthorized disclosures and made such acts a criminal offence: *Public Service Act 1967* (SA), s58(j). See also Regulation 21(1)(c)(i) & (iii) made under the 1985 Act: Government Gazette, (SA) June 26, 1986 p1668, which allows disclosures provided that it does not create a reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies or is not made contrary to any law or lawful instruction or direction.

12 *Parrish v Civil Service Commission of Almeda* 425 P2d 223 (Cal SC, 1967): *Morish v Henly (Folkestone) Ltd* [1973] 2 All ER 137, 139G (Nat Ind Rels Ct) (refusal to falsify records); *Gregory v Ford* [1951] 1 KB 121, 123H (Notts Assizes) (refusal to drive an uninsured vehicle).

13 *Swain v West Butchers Ltd* [1936] 3 All ER 261 (CA); *Sybron Corporation v Riochem Ltd* [1983] 2 All ER 707, 715H-J, 717F-G(CA).

14 A teacher was threatened with disciplinary action recently for making public comments about alleged safety problems at his school: *The Advertiser,* 23 January 1993, p4, cols 1-3.

15 The other exceptions are that there may be a higher duty to another authority, and a balancing of the public interest: P D Finn, 'Confidentiality and the Public Interest' (1984) 58 *ALJ* 497, 505-507.

16 A view reiterated in more recent cases such as: *Initial Services Inc v Putterill* [1986] 1 QB 396, 405 (CA); Y Cripps, 'Protection From Adverse Treatment by Employers: A Review of the Position of Employees Who Disclose Information In The Belief That Disclosure is In The Public Interest' (1985) 101 *Law Quarterly Review* 506-539.

17 For discussion of this case see: E Lominicka 'The Employee Whistleblower and His Duty of Confidentiality' (1990) 106 *Law Quarterly Review* 42-46. See also *Hasselblad* (GB) *Ltd v Orbinson* [1985] 1 QB 475, 504 (CA).

18 The same conclusions were reached in other cases involving intelligence officers in Britain: R Pyper, 'Sarah Tisdall, Ian Willmore, and the Civil Servant's Right to Leak' (1985) 56 *Political Quarterly* 72-81. For a summary account of most of these uses as well as the failed Spycatcher litigation in Australiasia see: A Stewart & M Chesterman, 'Confidential Material: The Position of the Media' (1992) 14 *Adelaide Law Review* 1, 8-12.

19 *Re Fraser and Public Service Staff Relations Board* (1985) 23 DLR(4th) 122, 133 (SCC).

20 L E Blades, 'Employment at Will vs Individual Freedom: On Limiting the Abusive Exercise of Employer power' (1967) 67 *Columbia Law Review* 1404, 1432.

21 M J Lindauer, 'Government Employee Disclosures of Agency Wrongdoing: Protecting The Right to Blow the Whistle' (1975) 42 *University of Chicargo Law Review* 530, 545, fn 88; Note, 'The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects' (1971) 57 *Virginia Law Review* 885-919. It should be noted that in Australia disclosures by witnesses to certain parliamentary committees are protected and retaliatory action against such witnesses is forbidden: *Public Works Committee Act 1951* (Cth), s32; *Public Accounts Committee Act 1969* (Cth), s19(2). In English law, if a constituent discloses wrong doing by public officials to a member of parliament, and in the letter defames the official concerned, the MP has a privileged occasion defence in receiving the letter: *R V Rule* [1937] 2 KB 375, 380 (CCA); *Beach v Freeson* [1972] 1 QB 14, 21-22 (QBD).

22 *Willy v Coastal Corporation* 855 F2d 1160 (5th Cir, 1988); (1992) 140 *Federal Rules Decisions* 219, 221.

23 M H Malin, 'Protecting the Whistleblowers From Retaliatory Discharge' (1983) 16 *University of Michigan Journal of Law Reform* 277, 304.

24 Note, 'State Law Protection of At Will Employees Who 'Blow the Whistle' (1988) 65 *University of Detroit Law Review* 551, 553, fn 5 lists 10 states with legislation. For a detailed discussion of three of the earliest state statutes see: T M Dworkin and J P Near, 'Whistleblowing Statutes: Are They Working?' (1987) 25 *American Business Law Journal* 241-264. For a list of the state statutes see: M P Miceli & J P Near, *Blowing The Whistle* (New York: Lexington Books, 1992) 260-273, where 35 state enactments are briefly described.

25 *Frazier v MSPB* 672 F2d 150, 162 (DC Cir, 1982).

26 *Civil Service Reform Act 1978* PL 95-454; 92 Stat 111 s2302(a)(2)(A).

27 B C Indig, 'The Rights of Probationary Federal Employee Whistleblowers Since The Enactment of the Civil Service Reform Act of 1978' (1983) 11 *Fordham Urban Law Journal* 567, 596.

28 K W Muelenberg & H J Volzer, 'Inspector General Act 1978' (1980) 53 *Temple Law Quarterly* 1049-1066.

29 PL 99-303; 94 Stat 855-856.

30 *Ibid* item IX in the Code.

31 Citing the views of Lord Devlin in *Chandler v DPP* [1964] AC 763, 807 (HL(E)).

32 J L Martin, 'The Whistle Blower Revisited' (1985) 8 *George Mason University Law Review* 123, 129.

33 *Frazier v MSPB* 672 F2d 150, 165 (DC Cir, 1982).

34 P H Jos, *et al*, 'In Praise of Difficult People: A Portrait of the Committed Whistleblower' (1989) *Public Administration Review* 552, 554, Table 2.

35 US General Accounting Office, *Whistleblower Complainants Rarely Qualify for Office of Special Counsel* (Washington DC: Government Printer 1985) 18 as cited in G A Calden & Judith A Truelson, 'Whistleblower Protection in the USA: Lessons Learnt and To Be Learnt' (1988) 47 *Australian Journal of Public Administration* 119, 123.

36 *Frazier v MSPB* 672 F2d 150, 165 (DC Cir, 1982).

37 G A Calden & Judith A Truelson, 'Whistleblower Protection in the USA: Lessons Learnt and To Be Learnt' (1988) 47 *Australian Journal of Public Administration* 119, 122.

38 *Ibid* p122. The same pessimistic conclusion was reached in T M Dworkin and J P Near, 'Whistleblowing Statutes: Are They Working?', (1987) 25 *American Business Law Journal* 241, 258-259.

39 J A Truelson, 'Blowing the whistle on systematic corruption: On Maximizing reform and minimizing retaliation' (1987) 2 *Corruption and Reform* 55, 57. P H Jos, *et al*, 'In Praise of Difficult People: A Portrait of Committed Whistleblower'. (1989) *Public Administration Review* 552, 554, Table 1 shows that only 1% did not experience retaliation.

40 Jos *id* put this figure at 57%.

41 Ontario Law Reform Commission, *Report on Political Activity Public Comment & Disclosure by Crown Employees* (Toronto, 1986) 236.

42 For two excellent accounts of this see: M Glazer & P Glazer, *The Whistleblowers* (New York: Basic Books, 1989) and M P Miceli and J P Near, *Blowing the Whistle* (New York: Lexington Books, 1992).

43 E S Callahan, 'Employment At Will: The Relationship Between Societal Expectations and the Law' (1990) 28 *American Business Law Journal* 455, 462-463.

44 M A Parmalee, et al, 'Correlates of Whistleblowers' Perceptions of Organisational Retaliation' (1982) 27 *Administrative Science Quarterly* 17, 32-33.

45 H L Laframboise, 'Vile Wretches and Public Heroes: The Ethics of Whistleblowing in Government' (1991) 34 *Canadian Public Administration* 73, 76.

46 M P Miceli and J P Near, 'Individual and Situational Correlates of Whistle-blowing' (1988) 41 *Personnel Psychology* 267-281; Mary Brabeck, 'Ethical Characteristics of Whistle Blowers', (1984) 18 *Journal of Research in Personality* 41-53.

47 J A Truelson, 'Blowing the whistle on systematic corruption: on maximizing reform and minimizing retaliation' (1987) 2 *Corruption and Reform* 55, 56 reports that in one US study by the MSPB 70% of federal employees claiming personal knowledge of corruption did not report it.

48 M P Miceli et al, 'Who Blows the Whistle and Why?' (1991) 45 *Industrial and Labour Relations Review* 113, 125-126.

49 *Ibid* 127.

50 R A Johnson and M E Draft, 'Bureaucratic Whistleblowing and Policy Change' (1990) 43 *Western Political Quarterly* 849-874.

51 *Ibid* p869.

52 *Public Law* 101-12 (10 April 1989); 103 Stat 16.

53 E S Callahan, 'Employment At Will: The Relationship Between Societal Expectations

and The Law' (1990) 28 *American Business Law Journal* 455, 480.

54 *Whistleblowers Protection Act 1989* PL 101-12; 103 Stat 16, s2(b)(2)(A).

55 (1991) 133 *Federal Rules Decisions* 392, 399.

56 Ibid pp 400-401.

57 (1992) 140 *Federal Rules Decisions* 219, 221.

58 *Criminal Justice Act 1989* (Qld) ss3.31 & 3.32.

59 *Mt Healthy School District Board of Education v Doyle*, 50 L Ed 2d 471, 482 (US SC, 1977); *Pickering v Board of Education*, 20 L Ed 2d 811 (US SC, 1968); *Connick v Meyers*, 75 L Ed 3d 708 (US SC, 1983); *US v Richey*, 924 F2d 857, 860 (9th Cir, 1991). First amendment rights are not absolute, for a balance may need to be struck between their interest as a citizen and the interst of the state, as an employer in promoting the efficiency of the public services it performs though its employees. The same ideas have been accepted in Canada: see Re *Fraser and Public Service Staff Relations Board* (1985) 23 DLR (4th) 122(SCC); *Re OPSEU and Attorney-General of Ontario* (1988) 41 DLR (4th) 1, 16((SCC).

60 See: Australia: *State Bank of South Australia v Hellaby (1992)* 168 LSJS 1(FC) *Kerrisk v North Queensland Newspapers Co Ltd* [1992] 2 Qd R 398 (FC); *John Fairfax & Son Ltd v Cojuanco* (1988) 165 CLR 346 (HCA); *The Herald and Weekly Times Ltd v The Guide Dog Owners" and Friends' Association* [1990] VR 451; *McGuiness v Attorney-General of Victoria* (1940) 63 CLR 73(HCA). Britain: *Attorney-General v Mulholland* [1963] 2 QB 477; *Attorney-General v Clough* [1963] 1 QB 773; *Maxwell v Pressdram Ltd* [1987] 1 WLR 298; *X v Morgan-Grampian (Publishers) Ltd* [1990] 2 WLR 1000(HL(E)); The United States: *Branzburg v Hayes*, 33 L Ed 2d 626(US SC, 1972); *Cohen v Cowles Media*, 115 L Ed 2d 586 (US, SC, 1991). Canada: *Moysa v Labour Relations Board* (1989) 60 DLR (4th) 1(SCC). For disucssion see: T R S Allen, 'Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law' (1991) 50 *Cambridge Law Journal* 131-162; S Walker, 'Compelling Journalists to Identify Their Sources: 'The Newspaper Rule' and 'Necessity' (1991) 14 *University of NSW Law Journal* 302-324; A Stewart & M Chesterman, 'Confidential Material: The Position of the Media' (1992) 14 *Adelaide Law Review* 1-34.

61 The issue in *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417(CA) concerned the leaking of information that showed that the testing of blood alcohol limits was highly unreliable and that the private manufacturers knew this. On the basis of the findings produced by faulty equipment the police and the Home Office continued to use this equipment in traffic law enforcement.

62 M P Glazer & P M Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* (New York: Basic Books, 1989) 240-246.