

New Whistleblower Protection Laws for Japan

*Leon Wolff**

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I. INTRODUCTION

The Whistleblower Protection Act (Law No. 122 of 2004) was passed by the House of Representatives on 25 May 2004 and, less than one month later, by the House of Councillors on 14 June. It was promulgated on 18 June. The new Act protects those who expose corporate or government misconduct from unfair treatment, such as dismissal, demotion or salary cuts.

By passing such legislation, Japan has joined a number of other countries which offer similar statutory protection to whistleblowers. The United Kingdom safeguards “protected disclosures” in the Public Interest Disclosure Act 1998. The United States provides anti-retaliation relief in the generic Whistleblower Protection Act 1989, supplemented by industry-specific statutes such as the Aviation Investment and Reform Act for the 21st Century 2000 and the Corporate and Criminal Fraud Accountability Act (Sarbanes-Oxley Act) 2002. Australia promotes public-interest whistleblowing with differential state-based legislation.¹ Israel’s Workers’ Protection Act 1997 guarantees protection of whistleblowers against retaliation and/or termination at the workplace; South Africa’s Protected Disclosures Act 2000 prohibits an employer subjecting an employee to disciplinary action, suspensions, dismissal, demotion or harassment for raising concerns about unlawful or irregular conduct; and Ghana’s Whistleblower Protection Act 2001 offers rewards and protections to those who volunteer information leading to the prosecution of white collar criminals. According to a 1999 Organization

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1 Whistleblowers Protection Act 1993 (SA); Protected Disclosures Act 1994 (NSW); Whistleblowers Protection Act 1994 (Qld); Public Interest Disclosure Act (ACT); and Public Interest Disclosure Act 2002 (Tas). Due to constitutional constraints, there is no federal legislation on point. *Cf.* generally ELLETTA SANGREY CALLAHAN, TERRY MOREHEAD DWORKIN & DAVID LEWIS generally “Whistleblowing: Australian, U.K., and U.S. approaches to disclosure in the public interest”, *Virginia Journal of International Law* (2004) 44(3) 879-912.

for Economic Co-operation and Development (OECD) Public Management Policy Brief, *Building Public Trust: Ethics Measures in OECD Countries*, two-thirds of all OECD countries require or facilitate reporting of misconduct, especially by public servants. The report notes that these protections have strengthened in recent years, reflecting the growing emphasis on values and ethics-based standards – such as public interest, organisational justice, transparency, efficiency and accountability – in public and private governance systems.

Such legislative protections for whistleblowers is important. In *Whistleblowers: Broken Lives and Organization Power*², C. Fred Alford debunks the myth of the whistleblower as the brave and righteous individual rewarded by society for exposing illegal, corrupt or unethical conduct. As many as 90% of whistleblowers lose their jobs; additionally, they may also lose their savings, their home and even their families. Very few succeed in institutionalising change.

II. BACKGROUND TO THE LEGISLATION

The issue of ethical behaviour in public and private life is a global concern. Business ethics has particularly come under the spotlight with a series of high-profile corporate collapses – *Enron* and *WorldCom* in the US; *BCCI & Maxwell Pensions* in the UK; *HIH* and *OneTel* in Australia – precipitated by flagrant breaches of legal and accounting standards.

Japan has not been immune to this trend. In 2000, for example, *Mitsubishi Motors*, one of Japan's largest car manufacturers, was mired in scandal for hushing up consumer complaints. It finally confessed that it had failed to inform the authorities about at least 64,000 customer complaints over faulty vehicles since 1977, opting to repair the vehicles instead of issuing costly model-wide recalls. In 2002, *Snow Brand Food Co.* was exposed for mislabelling imported beef as domestic beef. This was so that it could benefit from the government's beef buy-back program following the outbreak of bovine spongiform encephalopathy ("mad cow disease") in Japan. In 2003, *Takefuji Corporation*, a leading non-bank consumer loan company, was caught engaging in illegal wire-tapping in violation of the Telecommunications Business Act. The company's chairman, *Yasuo Takei*, was arrested on charges of ordering employees to bug the phone of a freelance journalist who had been critical of the company.

Professor Muneyuki Shindo of Chiba University deplores what he regards as a downward spiral in public and private values. In the *Daily Yomiuri* of 24 May 2004, *Professor Shindo* declared that "business ethics have deteriorated significantly [in Japan], and executives value their businesses much more than their morals. They should change their mind-set."

2 Ithaca: Cornell University Press, 2001.

III. AN OUTLINE OF THE WHISTLEBLOWER ACT

Japan's Whistleblower Protection Act, therefore, is an important addition to international jurisprudence on regulating ethics. The key sections of the new Act are outlined below.

Section 1 sets out the objectives of the Act. It explains that the purposes of the law include invalidating dismissals or other disadvantageous consequences for those who disclose public interest information about companies or government agencies, and mandating private and public organisations to respond to any allegations of improper conduct. The protection of the act is wider than just whistleblowers themselves; it also extends to the "life, body, assets and other interests" of the general public by ensuring corporate and government compliance with minimum legal standards.

Section 2 defines whistleblowing (or public interest disclosure). According to the section, whistleblowing involves:

1. disclosure of "relevant disclosure information";
2. by a "worker";
3. to either:
 - (a) an "employer";
 - (b) a government agency or officer with relevant jurisdiction; or
 - (c) any other person deemed necessary to prevent the matter from occurring or worsening; and
4. not for an illegitimate purpose.

"Relevant disclosure information" means information pertaining to criminal conduct or statutory violations relating to the protection of consumer interests, the environment, fair competition and generally the "life, body and property of the general public". According to the Schedule to the Act, this includes (but is not limited to) violations of the Criminal Code, the Food Sanitation Act, the Securities Exchange Act, the Standardisation and Proper Labelling of Agricultural and Forestry Products Act, the Air Pollution Prevention Act, the Industrial Waste Disposal and Cleaning Act and the Protection of Personal Information Act. The information may relate to conduct that has already occurred or is about to occur.

A worker is defined as an employee under the Labour Standards Act, including permanent and temporary employees, public officers, retirees and dispatched workers. An employer – whether a company, association, organisation or individual – is a legal person who either employs workers or dispatches temporary workers. Directors, executive officers, auditors, employees and agents of the company also fall within the definition.

The disclosure must not be for an illegitimate (or "unfair") purpose. Thus, disclosure of information in order to secure an unfair advantage for oneself or cause a detriment to a third party will not trigger the protective provisions of the Act.

Sections 3-5 set out the protective provisions of the Act. Thus, whistleblowers who uncover criminal and other unlawful information at their place of employment and inform their employers of this are protected from retribution in the form of dismissals, demotions, salary cuts, termination of dispatch arrangement, and other detriments. If, however, the whistleblower discloses “relevant disclosure information” to a government agency or public officer, they will only get protection under the Act if they had “sufficient cause” to bring the complaint. In short, whistleblowers are encouraged to refer their concerns to in-house complaints handling systems, and can only alert the authorities if they have sufficient evidence of criminal or other conduct violative of the law.

If the whistleblower contacts a third party, such as a media outlet, the preconditions for enjoying statutory protection from retribution are even tougher. Whistleblowers will also need to establish “sufficient cause” that:

- they will be fired or otherwise disadvantaged in the workplace if they bring a complaint to the employer’s attention;
- evidence supporting the complaint will most likely be destroyed, altered or forged;
- the employer has failed to advise the whistleblower within 20 days in writing that it will investigate the complaint or advises without good reason that it will not investigate; or
- someone’s life is at risk.

Sections 9 and 10 impose certain mandatory obligations upon private and public organisations when informed of a potential breach of the law. By section 9, employers must notify the whistleblower in writing “without delay” what steps it will take to remedy or overcome the complained-of conduct or whether there is insufficient evidence to sustain a complaint. By section 10, government agencies must respond by investigating the whistleblower’s complaint and taking any necessary remedial action.

IV. WHISTLEBLOWING IN THE WIND?

In many respects, Japan’s Whistleblower Protection Act makes an important contribution to preventing corruption and mismanagement. Indeed, its legislative scope is wider than other comparable statutes. For example, unlike most jurisdictions which confine their legislation to government and its agencies, Japan – along with the US,³ South Africa⁴ and South Australia⁵ – extends relief to whistleblowing in the private sector.⁶

3 Whistleblower Protection Act 1989 (USA).

4 Public Disclosure Act 2000 (South Africa).

5 Whistleblowers Protection Act 1993 (SA).

6 Cf. DAVID LEWIS, “Whistleblowing Statutes in Australia: Is it Time for a New Agenda?”, in: *Deakin Law Review* (2003) 16.

But this is not to suggest that the Whistleblower Protection Act is not without its critics. Some, for example, argue that the definition of whistleblower is too narrow. Thus, section 2 does not cover business partners or customers. This is open to criticism given that business partners and customers may suffer adverse consequences by exposing improper conduct. Take *Yoichi Mizutani*, president of a storage company, for instance, who blew the whistle on *Snow Brand's* beef labelling scheme. His company was ordered by the Construction and Transport Ministry to suspend his operation for 16 months until it was eventually cleared of participating in *Snow Brand's* fraudulent scheme.

Others point to the stringent conditions on whistleblowers before they can enjoy statutory protection. In particular, whistleblowers need to ensure that they have evidence of criminal or other statutory breach before they can alert the authorities or involve the media. Although business groups warn against "employee disloyalty" and the loss of reputation for unsubstantiated allegations of unlawful behaviour, it is questionable whether such conditions are amenable to promoting ethical standards and values in corporate and public life.

Further, the Act imposes no penalties on corporations or government officials for failing to investigate properly complaints of misconduct as required under the Act.

Finally, the Act only deals with disclosure of criminal and a limited range of unlawful conduct. It does not cover infractions of tax, public elections, and political funds regulations. Moreover, the Act does not apply to cases where the behaviour was inappropriate as opposed to illegal. Thus, whistleblowers will not be protected if they reveal that a public officer misallocated funding for a particular matter to spend on another project or case.

The Whistleblower Protection Act, therefore, although an important advance in public and private governance regulation, is constrained in its ambit. Cynics can rightfully question the impact of the Act on promoting good governance and ethical standards given the Act's emphasis on self-regulation of malfeasance. In its current guise, it is fair to ask: precisely who is protected by the Act – whistleblowers and the general public, or big business and bureaucrats?⁷

7 To be fair, similar criticisms have been directed at the UK statute. See, e.g., SHERYL GROENEWEG, "Three Whistleblower Protection Models: A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom", Public Service Commission of Canada Research Directorate, October 2001 <http://www.psc-cfp.gc.ca/research/merit/whistleblowing_e.htm> (accessed 2 August 2004).