

ETHICS AND WHISTLE BLOWING: AN INVESTIGATION OF THE MORAL JUSTIFICATION AND FRAMEWORK FOR THE PRACTICE OF WHISTLE BLOWING

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the requirements for the degree**

M.PHIL IN APPLIED ETHICS

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DECLARATION

I, Muvhulawa Simon Mafela, hereby declare that this assignment is my own work and that all sources have been accurately reported and acknowledged, and that this document has not previously in its entirety or in part been submitted at a university to obtain an academic qualification. I also agree that this document may be used to assist other researchers or institutions for the purpose of enhancing knowledge on this aspect.

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SUMMARY

This research project examines the concept and practice of whistle blowing with the aim of answering the fundamental question: when is whistle blowing morally justified or unjustified? While the different forms of whistle blowing receive attention, the focus is on the corporate world, or non-governmental whistle blowing. Whistle blowing in the corporate world has become a moral and strategic point of debate with the issue being how it can be employed as a mechanism against corruption and other forms of abuse in a way that is fair to employees, employers, and the public..

The project focuses on the moral justification of whistle blowing and the ethical framework within which it needs to function. The methodology used is that of an extensive literature study. The views of researchers' from different countries are discussed and analyzed, and the deontological and utilitarian approaches to ethical decision-making are used to arrive at deductive conclusions. It is concluded that from an ethical viewpoint, employees are morally obliged to blow the whistle to prevent potential harm to e.g. the public or the environment. Specific conditions must be satisfied, however, before whistle blowing against a corporation or employer can be regarded as morally justified.

With reference to the views of researchers and a South African case study, it is established that whistle blowers need to be protected against retaliation from employers and that legislation in this regard has been lacking. An important mechanism to protect whistle blowers would be the introduction of laws to protect them against retaliatory actions such as dismissals or demotion. One of the aims of South Africa's Protected Disclosures Act (Act. No. 26, 2000) is to protect employees against any occupational detriment as a result of having blown the whistle in a manner consistent with the conditions outlined in the Act. It is concluded that it is to the advantage of employers to promote a culture in which justified and responsible whistle blowing is encouraged and protected. Suggested ways to achieve this include developing an ethic of whistle blowing, involving unions, introducing rewards, instituting codes of ethics, and establishing specific complaint recipients within organizations.

On the basis of a US case study and a study of relevant literature, it is concluded that employers and corporations also need to be protected against unethical whistle blowing. By laying down conditions that have to be met before an act of whistle blowing can be justified, the Protected Disclosures Act (Act No. 26, 2000) provides protection in this regard.

The study concludes with a critical appraisal of the positive as well as the negative aspects of the Protected Disclosures Act. The Act provides the necessary legal framework and guidelines for fair and responsible whistle blowing with protection for both employees and employers, and as such could help to reduce crime and corruption in both the public and private sectors. In the South African context of high levels of poverty, illiteracy and unemployment, however, certain shortcomings are identified that may diminish the potential value of the Act.

OPSOMMING

Hierdie navorsingsprojek ondersoek die konsep en praktyk van onthulling (“whistle blowing”) met die doel om die fundamentele vraag te beantwoord: wanneer is onthulling moreel geregverdig of ongeregverdig? Hoewel daar gekyk word na die verskillende vorms wat onthulling kan aanneem is die fokus op die korporatiewe wêreld, of nie-regeringsonthulling. Onthulling het in die korporatiewe wêreld ‘n morele en strategiese besprekingspunt geword, met die strydvraag hoe dit as ‘n meganisme teen korrupsie en ander skadelike praktyke aangewend kan word op ‘n manier wat billik teenoor werknemers, werkgewers en die publiek is.

Die projek fokus op die morele regverdiging van onthulling en die etiese raamwerk waarbinne dit moet funksioneer. Die metodologie behels ‘n omvattende literatuurstudie. Die sienings van navorsers van verskillende lande word bespreek en ontleed, en die deontologiese en utilitaristiese benaderings tot etiese besluitneming word gebruik om deduktiewe afleidings te maak. Die gevolgtrekking is dat uit ‘n etiese oogpunt, werknemers moreel verplig is om as onthullers op te tree om potensiële skade vir bv. die publiek of die omgewing te voorkom. Daar moet egter aan spesifieke voorwaardes voldoen word voordat onthulling wat ‘n korporasie of werkgewer benadeel, as moreel geregverdig beskou kan word.

Met verwysing na die sienings van navorsers en ‘n Suid-Afrikaanse gevallestudie word vasgestel dat onthullers beskerm moet word teen wraakneming van werkgewers en dat wetgewing in hierdie verband ontbreek het. ‘n Belangrike meganisme om onthullers te beskerm sou wees die instelling van wette om beskerming te bied teen vergeldingsaksies van werkgewers soos ontslag of demosie. Een van die oogmerke van Suid-Afrika se Wet op Beskermdde Bekendmakings (Wet. No. 26, 2000) is om werknemers te beskerm teen enige beroepsverwante nadeel as gevolg van ‘n bekendmaking wat voldoen aan die voorwaardes wat in die Wet gestipuleer word. Die gevolgtrekking word gemaak dat dit tot werkgewers se voordeel is om ‘n kultuur te bevorder waar geregverdigde en verantwoordelike onthulling aangemoedig en beskerm word. Voorgestelde wyses waarop dit gedoen kan word, sluit in die ontwikkeling van ‘n onthullingsetiek, om vakbonde te betrek, die instelling van belonings, die aanneem

van etiese kodes en om spesifieke klagte-ontvangers binne organisasies te vestig.

Na aanleiding van 'n VSA-gevallestudie en 'n studie van tersaaklike literatuur word die gevolgtrekking gemaak dat werkgewers en korporasies ook teen onetiese onthulling beskerm moet word. Die Wet op Beskernde Bekendmakings (Wet No. 26, 2000) bied beskerming in hierdie verband deur voorwaardes te stipuleer waaraan 'n bekendmaking moet voldoen voordat dit geregverdig is.

Die studie word afgesluit met 'n kritiese evaluasie van die positiewe sowel as die negatiewe aspekte van die Wet op Beskernde Bekendmakings. Die Wet stel die nodige wetlike raamwerk en riglyne vir billike en verantwoordelike onthulling daar met beskerming vir werknemers sowel as werkgewers, en as sulks kan dit help om misdaad en korrupsie in beide die openbare en die private sektor te laat afneem. In die Suid-Afrikaanse konteks van hoë vlakke van armoede, ongeletterdheid en werkloosheid word daar egter bepaalde gebreke geïdentifiseer wat die potensiële waarde van die Wet mag verminder.

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Chapter 1

1. Introduction and purpose of the research

1.1 Introduction

Crime, corruption and harmful business practices are among the most serious problems that countries worldwide are facing. The only effective institutions that could eradicate these problems are the police and the justice system. Both the law enforcers and the justice system cannot be effective, however, if there is no-one to provide evidence to the judges and the prosecutors.

Since ancient times, informal spies and informers have operated, providing kings and judges with information or disclosures that led to the arrest and prosecution of suspects or criminals. The most striking question is whether the acts of informing and disclosing were ethical or unethical.

The fact that the problems of crime, corruption, nepotism, and illegal business practices that lead to human or environmental harm remain chronic has prompted many people to blow the whistle. Although there has for many years not been any form of formal guidelines on the practice of whistle blowing, many people have continued to blow the whistle and in numerous instances they have been the victims of their heroic actions.

In some cases the practice of whistle blowing was abused. In modern societies, there is a need for objective guidelines to be provided for the moral use of whistle blowing. This has prompted many researchers to look for such conditions. This research is but one example. The fundamental question is: when is whistle blowing morally justified or unjustified?

1.2 The purpose of the research

The purpose of this research is to distinguish between the different forms of whistle blowing in order to answer the following questions:

1. When is whistle blowing morally unacceptable/unjustified?
2. When is whistle blowing morally acceptable/justified?
3. Do employees have an obligation to blow the whistle?
4. How can whistle blowers be protected?

The research also seeks to establish the culture and system of values that an organization should uphold in order to make whistle blowing unnecessary.

The focus of the research project is the corporate world or what is known as non-governmental whistle blowing. Whistle blowing in the corporate world has become, over the past years, a moral and strategic point of debate with the issue being how it can be employed as a mechanism against corruption and other forms of abuse. The project focuses on the moral justification of whistle blowing and the ethical framework within which it needs to function. It aims to achieve this by an extensive study of the relevant literature. The literature will be studied to find out whether the following assumptions are realistic:

1. Whistle blowing can be both moral and immoral.
2. Whistle blowing is a moral obligation when the need for it exists.
3. Whistle blowers can face retaliation from employers or corporations.
4. Whistle blowing can occur as a form of retaliation against an employer or corporation.

1.3 The scope of the research

This research is mainly focused on the concept of whistle blowing. It is a concept that is ambiguous and that can easily be confused with other familiar practices such as the

actions of match officials during soccer or rugby games. This means that many people may think of whistle blowers as referees. In some countries, for instance South Africa, whistle blowing is termed protected disclosure (South Africa 2000). It is the purpose of this research to clearly define the concept of whistle blowing and discuss the ethical implications thereof.

This project will also try to explain the different types of whistle blowing and to clarify how these types differ from each other.

The primary objective of the research is to establish how whistle blowing can be morally justified, i.e. how it can be practised within the acceptable moral expectations of the public or society. Another aim is to establish the conditions under which the practice of whistle blowing can be morally unjustified or unacceptable, i.e. to find out in what situations the practice of whistle blowing can be abused or used for unethical ends.

This research also aims to provide information on the mechanisms through which both the whistle blower and those against whom the whistle has been falsely blown, can be protected. This is mainly because there are instances where those who blew the whistle were victimized and where employers and corporations became victims of false and unethical whistle blowing.

The project therefore provides guidelines for morally acceptable whistle blowing that could be used to curb immoral, illegal and harmful activities by either employers or corporations. It also provides guidelines for ethical policies and codes within corporations which can eliminate the need for whistle blowing. The argument is that if the need for whistle blowing is eliminated, the whistle blowers are also protected against retaliation because they will have nothing to blow the whistle on.

1.4 Research methodology

This research investigates a topic that is still relatively uncommon in South Africa. The methodology used in the research is mainly literature study. The focus is on finding out how various researchers and scholars view the concept of whistle blowing. In the study of the literature, critical thinking is also applied.

The problem to be studied is: "When is whistle blowing morally justifiable or unjustifiable?" Much attention is paid to the study and analysis of the views expressed by different writers and in the process, a comparative approach is used to arrive at certain conclusions. Different views from different countries are compared and contrasted critically.

Deductive conclusions are arrived at after a study of the literature to establish whether or not whistle blowing can be morally justified. The deontological and utilitarian approaches are used to arrive at certain conclusions.

An analysis of a case study has been included to substantiate certain arguments or conclusions. Reference will also be made to the Protected Disclosures Act (Act No. 26, 2000) of South Africa. It means that this research does not use empirical methods but is basically an analysis of the literature on the concept of whistle blowing.

In Chapter 2 an analysis will be given of the concept of whistle blowing. This analysis is necessary in order to deal with the question of conditions for unjustified and justified whistle blowing (Chapter 3).

Chapter 4 deals with the important ethical and strategic question: do employees have an obligation to blow the whistle? In Chapter 5, following from Chapter 4, the issue of protection for whistle blowers is addressed. Chapter 6 focuses on an equally important issue: the protection of employers and corporations against unfair whistle blowing. Chapter

7, the concluding chapter, refers to South Africa's Protected Disclosures Act (Act No. 26, 2000).

Chapter 2

2. The concept of whistle blowing

2.1 Definition of the concept of whistle blowing

The question “What is whistle blowing?” remains rhetorical unless and until a well-thought-out definition is provided. The failure to provide an appropriate definition is a hampering element in many studies on whistle blowing. It might well lead to abuse of the concept as societies should be in a position to be able to draw a line between police informers and genuine whistle blowers. For this purpose, one has to find answers to the questions “What is whistle blowing?” and “Who is the whistle blower?”

Near and Dworkin (1998:1551-1561) make the point: “The disclosure by organization members (former or current) of illegal or illegitimate practices under the control of their employer to persons or organizations that may be able to effect action is whistle blowing.” According to Guy (1990:141) whistle blowing is the act of a man or woman who believes that the public interest overrides the interest of the organization he or she serves. Guy believes that whistle blowing is going public with information regarding product safety, aiming to spotlight procedures that run counter to company policy or public expectations.

A close look at the views expressed by the above writers reveals the fact that whistle blowing is about disclosing or reporting actions that might be harmful to the public or where the public interest is threatened by the interest of the organization. It is about revealing a harm that is imminent to the public. The harm may be physical or monetary.

According to South Africa’s Protected Disclosures Act (Act No. 26, 2000) (South Africa 2000, sec. 1(i)), “disclosure” means:

Any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (a) that the health or safety of an individual has been, is being or is likely to be endangered;
- (d) that the environment has been, is being or is likely to be damaged;
- (a) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
- (e) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

The question that one may ask is whether whistle blowers are the same as spies or police informers. Can the members of the National Intelligence Agency be regarded as whistle blowers? This question can well lead us to confusion in our understanding of the concept of whistle blowing. It is therefore crucial for us to further explain that whistle blowers are not the same as spies, police informers or members of the National Intelligence Agency. Although they all disclose or report wrong activities, they still differ. While they all have responsibilities, their responsibilities differ dramatically.

The *Collins Cobuild student's dictionary and grammar* (1995, s.v. 'informer') defines an informer as someone who tells the police that another person has done something wrong. Spies and informers are employed by certain organizations or states and are motivated by the income they get to do their work. Such persons have legal responsibilities. They mostly work on criminal cases that emanate from offences committed by those who break the law.

The *Concise Oxford dictionary of current English* (1991, s.v. 'spy') defines a spy as a person who secretly collects information and reports on all kinds of activities. Whistle blowers may not be furtive or secretive. A spy is further defined as a person whose job is to find out secret information about another country or organization. It means that spies do not work for moral gains only.

In contrast to spies and informers, whistle blowers are not employed to blow the whistle. They are not paid for what they do. They are not even legally bound to blow the whistle. Whistle blowers are actually morally bound to perform their actions. Unlike informers and spies who usually have self-interested reasons for their disclosures, such as obtaining prosecutorial immunity, whistle blowers sometimes become the victims after their heroic actions. According to De George (1995:228), "the whistle-blowers are rarely honored by their fellow workers". They are perceived as traitors and may therefore have more to lose than to gain. They are sometimes punished for their actions

According to the Protected Disclosures Act (Act No. 26, 2000), whistle blowing is termed "protected disclosure". The Act itself is called "the Protected Disclosures Act". This immediately brings to light the fact that in the past, whistle blowers were acting at their own peril in South Africa, since there were no laws that protected them. It is therefore the purpose of this Act to provide a framework within which whistle blowers can actually do the greatest good without fear of victimization at all levels. This includes both the public and the private sectors.

2.1.1 Summary

One can conclude that whistle blowing is an act by an employee or former employee of disclosing an immoral practice by a corporation that is causing, or has caused, or has the potential to cause harm to the public interest. The aim of blowing the whistle is to correct, to bring to an end, or to prevent the immoral practice. This can be achieved by reporting

it to any official that could help within the corporation, or by going to external people after meeting certain conditions.

2.2 Types of whistle blowing

According to De George (1995:223) there are several kinds of whistle blowing: "Whistle blowing is a term used for a whole range of activities that are dissimilar from a moral point of view." The following types are mentioned by De George: internal, personal, impersonal, external, governmental, and non-governmental whistle blowing.

2.2.1 Internal whistle blowing

This is when the disclosure or allegation of inappropriate conduct is made to someone within the organization or system, for example, when disclosures are made by employees to executives in a firm, perhaps concerning improper conduct of a fellow employee or superiors who are cheating on expense accounts, or engaging in petty or grand theft. According to De George this is morally permissible.

2.2.2 Personal whistle blowing

In this regard the charge is not for an offence against an organization or system, but against oneself, for instance, if someone is sexually harassed and then reports the offence. The whistle is then blown for a personal matter, to be prevented or redressed. In South Africa this can help to address discrimination and abuse.

2.2.3 Impersonal whistle blowing

This occurs when one blows the whistle when the potential harm or actual injury is to others (the public) or to the organization rather than to oneself. A good South African

example is that of Louis Maloma who, according to the *Sowetan* (2000 26 July:7) was alleged to have blown the whistle on the Civil Aviation Authority (CAA) pilots' licence scam. In this case the potential harm was to the public or the potential passengers, not to Maloma himself. This kind of whistle blowing can serve to prevent all activities by corporations that could harm the public or the environment, such as the sale of defective goods, harmful drugs and toxic chemicals that can pollute the environment.

2.2.4 External whistle blowing

External whistle blowing occurs when one goes outside the system or organization and reports the wrong action or the potential harm, e.g. in the CAA pilots' licence scam, Maloma was said to have reported or to have been eager to air his views to the South African Press Association. It means that in this regard one does not have to report to a person within the corporation, but to someone that can take the matter to the public.

2.2.5 Governmental whistle blowing

This is when a government employee reveals wrongs to a particular office or to the public through the media. This is mainly meant to address matters such as nepotism and corruption on the part of government officials which could harm the public.

2.2.6 Non-governmental whistle blowing

This is whistle blowing by employees on their employers in the private sector. It is also called private sector whistle blowing. It means the employees can use this mechanism to reveal all forms of harmful activities that could harm the corporation or the public.

2.3 Focus of this research

It is evident that both governmental and non-governmental whistle blowing could be either internal or external. The focus of this research is, however, on non-governmental, impersonal whistle blowing from both the internal and external perspectives. It focuses basically on the corporate sector level.

2.4 The significance of whistle blowing

“Whistle-blowers act in order to stop, or modify a particular activity (or correct an omission) that is wrongful” (Miceli & Near 1992:6). It means that whistle blowers act for the good of the public. According to the *Oxford dictionary of philosophy* (Blackburn 1996:161), Kant states that the only thing good in itself is a good will. Kant defines a good will as the unconditional, intrinsic good, independently of what it effects or accomplishes in the world. This further emphasizes the fact that whistle blowing should be done with a good purpose, for instance, the good of the public.

One has an obligation to blow the whistle on illegal or immoral actions, an obligation that is grounded on the fundamental human duty to avoid preventable harm to others (James 1993: 535). It means one has to blow the whistle for the good of others, not only for the sake of self-interest.

South Africa's Protected Disclosures Act (Act No. 26, 2000) describes crime and other irregular conduct in organs of state and private bodies as detrimental to good, efficient, accountable and transparent governance in the public and the private sector. These ills present a danger to the economic stability of the Republic and have the potential to inflict social damage.

Although this research focuses on the practice of whistle blowing in the private sector in

particular, it should be noted that the public sector is facing the same challenges. Nepotism, corruption and fraud pose a threat to the interests of the public. In South Africa, this is basically confirmed by the fact that parliament had to pass legislation on protected disclosures. It is also confirmed by the creation of a number of institutions, such as the Public Protector, to focus on corruption. The provincial governments of the Northern Province and Mpumalanga have also developed mechanisms to fight this crime in the public sector: Mpumalanga has an anti-corruption hotline and challenges employees to blow the whistle on corruption.

It is, however, not only the incidence of crime that could be used to support the practice of whistle blowing in the private sector. According to Singer, Mitchel and Turner (1998:528) whistle blowing refers to the disclosure of illegitimate or unethical organizational practices by employees. It is also viewed as pro-social behaviour which aims to promote the well-being of others. The well-being of others can be promoted by disclosing any harm that can be caused to them; for example, had someone blown the whistle on the conditions at the Eschem factory in Lenasia, outside Johannesburg, those workers who perished by fire would not have died.

De George (1995:222) states that people have a moral obligation to prevent serious harm to others if they are able to do so with little cost to themselves. According to Cottell and Perlin (1990:79-80) a sense of reciprocity and of potential collaboration suggests what sociologists have long known: that we are social beings and we can only thrive with others.

2.5 Summary

To answer the question as to why the whistle should be blown, one can conclude from the above data that, although there are many other reasons that might not have been included, it is evident that the whistle is blown:

- To stop or prevent serious harm.

- To do the greatest good.
- Because of the introduction of new laws that protect whistle blowers.
- Because of the increase of corruption, nepotism and criminal activities.
- Because of the introduction of laws that provide rewards for whistle blowers.
- Because of the lack of effective internal procedures to prevent potential dangers within corporations.

It is very likely that the whistle can be blown for either a good reason or a bad one, for instance, the whistle can be blown for the sake of rewards or for revenge. According to the Protected Disclosures Act (Act No. 26, 2000) the aim of whistle blowing should be to create a culture in which employees will disclose information of crime and other irregular conduct in the workplace in a responsible manner. Comprehensive statutory guidelines are provided for the disclosure of such information and protection against any reprisals as a result of such disclosures. It means that the South African parliament has also taken note of the fact that some individuals may blow the whistle for wrong motives. According to De George (1995:225) the only motivation for blowing the whistle worth considering is a moral motivation. It means that the whistle blower should be ethical in disclosing the wrongdoing or the ill practices that needed to be disclosed. Whistle blowers should not just inform on their employers without valid moral reasons.

Guy (1990:142) states that "when internal systems are ineffective, however, a whistle blower must go outside the company to the public." This is mainly relevant in cases where the whistle blower has first tried to seek a remedy or redress to the problem by informing authorities within the corporation but could not get the desired results. This situation will obviously leave the whistle blower with no other option but to blow the whistle externally. It means that the lack of effective guidelines, codes or policies that could be used to solve problems or prevent harm within corporations is one of the reasons why people turn to whistle blowing.

Chapter 3

3. Conditions for unjustified and justified whistle blowing

3.1 Morally unjustified / unacceptable whistle blowing

De George (1995:227) states that whistle blowing can be defined in such a way that it is always morally permissible or always morally obligatory, but there are cases in which it can plausibly be considered as morally neutral or even unjustifiable. The question is: "When can whistle blowing be morally unacceptable or unjustified?" This is the focus of this project. Miceli and Near (1992:1) point out that while a survey of federal employees in the USA showed that most individuals view whistle blowers positively, the term often has a negative connotation. They also state that many persons believe that organizations should be free to discipline and retaliate against members who reveal questionable practices. This raises the question as to whether whistle blowing should be regarded as justified or unjustified only on the basis of traditional beliefs.

De George (1995:230) takes the debate further by stating that tradition has placed the onus on those who justify whistle blowing, the common assumption being that it is morally prohibited. He argues that neither the right to free speech nor loyalty to employers is always overriding and that sometimes they can both give room to other considerations. Out of this he concludes that whistle blowing can sometimes be immoral. Another point which De George puts forward is that of disobedience. He argues that it is immoral to disobey, be it civil disobedience, disobedience to the corporation or a child's disobedience to parents. This he uses to lead to the conclusion that whistle blowing is sometimes morally wrong since it is immoral to disobey.

Camerer (1996:48-54) also echoes the fact that whistle blowing can sometimes be

denounced as morally unjustifiable on the presumption that it violates the obligation to be loyal and the adherence to confidentiality owed to the business or profession. Guy (1990:14) states that the whistle blower must reconcile conflict between loyalty to the employer and loyalty to the public. A whistle blower must choose among “goods”. The concepts of “goods” brings in the philosophical views of Aristotle’s ethics. Aristotle states that people have purposes which are not only immediate but ultimate and natural. He maintains that “goodness” is “happiness” or “doing well”, which in Greek is *eudamonia*. Aristotle regards “happiness” as the real name of the good life (Solomon & Higgins 1995:64).

Guy also states that allegations of misconduct have to be made only on the basis of substantial evidence. It means that if there is no substantial evidence, no-one can be justified for blowing the whistle under such circumstances. It therefore follows that blowing the whistle without substantial evidence cannot be accepted or justified.

Another aspect which Guy (1990:251) brings to light is that of blowing the whistle anonymously, which he discourages. The argument is that such whistle blowers cannot participate in the actual debate to present their side and defend it. One can also go on and point out that this could well leave room for those who hold grudges to defame their enemies through this process. It means that not everyone can be justified in blowing the whistle. Certain requirements have to be fulfilled before the act can be seen as justified.

Alford (1999:266) also brings in an input on the unjustified whistle blower’s act to prevent harm to others. The whistle blower must first try to rectify the situation within the framework provided by the organization while possessing evidence that would convince a reasonable person. It also deductively follows that blowing the whistle without meeting the said preconditions cannot be justified. Camerer (1996:50) states that the information must certainly be in the public interest, and not of mere interest to the public. The media have a private interest of their own in publishing what appeals to the public and are particularly

vulnerable to the error of confusing the public interest with their own interests. It means that one should not blow the whistle for the purpose of personal gain, but for the benefit of the majority or the public. If it is done for individual or personal gain, then the act may not be acceptable or justified.

Any potential whistle blower has to ask and try to answer a number of questions. The answers to the questions can then help him or her to judge whether the act of whistle blowing can be justified or not from the moral perspective. The following questions have to be asked and answered:

1. Is my knowledge of the matter complete and accurate?
2. What are the objectionable practices and what public interest do they harm?
3. How far should I and can I go inside the organization with my concern or objection?
4. Will I be violating any rules by contacting outside parties and, if so, is whistle blowing nevertheless justified?
5. Will I be violating any laws or ethical duties by not contacting external parties?
6. Once I have decided to act, what is the best way to blow the whistle? Anonymously, overtly, by resignation or speaking out, or in some other way?

(Ezorsky 1987:91)

These questions have also been repeated by many other researchers and writers on whistle blowing. It seems they can be regarded as the general norm or guideline that can be used to decide whether the said act of whistle blowing can be justified within that particular and specific context. It is, however, deductively obvious that if “yes” answers to these questions will lead to a justified act of whistle blowing, negative answers will lead to an unacceptable or unjustified act of whistle blowing.

The Protected Disclosures Act (Act No. 26, 2000) in sections 6 to 8 contains guidelines for protected disclosures which are legal and also moral. These sections deal with protected disclosure to an employer, protected disclosure to a member of Cabinet or the Executive Council of a province, and protected disclosure to certain persons or bodies. The most important words are “any disclosure made in good faith”, indicating that a disclosure made in bad faith cannot be justified. It means that a person who makes a disclosure in good faith will take care to tell the right person and also consider the seriousness of the consequences of the disclosure.

Leob (1995:115) quotes the Ethics officer of a Fortune listed company as saying: “You wouldn’t rat on your boss for taking home a computer. You wouldn’t rat on him for having one dinner you knew didn’t have any business angle, but you would if it was a pattern.” It would mean that if you make a disclosure while it is not a pattern, your disclosure cannot be justified. This officer goes on to suggest that one has to ask oneself seven questions. If the answers are all negative, the act of whistle blowing cannot be justified. The questions are:

1. Am I totally clean?
2. If I confront the offender, will he change?
3. Is this behaviour unethical or illegal?
4. If a gross and repeated practice continues, can it cause serious harm to someone - to co-workers, customers, users?
5. Is there a reasonable chance for success?
6. Will the long-term benefits outweigh the harm?
7. Am I prepared to suffer the consequences?
9. Rat when corruption is a pattern.

(Leob 1995:115)

The question now is, how do we conclude that whistle blowing is unethical or immoral?

According to De George (1995:61) utilitarianism is an ethical theory that holds that an action is right if it produces, or if it tends to produce, the greatest amount of good for the greatest number of people affected by the action. Otherwise the action is wrong. It is therefore morally acceptable for one to follow a utilitarian approach as an ethical analyst, and weigh the good and bad results of an action on everyone affected by it.

Utilitarianism is problematic when it only counts the results without considering the means, that is, without looking at whether the good results could have been achieved by bad means. The whistle blower will be justified according to the utilitarianists if the consequences of blowing the whistle will save many lives or benefit the greatest number, but if they do not, then the whistle blowing cannot be accepted or justified.

Another view is that of the deontologists. According to Cottell and Perlin (1990:49) the deontological approach to ethical arguments assumes that rights or duties are valuable per se, not because of the results achieved by certain acts. Some acts are wrong regardless of the consequences, while others are right no matter what the results. This does not seem to be more suitable for the justification of whistle blowing in certain situations though it can be used in other circumstances. It therefore follows that whistle blowing can be found to be unjustified through the deontological approach which also focuses on the means and not only on the consequences or the results. In this context it means that we should not only be interested in the results that the act of whistle blowing has yielded in preventing the potential harm to the potential victims, but we should also guard against creating undesired and preventable harm to the potential culprit, the corporation against which the whistle is blown.

3.1.1 Summary

From the above literature study one can draw the following conclusions:

1. It is not easy to conclude or judge whether whistle blowing can be justified.

- or unjustified under certain circumstances unless research is done.
2. A number of researchers and authors do agree that under certain circumstances whistle blowing cannot be accepted or justified.
 3. They also agree that certain conditions have to be met before the whistle is blown, if it is to be justified.
 4. One can also conclude that, depending on cultural contexts, religions and senses of belonging, the following factors can make whistle blowing unacceptable or unjustified: disobedience to one's employers, lack of loyalty to the corporation, anonymous whistle blowing, blowing the whistle for personal gain, lack of substantial evidence, and lack of seriousness of the potential harm.

3.2 When is whistle blowing morally acceptable / justified?

In the previous section this project focused on whistle blowing as morally prohibited or unjustified. In this section, the focus is on the conditions under which it could be morally acceptable or justified. De George's argument will be used as a point of departure. De George (1995: 231) states the following:

The kind of whistle-blowing we are considering involves an employee somehow going public revealing information or concerns about his or her firm in the hope that the firm will change its product, action, or policy, whatever it is that the whistle blower feels will harm, or has harmed others, and needs to be rectified. We can assume that when one blows the whistle, it is not with the consent of the firm, but against its wishes. If we adopt the principle that one ought not to harm without sufficient reason, then, if the act of whistle blowing will be morally permissible, some good must be achieved to outweigh the harm that will be done.

De George (1995:231-238) also states that there are five conditions that, if satisfied, change the moral status of whistle blowing. It means that whistle blowing can either be

acceptable or unacceptable on the basis of these conditions. The five conditions under which whistle blowing can be morally permitted are:

1. Serious and considerable harm

“The firm, through its product or policy, will do serious and considerable harm to the public, whether in the person of the user of its product, an innocent bystander, or the general public. Because whistle blowing causes harm to the firm, this harm must be offset by at least an equal amount of good if the act is to be permissible” (De George 1995:231). This is mainly because “if the harm is not serious and considerable, if an action will do only slight damage to the public or to the user of a product, the justification of whistle blowing will be at least problematic” (De George 1995:232). There should always be “trade-offs between safety and cost” (De George 1995:232) because if the harm threatened by a product is slight or not certain, it might not be greater than the harm done to the firm through whistle blowing.

Blowing the whistle for prospective minor harm may cause whistle blowing to lose its credibility and therefore it cannot be justified. De George also shows that not every concern about possible harm to the public on the part of an employee should just be accepted without prior assessment to verify whether it is a genuine claim. It means that if this condition with all its qualifications is met, then the whistle blowing can be morally justified.

2. Reporting the threat to immediate superior

“Once employees identify a serious threat to the user of a product or to the general public, they should report it to their immediate superior and make their moral concern known. Unless they do so, the act of whistle blowing is not clearly justifiable” (De George 1995:233). In this regard De George argues that many firms do not want to cause harm

to the public and if told about the potential harm, they may quickly correct the defect or the mistake mainly to avoid bad publicity, lawsuits and adverse consumer reaction. This will result in less harm to the firm and the whistle blower can be justified for having strived for the greatest good. This will also prove that the whistle blower is loyal and obedient to the firm but is morally motivated to prevent the potential harm. It is obvious that if this condition is met, there will be valid reasons to justify the act of whistle blowing.

3. Exhausting all internal procedures

"If one's superior does nothing effective about the concern or the complaints, the employee should exhaust the internal procedures and possibilities within the firm" (De George 1995:234). It means reporting to all the levels of management up to the directors. In this regard De George argues that though there are objections that there could be a delay, prudence and judgment should be used. If no remedy is attained, then this condition is satisfied and whistle blowing can be justified. It will suggest that the whistle blower does so in good faith for a good cause.

4. Accessible, documented evidence

"The whistle blower must have, or have accessible, documented evidence that would convince a reasonable, impartial observer that one's view of the situation is correct, and that the company's product or practice poses a serious and likely danger to the public or to the user of the product" (De George 1995:235). De George's point in this regard is that one does not have a moral obligation to blow the whistle simply because of a hunch, guess, or personal assessment of possible danger, if supporting evidence and documentation are not available. One may, of course, have the obligation to attempt to get evidence if the harm is serious. But if it is unavailable - or unavailable without using illegal or immoral means - then a person does not have the obligation to blow the whistle.

5. Expectations for reasonable changes

“The employee must have good reason to believe that by going public the necessary changes will be brought about. The chance of being successful must be worth the risk one takes and the danger to which one is exposed” (De George 1995:236). De George’s point is that unless one has a reasonable expectation of success, one is not obliged to put oneself at great risk. He states that before going public, the potential whistle blower should know who (e.g. a government agency, newspaper columnists, or a TV reporter) will make use of the evidence, and how it will be handled. The whistle blower should have good reason to expect that the results of the action taken will be morally appropriate.

From the five conditions that De George has pointed out, it is deductively clear that the whistle blower should act in such a way that his concern or complaint can be morally acceptable or justified. It is also evident that whistle blowing can only be justified if it is practised with great caution and responsibility. It would seem that De George’s argument is based on the utilitarian approach, which states that we should evaluate an action by looking at its consequences, weighing the good effects against the bad effects on all the people affected by it. If the good outweighs the bad, it tends to be a good action; if the bad outweighs the good, it tends to be a bad action. According to De George (1995:67) utilitarian arguments are frequently used in dealing with legislation. “A moral political system is one that produces an abundance of good over bad for the members of the society. A policy is morally justified if it produces more good than bad, and it is optimally justified if it produces more good than any other alternative would.”

The question “When is whistle blowing morally acceptable or justified?” remains unresolved if this research only focuses on De George. De George does seem to have successfully laid out the conditions that could make whistle blowing morally acceptable, but it should be established whether there is consensus between De George and other researchers or authors.

According to section 9(1) of the Protected Disclosures (Act No. 26, 2000),

Any disclosure [other than a disclosure made in accordance with sections 5,6,7 or 8] made in good faith by an employee -

- (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true, and
- (b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law; is a protected disclosure if -
 - (i) one or more of the conditions referred to in subsection (2) apply; and
 - (ii) in all circumstances of the case, it is reasonable to make the disclosure.

Section 9(2) of the above Act reads as follows:

The conditions referred to in subsection (1)(i) are -

- (a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;
- (b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;
- (c) that the employee making the disclosure has previously made a disclosure of substantially the same information to -
 - (i) his or her employer; or

- (ii) to a person or body referred to in section 8,
in respect of which no action was taken within a reasonable period after the disclosure; or
- (d) that the impropriety is of an exceptionally serious nature.

The most important points to note in this Act are:

- (1) The concept of “good faith” in section 9(1);
- (2) The concept of “substantially true” in section 9(1)(a);
- (3) The concept of “personal gain” in section 9(1)(b);
- (4) The concept of “previously made disclosure” in section 9(2)(c); and
- (5) The concept of “serious nature” of the impropriety in section 9(2)(d).

These concepts are related to De George’s preconditions for morally acceptable or justified whistle blowing. It means that there is general agreement here that protected disclosures or whistle blowing can be justified after certain conditions have been met. For example, the concept of the seriousness of the nature of the impropriety is related to De George’s first condition of “serious and considerable harm”. The concept of “previously made disclosure” is related to De George’s third condition of “exhausting all internal procedures”. The concept of “substantially true” is related to De George’s fourth condition of “accessible, documented evidence”. This analysis deductively leads one to believe that whistle blowing can be justified or accepted after certain conditions have been satisfied.

Many of De George’s arguments on the basis of which whistle blowing can be justified or accepted are also corroborated or echoed by Guy (1990:140). Guy similarly points out that the whistle blower should exhaust all internal channels before bringing in outside factors. Another point he mentions is that allegations of misconduct have to be made only on the basis of substantial evidence. Guy also indicates that “when internal systems are ineffective, a whistle blower must go outside the company to the public”. All the points made by Guy form the core of the conditions under which whistle blowing can be morally

justified. Not only Guy but also Leob seems to have views which are similar to De George's. Leob (1995:115) has proposed that the whistle blower should ask himself seven questions. These seven questions cover the scope of De George's conditions for morally acceptable or justifiable whistle blowing.

Dworkin and Baucus (1998:1282) state that:

Whistle blowing is described as a four-stage process. These stages are:

- (1) A triggering event occurs, involving questionable unethical, or illegal activities, and this leads an employee to consider blowing the whistle.
- (2) The employee engages in decision making, assessing the activity and whether it involves wrongdoing, gathering additional information, and discussing the situation with others.
- (3) The employee exercises his voice by blowing the whistle; alternatively, the employee could exit the organization, or remain silent out of loyalty or neglect.
- (4) The organization members react to, and possibly retaliate against the whistle blower.

An analytical look at these four stages will reveal that the first two stages can well be regarded as those conditions mentioned by De George that must be met before the whistle is actually blown.

From the afore-mentioned instances, it is evident that some deductive conclusions can be drawn. The premise or the supposition could be that whistle blowing is an act. Therefore whistle blowing can be morally justified because of the conditions set in any one of the stages. It means that whistle blowing can be justified on condition that it is generally all right (all things considered), or on condition that it is either morally or rationally required.

3.2.1 Summary

At this stage it is evident that although De George's argument was only used as a point of departure for the moral justification of whistle blowing, the few other researchers and writers examined also seem to concur that there are indeed certain conditions that precede the moral justification of an act of whistle blowing.

What is also evident is that not only the consequences count towards the justification of whistle blowing, the means also play a fundamental role. It means that whistle blowing is justified on the basis of deontological ethics. According to De George (1995:83) the deontological approach to ethics denies the utilitarian claim that the morality of an action depends on its consequences. Deontologists maintain that actions are morally right or wrong regardless of their consequences. One's duty is to do what is morally right and to avoid what is morally wrong, regardless of the consequences of so doing. This means that the act of whistle blowing will be morally justified, regardless of the results it will yield, if the whistle blower has a moral motivation and does so in good faith. De George tends to show the strong bond that exists between Christianity and deontology. A good example is the ten commandments, which promote good relationships between people. The emphasis here is on concepts such as "good faith", "not to harm", and "to do good". These concepts form the backbone of morally acceptable or justified whistle blowing.

At this point, the following conclusions can be drawn about the basis on which whistle blowing can be morally justified:

- (1) There should be a serious potential harm that can be prevented, or the harm that has occurred or that is taking place can be redressed by blowing the whistle.
- (2) The whistle should be blown to protect the interests of the public and not for the sake of an individual's personal interests.

- (3) Where possible, the potential whistle blower should first seek to solve the problem or prevent the harm by using internal channels before going public.
- (4) Substantial evidence should have been gathered before blowing the whistle to avoid unwanted bad publicity for innocent corporations.
- (5) Whistle blowing should be done in good faith, that is, it should be done to bring to an end what the whistle blower honestly believes to be an illegal practice.

Chapter 4

4. Do employees have an obligation to blow the whistle?

4.1 Definition of concepts

4.1.1 Employees

The most striking question is, "What are employees?" The *Concise Oxford dictionary of current English* (1991 s.v. 'employee') defines an employee as a person employed for wages or salary, especially at non-executive level. In section 1(i) of the Protected Disclosures Act (Act No. 26, 2000) the concept of "employee" is defined as follows:

- :
- (a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and.
 - (b) any other person who in any manner is carrying on or conducting the business of an employer.

Section 1(iii) defines an "employer" as any person -

- (a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
- (b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer.

From the two definitions one can see that an employee is part of the business owned by an employer, which could be a small business or a big corporation or company. Both the employee and the employer are members of the general society in the country. They are both bound by the laws and the Constitution of the country. It means that they both have

rights, responsibilities and obligations.

4.1.2 Obligations

The *Oxford dictionary of philosophy* (Blackburn 1996 s.v. 'obligation') defines an obligation as an action that is required of one, that is, that which is owed to other people. The concept may also suggest a regimented view of ethical life, in which we are all forced conscripts in a kind of moral army.

According to De George (1995:99-100), as human beings, we all have the same general moral obligations. In addition, we can have a large variety of special moral obligations. These are general or universal not in the sense that they apply to all persons, but in the sense that they apply to all persons similarly placed. De George also highlights three special obligations of particular importance:

- (a) Obligations that come from special relations. e.g. familial obligations of love, fidelity and care.
- (b) Obligations that come from particular actions we perform. e.g. obligations to keep promises, to repair damage caused to others, and to show gratitude.
- (c) Obligations that come from the roles we play, which are important in business. Those who accept jobs take on certain roles and are obliged to perform those legitimate activities that their role within an organization demands and for which they are paid. The president of a firm has different obligations from the junior, but each has the responsibility to fulfil the obligations that go with the positions they occupy.

4.2 Employees and obligations

It is now clear that an "employee" is any person employed by an "employer" and that such

a person has an “obligation” which he or she is responsible to fulfil. An employee is morally required to do good to others since he or she is a person. The definition of the *Oxford dictionary of philosophy* connotes that all people are morally obliged to fulfil the moral obligations.

If whistle blowing can be morally justified or accepted, then the question is, “Are employees as people obliged to blow the whistle?” Before attempting to answer this question, one is compelled to conduct an extensive literature study as required by the research method of this project.

According to Guy (1990:141) it is not possible to talk about responsible citizenship for long without talking about whistle blowing. Matthews (1987:40) states that “whistle blowing is the act of a man or woman who believes that the public interest overrides the interest of the organization he or she serves”. It means that an “employee”, as a citizen, is also bound to act like a responsible citizen by taking as a priority the interest of the public. Cottell and Perlin (1990:49) mention Ross’s three principles of

- (1) Non-maleficence (the duty to do no harm);
- (2) Fidelity (the duty to keep promises); and
- (3) Justice (the duty to make sure that each gets his or her due).

If all these principles are good for the public or the general society, then every citizen is obliged to act morally, and employees are no exception. Cottell and Perlin (1990:79) also state that a minimum of concern for others is required for the moral personality. They argue that we must calculate the consequences of our actions with a mind towards maximizing the good for the many, and not just for ourselves. An example that these authors give is that “an accountant is obliged to care for the public welfare, especially the interests of shareholders and other ‘owners’ of corporate property, by telling the truth and by resisting unethical propositions”. It means that if whistle blowing is about telling the truth about something unethical, and if it is meant to prevent harm against people, then

employees are obliged to blow the whistle.

Since every individual has the responsibility to prevent harm to others, then if blowing the whistle can prevent harm, it will follow that one can be blamed for not preventing the potential harm or bringing it to an end. It subsequently leads us to the conclusion that employees do have a moral obligation to blow the whistle to prevent a potential harm to the public (others) or to bring to an end a harmful practice or process.

De George (1995:197) states that in examining the moral responsibility of corporations, we noted the obligation not to harm. The obligation “not to harm” exists whether or not society explicitly demands it. But this obligation may also be expressed as a social demand, either through public pressure or other means. Morality may not specify how a company has to control and prevent the harm it might do.

An in-depth look at De George’s position leads one to believe that employees do have a moral obligation to blow the whistle to prevent harm. Employees are part of the corporations or companies for which they work. Sometimes the harm that the corporations or companies do to the public or others, is done by the employees or through the employees. For example, fraud and nepotism can be committed by the employees and can also be prevented if other employees can blow the whistle to bring these ill practices to an end. Another good example could be that of the company engineers who will let an unsafe product go to the market, or the directors who will insist that a product get to the market despite the evidence that it is or will be harmful. If there is an employee who is aware of this situation, then such person is morally obliged to blow the whistle to prevent the harm.

Dandekar (1993:556) states in the essay “Can whistle blowing be fully legitimated? A theoretical discussion” that, according to De George, whistle blowing becomes increasingly obligatory if there is documentation of the potentially harmful practice or defect, and there is good reason to believe public disclosure will avoid the present or

prevent similar future wrongdoing (Dandekar 1993:561). The fact that Dandekar does not specify who is obliged to blow the whistle will suggest that all people are morally obliged to blow the whistle to prevent the harm. It also further suggests that since employees are people, they are therefore also morally obliged to prevent harm and that they could only do so by blowing the whistle. This is also related to the Christian principle that says “Any one that could do good, and does not do it, commits sin” (Bible. James 4:17). The concept of “good” suggests that whistle blowing is obligatory when it is done for a good cause. It should also be noted that De George has consistently stated the fear of making whistle blowing obligatory for employees because of the fear of retaliation by those in positions of power or authority. These are mainly employers.

According to Nader, Petkas and Blackwell (1972:3-11) corporate employees are among the first to know about industrial dumping of mercury or fluoride sludge into waterways, defectively designed automobiles, or undisclosed adverse effects of prescription drugs and pesticides. They are the first to grasp the technical capabilities to prevent existing product or pollution hazards. At this point, one can clearly realise that employees are the ones that can have substantial evidence that can make whistle blowing not only morally permissible, but also morally required, if one has to consider De George’s fourth and fifth conditions for making whistle blowing morally justified.

But Nader *et al.* (1972:3-11) go on to echo De George’s fears of retaliation. They state that corporate employees are often the last to speak out, much less to refuse to be recruited for acts of corporate or governmental negligence or predation. The fact that corporations can be in a position to recruit people for these ill purposes, corroborates the point made earlier on that employees are part of corporations and that if corporations are obliged to prevent harm, then the employees are also supposed to be obliged to prevent harm as much as they can. It means that if whistle blowing can prevent harm, then the employees are obliged to blow the whistle.

Nader *et al.* express the view that silence in the face of abuses may also be evaluated in terms of the toll it takes on the individuals who in doing so subvert their own consciences. For example, the twenty-year collusion by the American domestic automobile companies against the development and marketing of exhaust control systems is a tragedy, among other things, for engineers who, minion-like, programmed the technical artifices of the industry's defiance. Nader *et al.* go on to ask a fundamental moral question: "At what point should an employee resolve that allegiance to society (e.g. the public safety) must supersede allegiance to the organization's policies (e.g. the corporate profit), and then act on that resolve by informing outsiders or legal authorities?"

The above argument leads us to a point where we have to weigh "the greater good" between blowing the whistle and not blowing the whistle. How much will be the damage done or the harm done if one blows the whistle? These questions seem to be moral dilemmas that can only be resolved by looking at the two methods or approaches that are used to arrive at objective moral conclusions. These approaches or methods are deontology and utilitarianism. One will also think of "Aristotle's emphasis on the existence of individual things as complete in themselves and the importance of the seemingly obvious idea of a thing having features or properties" (De George 1995:225). Not all of the properties of a thing are of equal weight or importance. Some are essential - definitive of the substance as such. Others are "accidentally-contingent essential". They might be present in a thing, but if they were not, the thing would still be the thing that it is. For example, "when Socrates loses his hair, he is still Socrates" (Solomon & Higgins 1995:59).

The views of Socrates suggest that though things are all good, they cannot be equally good. It means that some things are better than others. This will bring us to the conclusion that blowing the whistle and not blowing the whistle when there is a potential harm that could be prevented by blowing the whistle, cannot be equally good. Then it has to be worked out which is the greater good. It means one good should be bad. According to Cottell and Perlin (1990:49) we are creating a kind of ethical "balance sheet" with good

consequences on the one side and bad consequences on the other. Our desire is to find out by how much our ethical liabilities (bad consequences) for each possible decision exceed our ethical assets (good consequences). How we make this choice will, naturally, depend upon the ethical weight we give to the various factors. The ethical weighing and summing of probable consequences of actions is known as the calculus of utilitarian ethics. A satisfactory utilitarian justification of this case or any ethical dilemma will balance good consequences against bad consequences and come up with an appropriate decision that maximizes good consequences. In this argument Cottell and Perlin have used the utilitarian approach.

According to Camerer (1996:48-54) no private obligation can dispense with that universal one which lies on every member of the society to discover every design which may be formed contrary to the laws of the society, to destroy the public welfare. Camerer goes on to state that while there is the obligation of the law of fidelity owed by the employee to the employer, and a public interest that confidence should be protected by law, this kind of public interest may be outweighed by a countervailing public interest that favours disclosure. In the Spycatcher case the court held that there was no obligation on an employee to keep information secret if it relates to such misconduct on the part of the employer or fellow employees that there is a public interest in its disclosure. For instance, in the case of a crime, the public interest in the maintenance of confidence may be overridden wherever there is a countervailing public interest in disclosure which is sufficient to override it.

The approach to this dilemma is that of the deontologists. The deontological perspective does not give a clear choice in the matter, but what it does is give one the chance to think more clearly about the ethical reasons for alternative actions. Ultimately, it is the ethical agent that must make a decision based upon the weight of the ethical duties brought to bear in a given situation.

In the final analysis I would like to argue that employees as people do have an obligation to blow the whistle so as to prevent any harm that may befall the public. If there is fear for retaliation, then mechanisms should be put in place to prevent those that may intend to cause trouble for the whistle blowers from doing so. This position is endorsed by the Protected Disclosures Act (Act No. 26, 2000) in the preamble, where the third paragraph states that crime and other irregular conduct in organs of state and private bodies are detrimental to good, efficient, accountable and transparent governance in organs of state and open, good corporate governance in private bodies, present a danger to the economic stability of the Republic, and have the potential to inflict social damage. The fifth paragraph also states that every employer and employee has a responsibility to address crime and any other irregular conduct in the workplace, and that every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure. This will then corroborate the conclusion that employees do have an obligation to reveal information or blow the whistle to prevent any harm to the public or others.

4.3 Summary

An in-depth look at the literature studied so far reveals that one can be justified in concluding that employees, like any other responsible citizen, do have an obligation to prevent harm to others. If corruption, the sale of defective articles, fraud and other criminal or illegal practices can cause danger to society, or are harmful to the public, then the employees have an obligation to blow the whistle to prevent this harm to the public or others. One can also state that if employees are not obliged to blow the whistle, society's safety can be seriously at stake. Legislation should be put in place to compel every individual to disclose illegal and harmful practices.

Chapter 5

5. Protection for whistle blowers

5.1 Introduction

It will not be logical to start off by telling how whistle blowers can be protected before we find out why they should be protected. Is there a need for whistle blowers to be protected? It is the purpose of this research to establish the reasons for the need of whistle blowers to be protected before finding ways to protect them.

5.2 Why should whistle blowers be protected?

Although there is limited documented information on cases of whistle blowing in South Africa, a comparative study of cases and some literature studies on what transpired in other countries can also cast light on the South African situation. Our point of departure should be to look at the concept of "protection". The *Concise Oxford dictionary of current English* (1991 s.v. 'protection') defines it as "to defend, to guard or to keep safe". This will be against some kind of harm that could possibly be done by the employer or those against whom the whistle has been blown.

An intensive look at available literature reveals that whistle blowers put their lives at risk by blowing the whistle. According to Alford (1999:264), in one of the largest studies of whistle blowing, the percentage of those who blow the whistle and are retaliated against is about 65%. The nature of retaliation is similar in most cases, almost always the loss of a job and generally a career. It means that if a whistle blower happens to be an employee, the consequence is that he or she is more likely to be fired.

According to Rothschild and Miethe (1996:16-17), not only do most whistle blowers get

fired, they rarely get their jobs back. This is also corroborated by Clark (1997:1065). A whistle blower fired for reporting safety lapses by the Nuclear Regulatory Commission is not likely to get a job working for General Electric, which makes nuclear reactors. Most whistle blowers lose their houses and many lose their families. A recent review of the situation shows that of a dozen whistle blowers, eight had lost their houses and seven their families.

Guy (1990:144) also gives a number of examples and reasons that could corroborate why whistle blowers should be protected. He mentions a number of cases that occurred in the US and refers to Lawrence Archer's research (1986) which cites a study that suggested that out of every ten whistle blowers, only one was still employed with the firm that had employed them when they blew the whistle. This study also revealed that organizations were more likely to retaliate against the whistle blowers who were valued by the organization because of their age, experience, or education and against whistle blowers whose cases lacked public support, than against other whistle blowers.

When an employee steps forward and legitimately accuses an organization of wrongdoing, it can bring out the worst in everyone. The company may try to discredit the individual and it could retaliate against him or her. Fear of bad publicity, expensive litigation and loss of business can make a company hostile and defensive, usually at the expense of the whistle blower's personal or professional reputation. The individual's co-workers get suspicious and angry because their expertise or ethics may be suspect. The whistle blower's family becomes anxious and insecure; "If we lose that paycheck, what happens to us?"

Retaliation may include demotion, false complaints about job performance, reassignment and relocation, assignment of unsympathetic co-workers or supervisors and otherwise making the job difficult, withholding of pension, orders to undergo a psychological examination, investigation of personal finances and personal life, and harassment of family

and friends. The fitness-for-duty psychiatric examinations are used to eliminate the whistle blowers or make them appear crazy. A good South African example that corroborates this claim may be that of Louis Maloma, the alleged whistle blower in the Civil Aviation Authority (CAA) pilots' licence scam, who was described as an unstable man by his former employer who had asked that Maloma should have a psychological evaluation. The *Sowetan* (2000:7) also quoted Duke Marroosi as saying that Maloma was dismissed in January 2000 because he was not performing..

Civil Aviation Authority case

The following report on the above case appeared in the *Sowetan* of 26 July 2000 (2000:7):

Louis Maloma, the alleged whistle blower in the Civil Aviation Authority (CAA) pilots' licence scam, has been described as an unstable man by his former employer. SA Airlink operations manager Duke Marroosi told a hearing panel in Johannesburg on Tuesday that he had asked for a psychological evaluation of Maloma, because the pilot was having problems during a training program in the United States.

"The overall picture from the aviation authority's psychological report was that there was definitely a problem," Marroosi said. Maloma is part of a group of eight pilots facing charges of corruption, defeating the ends of justice and possible charges in terms of the Civil Aviation Act in Pretoria.

Marroosi told the panel he was aware that Maloma was taking medication. "Maloma told us (Airlink) that he was on medication," Marroosi said. "I asked him if his doctor knew he was a pilot and he said yes."

Marroosi related an incident in December 1999 in which Maloma phoned him

at 11pm to tell him that his gun had gone off by accident. "He didn't want his neighbours to wrongly construe what had happened while he was alone in his apartment," Maroosi said. "This was when I knew he was not well. He was also apologetic when he threatened to kill his chief pilot. He told me he didn't mean what he'd said." Maroosi said he eventually dismissed Maloma in January this year because he was not performing.

Maloma, who was to be a key witness at the hearing, failed to appear before the panel on Monday after promising to do so on Friday. Friday's hearing was delayed for several hours while the panel waited for Maloma to pay his bail of R5 000 at the Pretoria Central Prison. Maloma told Sapa after proceedings had finished that he was eager to air his views.

Not only are employees who blow the whistle disadvantaged by their employers or their co-workers, they are also let down by the courts of law or the national legislature. A typical example to corroborate this argument is provided by Ottensmeyer and McCarthy (1996:424-430), who state that William C. Bush blew the whistle on a private National Aeronautics and Space Administration (NASA) directive disallowing executive leadership training programmes for employees after the age of 40. Eventually, the Supreme Court ruled 9-0 against Bush, saying that federal employees did not have the constitutional right to blow the whistle. Bush had to retire from NASA in 1986 and now suffers from several stress-related illnesses he says were brought on by continual harassment

Ottensmeyer and McCarthy also point out that there is no coherent body of law in the US that protects all whistle blowers in the state, municipal, federal and corporate structures (both public and private companies).

The literature studied so far reveals that there are serious problems that whistle blowers face as a result of blowing the whistle if there are no effective laws to protect them. One

may now focus on the question as to how whistle blowers can be protected. But before that, it should be established what problems they face. The literature study done so far reveals the following as common to most researchers:

5.2.1 Retaliation by employers or bosses

Employers retaliate in many different ways, with consequences for employees such as the following:

- (i) The loss of a job.
- (ii) The loss of a career.
- (iii) The loss of a house.
- (iv) The loss of a family.
- (v) The employer may be hostile to the employee.
- (vi) The employee or whistle blower may be hated by his or her co-workers.
- (vii) The whistle blower's family becomes anxious and insecure.
- (viii) The employee or whistle blower may be accused of under-performance.
- (ix) The employee (whistle blower) may be redeployed.
- (x) The employer may order psychiatric test for the employee (whistle blower).
- (xi) The employee may be discredited.

5.2.2 The lack of laws that protect whistle blowers

In most cases, the literature studied has revealed that in the past, the common law or the expectation of the common law has been that to blow the whistle is to be disobedient to the employer. This makes employees afraid to blow the whistle.

The conclusion is that there are reasons why whistle blowers should be protected and that there is a need for whistle blowers to be protected so that they can be able to serve the greatest good or the public interest by preventing harm without fear of retaliation. If the

whistle blowers are not protected, they may not be willing to disclose harmful activities, which of course will be detrimental to society or the public.

5.3 How can whistle blowers be protected?

5.3.1 Definition of concepts

In order to be able to know specifically what the focus of the research in this section will be, one has to revisit the concept of “protection” as defined by the *Oxford dictionary of current English*. It is “to defend, to keep safe or to guard”. Keeping safe and guarding have connotations of preventing harm that is potential. It means that there should be preventive measures against retaliation by employers. Defending has the connotation of fighting against existing trouble, that is, trying to bring to an end an undesirable or immoral practice. It means that the concept of “protection” is ambiguous if it is not explained. In this context it is intended to mean a mechanism that can be used to counter the steps of retaliation taken by the employer whose undesirable activities have been disclosed by the whistle blower. The concept of “protection” therefore has both preventive and defensive connotations.

5.3.2 Ways to protect whistle blowers

5.3.2.1 Developing an ethic of whistle blowing

According to Nader *et al.* (1972:6-11) there is a great need to develop an ethic of whistle blowing which can be practically applied in many contexts, especially within corporate and governmental bureaucracies. For this to occur, people must be permitted to cultivate their own form of allegiance to their fellow citizens and exercise it without having their professional careers or employment opportunities destroyed.

This new ethic will develop if employees have the right to due process within their organizations and if they have at least some of the rights - such as the right to free speech - that now protect them from state power. According to Nader *et al.*, in the past, whistle blowing has illuminated dark corners of American society, saved lives, prevented injuries and disease, and stopped corruption, economic waste, and material exploitation.

Guy (1990:143) states that some protection against retaliation is available to whistle blowers, but they must prove that they were fired or demoted directly because of the act of blowing the whistle.

Upholding the ethics of the King Report on Corporate Governance, initiatives have been undertaken in South Africa to get organizations to adopt ethical codes which, if supported by effective communication channels and training and seen to be enforced, would contribute to the development of a moral business culture in South Africa. Camerer (1996:48-54) states that high ethical standards include the creation of clearly understood procedures and channels of communication by business organizations so that employees who are aware of illegal or unethical conduct or practices in the workplace are able to disclose these without fear of reprisal or victimization. The Protected Disclosures Act (Act No. 26, 2000), supported by leading business people, unions and others, has been introduced as a legal protection for whistle blowers.

5.3.2.2 Involvement of unions

De George (1993:530) makes the following valid point: "Unions and professional organizations should become concerned with the problem of whistle blowing." They should support their members who feel obliged to blow the whistle on a company; they should defend and support members in their endeavours, and prevent them from being fired or abused on the job. They can also establish channels of their own to which members can report concerns, and then follow up such concerns and force appropriate action.

According to Nader *et al.* (1972:8-11) unions and professional societies should strengthen their ethical codes and adopt such codes if they do not already have them. Unions should move beyond the traditional “bread and butter” issues, and apply their significant potential power to protecting members against retaliation from employers in the event of whistle blowing. Whistle blowers who belong to labour unions have fared only slightly better than their unorganized counterparts. It means that if they fared slightly better when there were no mechanisms in place to help them, then if mechanisms are put in place they are more likely to do better.

5.3.2.3 Introducing relevant laws

James (1993:531-544) states that a number of federal statutes in the USA contain provisions intended to protect whistle blowers. The National Labor Relations Act, Fair Labor Standards Act, Title VII of the 1964 Civil Rights Act, Age Discrimination Act, and Occupational Safety and Health Act all have sections prohibiting employers from taking retaliatory actions against employees who report or testify about violations of these Acts. Although these laws seem to encourage and protect whistle blowers, to be effective they must be enforced. A 1976 study of the Occupational Safety and Health Act showed that only about 20 percent of the 2,300 complaints filed in the years 1975 and 1976 were judged valid by OSHA investigators. About half of these were settled out of court. It should be noted that these laws are not relevant to the South African Situation. We can, however, learn that such laws should not only be made, but also enforced.

The preamble of South Africa’s Protected Disclosures Act (Act No. 26,2000) states the aim of the Act as follows:

To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or

irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

Section 2(1) states the objects of this Act as -

- (a) to protect an employee, whether in the private or public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
- (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
- (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

Section 2 (3) states that:

Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it -

- (a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
- (b)
 - (i) purports to preclude the employee; or
 - (ii) has the effect of discouraging the employee, from making a protected disclosure.

According to section 3, “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.”

The sections quoted above suggest that the South African parliament wanted to put in place preventive mechanisms which are meant to prevent the employers from retaliation. The employers are forewarned or discouraged from taking reprisal action against the whistle blowers. They are also discouraged from preventing the whistle blowers to disclose the ill practices they wish to make known to the public.

Section 4 provides guidelines for those whistle blowers who are being harassed or punished for blowing the whistle as to what they should do, or whom they should approach in this regard. It gives guidelines for defence. Subsection (1) states that an employee may approach any court having jurisdiction, including the Labour Court, or may pursue any other process allowed or prescribed by any law, in order to protect him or her from suffering an occupational detriment in breach of section 3.

So far it would seem that the literature studied reveals the legal mechanisms that states or governments are trying to put or have put in place in the hope that whistle blowers will be free to disclose information without fear of reprisal. Although the focus of this research is mainly on the non-governmental sector, the mechanisms that have been suggested or implemented can suit all situations or contexts.

5.3.2.4 Introducing rewards

Governments should not only focus on avoiding retaliation by trying to develop legal mechanisms to encourage whistle blowing. People putting themselves at risk for the general good deserve protection from society. Bok (1980:301-364) makes the point that

even legislation that absolutely prevented retaliation against whistle blowers would not, in itself, spur all observers of organizational wrongdoing to blow the whistle. It means that this researcher feels that there should be some kind of motivation to spur or encourage whistle blowers to blow the whistle. Rewards provision has been inserted recently in several US bills, such as the Savings and Loan Bill.

According to Callahan and Dworkin (1992:336) virtue may be its own reward, but for many, money is more gratifying. This is a point that I have also made earlier when trying to point out why whistle blowing is said to be on the increase. It seems people do not only need to be protected, they also need to be encouraged to blow the whistle. The question is, "What can motivate people to blow the whistle?"

Some studies show that money, as an extrinsic reward, is likely to stimulate action in those who, unlike the traditional whistle blowers, are not focused on intrinsic rewards. Monetary rewards are more likely to be a motivator for younger employees or those with low incomes. The history of cases relying on the FCA in the USA shows that rewards are spurring increases in whistle blowing, therefore, rewards provide symbolic proof that whistle blowing is condoned by society.

Nader *et al.* (1972:8-11) also corroborate the fact that rewards motivate whistle blowing. "Under the recently rediscovered Refuse Act of 1899, anyone who reports a polluter is entitled to one-half of any fine collected - even if the person making the report is an employee of the polluting company." Although the idea of rewards has been widely criticized by some ethicists, there are several who believe that whistle blowing which is done to prevent or bring to an end, harm to the public by a company or corporation, should be justified regardless of the whistle blower's motivation. It means that even if the whistle blower has made a disclosure for a monetary purpose, he or she should be praised for doing the greatest good to the public. Although the idea of providing financial rewards to stimulate suits against employers is not universally applauded, it has become a fixture

in the US federal government's overall enforcement arsenal.

5.3.2.5 *Codes of ethics*

Calitz (2000:19) says:

You can't be in business today without a code of ethics that guides the way you conduct your business. Without this, you automatically create mistrust, and undermine support for your business decisions and strategy. Transparency in all processes and the rights to question and challenge are very important in industry: To say "we have ethics" is meaningless. What is important is that a company has guidelines that determine the way you relate to each other and your clients.

Calitz (2000:19) states that codes of ethics and other policies that relate to wrongdoing should spell out more specifically, but without inappropriate rigidity, what activities are considered wrong. A policy that provides specific examples of questionable activities is more easily understood by employees and will result in fewer unfounded complaints than one that does not.

I would like to point out that a code of conduct that discourages unfounded complaints is also in a way protective to the whistle blowers because it prevents them from being involved in risks that will be costly to them. Codes and formal policies should also specify what actions are desired. For example, to whom should employees report potential harm or wrongdoing - their boss, the personnel department, a corporate attorney or an internal auditor? This will also serve to protect whistle blowers because they will be able to exhaust all the preconditions before blowing the whistle worthy of legal or statutory protection.

Each corporation should have a bill of rights for its employees and a system of internal appeals to guarantee these rights. As a condition of employment, workers at every level

in the corporate hierarchy should have the right to express their reservations about the company's activities and policies, and their views should be accorded a fair hearing. They should have the right to "go public" (or to blow the whistle), and the corporation should expect them to do so when internal channels of communication are exhausted and the problem remains uncorrected (Ezorsky 1987:92).

The above means that the whistle blowers will feel more protected and comfortable to blow the whistle for the purpose of the good of the general society or the public. It also means that the employers will not have grounds to harass the whistle blowers, if the corporate code of ethics allows them (the employees) to blow the whistle when the need arises. This will also discourage companies or corporations from getting involved in harmful business practices or activities that could cause harm to others, because of the fear of disclosure. For example, if the employees of the Eschem factory in Lenasia outside Johannesburg where the workers perished as a result of a fire in the factory had ways or means through which they could inform the public of their unsafe working conditions, their lives could have been spared. Another example could be that of the Helderberg disaster where a plane crashed and scores of passengers were killed after an alleged explosion. If mechanisms or guidelines were provided to the members of the crew, they could have blown the whistle internally or externally, to save the lives of the people by preventing a potentially harmful flight.

According to De George (1990: 240) a company that wishes to be moral - that does not wish to engage in harmful practices or to produce harmful products - can take other steps to preclude harmful products and the necessity of whistle blowing. It can establish channels whereby those employees who have moral concerns can get a fair hearing without danger to their position or standing in the company. Expressing such concerns, moreover, should be considered a demonstration of company loyalty and should be rewarded appropriately. Although this may not sound like a real direct protection mechanism for the whistle blower, it, however, serves to prevent the whistle blowers who

feel obliged to save the public interest from reaching that stage of risk. It means that it is a mechanism that can be regarded as an internal whistle blowing that is put in place for the purpose of preventing a stage where the whistle blower can face retaliation.

If the corporation is willing to take advice or heed complaints about its activities that are illegal or harmful, then there will be no need for the whistle blower to blow the whistle. The purpose of the whistle blower should be that the immoral practice be discontinued or prevented.

5.3.2.6 Establishing specific complaint recipients

De George (1995:240) goes on to state that every company of a certain size should be required by law to have an inspector-general or an internal operational auditor whose job it is to uncover immoral and illegal practices.

This person's job will be to listen to the moral concerns of employees, at every level, about the firm's practices. He or she should be independent of the management, and report to the audit committee of the board, which, ideally, should be a committee made up entirely of outside board members. The inspector or the auditor should be charged with making public those complaints that should be made public if not changed from within. If the inspector fails to go public until an employee does so, the inspector will face criminal charges for an attempt to cover up a dangerous practice or product. Although this could be protective to the employees or the actual whistle blowers, it can still land the poor inspectors in hot water if they are not independent of the corporations or companies against which the whistle is blown. If the inspector is employed by the particular accused corporation, then he (the inspector) may also serve as a shock-absorber for the corporation. For this idea to be effective, the inspectors should be independent of the companies so that they may not also face the fear of retaliation by their employers if they have

disclosed any illegal activity. It means that the employees will be safe because they will only be blowing the whistle behind the curtains.

According to Westin (1981:144) a few companies, such as General Electric's Aircraft France Division, Control Data Corporation Singer and MacDonald's, have created ombudsmen programmes that provide a single official to receive, investigate, and respond to employee complaints. However, ombudsmen may not be able to deal effectively with a charge of illegal or improper conduct. Although this can be an effective mechanism to reduce extreme cases of whistle blowing, it has some flaws that can discredit it. The management can have an influence that can result in unfair judgments.

According to Miceli and Near (1992:65-72) employees may feel more comfortable reporting unethical or illegal behaviour through the suggestion system rather than to other recipients, particularly when anonymous suggestions are accepted. This could be one way to effectively protect the whistle blowers from retaliation by either the employer or co-workers. It must, however, be guarded against that the anonymous whistle blowers may take advantage and falsely discredit either corporations or individuals. Miceli and Near also mention as an example that IBM has an "open door" policy under which employees are urged to carry complaints all the way up the corporate ladder. IBM receives up to 18,000 letters a year from workers making confidential complaints under a "Speak Up" programme. Bank of America in San Francisco encourages its employees to submit complaints or reports through its "Open Line" programme. The programme coordinator contacts the whistle blower at home to gather information in complete confidence and then confronts the accused person for a response.

The idea of creating hotlines for whistle blowers who can anonymously disclose information, sounds good for the protection of the whistle blowers, but the recipients of the complaints should also be moral people that may not be corrupt. They should also seek responses from the accused for verification.

The Protected Disclosures Act (Act No. 26, 2000) also states directly who should be the recipient of complaints from whistle blowers in sections 5, 6, 7 and 8. According to these sections protected disclosures can be made to:

- (i) A legal adviser
- (ii) The employee's employer
- (iii) A member of Cabinet or of the Executive Council of a province
- (iv) Certain persons or bodies (e.g the Public Protector).

The idea of letting whistle blowers reveal or disclose complaints to specific persons can be very effective if the general public, including all potential whistle blowers, are aware of whom to report to and if they also know how protected they will be if they report to that individual. It means that the recipient should be fair, honest and faithful so that the public could have trust in him/her.

According to Westin (1981:143) there has to be a clear process of receiving complaints, conducting impartial investigations, defining standards of judgment, providing a fair-hearing procedure, and reaching the most objective and responsible decision possible. Such a procedure has to be fair both to the complaining employee and the company official if morale is to be preserved and confidence in management's integrity is to be the general expectation of the workforce.

Westin's suggestion can also be used to reach a general conclusion that if the conditions mentioned are all met, then the chances of whistle blowers being victimized or punished will be minimal. It will be unrealistic to expect that there will be rules or laws that can virtually wipe out any form of retaliation against whistle blowers by either employers or co-workers. The mechanisms that can be put in place can only serve to minimize it. It is then crucial for one to ask what could be done to defend whistle blowers or to counter the

retaliation that has already taken place against whistle blowers who have correctly and fairly blown the whistle. However, before attempting to answer this question, let us revisit the question “How can whistle blowers be protected?”

5.4 Summary

At this point, can we conclude that there are mechanisms that can be used to protect whistle blowers or to minimize their victimization? From the literature that has been studied so far, one can say that there are indeed certain protective or preventive mechanisms that can be used to protect whistle blowers. These, according to Westin (1981:141), can be organized into three main categories:

1. Internal policies and procedures that management should institute.
2. Mechanisms for outside review and action by governmental bodies and courts.
3. The role that professional, public-interest, and employee-protection groups can play in whistle blowing situations.

Westin (1981:154) also makes suggestions for changes to US law:

1. To enact federal or state legislation to protect whistle blowers in private industry.
2. To pass more general legislation forbidding private employers to engage in “unjust dismissals”, with one type being discharge of whistle blowers.
3. To have state courts change the common law rule supporting employer prerogative to an approach that allows such courts to examine the propriety of contested discharges.

Westin’s proposals effectively sum up the major conclusions that could be drawn after an intense look at the literature. Most of the documents studied have suggested the following

mechanisms as the ways that could be used to protect whistle blowers:

1. Establishment of codes of ethics that will serve to give guidelines to both employees and employers on matters pertaining to whistle blowing.
2. Introduction of rewards to encourage the whistle blowers and the provision of funds for suits against unfair dismissals of employees who blow the whistle.
3. The establishment of laws that are intended to protect whistle blowers against retaliation such as dismissals, demotions and redeployment on the basis of the fact that one has blown the whistle.
4. Involving the trade unions.
5. Developing an ethic of whistle blowing in corporations.

Chapter 6

6. Protection of employers and corporations against unfair whistle blowers

6.1 Introduction

The million dollar moral question is, “Is there a need for employers or corporations to be protected against unfair, immoral and unjustifiable whistle blowing?” If the answer to this question is “yes”, then what is immoral or unfair whistle blowing? How can employers or corporations be protected against this?

A number of researchers agree that if the whistle has been blown for a wrong motive, what counts is whether there is truth in the whistle blower’s case, and not the motive. If the whistle blower’s claims or complaints happen to be good enough to prevent potential harm, then there will be no need to care about the corporation’s or the employer’s image.

According to James (1993:534), “No matter what one’s special obligations, one is never exempt from the general obligations we have to our fellow human beings. One of the most fundamental of these obligations is to not cause avoidable harm to others.”

Duska (1993:555) puts it strongly: “Whistle blowing is not only permissible but expected when a company is harming society.” This gives us enough evidence to be able to agree that when there is harm to the public, then the whistle should be blown to prevent the potential harm, but it does not provide enough grounds to conclude that there is no need to protect corporations or employers against unfair whistle blowing.

6.2 Can a corporation or an individual employer be a victim of unfair whistle blowing?

In the book of Genesis Chapter 39, verses 1 to 19, we read the story of Joseph who was falsely and unfairly accused of raping his master's wife. His master's wife had lusted after him, but when Joseph refused to sleep with her she blew the whistle, accusing him of having raped her. Although this was not true, Joseph was put in jail, hence unfair whistle blowing. The flaw in this story is that Joseph's master did not conduct an investigation that could have avoided unfair punishment. It means that the recipients of whistle blowing claims should always conduct their own investigations before taking action.

According to Westin (1981:134), "Putting the whistle to one's lips does not guarantee that one's facts are correct." It means that one has to verify the claims. This view is also echoed by De George (1990:227): "In some cases whistle blowing may be morally prohibited, in some cases it may be morally permissible, and in others it may be morally mandatory." It is therefore evident at this stage that the possibility exists of unjustifiable or unfair whistle blowing that may lead to unnecessary bad publicity for the corporation or the employer. If this is the case, then there is a need for corporations or employers to be protected against such unethical conduct. A good example that could cast some light on the flaws that exist in the practice of whistle blowing is the McDonald's Polystyrene Case, taken from De George (1990:194):

The McDonald's Polystyrene Case

Environmental consciousness has increased dramatically in the United States in the past fifteen years. More and more people are conscious of toxic wastes, of pollution, of the mountains of garbage that pour into landfills, of the depletion of forests. McDonald's, the largest restaurant chain in the world, presents a notable environmental case study.

For years McDonald's, like most other quick-food chains, used polystyrene containers - famous Big MacDonald's clamshell - for its hamburgers. This container was lightweight, did not absorb grease, and kept the hamburgers warm. McDonald's had chosen polystyrene over paperboard for these projects and had joined with others in a \$16 million project to build seven polystyrene-recycling plants around the country. But by the end of 1990 it was to change its mind. Because of its size and dominant position, McDonald's became the target of the Environmental Defense Fund, which claimed that making polystyrene packaging created toxic fumes, that it took up too much landfill, and that it took too long to biodegrade. In addition, a lobby called the Pro-Environment Packaging Council, funded by paper companies, started targeting schools with a campaign about the adverse impact of polystyrene products. McDonald's was soon faced with what Forbes Magazine called a "children's crusade", which involved a Send-It-Back campaign, letters written by classes of children, and a threatened boycott. On November 2, 1990, McDonald's announced that within sixty days it would phase out its polystyrene clams and replace them with coated paperboard.

The announcement was hailed as a victory for environmentalists and as a demonstration of the power of public opinion. Newspaper editorials across the country congratulated McDonald's for taking the leadership in environmental issues and put pressure on other chains to follow McDonald's lead.

Although no one spoke against the importance of environmental concerns, several voices were raised, but scarcely heard, that questioned the soundness of McDonald's decision. Edward H. Rensi, head of McDonald's U.S. Operations, who had long defended the clamshell boxes, said, "Although some scientific studies indicate that foam packaging is environmentally sound, other customers just don't feel good about it." Jay Beyea, a scientist at the National Audubon Society, noted

that the change would result in using a lot more paper and that “Using a lot more paper means a lot more pollution”. It also means cutting a lot more trees. A study by the Stanford Research Institute concluded that there was no sound basis for claiming that using paper products was environmentally superior to using polystyrene or other such plastic-based materials. Nor would the change affect the landfill problems, since such material accounts for only one-third of 1 percent of landfill waste by volume. Lynn Scarlett, vice-president of research at the Reason Foundation, pointed out that manufacturing polystyrene clamshells used 30 percent less energy than paperboard and produced 40 percent less air pollution and 42 percent less water pollution.

What is even more challenging in the McDonald’s case is the question as to who actually had won in the end. Is it only the public that had won? The fact in this case that raises questions is the involvement of seemingly competing companies in the campaign against the use of polystyrene. The involvement of the paper companies, by funding the Pro-Environment Packaging Council, makes one doubt the morality of the campaign. It also means that if people are not careful, the same strategies can be used by competing companies against their competitors by fabricating false stories and then blowing the whistle with the aim of tarnishing the public image of the particular corporation. Although this may not be a common practice, it should be avoided, if whistle blowing is to yield fruits.

Under these circumstances, one can conclude that there is a need for corporations and employers to be protected against unfair whistle blowing. Westin (1981:134-136) lists seven points that I wish to use to sum up this argument. These points are:

1. Not all whistle blowers are correct in what they allege to be the facts of managements’s conduct, and determining the accuracy of whistle blowing charges is not always easy.

2. There is always the danger that incompetent or inadequately performing employees will take up the whistle to avoid facing justified personnel sanctions.
3. Employees can choose some ways of blowing the whistle that would be unacceptably disruptive, regardless of the merits of their prospects.
4. Some whistle blowers are not protesting unlawful or unsafe behaviour but social policies by management that the employee considers unwise.
5. Legal definitions of what constitutes a safe product, danger to health, or improper treatment of employees are often far from clear or certain.
6. The efficiency and flexibility of personnel administration could be threatened by the creation of legal rights to dissent and legalized review systems.
7. There can be risks to the desirable autonomy of the private sector in expanding government authority too deeply into internal business policies.

Although there could be room for counter-debate on these issues, it should be evident that these facts or points could serve to caution anyone who will have to take action whenever the whistle is blown.

6.3 How can corporations and employers be protected against unfair whistle blowing?

A number of researchers have discovered that there should be certain conditions that have to be met before an act of whistle blowing can actually be justified. Even the Protected Disclosures Act (Act No. 26, 2000) has laid down certain conditions that should be

satisfied before the act of whistle blowing can be justified, for example, section 9(3) (a) - (g) states such conditions. It means that these conditions serve as guidelines that could be used to protect employers and corporations against unjustified or unacceptable whistle blowing. One of the conditions is, for instance, that there should be substantial evidence of an impropriety before one's act of whistle blowing can be justified.

According to Leob (1995:115), one has to ask oneself seven questions before actually blowing the whistle. This emphasizes the fact that whistle blowing should not just be casually accepted without some assessment of the case reported. Although there is very little documented evidence of how corporations could be protected, it will be appropriate to meet all the conditions set out by De George and other researchers before acting against the accused employer or corporation. It means that it should be established whether the whistle blowing was done in good faith or not. It should be established whether there is indeed an ill practice or not. There should be some punitive legal steps laid down to caution potential whistle blowers against the misuse of this practice.

Chapter 7

7. The Republic of South Africa Protected Disclosures Act 2000

7.1 A critique of the Protected Disclosures Act

This section presents a close and critical view of the Protected Disclosures Act (Act No. 26,2000). The main purpose is to determine both the likely successes and shortcomings of this Act. The fundamental question is, “Does this Act adequately address all the objectives it was intended to fulfil?” This will also help us to establish the link between this Act and the whole issue of whistle blowing.

7.1.1 The aims of the Act

The preamble of the Act contains the following aims that are here summarized:

- To protect the rights of all people including their moral rights.
- To promote good, efficient, accountable and transparent governance in organs of state and in corporate private bodies.
- To promote the economic stability of the Republic of South Africa.
- To protect the public or the general population against social harm or damage.
- To create a culture of fighting crime and other irregular conduct in the workplace in a responsible manner.
- To provide comprehensive statutory guidelines for the disclosure of criminal or irregular practices.
- To provide protection against reprisals against those who have blown the whistle.

Generally the aims contained in the Act are well intended, because they are mainly in line with fundamental human rights and they also consider the obligation all human beings have to prevent social, economic or any other harm to others or the environment. This

does not mean, however, that this Act can just be generally considered a success. There are certain aspects of the Act that may be positive and others that may be negative. The health or survival of every planted seed depends on the type of soil or environment in which it is sown.

7.1.2 The positive aspects of the Act

1. It provides the legal framework for those who might be heroic enough to blow the whistle and face the possibility of reprisals as a result.
2. It also provides remedies to those who could have been disadvantaged because they have blown the whistle against their employers (section 4).
3. It provides guidelines as to who can and cannot blow the whistle, i.e. the whistle should be blown in good faith for a good purpose. These guidelines are mainly contained in section 9 of the Act.
4. It can reduce the level of organised crime and corruption in both the private and the public sectors. It means that the social and economic harm that can be caused by crime and corruption can be prevented.
5. It can also promote respect for life and for fundamental human rights by all individuals.
6. It reassures workers that silence is not the only safe option.

7.1.3 The shortcomings or the negative aspects of the Act

The question now is, “Is South Africa a suitable environment for this Act?” Will this Act ever benefit all the people of South Africa? South Africa is a country which has a history of disparities. People are divided into the rich and the poor, the literate and the illiterate, and so on. Most of those who are employees in South Africa are the poor and illiterate. They are also the ones that are more likely to suffer because of the illegal practices of the rich and literate.

The rich and literate are the ones who own factories and industries that can cause harm to others and even to the environment. They can produce defective products and sell them to the unsuspecting poor and illiterate public. They can also employ the poor and let them work under harmful conditions, for example, those who work in mines where they are exposed to dangers.

My argument here is that knowledge is poor. The poor and illiterate, who are the majority in South Africa, may not be aware of the Protected Disclosures Act. The fear they have of reprisals by employers or those who are in positions of power will remain. The question may be, “Who are the most corrupt people in South Africa?” “Are the poor and illiterate corrupt?” “Are the employers more likely to blow the whistle against their employees?” If the rich and literate are the ones who are more corrupt than the opposite, then the Act cannot succeed because the illiterate cannot understand or use it effectively.

The following factors may be regarded as the shortcomings of this Act:

1. Only those government officials in higher positions and a minority of rich people who have computers with Internet access can get access to the Act.
2. The Act is also written in a language that can only be understood by the literate.

3. The Act does not provide motivation for those who can blow the whistle, as it does not encourage people to seek compensation for disclosing potentially harmful practices. The fact is that the offenders may be ready to bribe the potential whistle blowers so that they may not blow the whistle and if nobody is ready to counter it, harmful practices may prevail.
4. The Act only focuses on employees and employers and does not include the unemployed, who are in the majority in South Africa.
5. The Act does not draw a clear line of demarcation between whistle blowers and police informers.

7.2 Conclusion

The practice of whistle blowing is important in every country, including South Africa. Whistle blowing can be morally justified if it is done within certain morally justifiable conditions. It can also be unacceptable if it does not meet certain requirements or if it is not done in good faith. The value of the practice of whistle blowing can be reduced if whistle blowers are not protected against reprisals by those against whom the whistle has been blown. It means that there should be legislation to protect the whistle blowers. There should also be remedies to help the victims of reprisals. It means that there should be means to motivate people to blow the whistle if we are to win against crime and corruption. It is also important that there should be conditions and guidelines that will protect employers and other people against unfair and unjustified whistle blowing that can unnecessarily harm their business or reputation.

Independent centres that can serve to receive all cases of whistle blowing should be established, if whistle blowing is to succeed. These centres should be spread throughout

the country, not just confined to one place.

Legislation on whistle blowing should be written in a language that all people are able to understand, and be made accessible to all people including the poor, the unemployed and the illiterate.

If these suggestions or findings are carefully refined and considered, whistle blowing can be an instrument to promote patriotism, and eradicate crime and corruption in our country.

What is needed in corporations is an effective policy to encourage whistle blowing. Such a policy has to enable employees to find out when something is going wrong. In fact, a positive whistle blowing culture is a critical element in the success of any HR management system. Effective HR management makes it unnecessary for regulators and legislators to intervene. Whether or not corporations have effective whistle blowing policies in place demonstrates their ability and will to regulate themselves.

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