Chapter Six

Whistleblower Protection and the Challenge to Public Employment Law

Robert G Vaughn

The last three decades have witnessed a dramatic but often unheralded revolution in the character of public employment law. Beginning with the federal government in the United States in 1978, protection of federal-employee whistleblowers has emphasised concepts of personal responsibility and accountability, long accepted in principle, but rarely implemented. The whistleblower provision of the *Civil Service Reform Act of 1978*¹ also marked the acceptance that disciplinary actions might be commenced against high-level government officials through an administrative process initiated outside an agency's chain of command.²

Subsequent amendments in federal law strengthened the enforcement of these whistleblower protections for federal employees.³ These amendments also incorporated a right to disobey illegal orders,⁴ a right previously recognised only by some state and federal courts.⁵ The right to disobey also stressed the themes of personal responsibility and accountability.⁶

Since 1978, the vast majority of the US states has enacted statutes protecting whistleblowers who are public employees.⁷ These statutes vary in scope and character but, like the federal statute, authorise employees to disclose information outside of the chain of command and under standards that replace internal agency rules or guidelines.⁸ Like the federal law, these provisions articulate a concept of employee loyalty extending beyond an employee's agency or its managers.⁹

In the last decade or so, a number of countries, including Australia, New Zealand, Canada, South Africa, and the United Kingdom, enacted whistleblower statutes that protect public employees who disclose various types of misconduct or incompetence.¹⁰ These enactments are striking not only because of their number, but also because they have been adopted in legal and cultural contexts seemingly inconsistent with them. For example, one of the more expansive whistleblower provisions may be found in Great Britain, a country with legal and cultural traditions supporting secrecy.¹¹ In Britain, one scholar had argued that

whistleblowing by public employees was inconsistent with Britain's constitutional norms and parliamentary government.¹²

During this same period, a number of international treaties and conventions addressing governmental corruption have included provisions protecting whistleblowers.¹³ Some international organisations, such as the World Bank and the European Commission, are developing internal standards and guides to protect employees who disclose corruption or wrongdoing connected with the activities of these organisations.¹⁴ The recent spate of provisions protecting public sector whistleblowers, the strength of the international movements for transparency, for honesty in government, for human rights that support whistleblower protection, and the debates about the appropriate role of the public sector all counsel an examination of the challenge to public employment law evidenced in the legal protection of whistleblowers.

This chapter explores the implications of this legal revolution in the protection of whistleblowers. The first task of this exploration is to establish a framework into which the variety of laws may be placed. This undertaking begins with an analysis of the federal whistleblower law in the United States protecting federal employees, particularly the *Civil Service Reform Act of 1978*, a provision that stimulated subsequent legislation protecting public sector whistleblowers.¹⁵ The background of this law and a review of its provisions and those of subsequent amendments establish themes to guide the subsequent analysis. These themes address concepts of employee loyalty, approval of individual responsibility in the face of hierarchical command, connection to information policy and access to government information, and empowerment of the right of freedom of expression as an underpinning of democratic accountability. These themes are developed in a review of state provisions protecting public sector whistleblowers.

Secondly, the chapter surveys the whistleblower laws of other countries. This survey permits a comparison of these laws with the themes developed with such public sector statutes in the United States. This comparison emphasises the many common themes as well as similar implications for public employment law drawn from these themes.

These tasks completed, the chapter considers the implications for public employment law. Whistleblower protection implements several principles and relies upon perspectives that challenge many concepts in public employment law. Whistleblower protection supports views of public employment that are not as fully recognised in public employment law but which amplify the effects of whistleblower protection on public employment law. Moreover, whistleblower protection blurs the distinctions between the regulation of public and private employment. The convergence of public and private sector employment law suggests that similar protections may apply to both, often under analogous

justifications. This convergence offers some grounds by which to address a number of current phenomena including, as an example, the delegation of public functions to private organisations.

Protection of Whistleblowers and Public Employment Law

Two pieces of United States legislation, the *Civil Service Reform Act of 1978*¹⁶ and the *Whistleblower Protection Act of 1989*,¹⁷ define the character of whistleblower protection for federal employees in the United States. In doing so, these statutes demonstrate how whistleblower protection challenges existing tenets of public employment law and show how whistleblower protection may transform public employment law. These statutes, particularly the *Civil Service Reform Act of 1978*, stimulated the enactment of other whistleblower provisions by the states.

The US *Civil Service Reform Act of 1978* and the *Whistleblower Protection Act of 1989*

The *Civil Service Reform Act of 1978* ('Civil Service Reform Act') was the most extensive reform of the federal public service since the enactment of the *Civil Service Act of 1883*. Like the 1883 Act, the Civil Service Reform Act occurred in the shadow of national turmoil and a constitutional crisis. The violations of constitutional and civil liberties, the abuses of governmental power which forced the resignation, under threat of impeachment, of President Richard M Nixon in the view of some established a blueprint for executive tyranny. That blueprint relied heavily upon control of the public service and use of that control to evade legal and ethical restraints on executive power. That evasion permitted acts such as the ordering of illegal wiretaps, the improper award of grants and contracts, and the reduction of health and safety standards.¹⁸ Particularly, loyalty to the president's 'team' replaced loyalty to agency, to law or to the public.¹⁹

The Vietnam War, which divided the American public, often along generational lines, legitimated dissent. This dissent included the release of the Pentagon Papers by whistleblower Daniel Ellsberg. Those confidential government documents that belied the government's own justifications for the war were published by the *New York Times*.²⁰ President Nixon's use of persons with connections to the Central Intelligence Agency to break into the Democratic National Committee's headquarters in the Watergate apartment complex and other violations of civil liberties, particularly the burglary of the office of Daniel Ellsberg's psychiatrist, suggested the importance of the First Amendment and the role of free speech and expression in supporting democratic accountability. Ironically, the Nixon cover-up of the Watergate break-in was motivated in part by the fear that exposure of that operation would lead to the discovery of Nixon's role in the Ellsberg burglary and other violations of civil liberties.

The Civil Service Reform Act pursued two, sometimes inconsistent, goals. The Act sought to make the public service more efficient by increasing the power of government managers to deal with poor performers, creating merit pay provisions, increasing the influence of political appointees over high ranking public employees, and regularising federal sector labor relations. Given the Nixon resignation and the national trauma surrounding the Vietnam War, the legislation also sought to protect federal employees from the abuse of the personnel authority, including that newly granted.

An important and revolutionary provision sheltered 'whistleblowers', employees who disclosed information that they reasonably believed evidenced a violation of law, rule, or regulation, a gross waste of funds, an abuse of authority or a specific and substantial danger to public health or safety.²¹ The Act created an Office of Special Counsel to investigate violations of these protections, to represent whistleblowers, to examine allegations of misconduct, and to advocate for whistleblower protection.²² Whistleblower claims could be pursued before a type of administrative court, the United States Merit Systems Protection Board, either as a defence to an appealable personnel action or in an action brought on behalf of the whistleblower by the Office of Special Counsel.²³

The provisions pursuing the first goal of the Act assumed that employees are guided by command and motivated by fear.²⁴ The provisions implementing the second goal of the Act, including whistleblower protection, reflect a view that employees are also motivated by ideals and a desire to serve the public.²⁵

These protections for whistleblowers can be seen as implementing principles already found in public employment law. For example, discipline of public employees rests on a concept of personal responsibility and accountability. Public employees are personally responsible for their misconduct or their failure to perform. Their conduct is evaluated by others and sanctions are applied based upon that evaluation. Depending upon the character of the position held, such an evaluation may be subject to judicial review or to independent adjudication.

Whistleblower protection can also be seen as departing substantially from existing provisions in public employment law. The protection of whistleblowers permits individual employees to call to account senior officials within a department or agency. The disclosure of information about misconduct or nonfeasance of others higher in the chain of command makes it more likely that the concepts of individual responsibility and accountability will be applied to all.

To the extent that whistleblower protection makes agency managers who retaliate against whistleblowers personally responsible for that retaliation through administrative discipline or through civil or criminal action, it radically alters the scope of persons within an agency to whom the traditional concepts of

personal responsibility will apply. Indeed, the whistleblower provision of the Civil Service Reform Act permits the Office of Special Counsel to commence disciplinary actions against retaliating officials before the Merit Systems Protection Board.²⁶ This authority of the Special Counsel is one of the few instances in federal law that allows disciplinary actions to be commenced against high-level government officials by persons outside of the chain of command.²⁷ The whistleblower provision of the Civil Service Reform Act can also be seen as implementing existing notions of employee loyalty. Although whistleblowing can appear to those superiors within an agency whose conduct is challenged as an act of disloyalty, federal employee whistleblowers had previously relied on the Code of Ethics for Government Service, a resolution passed by the United States Congress, as grounds for their disclosures. Among other provisions that code provided: 'Any person in government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or government department ...
2. Expose corruption wherever discovered
3. Uphold these principles, ever conscious that public office is a public trust'.²⁸

This code was striking for the breadth of its definition of loyalty and for its imposition of an ethical obligation to expose misconduct.

This code, however, was hortatory. It failed to provide a basis in federal public employment for the protection of whistleblowers. The whistleblower provision was revolutionary because it provided legal protection for conduct that had previously been supported by mere admonitions. It permitted employees, quite properly, to expose the misconduct or nonfeasance of their superiors and to disclose information embarrassing or perhaps even harmful to the short-term interests of the agency for which they worked. By implication, it established, as did the code, a loyalty beyond persons, party or government department. That loyalty may be more circumscribed than loyalty to the highest moral principles or to the country, but remains a loyalty stretching far beyond that to an employee's immediate superiors and particular employer. An examination of protected disclosures suggests the character of this broader loyalty.

The protection of disclosures regarding the violation of law, rule or regulation describes a loyalty to the law, to the standards established by statute or by agency rule or other norms articulated and disseminated by a government agency. The rule of law, the concept that governmental power is limited by legal standards adopted either by Congress or by the Executive itself, is a premise underlying any democratic government seeking to protect the private sphere from improper interference by the government. Laws are approved by Congress and represent the articulation of standards by a democratically accountable body. Even agency standards rest upon the agency's perceptions of its legal powers deriving from statute or from the constitution. Because of its central

place in the preservation of democratic government, loyalty to the rule of law encompasses a loyalty to the political and legal system which public employees ultimately serve. Because the legitimacy of a democratic government rests upon its authority rather than power alone, the government has an interest in ensuring that its agents act lawfully. Moreover, the specific agency for which the employee works also shares this interest in adherence to the law. Disclosures of abuses of authority address values likewise incorporated into the rule of law.²⁹

Disclosures regarding a gross waste of funds acknowledge the interests of the government and taxpayers in the efficient use of resources in the implementation of government programs. The particular government program or agency also has an interest in the efficient use of those monies given it. Again, the loyalty implied by the protection of these disclosures encompasses a whistleblower's immediate employer but extends well beyond that employer.

In the sense that these disclosures protect the interests of the agencies, whistleblowers may be the most loyal employees even if loyalty focuses on the obligations of an employee to his or her employer. Whistleblowers are able to make this argument even in the narrow context of loyalty to the employer, because the Act implies a definition of loyalty to an organisation that extends beyond the interests of the managers who control that organisation at a particular time. Whistleblower protection separates loyalty to one's superiors from loyalty to one's employer. This separation, as does whistleblowing generally, challenges hierarchical command and gives to individual employees a role in the administration of government not previously countenanced.

Finally, disclosures regarding specific and substantial dangers to public health and safety concern the interests of the public generally. The employee loyalty implied by protection of such disclosures seems less clearly to encompass the employing agency or the government. Although government and individual agencies, particularly if they are charged with preserving health and safety, have an interest in the well being of the public, they do not implicate basic agency interests in legality or in efficiency.

There are perhaps reasons that explain this difference. Health and safety considerations are unique; for, injury to the person can never be fully compensated. Although we place a value on life and limb, the rationale for the disclosure of such risks, if they are specific and substantial, seems particularly strong. At the very least, such disclosures give responsible authorities and perhaps the public an ability to respond to them. Because of the strength of this interest, the Act protects these disclosures even if the risks do not flow from the violation of law, rule or regulation or the abuse of authority.

The whistleblower provision replaced a hortatory and abstract definition of employee loyalty with a practical and concrete one of legal effect. These changes

in the concept of employee loyalty arise from whistleblower protection, but they can reverberate throughout public employment law.

These disclosures concern the activities of government.³⁰ Because they do so, protection of those employees who make these disclosures binds whistleblower protection in another way to the concept of democratic accountability. The ability of citizens to change government conduct, to require the redress of specific actions, to demand modifications in the powers or scope of government programs, or to insist on punishment or legal redress rely on the rights of freedom of expression, including the right of free speech and association. These rights are less meaningful without access to information about actions and procedures of government. Whistleblowers are an important source for such information.

This relationship of access to information to democratic accountability explains why whistleblower provisions are often connected to freedom of information and other open government laws. The passage of the federal *Freedom of Information Act*³¹ in 1966 allowed whistleblowers to argue they simply provided the types of information to which the public would be entitled under a freedom of information law. One of the first state whistleblower laws was linked to the state's freedom of information law,³² and the first attempt to enact whistleblower protection for federal employees likewise tied that protection to the federal *Freedom of Information Act of 1966*.³³ In a sense, both freedom of information and whistleblower laws statutorily empower the First Amendment.

The prohibitions against disclosure are limited. A disclosure is not protected if the disclosure is 'specifically prohibited by law' or if it is 'specifically required by an Executive Order to be kept secret in the interest of national defence or the conduct of foreign affairs'.³⁴ These prohibitions restrict the use of agency rules and regulations to limit scope of disclosure.

In enacting the whistleblower provision of the Civil Service Reform Act, Congress considered the First Amendment.³⁵ The whistleblower provision protected disclosures not protected, or ambiguously protected, under First Amendment law at the time.³⁶ For our purposes, one of the most striking distinctions was the protection under the statute of disclosures that might have been considered disruptive and not entitled to protection under the First Amendment. Congress legislated against weaknesses in the First Amendment and adopted a different approach to protection. The protection of employees who disclosed misconduct regarding their immediate superiors, with the attendant disruption, emphasises again how the enactment rejected a prevailing tenet in public employment law — the importance of hierarchical command. The Act and similar statutes create rights to freedom of expression not previously granted under public employment or constitutional law.

Moreover, when a legislative body weighs the disruption resulting from a whistleblower's disclosures and protects those disclosures, it reverses a judicial tendency to defer to a narrowly defined set of governmental interests focusing on efficiency and the chain of command. The judgment of a legislative body that the value of disclosures outweigh any resulting disruption enables the courts to act more boldly in applying constitutional restrictions. In another sense, such a provision is a redefinition of the character of public employment, which courts might appropriately incorporate into judicial development of that body of law.

A brief description of some of the principal provisions of the whistleblower provision of the *Civil Service Reform Act of 1978* supports the conclusion that the provision radically modified principal tenets of public employment law. Other parts of this provision buttress the view that whistleblower protection altered the scope of personal responsibility within government agencies, changed the character of employee loyalty, encouraged employee participation outside the chain of command, and rejected a view of government efficiency linked to preservation of the hierarchical control.

Of the important parts of the provision not previously discussed, three are particularly relevant to the themes already developed:

1. protection of disclosures resting on reasonable belief;³⁷
2. approval of disclosures to persons and groups outside of the federal government;³⁸ and
3. a provision directing that the Office of Special Counsel require federal agencies to respond to certain allegations of misconduct presented to the Special Counsel.³⁹

The first of these protects an employee who has a 'reasonable belief' that a disclosure evidences one of the protected categories. The rejection of a more demanding standard, such as the requirement that the disclosure 'in fact' shows that there has been a violation of law, rule or regulation, a gross waste of funds, an abuse of authority, or specific and substantial danger to public health and safety exemplifies Congressional judgments about the value of these disclosures compared to the risk of disruption. That judgment relies on broad conceptions of employee loyalty and the importance of access to information to democratic accountability. The reasonable belief standard should encourage more disclosures, including some where there has in fact been no wrongdoing.

The language and legislative history of the whistleblower provision approves disclosures within government agencies and authorises them outside of the government as well.⁴⁰ Subsequently, Congress has made it clear that disclosures to the press are protected.⁴¹ The protection of internal disclosures seeks to change the character of the workplace, making it more open to employee criticisms and participation. The protection of disclosures outside of government

emphasises that the preservation of agency procedures and structures, including those regarding employee disclosures, do not justify limitations on the prerogatives of employees.

One of the most contentious provisions requires the Special Counsel to forward to an agency head for investigation and response those allegations which the Special Counsel believes demonstrate a substantial likelihood of agency misconduct.⁴² The provision was contentious because it was a particularly clear embodiment of the tenet that an individual employee could bring the highest-ranking agency officials to account. Such accountability illustrates the practical expansion of the concepts of personal responsibility ingrained in whistleblower protection.

Subsequent changes in the whistleblower provision of the Civil Service Reform Act, particularly those contained in the *Whistleblower Protection Act of 1989*, addressed weaknesses in the enforcement structure, including the Office of Special Counsel, shortcomings in the drafting of the provision, and restrictive judicial interpretations.⁴³ A crucial change made it easier for a whistleblower to prove retaliation by stating that in order to meet the burden of demonstrating retaliation a whistleblower need only prove by a preponderance of the evidence the protected disclosure was a 'contributing factor' to the challenged agency action against the whistleblower.⁴⁴ If the whistleblower carried this burden, the agency must prove by clear and convincing evidence that it would have taken the same action absent the protected disclosure.⁴⁵

For our purposes, the most important change was the recognition of the right of federal employees to disobey illegal orders.⁴⁶ Adoption of the right to disobey affirms many of the principles of the original Act that transform public employment law. The right to disobey illegal orders embodies the same concepts of employee loyalty incorporated in protection of disclosures of violations of law, rule or regulation. Those concepts of loyalty are broad ones encompassing more than loyalty to superiors or to a government agency but also a loyalty to the government and to the system of democratic government. Acceptance of the right to disobey contains similar judgments regarding the weight to be given to legality as opposed to the government's interest in preventing disruption of the workplace. Acceptance approves a concept of individual responsibility that allows an individual employee to act upon his or her own judgment about the legality of an order. Acceptance confirms that disobedience like criticism is a form of employee dissent appropriately protected not only because it preserves an employee's right of free expression but also because it vindicates the concept of democratic accountability.

State Whistleblower Statutes

Following the *Civil Service Reform Act of 1978*, several states enacted laws protecting whistleblowers in public employment. An examination of these laws of general application illustrates the themes already developed and demonstrates how whistleblower protection has altered not only federal but also state public employment law. This examination also allows an assessment of how much the changes in public employment law follow the extensive protections provided in the federal provisions and how much the changes result simply from the acceptance of the concept of 'whistleblowing'. Such an assessment provides a basis for a discussion of whistleblower provisions applicable to public employees in other countries.

After 1978, statutes protecting whistleblowers in public employment swept the United States. At least forty-two states now have such statutes of general application to public sector employees.⁴⁷ In addition, several states have statutes applicable to specific areas of concern, such as health care, abuse of children and the elderly, foster homes, motor vehicle emissions, workers compensation and public utilities.⁴⁸ These statutes of general application vary in scope and in the character of protections provided but all accept whistleblowing by public employees.

A review of how these statutes resolve issues considered in the federal whistleblower law permits an appraisal of their implications for public employment law. The great majority of the state statutes protect disclosures regarding violations of law.⁴⁹ Most of the states that protect only one type of disclosure limit those disclosures to violations of law.⁵⁰ The substantial majority of these statutes protect disclosures regarding violations of federal as well as state law.⁵¹

No other category of protected disclosures is as common as the one regarding violations of law. The other most frequently protected disclosures regard, in order of frequency, governmental waste, substantial and specific dangers to public health or safety, and abuse of authority.⁵² Another less commonly protected disclosure concerns mismanagement.

These categories of protected disclosures follow closely those articulated in the federal whistleblower provision. To the extent these categories track federal ones, the implications of the protection of these disclosures for conceptions of employee loyalty, described in regard to the federal provision, apply to these state laws. Indeed, this similarity in protected disclosures suggests that the federal law provided the basic model to which states made particular alterations. Such a reliance on the federal law, while probable, is not necessary to conclusions about the implications of these state provisions. This similarity, however, should not obscure two important differences relevant to the character of employee

loyalty. First, the emphasis in the state statutes on violations of law occurs at the expense of the other disclosures which are less frequently included. Second, disclosures regarding violations of law encompass not only violations of state law but also violations of the law of another sovereign, the government of the United States.

The implications of whistleblower protection for the character of employee loyalty are not significantly altered by exclusion from the protection of some state statutes of all of the categories of disclosures except the violation of law. The majority of statutes contain most or all of the categories contained in the federal provision. Thus, the general implications of these whistleblower statutes for the field of public employment remain. Even if the analysis focuses on those states which protect only disclosures regarding violations of law, the implications of the character of employee loyalty in public employment law are still quite similar. The effect of the protection of disclosures of violations of law in federal law included above demonstrates that protection of that disclosure alone perceives an employee stretching beyond that to the employee's superiors or the agency in which he or she works. Rather, it describes a view of employee loyalty that includes the government generally, the system of democratic governance and those persons affected by such violations. Protection of such disclosures also sharply redefines the interests of the employee's own agency, separating loyalty to individual managers from loyalty to the agency. The analysis also asserted that same implications flow from protection of disclosures regarding an abuse of authority.

Although disclosures of waste or mismanagement concern interests in efficiency, the implications for conceptions of employee loyalty do not differ significantly from those applicable to the disclosures regarding violations of the law. Protection of these disclosures likewise suggests obligations beyond one's immediate superiors and a loyalty to others.

The effect of protecting disclosures regarding specific and substantial dangers to public health or safety does indicate that the exclusion of this protected disclosure might be relevant if we focus on a specific jurisdiction which does not protect such a disclosure. First, as noted in the discussion of the federal whistleblower provision, disclosures regarding specific and substantial dangers to public health and safety may not encompass the agency's own interests in the same way as the other protected disclosures. Arguably, the interest of a generic federal agency in the health or safety of the public does not implicate basic agency interests in legality and efficiency. Those agencies, however, with responsibilities for protecting public health and safety have a strong interest in ensuring that their mission is effectively accomplished. In this sense, the interests of some agencies are involved and like the other disclosures, this one includes a duty of loyalty to the agency.

Secondly, with those agencies having responsibilities for protecting public health and safety, these disclosures involve individual employees more directly in the administration of the agency's programs and the decisions applicable to them. This proposition relies on the premise that all agencies have a general concern for legality and efficiency in their operations and, while whistleblower disclosures regarding illegality or waste certainly become entangled with specific programs and policies (indeed, such entanglement may be the motivation for the disclosures), these disclosures are different in character and effect.

If this premise is accepted, it can be argued that the protected disclosures are less likely to be limited to activities in the workplace. A disclosure is more likely to concern the conduct of third parties that pose such a risk to public health or safety and such disclosures are more likely to enmesh employees in agency programs and policy making. For example, an employee identifies a private activity, involving the disposal of toxic chemicals in the course of mining, that the employee reasonably believes creates a specific and substantial danger to public health. The agency arguably has jurisdiction to regulate this conduct but is not legally required to do so. The agency is quite efficient in carrying out the regulatory responsibilities it has assumed. In effect, the employee's disclosure of a specific and substantial danger to public health challenges the agency's regulatory priorities.

If this line of argument is convincing, this type of protected disclosure gives individual employees an ability to participate in the development of regulatory policy, that may or may not occur in practice, beyond that approved in public employment law. Thus, the exclusion of this protected disclosure may have an impact on the principles of public employment in a particular jurisdiction. Perhaps the encouragement of employee participation lurking in the protection of this type of disclosure explains the requirement that the danger to public health or safety be 'specific and substantial'.

Providing protection solely of disclosures regarding violations of law can more generally be seen as an expression of hesitancy about encouraging independent judgment by individual employees concerning agency policy and practices. Disclosures regarding violations of law surely require judgment by an employee that addresses whether particular conduct reasonably can be seen as breaking established and articulated standards contained in laws, rules or regulations. The other types of disclosures draw upon less clear and established standards. For example, more employee discretion and analysis is involved in determining whether particular expenditures are a waste of funds or official action is mismanagement. Therefore, protection of these other types of disclosures may endorse more extensive judgments by employees regarding the propriety of the administration of an agency's programs.

A second important difference between these state statutes and the federal provision relevant to the character of employee loyalty pertains to the protection of disclosures of violations of federal law found in many state statutes. Certainly, this inclusion of violations of federal law reflects a judgment that the states' interests in the enforcement of these federal laws are viewed as significant enough to justify the extension of protection and the attendant costs. Conceivably, states could have a number of reasons for such an inclusion, but for our purposes, the more relevant question concerns implications for the character of employee loyalty of this protection of disclosures regarding violations of federal law.

The inclusion affirms the importance of legality in a democratic society. This affirmation stresses the larger obligation of every public employee to the concept of legality and to our political and legal system. That obligation overrides or replaces more narrow views of employee loyalty resting on the approval of supervisors, the convenience of agencies, or even the interests of state government. As a practical matter, the violators of federal law most likely identified by state employees are state officials or state agencies. At a time when many functions once performed by the federal government are 'devolved' to the states, this inclusion is also a reminder of the loyalty that state employees owe to the national government.

In contrast to the federal provisions which clearly protect disclosures to the press and to the public, 'the state statutes, with few exceptions, protect disclosures only to government officials and to public bodies'.⁵³ Although the overwhelming majority of the statutes broadly define public bodies 'often including state and local agencies and their employees, officials within the executive, judicial, and legislative branches, and federal agencies and officials',⁵⁴ this limitation does merit discussion. Many of the statutes do not specifically require that a public body have authority to regulate the conduct identified in a disclosure. A reasonable interpretation, however, would incorporate such a requirement. Even if this requirement is incorporated in the definition of a government body, a disclosure could still be protected when made to more than one agency.

In addition to the practical significance of this restriction on those persons and organisations to whom disclosures could be made, the limitation may alter the effect of a whistleblower provision on public employment law. Statutes which contain this restriction still reject the primacy of the agency structure of command. Many of these public bodies are separate from the public employer and some, at least, may not even be part of state government. Employees are permitted to make their own judgments about the conduct of agency officials and act in a way that may give those judgments legal effect. In this regard, the implications for whistleblower protection on public employment law do not seem altered.

This restriction on those to whom disclosures may be made, however, can alter the implications for public employment law in another way. To the extent that the close connection between whistleblower protection and public access to information links whistleblower protection to free expression and democratic accountability, the failure to protect public disclosures weakens this linkage. Arguably, such a restriction reflects different judgments about the weight given to the workplace disruptions likely caused by public exposures of official misconduct. In this sense, the statutes can be read, at least in part, as supporting a prevailing tenet in public employment law — the importance of workplace harmony sustaining hierarchical command.

Given the number of reasons for protecting internal disclosures, surprisingly few of the whistleblower statutes that are applicable to the public sector deal with this issue.⁵⁵ Of the statutes which address the issue, a good majority protect internal disclosures but require some type of internal disclosure before disclosures can be made to someone other than the employer.⁵⁶ Some of these statutes, however, incorporate exceptions that permit an employee to forego internal disclosures in certain circumstances often involving concern with delay, emergencies, reasons to believe that no action will be taken, and the fear of reprisal.⁵⁷

At first glance, the requirement for internal disclosure stresses a narrow definition of employee loyalty. Several aspects of these statutes, however, caution against a characterisation of these statutes as a return to a view of employee loyalty traditionally contained in public employment law. Most of the statutes only require disclosure to the public employer not to specific individuals within an agency.⁵⁸ The authorisation to report to persons outside of the employee's chain of command thus can be seen as defining loyalty in terms of the public employer rather than the specific managers to whom an employee is responsible. Moreover, several of the statutes contain exceptions which permit an employee to forego the requirement. Finally, an employee who made an internal disclosure or who, under some provisions, has given the agency a reasonable time to address the allegations, may disclose them outside the agency. Although the internal disclosure has practical effects on the likelihood of disclosures, the requirement does not necessarily reject broader conceptions of employee loyalty.

Like the federal law, most of the state statutes only require a reasonable belief that the disclosures fall within those protected.⁵⁹ A few statutes only require that an employee act in good faith;⁶⁰ two statutes seem to require that a disclosure be true in order to be protected.⁶¹ As noted, the reasonable belief standard relies on broad concepts of employee loyalty and the importance of access to information to democratic accountability by encouraging some disclosures which in fact are not accurate. The good faith standard should encourage a more substantial number of disclosures not in fact true. The

true-in-fact standard will encourage the fewest of such unsustainable allegations but may also discourage the disclosure of many valid ones as well. The state provisions demonstrate that the state statutes overwhelmingly adopt the same expansive views of employee loyalty and the importance of public access to information contained in the federal law. Even the two states that adopt the most restrictive standard for disclosure accept that employees should act to expose misconduct if they are convinced that it has occurred.

The state laws, however, are more likely than the federal law to require a substantial connection between the protected disclosure and the challenged action taken against the whistleblower.⁶² For example, whistleblowers may be required to prove by a preponderance of the evidence that the protected disclosure played a more substantial role in the challenged action.

Like the federal law, a substantial number of state whistleblower statutes include protections for employees who refuse to obey illegal orders.⁶³ These provisions vindicate the interests discussed previously with the federal statute and suggest the same types of revisions in public employment law created by protection of whistleblowers. The standard for disobedience is unclear under the federal statute.⁶⁴ The majority of the state laws adopt an illegal in fact standard of the right to disobey, but a significant portion of these laws embrace a reasonable belief standard.⁶⁵ Like the federal provision, these state laws have altered the landscape of public employment law.

The federal whistleblower law and the state statutes as a group contain many provisions that support and implement whistleblower protection. The discussion above demonstrates how these aspects of the whistleblower laws challenge public employment law by introducing principles and concepts that link whistleblower protection to innovative concepts of employee loyalty, to access to information and democratic accountability, and to free expression. These principles challenge in a number of ways a limited view of efficiency based on hierarchical command. It is useful to separate, however, the impact on public employment law of these relatively liberal statutes implementing whistleblower protection from the implications of the adoption of more restrictive whistleblower laws.

One way of accomplishing such a separation considers the implications for public employment law under a restrictive statute. The provision used for this purpose does not reproduce the terms of any statute thus far discussed, but rests on a hypothetical law that collects restrictive provisions from several state laws. In essence, this provision imagines the most limited law that still adopts, and presumably approves, the concept of whistleblower protection. That hypothetical law resolves the issues already discussed in the following manner:

1. it only protects disclosures regarding violations of law that come to the attention of the employee in the course of his or her employment;

2. it only protects disclosures to a particular public body, such as an ombudsman or auditor general;
3. it requires internal disclosure prior to any other disclosure and contains no exceptions to this requirement;
4. it imposes a standard for disclosure that requires wrongfulness in fact (reasonable belief is insufficient to provide protection);
5. it only covers an employee who acts in the public interest without malice and without consideration for personal gain (it thus encourages an examination of the motives of a whistleblower); and
6. it provides limited remedies and adopts a test for reprisal that compels an employee to prove that a protected disclosure was the primary reason for the challenged personnel action without the benefit of any presumption of retaliation.

From the discussion of the federal law and the state provisions, each of these resolutions of particular issues, as compared to those generally made in these provisions, are more supportive of traditional views of public employment and less accepting of the concepts behind whistleblower protection which challenge those views. However, that same discussion demonstrates that recognition of the legitimacy of whistleblower accepts concepts and values inconsistent with many of the assumptions regarding public employment on which legal regulation has relied. Of course, it is possible to argue that the combination of these choices in a single law renders application of the underlying principles so unlikely as to make the law a nullity. The ineffectiveness of the law can generate cynicism that undermines these underlying principles.

Despite this argument, the recognition of the legitimacy of whistleblowing is a powerful change in the view of public employment upon which legal regulation relies. Bureaucracies are not rigid and static, but dynamic. The behavior of employees is predicated in large measure by the perceptions of the types of conduct expected of them. Personal responsibility offers a fundamental way of controlling human conduct and behavior and provides an important principle by which large institutions may be limited by law. Articulations of employee loyalty which emphasise loyalty beyond the personal or institutional, support expectations of greater involvement by individual employees in protecting the public interest. Whistleblower protection expresses these values and brings them to bear on employee conduct. Whistleblower protection not only changes public employment law, but also alters the culture and character of public employment. Whistleblower protection, even in the most restrictive statute, can transform the character of the workplace.

International Acceptance of Whistleblower Protection

International acceptance of whistleblower protection illustrates its power to transform legal regulation of public employment. The acceptance of whistleblower protection in countries with cultural and legal traditions inconsistent with the protection of whistleblowers offers a particularly clear illustration of this power. Great Britain's whistleblower law, enacted in 1998, provides a readily accessible example.

In the last decade or so, many national laws and international conventions have adopted whistleblower protection.⁶⁶ A general review of these laws permits comparison of them with those laws in the United States previously discussed, and allows speculation about the effects of their adoption on public employment law. This comparison shows many striking similarities in these laws as well as some important differences, differences explained in part by the background and context to some of them.

The British *Public Interest Disclosure Act 1998*

The *Public Interest Disclosure Act 1998* (UK)⁶⁷ exemplifies the acceptance of whistleblower protection in a legal and cultural context antagonistic to it. It also demonstrates how the principles underlying such protection can transform the character of public employment law. It suggests how whistleblower protection subverts traditional rules regulating public employment.

The British public service, particularly the civil service, rested on centralised control, secrecy, and employee loyalty to the cabinet officer heading a ministry. By tradition and convention, civil servants were anonymous and silent. The character of public employment and premises of public employment law were antithetical to whistleblowing and offered whistleblowers little or no protection. Whistleblowing was an illegitimate act by any public employee.

The constitutional convention of parliamentary supremacy centralised control of a government ministry in the hands of the minister, who, as part of the cabinet, was directly accountable to Parliament for the administration of the ministry.⁶⁸ Loyalty to the minister was fairly conceived as satisfying loyalty to the government and to the democratic political system on which it rested. The conventions of ministerial responsibility and civil servant anonymity and supporting practices embodied this view of employee loyalty and of a circumscribed role for individual employees.⁶⁹ These conventions formed powerful arguments against whistleblowing, leading one commentator to conclude that a whistleblower commits a politically hostile act, and that an employee must make any complaints internally and may otherwise disclose concerns only after resigning from the public service.⁷⁰

Public employment law reflected this antagonism to whistleblowing. The Official Secrets Acts imposed criminal penalties for the release of government information.⁷¹ Civil service rules imposed discipline for the unauthorised release of information.⁷² Because permission was required before a civil servant could release information, most disclosures that could be characterised as whistleblowing were unauthorised and punishable as such.

Although some justifications for whistleblowing could be constructed within this restrictive framework of public employment law,⁷³ such justifications were of marginal effect. As in the United States, these justifications relied upon ethical and professional standards. The culture of the civil service and the tenets of public employment law denied legitimacy to whistleblowing and punished any public employee who made unauthorised disclosures.

The British *Public Interest Disclosure Act* represents a striking departure from a restrictive view of whistleblowing. This departure challenges existing tenets of public employment law and seeks to create a different type of workplace.

The Act, being broad in scope, covers almost all employees in Britain, including civil servants and most categories of public employees.⁷⁴ It permits disclosures in circumstances in which public employees would previously have been compelled to remain silent. Although the Act does not authorise violation of statutory prohibitions against disclosure, such as the Official Secrets Acts, it provides that in order to be denied protection, a whistleblower must have been convicted of a violation of the Official Secrets Act, or that the adjudicatory tribunal hearing a claim of retaliation must be effectively satisfied 'beyond a reasonable doubt', that the whistleblower committed the offence.⁷⁵ This provision of the Act combined with the subsequent enactment of a freedom of information statute⁷⁶ in Britain reduces the legal demands for secrecy. Moreover, the Act voids contractual provisions that prohibit whistleblowers from disclosing any information or from exercising their rights under the Act.⁷⁷ In this sense, the Act protects disclosures 'whether or not the information is confidential'.⁷⁸

The protection of whistleblowers alone undermines the legal and policy justifications for restrictions on the release of information by public employees. Such protection accepts and legitimatises such disclosures and implicitly rejects the arguments for restrictions which rest upon the premise that a public sector whistleblower commits a politically hostile act, both ethically and legally indefensible. On the contrary, the protection of whistleblowers is seen as so important that the Act deprives public employers of the ability contractually to limit disclosures protected by the Act.

The extent of the repudiation of tenets in public employment law illustrates the character of the challenge that whistleblower protection laws pose. The legal and cultural context in Britain starkly highlights this challenge. Advocates of

whistleblower protection in Britain believed that a law was necessary to 'good governance and openness in organisations'.⁷⁹ The law seeks to change the character of the workplace making it more open and giving employees an important role in ensuring that administration followed the law and the standards for good governance.

The Act addresses internal and external disclosures in a way that emphasises how whistleblower protection serves to reform employment, including public employment and administration. Many whistleblower statutes authorise disclosures under a single standard whether the disclosure is internal, to another governmental body, to the media or to any other person. These 'single standard' statutes tend to treat internal disclosures like all others. In doing so, they can seem to underplay the value of internal disclosures and generate attempts to require internal disclosure often with restrictive or ambiguous exceptions. On the other hand, the British Act varies the standards for disclosure based upon the audience receiving the disclosure.

The Act protects disclosures of 'crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health and safety or the environment and the cover up of any of these.'⁸⁰ Internal disclosures are protected under the most lenient standard, a reasonable belief and good faith belief that any of the covered misconduct has occurred or is threatened.⁸¹

A second type of disclosures, regulatory disclosures, may be made to prescribed persons, who are most likely to be health and safety or financial regulators.⁸² The standard for regulatory disclosures is more demanding than the standard for internal disclosures. Regulatory disclosures must meet the standard for internal disclosures and, in addition, the whistleblower must also reasonably believe that the allegations are substantially true.⁸³

Other disclosures, including disclosures to the media, must meet the test for regulatory disclosures, may not be made for personal gain, and must be reasonable under the circumstances.⁸⁴ In addition, the whistleblower must meet one of three preconditions for such disclosures:

1. reasonable fear of reprisal for the disclosure to the employer or to a prescribed person;
2. reasonable belief of the concealment or destruction of evidence relating to the misconduct; or
3. previous disclosure of the misconduct to the employer or to a prescribed person.⁸⁵

The reasonableness of such disclosures depend upon the identity of the persons to whom the disclosure is made, the seriousness of the conduct reported, whether

the conduct will continue or reoccur, and whether disclosure would require a breach of confidentiality.⁸⁶

By treating internal disclosures under the most lenient standard for protection separately from other disclosures, the British Act emphasises the work environment as the principal venue of whistleblowing. As such, the British statute seeks to influence employment law and practices in order to change the character of the workplace. Thus, the British law clearly challenges the tenets of public employment. At the same time, it recognises the need for external disclosures and leaves the employee options to pursue such disclosures when necessary. Under the British statute, public employment law must recognise a loyalty of an employee beyond his or her supervisors or the management of the agency; public employment law must accept the involvement of individual employees in the affairs of the public employer in ways that may challenge unity of command; and public employment law must acknowledge that public employees may be an important source of information to other agencies and to the public.

The British *Public Interest Disclosure Act* represents the acceptance of whistleblower protection in what would seem an uncongenial legal and culture context. Because the character of the changes that the legislation wrought in public employment law are so stark, this acceptance demonstrates how whistleblower protection challenges public employment law.

Whistleblower Protection as an Anti-Corruption Measure

Whistleblower protection is increasingly seen as an important part of international and national efforts to control corruption. Several national statutes emphasise this connection between whistleblower protection and anti-corruption efforts. The statutes of several Australian states illustrate this connection and allow an examination of the ways in which the ties to the control of corruption affect the arguments regarding the challenge that whistleblower protection poses to public employment law. This examination identifies some differences resulting from the connection of whistleblower protection to anti-corruption efforts but generally supports the analysis of the implications of whistleblower protection already presented.

As part of an international effort to control corruption, several international conventions, such as the European Union's Civil Convention on Corruption,⁸⁷ its Criminal Convention on Corruption,⁸⁸ and the Inter-American Convention Against Corruption,⁸⁹ contain provisions protecting whistleblowers. These provisions require implementing national legislation and the Organization of American States, Office of Legal Projects commissioned the draft of a model law to implement the section of the Convention protecting whistleblowers.⁹⁰

The whistleblower laws of several Australian states are linked to anti-corruption provisions. These Australian laws often rely on anti-corruption commissions or similar offices for enforcement. Although these provisions vary, they reflect a concern with governmental corruption, misadministration and waste. Generally, but not exclusively, they protect disclosures regarding misconduct by public officials and seek to regulate governmental corruption.

The *Corruption and Crime Commission Act 2003* enacted in Western Australia⁹¹ most clearly shows this link to anti-corruption efforts. This Act protects disclosures to the Corruption and Crime Commission regarding corrupt, criminal, biased or dishonest conduct by public officials.⁹² The Act prohibits victimisation of persons making such disclosures and provides criminal penalties for violation of this prohibition.⁹³ In addition, persons making disclosures to the Commission are protected from private civil actions based on those disclosures.⁹⁴ Likewise, the New South Wales *Protected Disclosures Act 1994*⁹⁵ protects disclosures of corrupt conduct, maladministration or substantial waste by public officials.⁹⁶ Disclosures must be made by a public employee and it must not be part of the employee's official duties to report the misconduct.⁹⁷ The persons to whom disclosures may be made is limited and disclosures to the press or the legislature are protected but only in very limited circumstances.⁹⁸

Other statutes, such as those of Queensland and South Australia, protect similar disclosures but also permit disclosures of official behaviour which poses a substantial risk to public health and safety.⁹⁹ The Queensland provision requires that the disclosure be made to an appropriate public body.¹⁰⁰ In certain circumstances, the South Australian law permits disclosures to others, including the media.¹⁰¹ Some statutes, such as those of Victoria and the Australian Capital Territory, cover somewhat broader disclosures¹⁰² but also limit disclosures to government agencies.¹⁰³

The South Australian law, the first permanent provision protecting whistleblowers, was part of a group of measures designed to combat 'fraud and corruption'.¹⁰⁴ Other jurisdictions seem to have 'followed suit' in a number of ways, including an emphasis on controlling official corruption.¹⁰⁵ The South Australian law, even though extending protections to private employees, primarily sought to protect against corruption in government.¹⁰⁶

Whistleblower laws linked to anti-corruption efforts may differ in some ways from the more general whistleblower provisions previously discussed. First, they are more likely to focus on disclosures to certain specialised bodies with responsibilities for punishing or preventing official corruption. Second, they suggest coverage of disclosures outside of the employment process. Undoubtedly many persons with knowledge of official corruption will be public employees, but it is easy to conceive that employees of private employers, employers who may be involved in corrupt practices with public officials, would be aware of

these corrupt practices. In addition, persons not employed by the government or by those affected or involved with private employers may also have knowledge of official corruption.¹⁰⁷ Finally, it can appear that an anti-corruption rationale for these whistleblower laws is more limited than the rationale underlying many whistleblower statutes.

Together, these differences may suggest a more limited impact on public employment law. The reliance on specialised bodies, by reducing those persons to whom disclosures may be made, permits the argument that changes in concepts of employee loyalty are more modest and greater weight is given to institutional prerogatives. The extension of whistleblower protection beyond the employment context suggests that the character of employment is less a concern of these provisions. The more limited rationale for these anti-corruption provisions signifies concerns less drastically challenging the character of public employment.

The implications of the first of these differences regarding limitations on persons to whom disclosures may be made has, in fact, been explored in earlier discussions of the scope of disclosure. At the least, the challenge posed by approval of whistleblowing noted in those discussions supports the conclusion that this difference does not affect the implications for employee loyalty, personal accountability, and chain of command of the approval of whistleblowing. The second of these two differences is unlikely to alter the conclusions already reached because the overwhelming majority of whistleblowing is likely to be employment based. This difference also represents an aspect of many whistleblower statutes not simply those resting on an anti-corruption rationale — for many of these statutes cover both public and private sector employment. The implications of this coverage of public and private employment under the same law will be discussed in more detail below.

Finally, upon examination, the anti-corruption rationale is not limited and does not necessarily stand in contrast to other grounds for whistleblower protection. Anti-corruption provisions necessarily rest upon the importance of the rule of law and employees' loyalty to the law and the democratic system of which it is a part. Anti-corruption provisions recognise access to information regarding the activities of government officials as crucial to democratic accountability. In this way, anti-corruption provisions are also tied to the rights of free expression of citizens and of employees. Thus, anti-corruption provisions can challenge the tenets of public employment as do other whistleblower provisions.

The statutes of the Australian states make the anti-corruption rationale seem more restrictive than the analysis above suggests is justified. These statutes are more restrictive than some other whistleblower protection laws. For example, these statutes often limit disclosures external to the government, require internal disclosure before external disclosure and at least in one instance, require that allegations must be based not only on a reasonable belief but also must be

determined to be substantially true. More restrictive statutes, however pose a challenge to public employment law similar to that of more liberal provisions.

The model whistleblower law drafted for the Organization of American States explicitly identifies the rule of law, democratic accountability, and free expression as supporting such a law.¹⁰⁸ This law represents provisions resting on the anti-corruption rationale that contains few of the restrictive provisions contained in the Australian anti-corruption statutes. Therefore, nothing in the character of the rationale for anti-corruption laws inherently reduces the challenge to public employment law.

A review of the types of whistleblower protections adopted internationally and in several countries supports the proposition that these protections challenge public employment law. The British *Public Interest Disclosure Act* clearly shows how the adoption of whistleblower protection modifies more general propositions in public employment law antagonistic to it. The Australian laws demonstrate that whistleblower statutes more closely tied to anti-corruption efforts present the same types of challenges to public employment law.

Protection of Whistleblowers and the Implications for Public Employment Law

The challenge posed by whistleblower protection to public employment law helps to fashion a vision of public employment. This vision incorporates many of the concepts inherent in whistleblower protection. Although this vision challenges many of the principles of public employment law, it is a vision that draws upon theories of public employment, while not dominant, has coloured the discussion of public employment. The connection of whistleblower protection to a vision of public service may strengthen the challenge that whistleblower protection presents for public employment law. Because of this power to transform the law, whistleblower protection becomes more than simply an adjustment in practice and procedure.

Whistleblower laws vary in how they distinguish public and private sector employment. The federal whistleblower provisions in the United States, previously discussed, are limited to public employees with separate provisions addressing employees in the private sector. Likewise, many state laws distinguish between public and private employment. In countries other than the United States, whistleblower laws sometimes treat public and private employees differently, sometimes under separate laws. Even these separate statutes, however, often address identical issues, and some statutes cover both public and private sector employees. Despite treatment in different state statutes in the United States, there do not appear to be substantial and dramatic differences in the ways in which statutes conceive public and private sector protections. The similarities invite a reconsideration of distinctions between public and private

sector employment and the significance of this reconsideration for public employment law.

The Vision of Public Service

Thus far, this chapter has portrayed public employment law as a somewhat monolithic embodiment of a conception of public employment. It is true that public employment law stresses a narrow view of employee loyalty, efficiency supported by unity of command and restrictions on the rights of expression of public employees. Public employment law also rejects a significant role for public employees in democratic accountability. The conception of public employment, however, draws on a more complex set of theories than thus far presented. Within the confines of this chapter, the examination of these theories is necessarily cursory and intended only to identify strains of thought embedded in conceptions of public employment to which whistleblower protection relates.

An examination of some of these strains of thought show their relationship to whistleblower protection. For purposes of illustration alone, these strains of thought together can be conceived as a vision of public service. This vision has different views than the dominant view of public employment law of employee loyalty, efficiency, freedom of expression of public employees, participation by them in agency administration, and public employees' role in democratic accountability. This vision also assumes that employees are motivated by a morality of role that stresses the obligations to the public of those who exercise public power.

The strains of thought from which this vision of public service can be perceived reflect theories from different historical periods. The theories themselves are not always consistent with one another because they rest upon different views of the ideal character of administration.¹⁰⁹ For our purposes, however, it is sufficient to suggest how they form a reservoir of ideas and arguments which coincide nicely with the ideas and arguments regarding whistleblower protection. This coincidence of ideas and arguments allows whistleblower protection to draw on existing conceptions of public employment, conceptions which magnify the challenge of whistleblower protection to public employment law.

The admonition that a public office is a public trust describes public employment in terms of fiduciary duty, that is, the obligation of one person to act on behalf of another.¹¹⁰ Conflict of interest provisions, in the United States, certainly support a duty to act on behalf of persons other than the management of an agency and, perhaps beyond a duty to act on behalf of the agency, to act on behalf of the government of which individual agencies are a part.¹¹¹ It is through this fiduciary duty that government employees act on behalf of the public.

This conception of loyalty reminds one of the Code of Ethics for Government Service discussed above. Like that code and the ethical standards contained

within it, this conception of employee loyalty is a broad one. Unlike those ethical standards on which whistleblowers relied, this conception of employee loyalty has legal effect and status as an important principle of public employment law.

A concept of efficiency relying upon unity of command rests in part upon the need to legitimise administration. Administrators are generally unelected and exercise considerable discretion only loosely controlled by legislative enactments. Unity of command links the democratic accountability of the executive and of the legislature to public employees more generally and offers a narrative which subjects public bureaucracies to legal control.¹¹² The heads of administrative and executive agencies are chosen by the President and confirmed by Congress. These persons are responsible to these democratically accountable bodies. In turn, they have the power to control their agencies and the personnel authority to ensure compliance by the agency's employees. This support for unity of command was melded with views of administration which emphasised machine-like efficiency with each employee functioning almost as a small cog in a larger machine.¹¹³

The 'New Deal' concept of administration rejected this machine analogy and adopted a model relying on the expertise of public employees.¹¹⁴ This emphasis on expertise provided not only a different view of efficiency — each employee now exercised considerable individual discretion and initiative within administration — but also a method of control of the bureaucracy — expertise and professional standards restrained the discretion of bureaucrats.

Beginning in the 1960s and 70s, public administration scholars also attacked the concept of efficiency arguing that centralisation and the control of information that it posited, reduced, rather than furthered, administrative efficiency.¹¹⁵ Moreover, efficiency could not be isolated from the obligation of public employees to follow democratic and constitutional norms.¹¹⁶ In a democratic society, these norms are inescapably incorporated into the role of the public employee. In becoming a public employee, one assumed an obligation to these norms.

With the demise of the view that public employment was a privilege, the grant of which could be conditioned on the surrender of an employee's constitutional rights, the courts began to apply constitutional protections, including freedom of expression, to public employees.¹¹⁷ The key Supreme Court decision in the United States regarding the free speech rights of public employees linked that right to the public's access to information and to democratic accountability.¹¹⁸

As scholars conceived of administration as politics, employee participation in administration became a restraint on a political process which often operated to benefit special interests at the expense of the public interest.¹¹⁹ An influential book on public administration argued that public bureaucracies should reflect

the composition of the constituencies that they served.¹²⁰ These views of administration rejected a passive role for public employees and defined their role to include advocacy within administration for the public interest.

Because public employee ethics can be conceived of as a type of role morality where the assumption of a position carries with it the obligation to support certain values and to adopt particular perceptions of appropriate behavior, these strains of thought could be incorporated into this role for public employees. The above examination of those strains of thought indicates why they fit well into a view of role morality. The appropriate role for a public employee is, of course, continually at issue, but the concept of role morality tends to buttress a view that public employees internalise and apply the most basic values of public service not from fear but from an acceptance of their role.

If the reservoir of ideas and arguments suggested by these strains of thought can be characterised as ‘a vision of public service’, that vision shares much with the challenge posed to public employment law by whistleblower protection. They both take a broad view of employee loyalty, reject unity of command, support employee freedom of expression, encourage participation in agency decision-making and recognise a central role for public employees in preservation of the rule of law and in democratic accountability. Therefore, as powerful as is the challenge posed by whistleblower protection, the connection of that challenge with this vision of public service magnifies its effect.

The Distinction between Public and Private Employment Law and Whistleblower Protection

The differences, or lack of them, between the protection of public and private sector whistleblowers probes the commonly drawn distinction between public and private employment law. Doubts about the validity of the distinction are part of a much more lengthy, and more generally articulated, critique of the distinction between what is public and what is private. These doubts also draw on the observation that the regulation of public and private employment increasingly rests upon statutes. These statutes do not vary significantly from public to private employment. In this context, the brief discussion here only plays some larger, well developed themes; it is a discussion that illustrates more than it expounds these themes.

For the purposes of this chapter, however, a discussion of whistleblower protection in public and private employment offers insights into the general thesis of this chapter — that whistleblower protection relies upon principles and precepts that challenge important concepts in public employment law. The application of those principles and precepts to private employment law ironically provides the last challenge to public employment law.

In the United States, although states address whistleblowers in the public and private sector in the same statutory provisions, many states address them separately. The statutes of jurisdictions which address separately the protection of whistleblowers in the public and private sectors approach the protections differently. These differences, however, are more likely to respond to practical differences in existing procedures in public and private employment law than to significant differences in the rationale for protection. Because the public employment system is more likely to have generated a broadly applicable uniform personnel and grievance system, public sector statutes show a greater preference for administrative procedures than do the private sector ones which are more likely to prefer judicial or other remedies.¹²¹ The preference for administrative redress also leads to a greater reliance on administrative remedies in public than private sector statutes. For example, it may be much easier administratively to discipline supervisors in a unified public employment disciplinary system than to do so in the more disjointed private sector.¹²² In private sector statutes, discipline is more likely to be through private suit or criminal prosecution.

Public sector whistleblower statutes rest upon the importance of access to government information. Although this rationale does not apply in the private sector, the differences in protected disclosures are not great.¹²³ Private sector statutes may be less likely to show the same concern with waste of funds or abuse of authority but other grounds for disclosure are quite similar. Private sector statutes are more likely to require internal disclosure than public sector ones and perhaps this difference reflects a desire to limit government interference in the private sector.¹²⁴

One could expect that the differences between public and private sector employment would create more dramatic differences between public and private sector whistleblower statutes. There simply does not appear to be substantial and dramatic differences in the ways in which these statutes conceive protection of public and private sector whistleblowers. The striking similarity in approach is also exhibited by the number of jurisdictions which protect public and private sector whistleblowers under the same statute.

The similarity of approach suggests that the principles of whistleblower protection which invest public employees with the obligation of preserving the public interest are also applied to private employment. Indeed, the first protections of private sector whistleblowers in the United States rested not on statute but on judicial decisions which created a public policy exception to the doctrine of at-will employment, a doctrine which otherwise permitted an employer to dismiss an employee for any reason.¹²⁵ The application of the principles of whistleblower protection to private employment produces some startling propositions, at least for lawyers in systems which apply different constitutional and legal protections to private employment. Like public

employees, private employees have a loyalty to the rule of law in a democratic society beyond any loyalty to their employers. They have an obligation to protect public health and safety. In addition, anti-corruption provisions rest upon equally startling propositions; for, they rely upon private employees to disclose corruption of public officials. These disclosures not only vindicate the rule of law but also provide access to information about the performance of government necessary to democratic accountability. In another sense, whistleblower statutes protect certain speech against regulation not by the government but by private employers.

The Australian statutes appear to draw clearer distinctions between whistleblowers who are public employees and those who are private employees. This clarity, however, does not weaken the conclusions regarding the similarities of public and private employment, previously drawn based on state laws in the United States.

Commonwealth legislation provides an example of the distinction between public and private employment. The *Public Service Act 1999* (Cth) provides that agency officials must not either victimise, or discriminate against, Australian Public Service employees who report breaches of the public service code of conduct.¹²⁶ The *Workplace Relations Act 1996* (Cth) prohibits employers covered by that legislation, generally corporate employers but also the Commonwealth as employer, from terminating a whistleblower's employment because of 'the filing of a complaint, or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities'.¹²⁷ These Commonwealth statutes can be characterised as ones that protect disclosures of the breaches of differing norms applicable to the employment relationships in the public and private sectors.

The laws of the Australian states, discussed previously, also vary in the coverage of employees in the public and private sectors. Some protect disclosures of official misconduct by any person in either the public or private sector.¹²⁸ Others protect disclosures only by public employees.¹²⁹ Those Australian statutes protecting disclosures by both public and private employees reflect a recognition of the overlap between the public and private sectors and of the difficulty of distinguishing between them.¹³⁰

However, the distinctions that these laws draw between employees in the public and private sectors do not alter the challenge that whistleblower protection poses to the concept of a public as opposed to a private employment law. These laws address the same problem of official corruption. Arguably the statutes applying only to public employees are striking not because they reflect a difference between public and private employment but rather, unlike many anti-corruption laws, they connect disclosures to employment. Therefore, these

laws confirm rather than weaken the conclusions based upon an examination of state whistleblower laws in the United States.

These propositions and principles impute to private employment many of the values associated throughout this chapter with public employment. In a practical sense, the insights provided by whistleblower protection provisions suggest a useful way to examine the issue of the privatisation of public functions. These insights should ease the task of regulating private employees in this context by using principles and concepts from public employment law.

An examination of how the principles and precepts of whistleblower protection challenge public employment law also exposes the similarities between public and private employment law. In discounting the distinctions between the two, whistleblower protection ironically poses perhaps its greatest challenge, a challenge to the very notion of a distinct public employment law.

ENDNOTES

¹ *Civil Service Reform Act of 1978*, Pub L No 95-454, 92 Stat 1111 (1978). See generally Robert G Vaughn, 'Statutory Protection of Whistleblowers in the Federal Executive Branch' [1982] *Illinois Law Review* 581.

² See below text at nn 26-28.

³ A discussion of subsequent amendments is found in Thomas Devine, 'The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent' (1999) 51 *Administrative Law Review* 531.

⁴ 5 USC § 2302(b)(9).

⁵ See, eg, *Parrish v Civil Service Commission*, 425 P 2d 223 (Cal, 1967); *Harley v Schuylkill County*, 476 F Supp 191 (ED Pa, 1979).

⁶ See generally, Robert G Vaughn, 'Public Employees and the Right to Disobey' (1977) 29 *Hastings Law Review* 261, 286-93.

⁷ Robert G Vaughn, 'State Whistleblower Statutes and the Future of Whistleblower Protection' (1999) 51 *Administrative Law Review* 581, 582 n 3.

⁸ See below text at nn 47-55.

⁹ See below text at nn 56-65.

¹⁰ Australia: *Public Service Act 1999* (Cth) sec 16 (Cth); *Public Interest Disclosure Act 1994* (ACT); *Protected Disclosures Act 1994* (NSW); *Whistleblowers Protection Act 1994* (Qld); *Whistleblowers Protection Act 1993* (SA); *Public Interest Disclosures Act 2002* (Tas) and *State Service Act 2000* (Tas), s 10(5); *Whistleblowers Protection Act 2001* (Vic); *Public Interest Disclosure Act 2003* (WA) and *Corruption and Crime Commission Act 2003* (WA); Canada: *Employment Standards Act*, NB 1982, c E-7.2 s 28; *Public Service Act*, O 1990, c 47 s 28.11-42; New Zealand: *Protected Disclosures Act 2000* (NZ); South Africa: *Protected Disclosures Act 2000* (SA); United Kingdom: *Public Interest Disclosure Act 1998* (UK).

¹¹ See below text at nn 67-78.

¹² M Wilding, 'The Professional Ethic of the Administrator' (1979) 34 *Management Services in Government* 181, 183. See generally Robert G Vaughn, 'The Role of Statutory Regulation of Public Service Ethics in Britain and the United States (1981) 4 *Hastings International and Comparative Law Review* 341.

¹³ Council of Europe, *Criminal Law Convention on Corruption*, Europ T S No 173 (27 January 1999); Council of Europe, *Civil Law Convention on Corruption*, Europ T S No 174 (24 November 1999); *Inter-American Convention Against Corruption*, opened for signature 29 March 1996, 35 ILM 724 (entered into force 6 March 1997).

¹⁴ World Bank, *Standards and Procedures for Inquiries and Investigations* (draft revision 1.1, (30 May 2000); European Commission, *Reforming the Commission*, Consultative Document CG3 (17 January 2000).

¹⁵ See below text at nn 47-52.

¹⁶ *Civil Service Reform Act of 1978*, Pub L No 95-454, 92 Stat 1111 (1978).

¹⁷ *Whistleblower Protection Act of 1989*, Pub L No 101-12, 103 Stat 16 (1989).

¹⁸ See generally, *Executive Session Hearings Before the Select Committee on Presidential Campaign Activity of the U. S. Senate*, 93rd Cong 2nd Sess (1974).

¹⁹ See generally, Robert G Vaughn, *Principles of Civil Service Law* (1977) § 1.4.

²⁰ *New York Times v US*, 403 US 713 (1971).

²¹ 5 USC § 2302(b)(8).

²² 5 USC §§ 1206-1207.

²³ See generally Robert G Vaughn, *Merit Systems Protection Board: Rights and Remedies* (revised ed, 2001).

²⁴ 'Theory X' in public administration asserts that employees must be coerced, manipulated and disciplined in order for them to work effectively. 'Theory Y', however, holds that employees will exercise self-restraint in pursuing goals with which they agree. For a more complete discussion of relationship of the Civil Service Reform Act to public administration theory, see Patricia Ingraham and David Rosenbloom (eds), *The Promise and Paradox of Civil Service Reform* (1992).

²⁵ *Ibid*.

²⁶ 5 USC § 1206(g).

²⁷ Another provision permits the Office of Special Counsel to pursue disciplinary actions for arbitrary and capricious withholding of information under the federal *Freedom of Information Act*, 5 USC § 1206(e)(1)(C) (1966).

²⁸ HR Con Res 175, 72 Stat B12 (1958).

²⁹ Because abuses of authority may rest upon internal delegations and practices not specified by law, rule or regulation, disclosures of such abuses may extend beyond those regarding violations of law.

³⁰ It is possible that a violation of law by a private party contracting with the government would so affect the mission of the government that disclosure of such a violation could be seen as addressing of violation of law by the government. As discussed below, specific and substantial dangers to public health and safety may concern the activities of private parties regulated by the government.

³¹ *Freedom of Information Act of 1966*, Pub L No 89-554, 80 Stat 383 (1966).

³² ALASKA STAT § 39.51.020.

³³ Hearings on S 1210 Before the Subcomm on Administrative Practice and Procedure of the Senate Comm on the Judiciary, 94th Congress, 1st Session (1975).

³⁴ 5 USC § 2302(b)(8).

³⁵ Vaughn, 'Statutory Protection of Whistleblowers in the Federal Executive Branch', above n 1, 637-641.

³⁶ *Ibid.* In one sense, the whistleblower provision may be more narrow than the First Amendment. The First Amendment protects opinions; the whistleblower provisions protect disclosures which reasonably evidence particular violations. Therefore, protected disclosures of whistleblowers must rely upon some factual grounds not required for the protection of opinion by the First Amendment. This difference may reflect the closer connection between whistleblower protection and access to government information.

³⁷ 5 USC § 2302(b)(8).

³⁸ Vaughn, 'Statutory Protection of Whistleblowers in the Federal Executive Branch', above n 1, 620-23.

³⁹ 5 USC § 1206 (b)(3)-(6).

⁴⁰ Vaughn, 'Statutory Protection of Whistleblowers in the Federal Executive Branch', above n 1, 620-23.

⁴¹ *Huffman v Office of Personnel Management*, 263 F 3d 1341, 1351 (Fed Cir, 2001), citing HR Rep No 100-413, 12-13 (1988).

⁴² Vaughn, 'Statutory Protection of Whistleblowers in the Federal Executive Branch', above n 1, 664-66. In these circumstances, the employee must disclose information acquired in the course of employment. This requirement suggests that other disclosures may rest upon information that the employee has otherwise acquired.

⁴³ Devine, above n 3.

⁴⁴ *Ibid* 554-55. The previous standard required that the protected disclosure be a substantial factor in the alleged retaliatory action.

⁴⁵ *Ibid* 556-58. The test is not whether the agency could have taken the personnel action absent the protected disclosure but whether it would have.

⁴⁶ 5 USC § 2302(b)(9).

⁴⁷ Vaughn, 'State Whistleblower Statutes and the Future of Whistleblower Protection', above n 7, 582 n 3.

⁴⁸ *Ibid.*

⁴⁹ *Ibid* 588 n 16. Most of these laws also protect disclosures regarding violations of rules and regulations.

⁵⁰ *Ibid* 589 n 17.

⁵¹ *Ibid* 589 n 18.

⁵² *Ibid* 592-93.

⁵³ *Ibid* 597.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* 599 n 57.

⁵⁶ *Ibid* 600.

⁵⁷ *Ibid* 600-01.

⁵⁸ *Ibid* 602.

⁵⁹ *Ibid* 603 n 70.

⁶⁰ Ibid 604 n 75.

⁶¹ Ibid 604 n 76.

⁶² Ibid 608-09. Some states permit whistleblowers to carry this burden of persuasion through reliance on the presumption that an adverse personnel action that closely follows a protected disclosure is taken because of that disclosure: Ibid 609. In most jurisdictions, employers may overcome the whistleblower's case by showing that action an independent ground for the action. The statutes appear to differ as to whether it is sufficient to show that the action could have been taken without the protected disclosure or whether it is necessary to demonstrate that action would have been taken in any event. Usually, the employer need only prove this ground by a preponderance of the evidence and not by clear and convincing evidence: Ibid 609-10.

⁶³ Ibid 617 n 130.

⁶⁴ Vaughn, *Merit Systems Protection Board: Rights and Remedies*, above n 23 § 16.03.

⁶⁵ Vaughn, 'State Whistleblower Statutes and the Future of Whistleblower Protection', above n 7, 619-20.

⁶⁶ See above n 10, 13-14.

⁶⁷ *Public Interest Disclosure Act 1998* (UK) c 23 ('Public Interest Disclosure Act').

⁶⁸ J Mitchell, *Constitutional Law* (1964) 176; E Wade and G Phillips, *Constitutional and Administrative Law* (1974) 106.

⁶⁹ Civil servants were anonymous and politically neutral. 'Parliamentary supremacy and ministerial responsibility deny the civil servant an appeal to some independent authority as the basis for doing something contrary to the minister's instructions': Vaughn, 'Statutory Regulation of Public Service Ethics in Great Britain and the United States', above n 12, 380 (footnote omitted).

⁷⁰ Wilding, above n 12, 183.

⁷¹ The Official Secrets Acts are several acts passed in 1888, 1911 and 1920. *Official Secrets Act 1911* (UK) c 28, s 2 prohibits civil servants and former civil servants from disclosing any government or government information to an unauthorised person.

⁷² J Michael, *The Politics of Secrecy: The Case for a Freedom of Information Law* (1979) 6.

⁷³ These arguments are built around weaknesses in the convention of ministerial responsibility and stress professional standards and civil servants' obligation to the law as the basis of whistleblower protection. See Vaughn, 'Statutory Regulation of Public Service Ethics in Great Britain and the United States', above n 12, 382-84 (discussing examples in Britain setting out these justifications).

⁷⁴ *Public Interest Disclosure Act 1998* (UK), c 23, s 43K(1)(b),(c), amending the *Employment Rights Act 1996* (UK) c 18. Members of the intelligence services, the army and police officers are excluded (although special provisions apply to the police). In addition, a minister may certify that a particular employee has duties implicating national security.

⁷⁵ Public Concern at Work, *Annotated Guide to the Public Interest Disclosure Act* (2003) <http://www.pcaw.co.uk/policy_pub/pida.html> [August 2007].

⁷⁶ *Freedom of Information Act 2000* (UK) c 36.

⁷⁷ *Public Interest Disclosure Act 1998* (UK) c 23, s 43J.

⁷⁸ Public Concern at Work, *Annotated Guide to the Public Interest Disclosure Act* (2003) <http://www.pcaw.co.uk/policy_pub/pida.html> [August 2007] referring to *Public Interest Disclosure Act*, ss 43J, 43B(2).

⁷⁹ Ibid.

⁸⁰ Ibid, referring to *Public Interest Disclosure Act 1998* (UK) c 23, s 43B(1).

⁸¹ *Public Interest Disclosure Act 1998* (UK) c 23, s 43C(1).

⁸² *Public Interest Disclosure Act 1998* (UK) c 23, s 43F.

⁸³ *Public Interest Disclosure Act 1998* (UK) c 23, s 43G(1)(b).

⁸⁴ *Public Interest Disclosure Act 1998* (UK) c 23, s 43G.

⁸⁵ *Public Interest Disclosure Act 1998* (UK) c 23, s 43G(2).

⁸⁶ *Public Interest Disclosure Act 1998* (UK) c 23, s 43G(3)(a)-(d).

⁸⁷ Council of Europe, *Civil Law Convention on Corruption*, Europ T S No 174 (24 November 1999).

⁸⁸ Council of Europe, *Criminal Law Convention on Corruption*, Europ T S No 173 (27 January 1999).

⁸⁹ *Inter-American Convention Against Corruption*, opened for signature 29 March 1996, 35 ILM 724 (entered into force 6 March 1997).

⁹⁰ Organization of American States, *Support for the Implementation of the Inter-American Convention Against Corruption in Central America, Non-Reimbursable Regional Technical Cooperation*, No ATN/SF-6184-RG. That model law is broader in scope than many whistleblower laws. See Thomas Devine, Keith Henderson and Robert Vaughn, *Model Law Protecting Freedom of Expression Against Corruption: Section-by-Section Explanatory Notes*, (2001); Robert G Vaughn, Thomas Devine and Keith Henderson, 'The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers' (2003) 35 *George Washington International Law Review* 857.

⁹¹ *Corruption and Crime Commission Act 2003* (WA).

⁹² *Corruption and Crime Commission Act 2003* (WA) s 4, definition of 'misconduct'.

⁹³ *Corruption and Crime Commission Act 2003* (WA) s 175.

⁹⁴ *Corruption and Crime Commission Act 2003* (WA) s 220. There is also protection from criminal liability (other than liability under the Act itself): s 220.

⁹⁵ *Protected Disclosures Act 1994* (NSW). Note the *Review of the Protected Disclosures Act 1994 Final Report*, November 2006, <www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/370027A06FBB2C77CA2572340012BDDC> [July 2007].

⁹⁶ *Protected Disclosures Act 1994* (NSW) s 3.

⁹⁷ *Protected Disclosures Act 1994* (NSW) ss 8-9.

⁹⁸ Disclosures may be made to the public agency affected by the misconduct or in varying circumstances to the Independent Commission Against Corruption, the Ombudsman, or to the Auditor-General: *Protected Disclosures Act 1994* (NSW) ss 10-12. Disclosures to the press or to members of Parliament are only protected in certain limited circumstances, after a previous disclosure of substantially the same information to an appropriate governmental body in circumstances that suggest that the allegations have been rejected or not timely considered: *Protected Disclosures Act 1994* (NSW) s 19. In addition, the employee must reasonably believe that the allegations are substantially true, and they are in fact substantially true: *Protected Disclosures Act 1994* (NSW) s 19(4), (5).

⁹⁹ *Whistleblowers Protection Act 1994* (Qld) s 8; *Whistleblowers Protection Act 1993* (SA) ss 3 (object) and, 4(1) 'public interest information' definition para (a)(iv) (also covers a substantial risk to the environment).

¹⁰⁰ *Whistleblowers Protection Act 1994* (Qld) s 10.

¹⁰¹ *Whistleblowers Protection Act 1993* (SA) s 5.

¹⁰² *Whistleblowers Protection Act 2001* (Vic) s 3(1); *Public Interest Disclosure Act 1994* (ACT) s 4.

¹⁰³ *Whistleblowers Protection Act 2001* (Vic) ss 6, 38; *Public Interest Disclosure Act 1994* (ACT) ss 15 (making a public interest disclosure) and 9 ('proper authorities').

¹⁰⁴ M R Goode, 'Policy Considerations in the Formulation of Whistleblowers Protection Legislation: The South Australian *Whistleblowers Protection Act 1993*' (2000) 22 *Adelaide Law Review* 27, 29.

¹⁰⁵ *Ibid* 43.

¹⁰⁶ *Ibid* 30-31.

¹⁰⁷ Given this characteristic of disclosures regarding corruption, it is surprising that a statute would limit protections to public employees: see, eg, *Protected Disclosures Act 1994* (NSW) ss 8-9.

¹⁰⁸ Vaughn, Devine and Henderson, above n 90.

¹⁰⁹ Thomas Sargentich describes three competing visions of administration — the rule of law ideal, the public purposes ideal and the democratic process ideal — that draw upon different strains of liberal political and economic theory: Thomas O Sargentich, 'The Reform of the American Administrative Process: The Contemporary Debate' [1984] *Wisconsin Law Review* 385. Gerald Frug relies upon critical legal theory to examine stories intended to assure us that bureaucracy is under control; these stories are the formalist model, the expertise model, the judicial review model, and the market/pluralist model: Gerald E Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harvard Law Review* 1276.

¹¹⁰ See generally Robert G Vaughn, *Conflict of Interest Regulation in the Federal Executive Branch* (1979) ch 1.

¹¹¹ For example, in US government-wide regulations prohibit any conduct which creates the appearance of using public office for private gain, giving preferential treatment to any person, impeding government efficiency or economy, losing complete independence or impartiality, making a government decision outside official channels, or adversely affecting the confidence of the public in the integrity of the government: 5 CFR § 735.201.

¹¹² Woodrow Wilson expressed this idea of unity of command in Woodrow Wilson, 'The Study of Administration' (1887) 2 *Political Science Quarterly* 197. Sargentich's analysis suggests that the rule of law ideal of administration places an emphasis on unity of command: Sargentich, above n 109, 397-407.

¹¹³ Frug, above n 109, 1297-1300.

¹¹⁴ Sargentich, above n 109, 410-415; Frug, above n 109, 1318-1323.

¹¹⁵ See, eg, Herbert Kaufman, *Administrative Feedback: Monitoring Subordinates' Behavior* (1973) 62-79 (centralisation could prevent the detection of widespread patterns of noncompliance); Anthony Downs, *Inside Bureaucracy* (1967) 71-74 (loyalty to a single leader creates second-rate subordinates); Warren Bennis, *Beyond Bureaucracy* (1966) 19-20, 188 (collaboration and shared leadership required in a social system operating under conditions of chronic change); Vincent Ostrom, *The Intellectual Crisis in American Public Administration* (1974) 136 (arguing for a system of democratic administration in which public employees consider, among other factors, the legal constraints of constitutional and public law).

¹¹⁶ John Rohr, *Ethics for Bureaucrats: An Essay on Law and Values* (1978) 59-76 (advocating the incorporation of democratic and constitutional values in administrative decisions).

¹¹⁷ See generally David H Rosenbloom, *The Federal Service and the Constitution: The Development of the Public Employment Relationship* (1971).

¹¹⁸ *Pickering v Board of Education*, 391 US 563 (1968).

¹¹⁹ Sargentich, above n 109, 425-28.

¹²⁰ Harry Kranz, *The Participatory Democracy* (1976).

¹²¹ Vaughn, 'State Whistleblower Statutes and the Future of Whistleblower Protection', above n 7, 624.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Nancy Modesitt and Daniel P Westman, *Whistleblowing: The Law of Retaliatory Discharge* (2004).

¹²⁶ *Public Service Act 1999* s 16 (Cth). Reporting alleged breaches is also protected in s 16.

¹²⁷ *Workplace Relations Act 1996* s 659 (Cth). The provision protecting whistleblowers adopts the language of the convention of termination of employment of the International Labor Organization: David Lewis, 'Employment Protection for Whistleblowers: On What Principles Should Australian Legislation Be Based?' (1996) 9 *Australian Journal of Labour Law* 135, 140.

¹²⁸ *Whistleblowers Protection Act 1993* (SA); *Whistleblowers Protection Act 2001* (Vic); *Corruption and Crime Commission Act 2003* (WA).

¹²⁹ *Protected Disclosures Act 1994* (NSW); *Whistleblowers Protection Act 1994* (Qld). (In the case of public interest disclosures, 'anybody' may make disclosures).

¹³⁰ Goode, 'Policy Considerations in the Formulation of Whistleblowers Protection Legislation', above n 104, 30-31. Not only were the lines between the public and private sectors blurred at the time of the passage of these provisions, but also were likely to become more so in the future with privatisation and contracting out.