ELAINE KAPLAN
*Special Counsel, U.S. Office of Special Counsel*

# The International Emergence of Legal Protections for Whistleblowers*

As the international community is increasingly recognizing, employees (especially public employees) are an invaluable source of information about official corruption. Anti-corruption efforts are hampered when employees are reluctant to become "whistleblowers" by coming forward and sharing their knowledge of official corruption and malfeasance with the proper authorities.

Whistleblower protection laws are intended to make it safe for employees to disclose misconduct that they discover during the course of their employment. Indeed, when accompanied by other initiatives, such laws can actually help foster an environment that rewards and encourages whistleblowing.

In the United States, statutory protection for whistleblowers has existed for at least 20 years. Further, constitutional guarantees of free speech have long been interpreted to protect public employees who speak out on matters of public concern—including corruption and malfeasance.

Other members of the international community have recently begun to enact their own laws to protect and encourage whistleblowers. Indeed, whistleblower protection is receiving the attention of multinational organizations. Section 8 of the Inter-American Convention Against Corruption provides that members of the Organization of American States should consider the establishment of "systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems."

This article presents a brief overview and comparison of some of the laws that have been or may soon be enacted to protect whistleblowers against retaliation. It concludes with observations based on the U.S. experience regarding the role such laws play in efforts to uncover corruption, and what additional measures are needed to promote a culture that not only accepts, but actively encourages, whistleblowing.

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## The United States

Popular culture in the United States suggests that its whistleblowers are held in high esteem. Hollywood films like "Serpico," "Silkwood," and "The Insider" tend to glorify the individual who takes on "the system" at great personal risk.

In real life, however, attitudes may be different. Whistleblowers are often viewed, not as heroes, but as disloyal "malcontents." This is especially true when their whistleblowing takes the form of going outside of their organizations to obtain redress. Ironically, whistleblowers are often forced to go outside to make their disclosures by an organizational culture that does not provide adequate assurances either that the whistleblower's underlying concerns will be addressed or that he will be protected against retaliation.

The United States Office of Special Counsel (OSC), was established in 1979, with one of its primary purposes the protection of whistleblowers in the federal employment sector. In addition to protecting whistleblowers against retaliation, OSC operates a secure channel through which federal employees and applicants can make disclosures of official wrongdoing, with assurances that their identities will be kept confidential.

OSC's establishment occurred in the wake of increasing mistrust of the federal government after the Watergate scandal, in addition to well-publicized allegations of retaliation by federal government agencies against employees who had blown the whistle on wasteful defense spending.[1]

The Office of Special Counsel enforces the whistleblower protection provision of the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (1979), as amended by the Whistleblower Protection Act (WPA) of 1989, Pub.L. 101-12, 103 Stat. 32 (1989). The WPA makes it illegal to take or threaten to take a "personnel action" against a federal employee because the employee has made a protected disclosure. "Personnel action" is broadly defined to include virtually any employment-related decision that has an impact on an employee at the worksite.[2]

A protected disclosure is the disclosure of any information that an employee reasonably believes evidences a violation of law, rule or regulation, a gross waste of funds, gross mismanagement, an abuse of authority, or a significant and specific danger to public health or safety. A disclosure need not prove ultimately accurate in order to be protected—it is enough if the person making it is acting in good faith and with an objectively reasonable belief in its accuracy.

The law was designed to make it relatively easy for the whistleblower to make a *prima facie* case of retaliation. Thus, causation is shown by establishing that an employee's protected disclosure was a "contributing factor" in a personnel action. Further, the law presumes that the employee has made this showing where there is close timing between the disclosure and the taking of a personnel action by an individual with knowledge of the disclosure.[3]

A unique feature of the WPA is that a whistleblower is not required to make his disclosure through any particular channel in order to benefit from the Act's protection. Thus, unless the information at issue is otherwise protected against public disclosure by law (for example, the laws prohibiting the dissemination of classified national security information), an employee is protected regardless of to whom he makes his disclosure. This includes protection for employees who take their allegations to the press.[4]

In order to ensure its impartiality, OSC was granted a good deal of independence within the executive branch of the U.S. government. The Special Counsel is appointed by the President, with the approval of the U.S. Senate. But the Special Counsel does not serve at the pleasure of the President. He or she has a fixed term of five years and can only be removed for misconduct or malfeasance.

The Special Counsel's staff is composed largely of career federal employees who have civil service protections that prevent them from being subject to political control. OSC has the power to compel witness testimony and the production of documents. OSC also has the power to seek a stay of a personnel action, before the completion of its investigation, where there exist reasonable grounds to believe retaliation has occurred.

In the vast majority of cases where the Office of Special Counsel determines that an illegal personnel action has occurred, the Special Counsel seeks and obtains voluntary correction by the agency involved. If an agency does not comply with the Special Counsel's request, however, then the Special Counsel prosecutes the retaliation case. An evidentiary hearing is held and a decision issued by an administrative judge, with appellate review by the Merit Systems

[1]See Fong, Bruce D., *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980's,* 40 Am.U.L. Rev. 1015, 1017-1018 (((1991).

[2]Such actions range from removal to the denial of promotions, details or training opportunities. They include geographic reassignments, and even the creation of a hostile working environment. *See* 5 U.S.C. § 2302(a)(2)(A).

[3]The contributing factor test is important because it is often difficult to prove that a personnel action was taken solely for purposes of retaliating. An employer can often articulate legitimate reasons for a personnel action. Those legitimate reasons may exist in conjunction with the retaliatory motive. To provide maximum protection to whistleblowers, the personnel action will be found illegal unless the employer can provide clear and convincing evidence that he would have taken the same action even if the employee had not engaged in protected activity. 5 U.S.C. § 1221(e)(2).

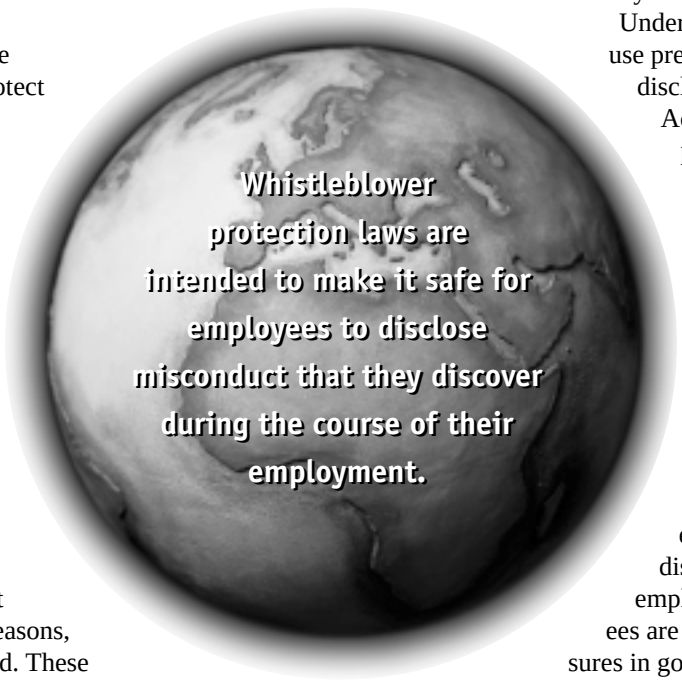
[4]In cases involving classified information or information otherwise protected against dissemination, an employee retains his protection if he makes his disclosure either to OSC or to an agency's Office of Inspector General. 5 U.S.C. § 2302(b)(8)(B).

Protection Board (MSPB), a three member administrative board.

If the Special Counsel concludes that retaliation has not occurred, or if OSC does not act within 120 days, whistleblowers can pursue an individual right of action before the MSPB. If the whistleblower does not prevail, he or she may take an appeal to federal court. The agency, however, generally has no right of appeal.

OSC has another important power—the power to seek disciplinary action against an agency official that has engaged in retaliation. OSC may file a petition with the MSPB asking that it order discipline against such an official with sanctions as severe as removal from federal employment.

## The United Kingdom




In the United Kingdom, like the United States, legislation to protect whistleblowers was enacted in the wake of well-publicized scandals and disasters that occurred in 1980s and early 1990s. These included the collapse of Bank of Credit and Commerce International (BCCI), the drowning of four children at Lyme Bay, and the Clapham Rail crash.

Official inquiries into these incidents concluded that people within the organizations involved often knew of the potential dangers or corrupt practices but, for a variety of reasons, were unwilling to come forward. These incidents, among others, suggested that the United Kingdom's longstanding "culture of secrecy" needed to be addressed. (*See*, Public Concern at Work, "The Public Interest Disclosure Act of 1998," available at *http://www.pcaw.co.uk/legislation/legislation.htm.*

The Public Interest Disclosure Act (PIDA) became effective on July 2, 1999, in England, Wales and Scotland, as an amendment to the Employment Rights Act of 1996. It was subsequently extended to Northern Ireland by Order of Council.

PIDA covers both private and public employees (except police officers), and provides that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done on the ground that the worker has made a protected disclosure." The Act itself does not define "detriment" (as the WPA defines "personnel action"). The explanatory notes on the bill that were prepared by the British organization Public Concern at Work, clarify that it encompasses a variety of unfavorable personnel actions, including refusals to promote, denial of pay raises, relocations, and denial of training. The law also specifies that it is unlawful to dismiss an employee "principally" because he made a protected disclosure.

PIDA protects a broad range of disclosures. These include any disclosure which, within the "reasonable belief" of the worker making it, tends to show that a criminal offense is being, has been, 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 that person is subject; that a miscarriage of justice has occurred, is occurring, or is likely to occur; that the health or safety or an individual has been, is being, or is likely to be endangered; that the environment has been, is being, or is likely to be deliberately concealed.

Under PIDA, whistleblowers must use prescribed channels for making disclosures in order to retain the Act's protection.[5] The Act's preference is that the disclosure be made to the employer itself or an appropriate public authority, rather than, for example, the media. Indeed, the Act clearly establishes a regime that disfavors disclosures that are wider than is demonstrably necessary to correct the evil being disclosed.

Thus, the Act protects an employee if he or she makes a disclosure in good faith to the employer himself. Public employees are protected if they make disclosures in good faith to a Minister of the Crown (i.e. to their employer's sponsoring Department). In addition, an employee is protected if he or she makes a disclosure in good faith to a person identified by the Secretary of State to receive such disclosures (generally a relevant regulatory agency). Again, in the interest of limiting the disclosure only to those with a need to know, the employee must reasonably believe that the relevant impropriety falls within the jurisdiction of the entity so prescribed and that the information disclosed, and any allegation contained in it, is substantially true.

Whistleblowers appear to be at some peril when going outside these officially sanctioned channels to make disclosures. Not only must they be able to show that they dis-

[5] PIDA contains a provision specifying that confidentiality clauses in employment contracts are void to the extent that they purport to prevent an employee from making a protected disclosure. PIDA § 1, codified at Employment Rights Act § 43J.

closed for reasons other than personal gain,[6] except in cases of "an exceptionally serious nature" (which is undefined), they must be able to justify the broader disclosure. They must demonstrate that use of a prescribed channel is either futile (because it has already been attempted), would lead to the destruction of relevant evidence, or could reasonably be expected to result in retaliation. Further, the whistleblower must also be able to show that "in all circumstances of the case, it is reasonable for him to make the disclosure" to the wider audience. [7]

As is readily apparent, the UK's scheme is materially different from that of the United States, which does not require employees to use any particular channel to raise their concerns. This difference reflects to a certain extent the expansive notion in the United States that constitutional protections, such as the right to free speech, are applicable to public employees, even when they are discussing matters related to their employment. It also reflects the UK's greater cultural distaste for "going public." (*See e.g.*, Hansard, HL 11 May 1998, Lord Borrie QC, col. 889, observing that without PIDA employees who feel unable to raise matters with their immediate supervisors, "might well feel that the only option is to stay silent or to blow the whistle in some underhand way, perhaps by taking the information to the media").[8]

One possible advantage of the UK's scheme is that its provisions encourage employers to create their own procedures for blowing the whistle and for responding to allegations of illegal or improper conduct. Employers who do so are ensured that whistleblowers must at least try to work within the organization before they make a potentially embarrassing matter public. Importantly, however, the Act also permits whistleblowers who are not comfortable raising their concerns internally to take them to prescribed regulators, albeit with the burdens of choosing the regulator that has jurisdiction over the matter and proving their "reasonable belief" that their disclosures are accurate. Beyond these channels, however, as noted above, the whistleblower may be at some peril.

PIDA does not provide for any independent agency of the State to investigate or prosecute whistleblower complaints. An employee must bring his retaliation claim to an employment tribunal, which has the power to award them compensation. Further, an employee who is dismissed has the right to seek an interim order, placing him back on the job, during the pendency of his case.

## South Africa

South Africa has experienced remarkable changes in the last two decades. After years of apartheid, violence, and repressive government, in May of 1994, after the nation's first election by universal suffrage, former anti-apartheid activist and political prisoner, Nelson Mandela, was sworn in as President.

In December 1996, President Mandela signed into law the new national constitution. One of the overriding purposes of the constitution, as stated in the Preamble, is to "[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law."

Whistleblower protection provisions became law through the Protected Disclosures Act, which was passed by the National Assembly June 20, 2000, and signed by President Mbeki on August 1, 2000. It went into effect in October 2000.

Among other things, the preamble to the Protected Disclosures Act recognizes the responsibility of employers and employees to disclose criminal and other misconduct in the workplace as well as the employer's obligation to protect whistleblowers against reprisal. Parliament described the purpose of the legislation as being to "create a culture which will facilitate the disclosure of information by employees relating to criminal or other irregular conduct in the workplace in a responsible manner . . ."

The Protected Disclosures Act appears to be modeled very closely on the UK's PIDA. It covers both private and public employees. It provides that "no employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure."

Like the phrase "personnel action" under American law, an "occupational detriment' is broadly defined to include any dismissal, suspension, demotion, involuntary transfer, failure to promote or disadvantageous alteration in a condition of employment. The South African law goes even further than U.S. law by explicitly including harassment and intimidation, as well as the refusal to provide an employment reference, or provision of an adverse reference as "occupational detriments." It has a catchall provision covering "any other adverse affect with respect to an employee's employment, profession or office (including

[6] The intent of this provision is to discourage "cheque book journalism." *See* Public Concern at 18.

[7] As observed in the notes to PIDA prepared by Public Concern at Work, organizations can "reduce the risk" that these conditions will be met by establishing a whistleblowing procedure, communicating to its workforce that retaliation is unacceptable, and making it clear that employees have the right to go to a prescribed regulator. Public Concern at 19. Going to the media with disclosures is fraught with peril; the "law of confidence" in the UK suggests that going to the media is unlawful when the public interest could as well be served by a disclosure to an authorized regulator of the conduct at issue. *See id* at 20.

[8] PIDA does not provide protection for public employees who make disclosures in violation of Britain's "Official Secrets Act." This Act protects information related to security, international relations, defense and criminal investigations and criminalizes its unauthorized disclosure by government employees. It has been widely criticized in the UK as a weapon that is used against whistleblowers and investigative journalists. Thus, these groups continue to view the Official Secrets Act as an obstacle to achieving Pica's ends.

employment opportunities and work security)." South Africa's law protects essentially the same range of disclosures as PIDA and also contains limitations on the permissible channels for making such disclosures.[9] Like PIDA, the Act's preference is that the disclosure be made to the employer itself or an appropriate public authority, rather than, for example, the media.

The South African law does not provide for any independent agency of the State to investigate whistleblower complaints or assist the whistleblower. Instead, the whistleblower may invoke the jurisdiction of any court or tribunal in order to protect himself against retaliation. Further, under the law, where it is practicable, a whistleblower that reasonably believes that he or she is going to be subject to an occupational detriment must, at his or her request, be transferred to another position with the employer.

## New Zealand

In New Zealand, the Protected Disclosures Act 2000 became effective on January 1, 2001. The New Zealand law covers both public and private employers and protects employees who, in good faith, and on the basis of reasonable belief disclose "serious wrongdoing" through internal procedures established by their employer. The law specifically requires that the employees be motivated to make their disclosures by a desire to see the serious wrongdoing investigated.

Like the UK and South Africa, the New Zealand law conditions wider disclosures upon an employee's reasonable belief that internal procedures will either be ineffective or corrupt. Thus, it provides that an employee may make a disclosure to the head or deputy head of his organization where he reasonably believes that the wrongdoer himself (or someone with a relationship or association with him) is involved with the internal procedure. He may go to an outside "appropriate authority" if he believes on reasonable grounds that the head of the organization may be involved in the serious wrongdoing, that there has been no action within 20 working days in response to a disclosure made internally, or where immediate reference to an outside authority is justified by the matter to which the disclosure relates or some other "exceptional circumstance." He may go to a Minister of the Crown or the Ombudsman (in the case of public employees) if the internal procedure or appropriate authority has decided not to investigate or has not made progress on the investigation within a reasonable time, or has investigated but not taken the necessary action.

The New Zealand law, unlike that of the UK and South Africa, provides no protection at all for disclosures outside these channels (for example, to the media). It affirmatively requires public organizations to establish internal procedures for receiving disclosures, and creates special rules for disclosures related to national security or international relations. The Ombudsman is charged with serving as a resource for advising employees about their rights under the law, and the avenues available to them for making disclosures.

The law protects employees against "victimization" on the ground that they intend to or have made a protected disclosure, have given information in connection with an investigation of a disclosure, or have assisted another person in making a disclosure or exercising their rights under the Act. "Victimization" means, in accordance with § 66 or New Zealand's Human Rights Act of 1993, any discrimination against an individual either because they have exercised a protected right or because a relative or associate has done so. Employees who believe that they have been victimized for making a protected disclosure are given all legal redress available under New Zealand's Employment Contracts Act of 1991.

## Canada

As of the writing of this article, the Canadian Parliament is considering the passage of S-6, the Public Service Whistleblowing Act. If enacted, S-6 would establish a mechanism for public employees to make disclosures of wrongdoing, and protect them against retaliation for doing so. In its current form, S-6 provides significantly narrower protection than the laws discussed above.

The purpose of the Public Service Whistleblowing Act (PSWA) is, according to its preamble, to provide a means for public employees to make allegations of wrongdoing in the workplace to an independent Commission and to protect them against retaliation where they invoke that process in good faith and on the basis of reasonable belief. The bill only covers public employees.

The bill provides for the designation of one of the Commissioners of the Public Service Commission as "Public Interest Commissioner." The Commissioner is authorized to receive allegations of "wrongful act[s] or omissions[s]" from public employees. These wrongful acts include violations of Canadian law; acts likely to cause the significant waste of public money or to endanger the public health and safety; significant breaches of established written public policies or directives of the Public Service; or acts of gross mismanagement or abuse of authority.

Under the bill, if an employee has reasonable grounds to believe that another person working for the Public Service or in the Public Service workplace has committed or intends to commit one of these wrongful acts, he may file a written notice of his allegations with the Commissioner (with a request for confidentiality). Where the Commissioner determines that the allegations are not trivial, are

[9]In addition to the matters covered by PIDA, the South African law protects disclosures that unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, has occurred. PDA §§ 1(vi)(a)-(i) 26 of 2000 (emphasis added).

sufficiently specific and were made in good faith, on the basis of reasonable belief (*see* at cl. 12(1)), the Commissioner will investigate the allegations and prepare a written report of his findings which is to be provided to the minister responsible for the employee against whom an allegation has been made.[10] The minister must then respond to the Commissioner, advising him of what action the minister intends to take.

The bill also provides that no person shall take a "disciplinary action" against an employee because the employee in good faith and on the basis of reasonable belief made disclosures to the Commission, or is believed to have done so. Further, the bill prohibits disciplinary action against an employee who, in good faith and on the basis of reasonable belief has refused or stated an intention to refuse to commit an act or omission contrary to the Act.

The phrase "disciplinary action" includes "any action that adversely affects the employee or any term or condition of the employee's employment. In addition, the Act creates a rebuttable presumption that any disciplinary action taken within two years after an employee gives notice to the Commission, was retaliatory. The burden of proof would then shift to the employer to show, by preponderant evidence, that the disciplinary action was not retaliatory.

The Canadian bill provides for enforcement of its provisions pursuant to whatever avenue of recourse is available to the employee under the law. The bill makes it a criminal offense, subject to a fine not exceeding $10,000 for any person to engage in retaliation.

## Conclusion

As the foregoing illustrates, the international community has begun to devise and adopt a variety of laws and procedures for protecting and encouraging whistleblowing. Thus far, the majority of the nations that have adopted these legal protections are established, rather than emerging, democracies. Nonetheless, the recent inclusion of a provision supporting the enactment of such laws in the Inter-American Convention Against Corruption, suggests that emerging democracies may be considering some form of whistleblower protection in the coming years.

The emerging democracies will likely face special challenges when they seek to enact and implement systems to protect and encourage whistleblowing. They have more recent histories of systemic corruption, no history of free expression, and less mature legal systems.

In the United States, we have learned that the bare existence of statutory protection for whistleblowers is not a panacea. To be sure, there have been a number of occasions over past years in which public employee whistleblowers have come forward and aided the fight against corruption and government waste. Nonetheless, despite the fact that the laws in the United States have protected whistleblowers for over 20 years, many members of the federal workforce remain unaware of these statutory protections or of the many avenues that exist for them to make their disclosures. Indeed, surveys of the federal civilian workforce suggest that the majority of employees are reluctant to blow the whistle either because they fear retaliation or because they believe that nothing will be done in response to their disclosures.[11]

Even in "free" societies, ignorant or distrustful employees will not feel safe to come forward, regardless of how many statutory protections exist for them in the abstract. To combat the ignorance and distrust, it is crucial, therefore, that public employees are educated about their rights and that the agencies responsible for receiving disclosures and protecting them against retaliation make it a priority to gain their trust and confidence. Moreover, to gain public trust and confidence, those agencies must be given the resources and support to permit them to function effectively.

Equally, or perhaps more importantly, government agencies and departments have a responsibility to change their cultures, to make them receptive, rather than hostile, to employees who "rock the boat." The message must be communicated from the very top levels of agencies and departments, indeed, from the top levels in government, that employees are encouraged to come forward when they believe that wrongdoing has occurred. Further, employees who do come forward with important information should be visibly rewarded. Finally, agencies must establish credible procedures for investigating misconduct and employees must be kept in the loop about agency actions in response to their disclosures.

In short, statutory protection for whistleblowers is only part of the equation, albeit an important part. Cultural change and top down support must accompany whistleblower protection laws in order for them to achieve their objectives.

[10] If the Commissioner concludes, however, that there are other review procedures that could "more appropriately" address the allegations, he is not required to prepare a report.

[11] There has historically been distrust of the very agencies that have been established to protect whistleblowers and receive their disclosures. In the first decade after its establishment in 1979, whistleblower advocate groups frequently criticized the OSC as ineffective. In recent years, however, OSC has established better relationships with these groups and has successfully undertaken efforts to win their support and cooperation. OSC has also embarked upon a policy of publishing its actions on behalf of whistleblowers, and undertaking initiatives (like the Special Counsel's "Public Service Award") to publicly recognize the contributions of whistleblowers to the public interest. *See http://www.osc.gov/press.htm.*