Lessons from the Norwegian Whistleblowing Law

- A Sociohistorical Governmentality Analysis on the Development of the Norwegian Law on Whistleblowing from 2007

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RESUMÉ

I 2007 kom det endelige utfallet av en 8 år lang prosess om varsling. Lov om varsling ble vedtatt som en del av Arbeidsmiljøloven med et uttalt ønske om å styrke ansattes ytringsfrihet, samt fremme et godt samarbeidsklima og åpenhet i norske bedrifter. 2017 markerte lovens ti-årsjubileum. I denne ti år lange perioden har loven vært sterkt kritisert av varslere, forskere og ledende samfunnsdebattanter. Særlig har kritikerne hevdet at loven ikke evner å leve opp til de overnevnte intensjoner. Med bakgrunn i et pågående arbeid som skal revidere dagens lovgivning om varsling søker denne oppgaven å finne ut hvorfor loven er blitt så kraftig kritisert. Herunder, hva er det loven ønsker å løse og hvordan klarer varslingsloven å løse disse utfordringene. Gjennom en induktiv governmentality-analyse basert på Mitchell Deans rammeverk søker denne analysen å undersøke utviklingshistorien til varslingsloven fra 2007. Gjennom kvalitativ tekstanalyse av monumentale dokumenter, fra tre forskjellige forvaltningsprosesser, analyserer denne oppgaven seg frem til kontinuiteter og diskontinuiteter som formet det endelige lovforslag. Funnene i oppgaven tilsier at den første perioden tilkjennegir store diskursive bevegelser om varsling. Varsling opprettes som et unntak til lojalitetsplikten for ansatte som en normerende panoptisk teknikk for å unngå mislighold i bedrifter. I den andre perioden formes varsling innenfor en biopolitisk ramme, hvor midlertidig lov om varsling skal hindre utfrysing og skader fra arbeidsplassen. I den tredje og avsluttende perioden er ønsket om risikominimering fremtredende. Det endelige lovforslag søker å beskytte bedrifter fra potensielle tap forårsaket av uinformert eller uforsvarlig varsling. Til dette formål opprettes et regime for å fremheve «forsvarlig varsling». Et begrep med underliggende målefaktorer for korrekt fremtreden, som oppretter en ny panoptisk teknikk rettet mot å styre varsling. Utfordringen med denne tilnærming til varsling er at man undergraver den panoptiske effekt varsling i utgangspunktet har for å unngå ulovlig eller uetisk praksis i organisasjonslivet. Når varsling omdefineres fra et statlig styringsredskap til et organisatorisk verktøy fjerner man statens rolle og evne til å ettergå bedriftene. Noe som igjen fører til at ansatte ikke føler seg beskyttet eller ivaretatt av varslingsloven. Manglende forståelse og fokus fra beslutningstakere på den normerende effekt varsling har som et panoptisk verktøy undergraver status og beskyttelse for varslere – noe som, sammen med andre funn, kan forklare kritikken mot varslingsloven.

Outline

1 Introduction

Whistleblowing, in recent years, has seen a resurgence in international politics, on national agendas and in organizational management. The names of Edward Snowden and Chelsea Manning have dominated international coverage on the subject. This paper, however, takes a step back from the international scene and focuses on Norwegian public policy on whistleblowing. Specifically, this paper aims to understand the development of laws on whistleblowing to the Norwegian Working Environment Act (WEA), ratified January 2007. When implemented, the law was hailed as one of Europe's most progressive laws on whistleblowing as it was aimed at protecting employees who speak out against critique-worthy conditions at the workplace and facilitate an open environment of cooperation at the workplace (Innst. O. nr. 6, (2006-2007), 2006, p.9) (Jarbo, 2017).

The natural starting point of the new law finds its origins in Norway's revision of §100 to the constitution, regulating freedom of speech. The first Official Government Report on this revision came in 1999, mentioning whistleblowing specifically as one key area of assessment. Through this and two other legislative periods of policy proposals, whistleblowing was finally ratified in 2007. In January 2017, the law had remained untouched for exactly ten years but is now set for a revision as of November 11th 2016 (Jarbo, 2017). This revision is due no later than March 2018, with some minor temporary changes ratified June 16th 2017 (Jarbo, 2017)(WEA §2 A (1-4)).

This thesis is meant to provide a social science perspective on the critique of the law by analyzing the complex and challenging development of the law ratified in 2007. In such, we will not occupy ourselves with the temporary law from 2017 nor the current undertakings in The Ministry of Labor and Social Affairs. Instead, this paper will compare and contrast the three public policy periods from 1999-2006 through a governmentality analysis inspired by Michel Foucault. Based on an analytical framework developed by Mitchell Dean, I will aim to understand the socio-historical developments of the law and see how a multiplicity of ideas and policy proposals shaped the final legislation. The telos ("*the mode of being we hope to create*") (Dean, 1995a, p. 565) from the 2007 Norwegian law on whistleblowing proposes a society where whistleblowers are a fundamental part of an open democracy and inclusive labor market. Ultimately, however, the final legislation is primarily occupied with facilitating risk management of businesses in cases of whistleblowing. It is this mismatch between the telos and the actuality of the law this paper seeks to understand, through

a Foucauldian governmentality analysis applying an inductive textual analysis of the policy documents relevant to the law from 2007.

In order to research the development of public policy on whistleblowing I have applied four research questions derived from Mitchell Dean to three documents from each of the three above-mentioned periods. By inductive reading of the nine documents, I have asked: what do they seek to govern, how do they seek to govern, why do they seek the subject's involvement and who are we to become (telos) (p. 572-579). This approach allows for observation of continuities and discontinuities between the different periods, but it also allows observation in between the different documents within each period. This enables us to identify the key issues in the legislative work and pinpoint its onset.

The findings suggest substantial variation between periods on policy goals, proposals, and conceptualization of whistleblowing. In the first period, revision of §100 to the constitution, set the stage for whistleblowing as an exception to an exception and as a panoptic tool of the state. The second period, the revision of the WEA, established whistleblowing as a biopolitical asset to prevent harassment and ostracising at the workplace. Establishing whistleblowing to the public as a right and protecting whistleblowers from retribution became inherent to facilitate increased whistleblowing. Policy in the third period came as a reaction to the unhinged legislation from the second period. It became vital to circumvent the damage potential ignorant whistleblowing might have on businesses. A risk management approach introduced "reasonability" as a concept to prevent and assess wrongful whistleblowing. In terms of telos, it seems that the conceptualizations, goals and proposals from the first two periods were too hard to disregard in the third period. Instead, the telos from these two periods remained while policy changed. This explains the mismatch between telos of government and current opinion and scholarly critique of the law.

The findings in this analysis suggests that the 2007 law on whistleblowing aligns itself with the international development of laws regulating whistleblowing. Whistleblowing is removed from its classical interpretation as a democratic tool and panoptic technique of government. Instead, whistleblowing is reimagined as an organizational tool aimed at minimizing risks within organizations. Essentially, this is not an issue from a public policy standpoint, however, failing to provide proper checks on organizations undermines the panoptic value whistleblowing provides in public governance.

1.1 History

In 2006, the Norwegian government proposed and implemented a new law to ensure rules and regulations on whistleblowing - governing all public and private organizations, businesses, and public offices. Laws regulating whistleblowing came in response to a revision of §100 to the Norwegian Constitution. Changes made in the 2004 constitutional revision facilitated a change from freedom of printing acts to freedom of expression and or freedom of speech. Employees' freedom of speech and whistleblowing became a topic in the constitution when considering limitations to freedom of speech. Employees' freedom of speech was not included in the constitution; rather, employees were given the same protection as the population in general. Limitations to freedom of speech for employees would demand legal legitimacy elsewhere. The ratification of the new constitution asked that employee's freedom of speech and whistleblowing be regulated in a planned revision of the WEA.

The first revision of the WEA, completed June 2005, failed to provide a complete legislation on whistleblowing. Instead, providing a temporary legislation on whistleblowing protecting whistleblowers from reprisals and establishing public whistleblowing as a right. The last process conducted a full conceptualization on whistleblowing delivering their proposals to parliament in late 2006. On January 1st 2007 the law came into effect, with changes and new law to WEA § 2-4, 2-5, 3-6, 13-8, 13-9 and 18-6.

1.1.1 High Profile Cases

Since its onset in 2007, the law has met repeated criticism from whistleblowers and scholars. This has become increasingly evident with several high-profile cases in recent years. One of the most prevalent such cases was the "Norweld"-case from 2007. The whistleblower, Pål Stenstad, who, first lost then, won a court case against the company he worked for, gave the following statement in an interview from 2014:

"But I did not really feel like a winner. I felt humiliated and ridiculed by completely false narratives and statements from the court, and the opposing side's trivilatisation of utterances on very serious conditions. ... In addition, it was pretty coincidental that I, as the first – and maybe, until now, only (whistleblower)[1] – won my case according to the law on whistleblowing. Without support from whistleblower Per Yngve Monsen and having an outstanding

[1] «Whistleblower» added for clarity

lawyer, Trygve Staff, it could have unfolded differently. To do your public duty and whistleblow about serious errors are like playing Russian roulette. … It could become expensive and unpleasant, and there is no guarantee for it actually helping. Even if you are right." (Kirkebøen, 2014) (own translation).

Essentially, his argument is that the current law is unable to facilitate protection for whistleblowers. His experience with whistleblowing left him with a three year battle against his former employer – spending a substantial amount of money out of pocket (Kirkebøen, 2014). 7 years later, at the time of this interview, his findings had still not been tended to: *"It is politically correct to say that we want whistleblowers and whistleblowing. But that is not the actualities. My whistleblowing has not been taken seriously. It has fallen short even though I won the court-case."* (Kirkebøen, 2014) (own translation). If we take his opinions at face value, his critique of the law is two-fold. One, the law encourages whistleblowing, but does little to protect actual whistleblowers. Second, the law is unable to enforce change to rectify the findings of the whistleblower. His closing statement is that whistleblowers should refrain from speaking out on findings. If you, as an employee, do not have the moral conviction to witness these findings – change job. It will save you a costly personal and financial legal battle without any guarantee that you will win, nor be able to rectify the conditions in question (Kirkebøen, 2014).

In the same year, 2014, another high profile whistleblower case, the "Monika"-case, furthered the arguments of Pål Stenstad. Even though, in this instance, the condition was fixed, the whistleblower experienced a similar story to that of Pål Stenstad. In the period where the police investigator gathered information and whistleblew internally, he experienced several repercussions for his actions. However, in the final decision from the Attorney General, top management at the Bergen Police District were cleared of all charges (Otterlei, 2017). The whistleblower, in a letter appealing the decision, argued that the Attorney General had taken little consideration of the statements made by the whistleblower about how he felt treated. In addition, him and his lawyer argued that the Attorney General had redefined what whistleblowing is in an attempt to omit the laws on whistleblowing (Otterlei, 2017). Even though the whistleblower was awarded a compensation in an earlier court-case, failure to prosecute top-management in the municipality Police District (for their actions against the whistleblower) could potentially jeopardize future legal protection of whistleblowers (Otterlei, 2017). In sum, in both the *Norweld*- and *Monika*-case, there seems to be a discord between the intention of the law and the outcomes for whistleblowers.

1.1.2 Academic Works on Whistleblowing

Whistleblowing is an interdisciplinary topic of research spanning across various scientific fields, such as law, political science, social science, behavioural psychology and organizational theory among others. For this paper, I will highlight research in social science and law, which has inspired this analysis. These works establish natural boundaries, as well as, supporting arguments to the findings in this thesis.

Birthe Eriksen, one of the key legal experts on whistleblowing in Norway, recently published her Ph.D.-thesis on the whistleblowing law in relation to current legal practice. In this thesis, she argues that the law on whistleblowing is effective at uncovering corruption, but argues that there are some inherent problems with the protection of whistleblowers and complexity.

> *"Despite the existence of a close relationsship between the rules in the WEA on protection of whistleblowers and the normative responsibility of the employer, there seems to be inconsistency and unnecessary uncertainty connected to the application of these laws when regulating conditions for employees."* (Eriksen, 2016a, p. 154) (own translation).

She argues that Norwegian judicial practice pay little attention to whistleblowing as an effective mechanism for uncovering and preventing critique-worthy conditions (p. 155). Instead, whistleblowing is caught up in, what she considers a classical dichotomy between loyalty to ones employer and freedom of speech (p. 155). This approach to whistleblowing emphasizes the approach of the whistleblower, rather than the emphasising the importance in the information provided. In one of her recent books, she furthers this argument by emphasising that the more effective and safe whistleblowing appears in society, the more effective it will become as a tool, however, with recent court cases and negative media attention its effectiveness is rapidly declining (Eriksen, 2014, pp. 171-172 & 201-203). Most recently she, in her personal blog, comments on the development in the "Monika- case" mentioned above (Eriksen, 2016b). Her observation on the verdict by the Attorney General is that it fails to comment and make judgment on some of the inherent flaws in the whistleblowing law. She argues that the Attorney General is not willing to comment on the power structures inherent in the law, arguing that, from an academic viewpoint, we need to look at the inherent power structures within the law and distinguish the power dynamics whistleblowing establishes.

One thing is how whistleblowing manifests itself in the court system. The other is its reception in society. In a social science report from 2016, a quantitative analysis investigated how whis-

tleblowing manifested itself in the Norwegian labor market. The findings suggests that the law on whistleblowing is not able to facilitate better or more whistleblowing. In figure 1.1, these findings are represented in the column furthest to the right – compared to previous studies. The 2016 report highlights a downward trend in whistleblowing effectiveness, increase in reprisals and a reduction in terms of how many would whistle blow again. In conclusion, drawing upon these numbers, the report concludes that there is reason to be concerned about the developments related to the Norwegian labour market and whistleblowing in general (p. 57). Findings in this report and findings from Eriksen seem to confirm, at least partially, that there are discrepancies in between what the law sets out to do and what it is actually able to accomplish. In part, it seems that it fails to meet the goals presented: protecting whistleblowers and facilitating an open environment of cooperation at the workplace.

Figure 1.1

Table 7.1 Findings from studies conducted during the period 2006–2016.

	SSB LKU 2006	Matthiesen et al. 2008	Trygstad 2010	Bjørkelo et al. 2010	Status for freedom of speech 2013	Trygstad & Ødegård 2016
Sample	Norwegian labour market	Norwegian labour market	Norwegian labour market	Norwegian labour market	Norwegian labour market	Norwegian labour market
Whistleblowing activity	77%	55%	53%	12% *	64%	53%
Whistleblowing effectiveness	-	51%	50%	59%	52%	36%
Exposed to reprisals	12%	18%	13%	7%	15%	25%
Proportion that would blow the whistle again?	-	81%	82%	-	84%	71%

* The percentage has been estimated on the basis of the sample, not on the basis of those familiar with reprehensible conditions in the workplace.

Retrieved from the English Summary of (Trygstad & Ødegård, 2016).

1.2 Abbreviations

WEA: The Norwegian Working Environment Act

A collection of laws regulating working environment, employment protection and working hours.

HSE: Health, Safety and Environment-regulations

Regulations primarily, but not limited to encompassing the goals, routines, and policies presented in the WEA.

NOU: "Norsk Offentlig Utredning" [Norwegian Official Government Report]

A report developed by a committee or panel, on behalf of the government, parliament or a specific ministry.

St.meld.: "Stortingsmelding" [Official Norwegian Government White Paper]

A term used to describe Official Norwegian Government White papers. St.meld. explains a proposal to parliament before it is handed over to a specific standing committee in parliament.

Ot.prp.: "Odelstingsproposisjon" [Official Norwegian Government White Paper]

A term used to describe Official Norwegian Government White papers regarding legal proposals. The intent of the Ot.prp. was to give parliament an explanation of proposals to new legislation. As with a St.meld,. a relevant standing committee reviews the white paper and comes up with a final proposal presented to parliament.

Innst.: "Innstilling" [Official Proposal to Parliament]

Innst. is the final proposal to parliament by the relevant standing committee. The standing committee is comprised of member's from parliament specialized within a certain field. The proposal is the last revision of the proposals in the policy process before the debate and voting process in parliament.

1.3 Research Questions and Point of Observation:

Research Question 1: *What challenges does the policy process seek to govern in terms of whistleblowing and are their solutions equipped to overcome these challenges?*	**Research Question 2**: *How can we understand the mismatch between the telos of policy on whistleblowing from 2007 and the actualities described by whistleblowers and scholars?*

In order to take a step back and understand the conditioning of the whistleblower law, I have chosen an inductive approach to the analysis. Instead of trying to prove a hypothesis, this analysis wants to comment on the choices made in the policy process and investigate potential challenges to the law. In this analysis, I have chosen to focus my attention on the observations made by the whistleblowers and scholars mentioned above. I am not necessarily out to confirm if these observations are true or not, nevertheless, these observations exemplify that there are discrepancies and mismatches worth investigating. This paper sets out to establish where this mismatch comes from and if we can understand the existence of this discrepancy from the development process of the law. In such, my research will not necessarily look into whether or not the law is a success. It may or may not be depending on whom you ask and what their rationalization of whistleblowing may be.

My first question therefore surrounds itself around what the law is setting out to achieve and how it seeks to overcome the inherent paradoxes of whistleblowing. In addition, are these measures sufficient in governing what they set out to do? The second question aims to understand the perception of the whistleblowing law and the critique it has received by whistleblowers and scholars. By looking at the development of the law on whistleblowing, can we explain how some feel betrayed by the actuality of the law in relation to what was promised? These two questions will not have a definitive answer, but will result in several findings that may explain the challenges inherent to the whistleblowing law. This knowledge might provide us with insight and prescriptive input on future policy on whistleblowing.

1.3.1 Point of Observation:

My point of observation will be the developments in the public policy process from 1999-2006, establishing Norwegian law and policy on whistleblowing, finalized with the ratification of a law on whistleblowing to the Norwegian Working Environment Act from 2007.

2 Scientific and Theoretical Approach

Primarily this analysis will build upon the theoretical framework of Michel Foucault and his concepts of *governmentality* and *dispositif*. The theoretical framework below will serve as the optic through which the empirical data is analyzed. The application of this optic will primarily base itself on Foucault's writing, with an analytical framework by Mitchell Dean.

2.1 Empirical Considerations

Foucault's writing on empirical considerations was primarily linked to his discussions on the validity of genealogy and discourse studies (Villadsen, 2006, pp. 94-95). As this paper takes a governmentality approach to public policy analysis, we will draw on governmentality developments made by Villadsen and Dean. Villadsen argues that the principles laid out by Focuault on discourse analysis serve well as a framework for policy text analysis (Villadsen, 2015, p. 157). In the following, I will explain the empirical considerations promoted by Foucault and later outline my own approach to the empirical data.

Foucault takes a hardline approach to empirical considerations. He argues that we need to read everything in order to fully understand the totality of what we are investigating (Villadsen, 2006, p. 101). In an interview, he says that his method involves "casual multiplication" in that every event we examine needs to be understood in the context of its milieu:

> *"...rediscovering the connections, encounters, supports, blockages, plays of forces, strategies and so on which at a given moment establish what subsequently counts as being self-evident, universal and necessary. In this sense, one is indeed effecting a sort of multiplication or pluralization of causes." (Foucault, 1991, p. 76).*

This multiplication effect is inherent in any Foucault-analysis as his access to discourse analysis is not that of singularity but of a pluralist view of discourses working together (Foucault, 1991, pp. 53-54). In a genealogical study, we need to build up an archive of archeological cuts relevant to describing the continuities and discontinuities within a certain phenomenon (Villadsen, 2006, pp. 94-95). An analysis then needs to encompass all that which affects the discourse in question. However, in practice, this is far from applicable. Instead, Foucault argues that we need to look at the analysis as a first draft within a specific discourse. The analysis will likely find new approaches to the subject and later need to build on its corpus in order to encompass new findings in another work (Foucault, 1970, p. 161). Hence, the analysis needs to be able to limit the study in three instances.

That of *theme, monumental texts,* and *time-period*. I will in the following outline these three empirical limitations with regards to Foucault.

Foucault, in The Archeology of Knowledge from 1972, says that an analysis needs to limit its scope to *"A provisional division … adopted as an initial approximation"* (Foucault, 1972, p. 29). Such an analysis need to select an empirical region or theme where "in which the relations are likely to be numerous, dense, and relatively easy to describe" (p. 29). Second, we need to take into account the totality of laws and formal structures of a discourse in order to fully understand its inner workings. Only focusing on the subject would not be fruitful – requiring the addition of supporting factor or other factors of impact (pp. 29-30). Last, we need to take into account all those who have made the subject, the discourse, their object of analysis and/ or part of their *"field of knowledge"* (p. 30).

Second, documents considered valid in an analysis need to be considered monuments. Foucault argues that monumental documents are those documents that have become part of our common history. Documents pertaining ideas that are given their own particular time and place in history (pp. 7, 138). Such monumental texts outline the discourse, its rules regulations, and continuities. Second, they are typically reflexive works – works that try to position themselves in the discourse by looking at former practices and challenges and coming up with new solutions. Often times, these are white papers, research, reports, evaluations, or new institutions (Villadsen, 2006, pp. 101-102).

The last empirical consideration is that of time-period. In a genealogical study, we are not aiming at a historical account of every event leading to the present. Instead, we are aiming to tell the story of how something came about through various events and its linkages as continuities and discontinuities (Villadsen, 2006, p. 100). The same holds true in discourse analysis, where it is often futile to pinpoint an exact origin. Instead, it is up to the researcher to highlight the event in which the discourse first establishes itself as a distinctive discourse. From this point, we can trace back in time, and follow its development until the discourse reaches a circular referential state (Villadsen, 2006, p. 101).

The topic is still in its infancy and the possibilities for an analysis is endless. Hence, limiting the theme of the paper has been of the essence. For the purpose of this paper, I have limited the theme to the creation of policy on whistleblowing, finished in 2007. In 2017, it was ten years since Norway introduced the law on whistleblowing. In recent years, several court cases and news arti-

cles, along with scholarly works, have drawn attention to the law. Quantitative social science papers have shown that the law is not able to ensure the well-being of whistleblowers, nor promoting more whistleblowing (Trygstad & Ødegård, 2016). In addition, the legal system was not properly able to deal with whistleblowing (Eriksen, 2016a). From these articles, the topic can be narrowed down to a very specific theme. In such, the analysis focuses on the socio-historic development of the whistleblowing law and the social constructs implicit in its design. This analysis, then, is still relatively broad, but encompasses aspects of whistleblowing in Norway not covered by former studies. In such, this paper aims to link the findings in the quantitative sociological studies of Trygstad & Ødegård and the legal findings in Eriksen's PhD-thesis.

For time-period, the empirical starting point will be the Official Norwegian Government report on the revision of §100 to the Norwegian constitution. It serves as a natural starting point for the legislation on employee's freedom of speech and whistleblowing. The policies and ideas presented here shape future work on whistleblowing. From this point on, we will follow the discursive movements present in subsequent documents, over three distinct time periods/ policy processes up until the final law on whistleblowing was ratified in 2007. For the purpose of this paper, and with the still undecided fate of the law, this is the natural end-point, to research the socio-historical developments of this policy. It is my assessment that this time-period allows for the multiplication of documents and the proliferation of referential texts, while at the same time narrowing down the analysis to a scale coherently able to trace the emergence of the policy on whistleblowing. Including all important documents in the three policy process's allows for comparing and contrasting continuities and discontinuities between the three periods, but also highlight variations between documents within the same period. Being a governmentality analysis following all three periods is not a requirement but, as we will see in the analysis, following the continuities and discontinuities from 1999-2007 provides substantially greater insight into what was actually at stake in policymaking on whistleblowing. The three periods I mention here are naturally divided between the policy work on a new §100 to the constitution, the revision of the WEA, and a specific work on policy regarding whistleblowing to the WEA.

Foucault's emphasis on monumental text has shaped the selection of documents available to the study. I will draw on documents that become self-referential and stand out as fundamental in the creation of the whistleblowing law. Choice has fallen upon Official Government White Papers, Official Government Reports and Official Political Proposals in the relevant period. Documents are

chosen based on their appearances in the following works and impact on the creation of the law. Limitations in terms of theme have also excluded the EU-legislation on freedom of speech, as its main intent is not to detail whistleblowing in Norway specifically. The Parliamentary discussions following each period provide interesting insights, but will primarily be used to underline tensions and findings already present in the other documents.

These considerations all accentuate the topic at hand and provides a focus to the analysis. Nevertheless, it also excludes potential findings, approaches and evidence that might have been able to elevate the analysis further or improved accuracy. This creates blank spots where the analysis is not able to see what it cannot see. By excluding the international milieu, limiting the time period to 1999-2007, and focusing only on what I have considered to be monumental texts, I am aware that I omit potentially important insights into the decision making on whistleblowing. But for the parsimony of this paper there is a need for *"a provisional division"* able to include that which is to be analyzed but, at the same time, shed interesting material that would serve better in another analysis with a different angle of approach (Foucault, 1972, p. 29). Nevertheless, the most important aspect with these empirical considerations is to be aware of their inherent limitations and be vigilant in terms of the boundaries of the analysis. No analysis will fully be able to encompass everything, in such an analysis only becomes part of the multiplication-effect Foucault emphasized.

2.2 Governmentality

The concept of governmentality was developed at the end of Foucault's analysis of the historical developments of political governance in Europe. A genealogical study of the developments from the sovereign king to modern democracy and neo-liberal rule. A liberal rule he coins "Governmentality". Governmentality is described as a shift in political attention from control over territory and resources, to focusing controlling the population (Villadsen 2015, p. 147). The population is to be governed by *"self-regulating mechanism"*, by a set of ideas, norm- and educational systems, which, work in conjunction with the state apparatus of police and judicial system that all influence the population to regulate themselves (p. 147). Foucault argues: *"To govern ... is to structure the possible field of actions of others."* (Foucault, 1982, p. 790). In such, governmentality is not to control every aspect of human life; rather it is the practice of laying out the playing field in plain view for the population to see. A playing field with apparent boundaries and rules. The population is then free to interpret and act according to the rules of the game – gaining a sense of freedom and agency in the process.

Governmentality is the conceptualization of governmental practices in a neo-liberal society. A society that:

"is not at all the ideal or project of an exhaustively disciplinary society in which the legal network hemming in individuals is taken over and extended internally by, let's say, normative mechanisms. Nor is it a society in which a mechanism of general normalization and the exclusion and of those who cannot be normalized is needed. On the horizon of this analysis we see instead the image, idea, or theme-program of a society in which there is an optimization of system of difference in which the field is left open to fluctuating processes, in which minority individuals and practices are tolerated, in which action is brought to bear on the rules of the game rather than on the players, and finally in which there is an environmental type of intervention instead of the internal subjugation of individuals." (Foucault, 2008, p. 259-260).

Herein lies the fundamental differences between the new liberal society and the old sovereign rule. The liberal art of government is a critique of the sovereign state and its tedious and inhibiting focus on controlling the population through subjugation. The liberal government, rather, promotes modern forms of government creating an environment and ideals, which promotes certain actions and deters others. The sovereign must accept fluctuating processes leaving room for individualism while moving society towards the ideal. In essence, governmentality is a form of government focused on creating an ideal, setting up guiding principles (norms) and allowing for individual adjustments so that the population adheres to the ideal autonomously, while at the same time experiencing greater individual freedom and autonomy.

Governmentality as a concept opens up an analytical doorway to the understanding of government in modern liberal society. The analytical strength of governmentality is twofold. First, it gives us the ability to include freedom as a factor in the analysis. Often, freedom is not only present in policy but is rather a precondition for the coming about of new policy. Foucault argues that power and freedom cannot be separated. As power can only be *"exercised over free subjects, and only insofar as they are free."* (Foucault, 1982, p. 790). In slavery or forced labor power is not used to control or sway subjects to adhere. Instead, violence is applied to bring about subjugation. This is not a power relationship but a relationship of violence. Secondly, the analytical strength of governmentality lies in its ability to go beyond the face value of the state, its institutions, and its policies. Instead, the optics provided by governmentality can analyze the system as a whole to look at the various techniques, ideas, and mechanisms that are built into the system. Techniques not necessarily working in conjunction with others.

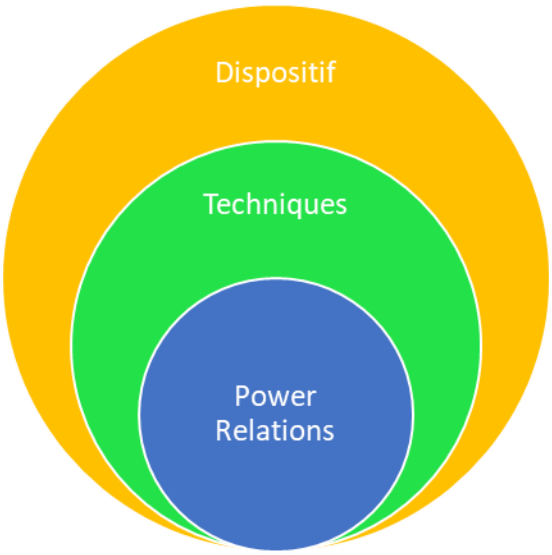
"Society has become governmentalized, which entails that there are put in place a jumble of intentional and unintentional forms of government between the state and population, where it is not feasible to separate laws from political strategies, economic regulation, institutional interests, calculation statistics or arbitrary events…" (Høilund, 2010, p. 53) (own translation).

A governmentality analysis, then, seeks to understand the problem-solving in state policy to overcome this jumble of governmental techniques. It analyzes strategies for dealing with challenges related to establishing governance and for the future development of such state policies. In a governmentality analysis, the state is seen as *"nothing more than the 'accumulated effect' of series of practices"* (Villadsen, 2015, p.149-150).

2.3 Dispositif, Techniques, and Power Relations

After establishing governmentality as a concept, we will here seek to understand the three levels of analysis in governmentality: power relations, techniques and dispositif. Power relations are the fundamental manifestation of power dynamics, the micro-level interactions between agents. Techniques are the various meso-level regulations, norms, and institutions, put in place to regulate the space of power relations. Dispositif, in this context, are macro-level societal strategies, guiding the development of both power relations and techniques.

Figure 2.1



[2]

[2] Figure 2.1, reinterpreted with inspiration from Almassy, Basby, and Norstrand, 2016.

2.3.1 Dispositif

Dispositif is at the macro-level of a governmentality analysis. This macro-level analysis tool will be prevalent throughout this thesis and for that reason it is important to provide a clear concept of how I will apply it in this thesis. Foucault does not quite help us in clearly defining what he means by dispositif. His own use of the term does not appear consistent and nor sufficiently explained (Villadsen, 2013, p. 59). Foucault, in an interview, describes the dispositif (here apparatus) as follows:

> *"What I'm trying to pick out with this term is, firstly, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions–in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be established between these elements." (Foucault, 1980: 194).*

In essence, that he is describing, is a macro-level constellation of discourses and ideas forming a heterogeneous concept. Nevertheless, the lack of clarity on dispositif has established a substantial scholarly debate over the term and its application. In this paper, I adhere to the interpretation of dispositif as a Foucault concept for socio-historical analytics as developed by Raffnsøe & Gudmand-Høyer. The apparatus, dispositif, is the established relationship between the various power relations in a society. It is the conceptualization of power relation interplay – archetypes of governmental considerations guiding the development of new policy and power structures (Raffnsøe & Gudmand-Høyer, 2014, p. 158). Raffnsøe & Gudmand-Høyer argue that the dispositif should be seen as a archetypes of fundamental societal ideas that make *"certain social inclinations more likely than others"* (2014, p. 155) (own translation). Dispositifs are societal concepts consisting of an array of discourses and concepts more or less clearly defined. Raffnsøe & Høyer argue that an analysis of the building blocks (discourses, institutions, philosophical statements etc.) of a dispositif is able to, in retrospect, develop historically how a certain societal rationalities or constructs have come about.

This approach by Raffnsøe & Gudmand-Høyer aligns with Mitchell Dean's approach to dispositif. Dean conceptualizes dispositif as governmental tools or more specifically referring to them as "economies of power" (Dean, 2013, p. 46). Dean argues that a dispositif analysis, "is more complex, less functionalist, and certainly less epochal" than other forms of Foucault analysis (Dean, 2013, p. 49). Using dispositif as a level of analysis makes us able to grasp the signature of power in a liberal society, where liberalism operates with a critique of power as its form of power (Dean,

2013, p. 51). We can look beyond the sovereign power of the state and pinpoint the elements behind a policy. Especially in periods of emergency such as Foucault's example of the food shortage as a driving factor in French politics in the late eighteenth century (Foucault, 2007, p. 30).

Foucault says to look for the interplay between dispositifs and *"the system of correlation"* between them, using it as a level of analysis for understanding its history, development, and manifestation in society (Foucault, 2007, p. 8). In essence, intrinsic to dispositif analysis is to understand how different dispositifs might work together or are shaped by interaction with other dispositif. The interplay between them determines if dispositifs are able to co-exist or if they condition other dispositif within their own framework or ensemble of discourses (Raffnsøe & Gudmand-Høyer, 2014, p. 159). The interplay between different dispositif could affect policy outcomes; outcomes that can (retrospectively) be understood in terms of the dispositifs that shaped its policies (p. 159). This approach enables us to understand if certain dispositifs take on a dominant role or if they start re-deploying other dispositifs as their own (Raffnsøe & Gudmand-Høyer, 2014, pp. 155-156).

2.3.2 Technologies / Techniques

If dispositif is the ethos behind the government, the driver of change, techniques are the means to which reaching a certain end. Techniques are those institutions, laws, rules, regulations, norms, and other societal factors that act upon the population. *"These techniques can be recognized by their level of detail, their relative size, but nevertheless great impact"* (Raffnsøe & Gudmand-Høyer, 2014, p. 168). These techniques set the stage for the game, outlining the rules of the playing field, its boundaries, and theme. Techniques can vary from insignificant rules or norms to legal documents, institutions or other strutures guiding social interaction. Techniques guide social interaction in a certain way. This makes it possible to decipher it, look at its various elements, its intent, its result, and its auxilliary results. Techniques become the benchmark through which we can analyze how social interaction is shaped through one or several social constructs.

2.3.3 Power Relations

Power relations should be understood as the fundamental aspect in any analysis of power and government. It serves both as a stand-alone micro-level of analysis and as the fundamental understanding for how power manifests itself on the meso- and macro-level. Any power relations analysis therefore need to understand the concept of power and the onset of power relations. I will, in this

segment, explain Foucault's conceptualization of power before explaining the means through which he wants us to understand power relations.

Foucault's understanding of power deviates from other contemporary conceptualizations of power. As with his other concepts, he refrains from providing a single definition of power but instead provides a list of criteria.

> "We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals', In fact, power produces; it produces reality; it produces domains of objects and rituals of truth." (Foucault, 1977, p. 147)

First, power and knowledge are inseparable, because powers ability to create and promote knowledge creates new opportunities for actions upon others. Second, power should not be seen as a capacity, it does not entail violence, nor is it necessarily repressive. Power is relational because it manifests itself as a mode able to act upon the actions of others (Foucault, 1982, p. 790). As a result, power in the eyes of Foucault is not repressive, but constructive because it need to act upon a goal in order to persuade its subjects. Power is, therefore, both intentional and non-subjective, because it cannot operate without intentions or goals (Foucault, 1978, p. 100). Third, power is not restricted to the sovereign and is not a binary hierarchy of ruler and subject. Instead, power builds itself in a self-producing system – continuously creating new power constellations. Where power manifests itself we will also find resistance, or as Foucault puts it, power relations exist by virtue of resistance (Foucault, 1978, p. 101). The manifestation of resistance either strengthens the power relations or forces it to change. The freedom of the individual is then inherently linked to power as power defines how freedom can operate within its boundaries.

Power relations then are those relations emerging out of urgency. Power relations are those relations, which form in society, between different agents, created by the need for cooperation. When analyzing these specifically Foucault argues that we need to look at five different ways power relations manifest themselves. In Subject and Power, Foucault outlines five points of analysis for understanding power relations: *1. the systems of differentiation, 2. the types of objectives, 3. the means of bringing power relations into being, 4. forms of institutionalization and 5. degrees of rationalization* (Foucault, 1982, p. 792). I will come back to how these five categories are applied, within Mitchell Dean's analytical framework, in the following segments.

2.4 Biopolitics and Panopticon

In addition to the concepts of governmentality, I want to add two additional concepts by Foucault: "biopolitics" and "panopticon" / "panopticism". Foucault explored biopolitics before the concept of governmentality and argued that it was a political strategy aimed at preserving life (Lemke, 2011, p. 33). Transforming the core concepts of political sovereignty aimed at creating a particular public management strategy combining medical science and politics (Carnera, 2010, p. 85). According to Lemke, Foucault has three different uses for biopolitics, first, as a rearticulation of sovereign power, second as a historic center for modern racism, third, as a distinctive art of government in liberal "social regulation and individual self-governance" (Lemke, 2011, p. 34).

In this paper, I am primarily occupied with the term as a distinctive art of government, with biopolitics here understood as a dispositif in liberal government. In Foucault's 1979 lecture series "The Birth of Biopolitics", he conceptualizes liberalism as a *"specific art of governing human beings"* rupturing the history of political thought (Lemke, 2011, p. 45). In what is the preliminary work leading up to governmentality, biopolitics is how Foucault remarks the shift from governing territories and resources, to governing the population. With the onset of a production-based society, the population is the new resource of the sovereign. This leads to a liberal public management perspective aimed at governing the life and health of the population. A population where human life is regarded as human capital (Lemke, 2011, p. 49). In this context, biopolitics can be reinterpreted as a dispositif - an archetype of governmental considerations guiding the development of new policy and power structures with a focus on the health and longevity of human life.

In terms of panopticon, I will here separate between panopticon as Bentham's architectural figure (Foucault, 1977, p. 200), panopticon as a concept for power reduced to its ideal form (p.205) and panopticon as a technique of coercion (p. 222). Bentham's architectural figure, which Foucault examines, is a concept for a prison or mental institution. A circular or annular building with individual holding cells surrounding a tower in the middle of the circle. The holding cells have bars or windows in the front and rear of the cell, allowing light to come through; assuring transparency of the cell. The tower in the middle is covered in two-way mirrors or shading. This prevents the subject (prisoner) from observing the guard in the watchtower – anticipating if and how the inmate is monitored. This creates a space where the inmate is *"perfectly individualized and constantly visible"* (p. 200). At the same time, it allows a single guard or no guard at all, through invisibility, to

create and maintain order by permanently inducing the inmate with a conscious state of constantly being monitored (p. 200).

To Foucault, this building, the Panopticon, should not be understood as "a dream building", but as a *"…diagram of a mechanism of power reduces to its ideal form"* (p. 205). It is a political technology, which needs to be separated from the building and history itself, as its applicability is not only confined to the prison system. Rather, it as a diagram of power lends itself well as a tool to understand the core aspects of power across different sectors and industries (p. 205). Foucault argues that it encapsulates the core aspects of discipline. The first aspect is to obtain the exercise of power at the lowest cost possible. Second, bringing into effect the innate social power to maximize intensity and reach, while at the same time reducing errors and missed information. Third, linking the achievements made from this system to the overall achievements of the disciplining system itself. This will eventually increase the potential likelihood of further subjugation to and information from the system (p. 218).

Last, I will touch upon panopticon as a technique of coercion. To Foucault, the rise of capitalist societies gave rise to a specific technique of disciplinary power based on the abovementioned core aspects. The sovereign needed a system to maintain conduct without the juridico-political structures of the old society and the binary relationship between action and reaction. The liberties of capitalist society brought about the techniques of discipline (p. 222). Techniques that emphasize conduct upon conduct through *"the formation of knowledge and increase of power*" acting upon each other in a circular motion (p. 224). This panoptic technique works by introducing a set of *"instruments, techniques, procedures, levels of application, targets; …"* to observe, spy, gather information and potentially punish the population (p. 224). Even able to act upon the mechanism of the panopticon itself or those controlling it (p. 204). It introduces a system that acts norming on the population and subjecting it through the possibility of oversight. To sum up, the panoptic technique aims at subjugating the actors through fictitious relations of surveillance and the possibility of constraints and punishment from misconduct.

2.5 Analyzing Governments and Governmental Techniques

The overarching idea of this paper is to look at how the whistleblower law is developed and how it seeks to manifests itself in a "neo-liberal formulae of government" (Dean, 1995a, p. 580). To do this, I want to apply Mitchell Deans proposition on how to analyze government and governmental

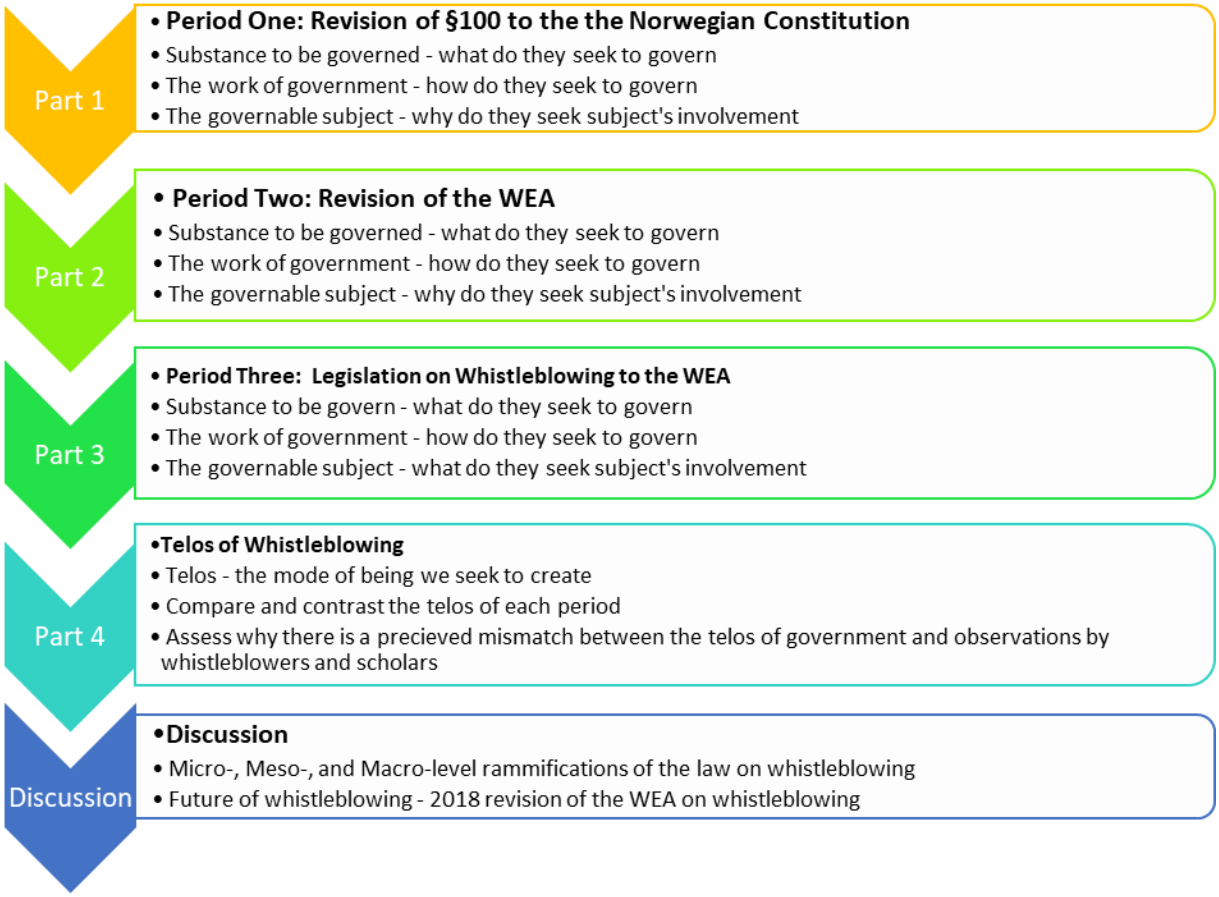
techniques from his 1995 paper "Governing the Unemployed Self in an Active Society". In sum, he argues that instead of looking at the present day statistical findings or lessons learned, we want to analyze the thoughts that went into the making of policies and how this type of government, or conduct, manifest themselves (Dean, 1995a, pp. 569-570). Instead of primarily focusing on the laws implemented or the policy framework, we encompass the entirety of the social construct created in terms of policy implementation.

Dean proposes four analytical questions aimed at uncovering the thoughts that went into policy-making and its emergence. Dean draws on Foucault's five categories for analyzing power relations as portrayed here in segment 2.4.3 (Foucault, 1982, p. 792). It is my assessment here that Dean takes these five categories and transforms them into four applicable research questions that take a more hands-on approach to an analysis of contemporary governmental practices. First, he asks *what do they seek to govern*, i.e. the substance to be governed (Dean, 1995a, p. 572)? Second, *how government creates a system to govern*, third, *the governable subject* and why do they seek their involvement, and fourth, the *telos of government* - "exploring the general political rationality in which these practices of self-formation are imbricated" (Dean, 1995a, p. 572). By applying these questions we can move away from just asking how governments operate to a broader investigation into the what is governed, who is governed and the reason why we govern (Dean, 1995a, p. 581). As a result, we can understand technologies of government to be more than just basic mechanisms or objective rules and regulations, but as significant drivers for societal change (Dean, 1995a, p. 581).

The first question asks what they are to govern and, maybe more interestingly, is what they are saying, they are trying to govern, really what they are setting themselves out to do? What is the ontology they adhere to? Second, how does one actually work towards this subject of government? In what way is it manifesting itself through policies or by setting up institutions (Dean, 1995a, pp. 573-574)? Third, the governable subject relates to the modes of subjectification through which the practices and institutions manifest themselves. In what way do policy or institutions derive certain sets of subjectifications that act upon the individual, organization or others to create self-government (pp. 576-577)? Fourth, the final question relates to the kind of utopian dimensions, which are created within the solution or social construct (p. 577). Asking, what kind of society does this telos present or envision through policy-making?

2.6 Analytical Strategy

Figure 2.2:



This study will apply the four analytical questions found in Dean's approach to the documents from each period. In the first part of the analysis, I will apply the first three questions to the documents from the first period. First, what do they seek to govern? Second, how do they seek to govern? Third, why do they seek the subjects involvement (Dean, 2016, p. 21)? The same questions will be applied to the documents in part two and three, where we will look at the revision of the WEA in period two and legislation on whistleblowing to the WEA in period three. Applying these questions to the empirical data, we will seek to out the most interesting developments in each period in order to better understand the historic development trajectory in each period and their impact on future legislation on the topic. This will provide a governmentality analysis able to outline the various policy developments, while, at the same time, facilitate a socio-historic analytical approach encompassing continuity and discontinuity observations and changes in dispositif.

In part four, we will compare the telos of the final proposal to parliament, from each period. Asking, who are we to become (Dean, 2016, p. 21), we will seek to understand how the final telos on whistleblowing came about by tracing the different rationalizations behind the from the two earlier periods. Comparing the three telos of government, we will seek to understand the perception held by whistleblower and scholars that there is a mismatch between what legislators argued the law set out to do and what the actualities are for whistleblowers.

The final discussion will apply the findings from the foregoing four analysis and provide a thorough discussion of the actualities of the law. From this, we will seek to understand the power relations present for employees and employers – comparing that to the promises made in the telos of government. This will lead in to a discussion of the new policy initiative on whistleblowing in order to propose a few different angles of approach for the future of whistleblowing.

3 Period One: Freedom of Speech

As mentioned above, this analysis will look at the selection of white papers and policy papers leading up to the ratification of the amendment to WEA about whistleblowing. The optics I apply here will be the three first questions outlined in Dean's article on public policy and governmentality. The last question, the question of telos, will be analyzed in the final analysis. This and the two next following investigations will perform an inductive textual analysis of the documents from each of the three aforementioned periods individually. Period one will analyze considerations made in terms of a new §100 to the constitution. Period two will analyze the revision of the WEA. Period three will analyze the final legislation process on whistleblowing in the WEA specifically. In each of these three periods, we will investigate each question in terms of the three relevant documents from that period before analyzing them and comparing them to each other or the other periods. Last, findings from the period in question will be analyzed in a final conclusion before, where applicable, compared to findings in previous periods.

In this first period, we will deal with three public documents aimed at creating a new §100 to the Norwegian constitution. A revision aimed at facilitating freedom of speech rather than freedom of print. This period, between 1999 and 2004, is characterized by the formative development of thought on the subject of whistleblowing. The fluctuation and scattered opinions we see here will solidify over the next two periods, as the topic at hand moves from freedom of speech to whistleblowing specifically. The documents I will deal with here are: Official Norwegian Government Report: NOU 1999:27, White Paper: St.meld. nr. 26 (2003-2004), and Legislation Proposal: Innst. S. nr. 270 (2003-2004).

3.1 Question 1: what do they seek to govern?

The mandate of the first Official Norwegian Report NOU 1997:27 emphasized a fundamental re-imagination of the position freedom of speech/ expression in Norwegian society (NOU 1999:27, p.13). The Freedom of Speech Committee was tasked with a broad revision of the historical perspective on freedom of speech, the description of the contemporary situation, and a mandate to redraw the constitution to better facilitate the actualities of freedom of speech (p. 13).

Employees freedom of speech and whistleblowing comes in as a topic when dealing with the limitations to free speech (p. 136). The committee argues that employment pre-supposes a certain

set of dynamics between the employer and employee (p. 170). Employee's freedom of speech can potentially be limited in some shape or form (a result of the contractual relationship between employee and employer) but such limitations requires clarification by law (p. 170). Whistleblowing, on the other hand, comes in as a solution to circumvent a strict interpretation of the loyalty implied in the contractual relationship. Allowing for disloyal activity on behalf of public interest and prevention of potential hazards to the state and the population (p. 174). Sometimes such overt disloyalty is the only way for society to uncover illegalities and mischiefs in society:

> *"Under certain conditions, overt disloyalty ought to be legal and sought after. We are here thinking about situations where an employee notifies the public about his or her workplace being involved in corrupt, illegal, immoral or other harmful activities." (p. 175) (own translation).*

Such disloyalty might make the public aware of illegalities hidden within the organization. Enabling society to act upon information hidden to them. In sum, the committee argues that §100 should give all citizens the right to freedom of speech – including employees. Employees, however, are in a contractual relationship with their employer, which puts certain limits on actions of employees, especially in terms of loyalty. Acknowledging that a strict interpretation of loyalty might inhibit important information from surfacing, the committee argues that an exception be created to ensure that employees have the right to speak out on important issues (p. 170). Whistleblowing ought to be established as an exception to the limitations put on freedom of speech for employees.

The following Official White paper, St.meld. nr.26 (2003-2004), builds upon the work of the NOU, detailing the Ministry of Justice and Police's conceptualization of freedom of speech and a new §100 to the constitution. They argue that the intent of free speech has been part of legislative processes for the last few decades, even though it has not been reflected in the constitution. Hence, not all limitations to the old §100 need further development in relation to the new §100. (St.meld. nr.26 (2003-2004), 2004, p. 108). One such limitation that does not need further development is the principle of loyalty and limitations to employee's freedom of speech. Employees freedom of speech is discussed under its own section named *Employees Freedom of Speech* (St.meld. nr.26 (2003-2004), 2004, p. 100). The main challenge this white paper sees is that a strong freedom of expression for the employee can pose a challenge for both the employer and the employee, as it can prove very resource intensive on the institution and the employee (p. 109). However, the degree of resources spent may vary, and effective production cannot be the only criteria for deciding whether employees should be able to engage in the public debate or not (p. 109). For one, the public's access

to information is crucial in creating a working democracy of informed citizens (p. 109). Second, employers need to expect and welcome critique and disagreement in order to further develop their institution, and instead answer critique with counter-arguments and corrections (p. 109-110). Third, employers should be able to expect some loyalty from their employees (p. 109). In sum, what they are seeking to govern, in terms of employee's freedom of speech, is balancing the democratic right of citizens and relationship between employer, employee and society.

On whistleblowing specifically, the Ministry argues that the legal situation for reporting critique-worthy relations at the workplace is unclear (p. 112). They argue that it is necessary to create laws able to facilitate greater willingness from employees to alert the public about severe cases of critique-worthy conditions at the workplace (p. 112). However, such laws need to facilitate loyalty and make sure that such utterances are based on loyal and true statements (p. 109). In such, the governing principle here is to lay the groundwork for policymaking aimed at facilitating whistleblowing, increase public awareness of wrongdoing but, at the same time, make sure that unnecessary harm to employers is prevented. Again, in this document, focus is on the relationship between the parties in the labour market and the interest of the public.

In the last document, Innst. S. nr. 270 (2003-2004), the Standing Committee on Scrutiny and Constitutional Affairs gave its comments and amendments on the proposals from the former white paper. On the topic of employee's freedom of speech and whistleblowing, the committee agrees with the two former documents that the legal situation on employee's freedom of speech is unclear and asks that the topic be more clearly defined in future legislation (Innst. S. nr. 270 (2003-2004), 2004, p. 39). On whistleblowing, they agree with the two former reports that that whistleblowing – in isolation - could be interpreted as disloyal behaviour, but that it is sought after from a democratic perspective (p. 38). Such speech acts and publication might be the only way to make sure that illegal or critique-worthy relations are dealt with (p. 38).

3.1.1 Partial Discussion

The assessment here on what they are trying to govern is that they are inherently creating a law, which will increase individual freedom in terms of freedom of speech. At the same time, however, they are out to limit the potential agency these new rights provide. One of the key factors here is the aspect of loyalty that employers can expect from their employees when they are in a contractual relationship. They all agree that critique from employees can be demanding on institutions, a notion

that seems to justify the aspect of loyalty. Whistleblowing on the other hand comes in as an exception to the exception. Where the aspect of loyalty is considered a valid exception to the new §100, whistleblowing ought to be a rightful exception to the loyalty principle.

What they set out to create is a new law on freedom of speech that is supposed to strengthen individual's rights, protect the interests of employers and underline the democratic aspect inherent in freedom of speech. In such attempting to satisfy the interests of employees, employers and public interest. However, the legislative process falls short as limitations established for the old concept of freedom of the press is retained without further questioning. This continuation of former limitations is built on an idea that the intent of freedom of speech was already encapsulated in these limitations. One of these limitations, the principle of loyalty, is accepted at face value – without further discussion of its underlying premise. What we are watching here is how the Paradox of Revolution inhibits new development in the wake of the revision to §100 (Tullock & Rowley, 2005, p. 180). Political ideas are set out to radically change fundamental aspects of society. Often times these new ideas are bolstered by positive arguments and wishful thinking (p.180). Nevertheless, these attempts fall short due to various economic, historical, social, or structural factors that limit the scale and scope of any new legislation (180). In this particular case, we see how old social and legal structures limit the scope of this new legislation. Freedom of speech is limited by established rules and norms. The problem with the paradox of revolution here is that the non-statutory and case law based principle of loyalty is allowed to remain without a new foundation under the new §100. In addition, as we will see, loyalty will become a significant hurdle to the future of whistleblowing.

3.2 Question 2: how do they seek to govern?

As mentioned, the NOU argues that employees do not need special emphasis in §100, but should be covered by the same protection as the rest of the population. Former limitations to employee's freedom of speech are proposed continued under the new constitution; however, they need further clarification. One of the main challenges observed by the NOU is that the principle of loyalty in work-relations is both, in their own words, are both "non-statutory and partially underdeveloped" (NOU 1999:27, p.170-171) (own translation). Employees face unclear rules and legal practices when dealing with challenges in terms of the loyalty aspect (p. 176). If the loyalty principle ought to become a valid argument for limitations on free speech it needs greater legal clarification, they argue (p. 176). The loyalty principle proves even more important to clarify in relation to legislation on whistleblowing, but this will have to be facilitated elsewhere.

In St.meld. nr.26 (2003-2004), they build upon the work from the NOU. The ministry, as with the previous document, also does not find it necessary to include employee's freedom of speech in the constitution specifically, arguing that general constitutional protection applies to them (p. 107). On the topic of loyalty, the ministry also find it to be fully reasonable to allow for the principle of loyalty to, in some instances, limit free speech (p. 108). Arguing that negative sanctions against disloyal utterances are not, in and of themselves, in conflict with the principles for freedom of speech (p. 108). As with the former report, they acknowledge that freedom of speech can be very resource intensive for the employers, but emphasize that organizations should be run so that both employees and top management can agree on how the business should be run. From a democratic standpoint, the population should have confidence that silence from an organization entails a good working environment (p. 109).

On whistleblowing specifically, the ministry is overall positive to laws regulating and encouraging whistleblowing in cases of serious critique-worthy relations at the workplace. They emphasize that there is a need for creating a system to better facilitate internal whistleblowing (p 112). The business should be allowed to fix their own issues before problems become a public matter. Such a system also needs to encompass rules for external whistleblowing: what kind of information one can publish, what documentation requirements are necessary, the level of awareness to truthfulness shown by the employee, what kind of critique-worthy conditions that qualify for whistleblowing, and what kind of legal protection the employee will have against unlawful sanctions from the employer (p. 112). On top of this, any legislation on whistleblowing needs to outline the requirements necessary for internal whistleblowing and whistleblowing to government agencies, before going public. Hereunder, what kind of exceptions are available when internal whistleblowing is not a valid option (p. 112). Laws governing whistleblowing will, according to the ministry, best be facilitated within WEA (p. 112).

The final proposal from the Standing Committee on Scrutiny and Constitutional Affairs agree with the former two reports that employees rights should not be mentioned specifically in §100 (p. 39). Consensus is that employees should share the same protection as any other citizen (39). They argue that any regulation of employees ought to be included in the revision of the WEA that is already underway and make sure that the legal status for employees freedom of speech is made clear (p. 39). Nevertheless, the committee was divided on the issue of whether or not the approach outlined above was sufficient to protect whistleblowers. The majority is pushing the clarifi-

cation of employee's freedom of speech onto a revision of the WEA. However, a minority in the committee argue that the authorities need to make sure that employees do not become the victim in whistleblowing processes – arguing that the abovementioned system could pose a threat to whistleblowers and urges the need for government attention to protect employees (p. 39).

3.2.1 Partial Discussion

All documents agree that employees are to be treated similar to citizens in terms of the new §100. Nevertheless, what we see here is that this new constitution does not pave the way for a radically new approach to employee's freedom of speech and whistleblowing. Rather, these three documents preoccupy themselves with re-imagining already present exceptions and limitations to the freedom of speech for employees established before the revision of §100 to the constitution. Some of the argument for this is that Norway has already come a very long way in developing freedom of speech and what we need now is a new §100 able to encompass development from recent decades (NOU 1999:27, p.18). For employees freedom of speech, the interesting aspect is that they are preoccupied with justifying these already established exceptions and frame them inside the new §100. The fundamental aspect of this law is that society does not need a law to further the development of freedom of speech; rather, the new constitutional review is established to encompass the changes already made. The paradox of revolution prevents ground-breaking development in the area of freedom of speech.

As a result, the loyalty aspect is taken at face value and never given a fundamental assessment; instead, practices and benchmarks are introduced to alleviate the shortcomings of the loyalty principle. Justifying the loyalty aspect by developing a system for assessing what ought to be regarded as disloyal and when it ought to be permissible to be overtly disloyal. In essence, not clearly developing loyalty as an exception to freedom of speech results in the development of whistleblowing as a possible escape from the loyalty principle. Essentially, whistleblowing is erected as a contrasting element to rigid belief in loyalty as an exception to freedom of speech. Whistleblowing becomes the exception to the exception, serving as a contrasting paradigmatic example for loyalty through disloyalty.

3.3 Question 3: why do they seek the subject's involvement?

In the first report, NOU 1999:27, they argue that the working environment and employment is part of public domain and, as a result, the public has legitimate interests in getting information about

conditions at different workplaces (NOU 1999:27, p.172). To secure a working democracy, information only accessible through the oversight of government agencies is not always sufficient to provide information to the public (p. 172). The quality of democratic discussions will be inhibited if, for instance, employees working on a certain topic are not able to join the public debate because of their employment status (p. 172). Many of these employees have access to information, which should not be excluded from the public debate (p. 172). At the same time, employees are a great source for society to access information hidden within the organization. As such, the subjects, here the employees, are sought after both for their contributions to the democratic process and their ability to uncover harmful activities hidden from public or government view. Employers are the second subject that they pursue involvement from, arguing that active employers might benefit from the information provided by employers, potentially gaining experience and credibility from dealing with these conditions properly (p. 172).

In St.meld. nr. 26 (2003-2004), the ministry argues that workers ability to speak out is not only an important benchmark for democracy; an open environment of information provides insights necessary to ensure a healthy labor market and institutions willing to improve from lessons learned (St.meld. nr.26 (2003-2004) p. 108). In such instances, silence could be considered more disloyal than bringing forth opinions of resistance (p. 108). Also, increased participation in the public debate from employees in the public sector is, according to the ministry, necessary in order to give citizens greater access to information about public spending, priorities, and public fulfillment of policy goals (p. 110). This could potentially lead to fewer resources spent by government authorities, as informed citizens are able to provide checks and balances through the electoral system (p. 110). Potentially vitalizing local democracy (p. 110). Lastly, putting this into law might bring about increased awareness of ethical questions in every institution and stimulate internal procedures necessary for whistleblowing, prevention of injury, and dealing with illegalities, such as corruption and environmental crimes, and other critique-worthy relations. The last document, Innst. S. nr.270 (2003-2004), does not occupy itself with the question of subjects, nor why they want subject's involvement, only agreeing that it is necessary that whistleblowers have the ability to come forth, but not why they should be involved.

3.3.1 Partial Discussion:

Businesses and institutions awareness of active citizens, citizens with a right to provide information about working conditions or illegalities, creates a system of conduct upon conduct. The awareness

of citizens who question, investigate and gives notice about wrongdoing might inhibit such wrongdoing from taking place. In such, these active employees and whistleblowers not only provide a system of checks and balances but, even more importantly, their potential presence might deter wrongdoers. This creates a panoptic system within society, not only linked to the labor market, where citizens, employees, employers, government employees, and politicians are all subject to a latent kind of surveillance. In such, freedom of speech and whistleblowing is not only there to uncover and punish misconduct, but impose discipline on the population.

3.4 Discussion Period One

On employee's freedom of speech, one of the main challenges the legislators wanted to tackle was the *non-statutory and partially underdeveloped* loyalty principle. Creating clearer regulation able to guide potential employees and protect whistle blowers from harm. Instead of making this an inherent part of §100 (specifying employees freedom of speech in the constitution), they try to define loyalty, disloyalty and whistleblowing as concepts and benchmarks within these documents. Promoting that this brings clarity and safety to employees and employers but instead increases complexity and uncertainty. Complexity increases because they fail to tackle the weak nature of the loyalty principle – instead they are fluctuating between democratic ideals and risk-management of businesses.

Legislators are aware that the loyalty aspect might inhibit free speech more than necessary. As a result, they establish whistleblowing as an exception to the loyalty aspect. Employees should be able to act overtly disloyal without fear of retaliation, when they uncover critique-worthy conditions. Whistleblowing should provide active citizens who contribute to democracy and establish greater societal discipline through conduct upon conduct. The loyalty aspect, definitions, assessment markers, and other ideas carry over into the new process and shape its potential outcome. Some of the ideas here will change and redevelop, but others will remain untouched. The loyalty aspect will remain the hardest difficulty to hurdle, because, without legally defining it through a legislative process, you, as a legislator, are forced to either add on to it or work around it.

4 Period Two: Working Life and Biopolitics

In this second period, we are dealing with three documents aimed at updating the Norwegian Working Environment Act (WEA). This work does not aim at whistleblowing specifically, but assesses and proposes legislation on the workplace as a whole. The documents I will deal with in this period are: Official Norwegian Government Report: NOU 2004:5, Official Norwegian White Paper: Ot.prp. nr. 49 (2004–2005), and Official Legislation Proposal: Innst. O. nr. 100 (2004–2005). In essence, the communication present in these documents pre-occupy themselves with the health and safety of employees and a sound working environment.

4.1 Question 1: what do they seek to govern?

Arguing that the workplace is one of the most important arenas for human interaction and self-development, NOU 2004:5 seek to establish a more inclusive and welcoming workplace for all (NOU 2004:5, p. 17). They argue that Norway is lacking workers to meet future employment demands. A deficit that will eventually decrease Norwegian ability to cover welfare costs and muster competent workers able to perform tasks related to the welfare system (p. 17). On the opposite end, a large number of employees are forced out of the labor market due to illness or disabilities (p. 17). As such, the mandate states that the government wants to make it easier to become part of the labor market but at the same time make it less likely that people drop out (p. 17). A healthy working environment and a safe place to work is vital to make sure citizens want to stay employed longer and are motivated for long term employment. The WEA serves as the foundation for achieving a political goal of creating a proficient and including working environment. Nevertheless, they emphasize that it is at the specific workplace that such a healthy working environment is maintained (p. 18). This demands close cooperation between the employers, employees and the authorities. The government specifically emphasizes the challenges regarding expulsion from the workplace and rules able to handle such issues (p. 18). Harassment and ostracism are one of the main issues the law wants to prevent. Such actions towards employees can inflict mental impacts prone to cause mental issues, health issues and inhibit the employee from future work (p. 178). Limiting health risks and ostracizing from work should be of the outmost importance when drafting a new WEA and workplaces need to adapt in order to prevent such cases (p. 179).

On whistleblowing specifically, the report argues that employees should have a duty, by law, to blow the whistle, to the employer or trustee, if they witness conditions prone to cause harm to the safety of others according to §16, nr.1 in WEA (p. 179, 538). If they have a duty to blow the whistle, they should also have a right to do so (p. 179). When using this duty or right, the employee should be protected from retributions prone to cause injury to themselves or others – eventually preventing them from whistleblowing (p. 32-33). As such, they are not out to create new policy on whistleblowing, as they are afraid such legislation might inhibit the present legal development in the court system (p. 450). What they are inherently afraid of is that a new law might gridlock the natural legal development on the whistleblowing and create a binary system of assessment (450). In such, their rationalization in terms of what they are trying to govern reflect a scepticism towards a creating a wholehearted legal regime on whistleblowing.

In the next white paper, Ot.prp. nr. 49 (2004-2005), much of the rationalization carries over. Most notably it aims to create a WEA capable of enabling a labor market that provides every employee with an opportunity to take the full potential of his or her capabilities (Ot.prp. nr. 49 (2004-2005), p.13). The overall goal, they argue, is to have a labor market with room for everyone (p. 13). Such a working environment needs to meet the expectations of the employee, the employer and the needs of society (p. 14). This increased cooperation should provide a greater influx in the labor market, eventually securing welfare in the future (p. 14). A healthy working environment should not only be seen as an economic question, but also an ethical one (p. 61). In one end, it is about preventing illnesses or health issues inflicted on workers through labor. On the other hand, it is about what kind satisfaction and prosperity meaningful work gives to the citizens of Norway (p. 61). As such, a new WEA should ensure equal treatment in the labor market and ensure a more inclusive labor market, by preventing bullying, discrimination and ostracism from happening (p. 17).

Nevertheless, on whistleblowing they take a detour from their abovementioned rationalization. Instead of focusing on the health issues from NOU 2004:5, they focus on freedom of speech and loyalty aspect from the former period. On whistleblowing, the ministry highlights the challenges faced by businesses dealing with whistleblowing cases. Increasing the ability to whistle blow should alleviate public interest in the state of democracy, increase the publics ability to partake in the public debate and further the transparency of government, public spending, and other factors that entail public intervention (p. 132). On the opposite end of the spectrum, modern media is now able to reach a broader audience faster and more efficiently than ever (p. 132). This could, they ar-

gue, have great impact on the performance of businesses, especially as technical innovations and the new media culture is able to further increase the impact of any publication. This can in fact become very labor intensive for the employer to deal with (p. 132). As such, the employer should have a special protection from unfounded claims and should be allowed to first deal with matters internally before they go public (p. 132). New laws on whistleblowing, they argue, need to ensure that businesses do not experience unnecessary harm.

The final proposition by the political committee on the new WEA, Innst. O. nr. 100 (2004–2005), can best be described as a document created out of considerable disagreement. The disagreement here is mostly on how they should govern and we will see the disagreement manifest itself more in the following question. In terms what they seek to govern, the committee as a whole agrees that work is a fundamental part of society. Work for everyone is one of the best assets for the sharing of resources among citizens. Work is also a significant social arena, playing a positive role in people's lives (Innst. O. nr. 100 (2004–2005), p. 5). With a new labor market requiring people to be more flexible, along with an increased demand for adaptability and individual competencies, laws need to facilitate safety and predictability (p. 6). In such, the WEA should set high standards for the Norwegian labor market. The workplace should be a pillar able to support oneself both in terms of financial stability, but, even more importantly, the workplace is where we build relations able to support ourselves through struggles in our personal lives (p. 10). It provides a sense of personal achievement and increases the feeling of self-worth (p. 10). The committee concludes that the correlation between health and work is positive, and that this accounts for most people and in most instances (p. 10).

On whistleblowing specifically, the committee is split, but the majority agrees that many employers exaggerate the aspect of loyalty beyond what is beneficial to society (p. 27). The majority argues that the state needs to set up the foundations necessary to ensure that employees do no suffer substantially throughout such processes (p. 27). The committee argues that the laws on loyalty are, as mentioned in St.Meld. nr 26 (2003-2004) about freedom of speech, not accurate enough. In such, the committee is positive to the protection against retaliation, but argue that these are not sufficient to face the challenges of whistleblowing in the future (p. 27).

4.1.1 Partial Discussion:

In period one, the three documents chose a similar approach to employee's freedom of speech and whistleblowing. In this period, however, there are considerable disagreement between the documents. The focus of the first paper is aimed at the protection of workers, creating a labour market of inclusion and maintain competent workers able to sustain the welfare state for the future. However, the focus on health and safety of workers is a key aspect in the white paper up until it starts dealing with whistleblowing. Here, we experience the same arguments we saw in period one. Arguments focusing on the limitations to freedom of speech, the challenges faced by institutions and corporations in terms of the media, and ramifications to organizations and businesses when dealing with cases of whistleblowing. In such, their focus is more on the limits of freedom of speech. They do that by downplaying the role whistleblowing might have in preventing health related issues and focusing on the negative consequences wrongful whistleblowing might have on businesses. The last document, Innst. O. nr. 100 (2004–2005), returns to the policy ideas of from NOU 2004:5. Legislation needs to make sure that employees are protected when they choose to come forward with important information and establishing whistleblowing as aright is a key element to assure more whistleblowing. As a result, the majority overruled the proposals made in the white paper and opted for policies protecting whistleblowers.

What we are observing here is a clear biopolitical dispositif approach in the NOU, followed by a risk-management dispositif in the white paper, with the final decision chosen by the majority of parliament embracing the initial biopolitical approach. As already explained, biopolitics in this context serves as a dispositif, a guiding principle in liberal government aimed at governing human life and longevity. We see this very clearly throughout the NOU, creating a new WEA and legislation on whistleblowing is inherent in balancing out the negative health effects work might inflict with the positive aspects work brings to the health of the population. Substantial to their argument is how Norway will have a shortage of labor in the future and that creating an inclusive working environment is fundamental in increasing future productivity. The biopolitical approach becomes an issue in the white paper in terms of employee's freedom of speech and whistleblowing. As mentioned, the biopolitical approach is prevalent in the work of the white paper, up until it starts to surround itself with whistleblowing. What they are primarily pre-occupied with, however, is risk-management of businesses – arguing that media's increasing power and damage-potential could

jeopardize companies' profitability and reputation. Prevention of such instances is of the outmost importance.

It is my assessment that this is approach, as seen in the last period and refined in the white paper, is based on a *"the dispositif of risk-management"* (Huber & Scheytt, 2013, p. 94). This dispositif, through *"an assemblage of discourses, institutions, regulations, etc."* establishes and maintains an optic of risk-management constituting a "permanent state of exception as risk is always a potential manifestation of an exception" (Huber & Scheytt, 2013, p. 94). As we saw in the former period, the loyalty principle was established as an exception to employee's freedom of speech. Eventually leading to whistleblowing becoming an exception to the exception of loyalty. The potential risks for companies associated with whistleblowing necessitates a state of exception, where companies are alleviated of the harm potential. Whistleblowing in general is seen as something positive, but the potential of instances where whistleblowing creates unnecessary harm becomes the fundament for how legislation is made. This risk management dispositif, according to Hubert & Scheytt, allows legislators to handle a paradox of introducing *"the exception (rather than a standard) as a principle into the very logics of organizing"* (p. 95). *"...uncertainties are transformed into risks through a standardized set of procedures and are then addressed with standardized measures"* (p. 95). This principle of the exception, how whistleblowing in some instances might negatively affect businesses, become the fundamental principle for designing a set of procedures, categories, benchmarks of assessment, and eventually a norm for the *reasonable* (correct) whistleblowing.

4.2 Question 2: how do they seek to govern?

As with former attempts to define and create legislation on whistleblowing. The report, NOU 2004:5 starts by defining what whistleblowers are. Arguing that whistleblowers are employees who inform about critique-worthy relations at the work place (NOU 2004:5, p.32). This report, however, does not want to legally define boundaries for employees access to whistleblowing and utterances, as it might gridlock the natural legal development on whistleblowing (p. 32). Whistleblowing should stay as an overall assessment of the interplay between loyalty and freedom of speech. They reason, and emphasize, that these cases can be plenty fold and be significantly different. Hence, a detailed list might inhibit issues that should be dealt with and inhibit potential legal breakthroughs on the subject (p. 32, 450). Though not making rules for whistleblowing explicit, they want to legally protect whistleblowers who are performing loyal whistleblowing. They argue this legislation

should protect the whistleblower in all cases of retaliation, such as harassment, discrimination, and termination of the working contract (p. 33). The legal protection should not be limited to only working environment issues, but whistleblowing on all topics. The report argues that the legal protection should only apply in cases where the utterance has adhered to the loyalty duty, based on current case law (p. 33). Instead of creating new laws here, they try to give input on what whistleblowing is and how it should be assessed in terms of the loyalty aspect. Their main argument is that it is in society's interest that critique worthy conditions are uncovered (p. 451). To this end, they propose a law protecting whistleblowers of loyal whistleblowing from retaliation related to whistleblowing on all types of critique worthy relations, also those not related to the working environment. They promote the following text for new §2-4 to the WEA: *"It is prohibited to retaliate against employees who with a loyal approach informs about critique-worthy conditions at the workplace"* (p.452) (own translation).

In the white paper, Ot.prp. nr. 49 (2004-2005), the Ministry argues that there is indeed a need for creating legislation specifically on whistleblowing (Ot.prp. nr. 49 (2004-2005), p. 134). They therefore suggest both a protection against retaliation, but also promote an independent effort to create legislation aimed at legitimizing whistleblowing (p. 132-134). They suggest an independent work be done on the topic of whistleblowing - the process we will deal with in period three. In the meantime, they argue that it is best to set up a temporary legislation aimed at protecting whistleblowers. Creating protection for employees in those cases where the employee has given notice to the public on critique worthy conditions and where it was done in accordance with the loyalty aspect. Further, the ministry will continue to work on this issue and report this in a manner they see fit. (p. 17) The Ministry argues for the general protection of loyal whistleblowing, by protecting against all forms of retaliation (p. 18). Such protection should apply to all types of whistleblowing, internal, as well as, external (p. 132).

In sum, the ministry argues for including the non-statutory legal standard of loyalty, and its limits, when creating this new law; they argue that it will be up to the court system to interpret legal conduct and theoretical approach, on the matter, in terms of §100 to the constitution and the loyalty principle (p. 133). In the end, they end up with the following proposal to a new legal text: "*Retributions against employees who with a loyal approach whistle blows about critique-worthy relations at the workplace is prohibited.*" (p. 348) (own translation). In addition to this legal text, the ministry argues that in its current form, the rules on whistleblowing are unclear. They propose a thorough

investigation based on creating better regulations on the topics (p. 133). Both employers and employees would benefit from clearer laws and guidelines concerning whistleblowing from this work. As with the former reports, they too establish a set of factors the whistleblower has to consider before whistleblowing, but underscores that these best can be implemented in the new process on whistleblowing (p.128-130).

As mentioned before, in Innst. O. nr. 100 (2004–2005), the members of the political committee were divided on several issues regarding the new WEA - the work on whistleblowing was no exception. First, there was strong disagreement between the parties from the minority government at the time and the fractioned majority on how to approach cooperation on workers' rights issues. The minority part of the committee argues that there has been a long tradition for leaving issues up to cooperation between the employers, employees and the government, and letting these questions be fully or partially solved in cooperation between the parties (Innst. O. nr. 100 (2004–2005), 2004, p. 6). The majority of the committee, argues that the government has attempted to weaken the legal protection for employees, watering down the proposals made in NOU 2004:5, by introducing a notion of considering the needs of businesses and society in the purpose statement of the new WEA (p. 8, 23). They argue that such a considerations will undermine the legal protection of employees. Health, safety and environment-considerations, they argue, should be at the core of the legislation, not financial considerations (p. 12).

On whistleblowing specifically, the majority of the committee argues that too many employers overemphasize loyalty from their employees. This demand from employers is beyond what they see as beneficial to society (p. 27). It is in the public's best interest to create solutions preventing harm from coming to employees who whistle blow on important matters (p. 27). In such, they will create new rules on whistleblowing arguing that the former white papers have shown that the legal situation for whistleblowers is not made clear (p. 27). Protection against retribution is a move in the right direction, but the committee emphasizes that it needs to be made clear that employees have a right to whistle blow (p. 27). In such, the majority supports the new process on whistleblowing, but provide their own proposal to a new legal text for a new §2-4:

"*(1) Employees have a right to whistle blow to the public about critique-worthy relations at the workplace, where this it is not in conflict with other laws. (2) Retribution against employees who whistle blow in accordance with the foregoing sentence is prohibited.*" (p. 27) (own translation).

The minority members from the political parties of the government argued that this proposal would have severe consequences, as this proposal would not encompass non-statutory limitations such as public interests, national security, privacy, protection against harassment, and business secrets (27). In addition, they argue that the proposals emphasis on the public would only apply to external whistleblowing (27). To facilitate internal, as well as, external whistleblowing and incorporate the former reports discussion on loyalty and freedom of speech, the government members of the committee proposed the following legal proposal:

"*(1) Employees have the right to whistle blow about critique-worthy relations at the workplace with a loyal approach. (2) Retribution against an employee who whistle blows in accordance with the foregoing sentence is prohibited*." (p. 28) (own translation).

The minority argues that it needs to be a goal that the future work on whistleblowing facilitates an effective protection for the freedom of speech of whistleblowers. (p. 28). In the end, the final decision on which legal text used fell on the proposal by the majority of the committee with a parliamentary discussion emphasising that whistleblowing to the public also included internal whistleblowing and whistleblowing to state authorities. There was also general consensus that this was only a step in the right direction and that whistleblowing needs an independent work, as proposed by Ot.prp. nr. 49 (2004-2005).

4.2.1 Partial Discussion

As we saw in what they seek to govern, there are internal differences between the three documents. The first report emphasizes the impact retribution might have on whistleblowing, proposing a new legal text to prevent such retributions. They argue that the loyalty aspect and legitimate whistleblowing ought to be sufficient in governing whistleblowing and refrain from developing it further, with the exception of providing an explanation of what whistleblowing is and how loyalty should be assessed in accordance with what was outlined in the first period. They fear that any further articulation or further expansion of a regime on whistleblowing might gridlock the natural legal development on the subject, potentially blurring or removing the current protection of whistleblowers.

In the following white paper, we observe three interesting points. One, the legal text proposed is similar to the previous one (with the exception of sentence structure) and they continue the prohibition of retribution against loyal whistleblowing. Second, this white paper is tasked with implementing employee's freedom of speech and whistleblowing in the WEA, but they instead sug-

gest a new process to facilitate clarification and new laws on the subject. Contrary to the notion of the former document emphasising how further legislations potentially could gridlock natural legal development on the subject. Lastly, even though they have promoted a new legislation process, they cannot refrain from creating their own input on how to assess whether the whistle blowing was legitimate or not. It might be interpreted as a natural extension of the temporary protection provided in the new §2-4, but it is interesting that they promote these benchmarks while at the same time establishing that another work could facilitate a better assessment of whistleblowing.

Lastly, the report from the standing committee, is a very interesting ending to these two reports. There are two main findings here. First, both the majority and the minority come up with two new suggestions to, what they both consider, a temporary §2-4. Here, there are three important factors to take away from these suggestions. One, they both establish that whistleblowing is a right. Two, they are in disagreement over whether or not the concept of loyalty should be the only benchmark for assessing if the whistleblowing is rightful. Three, there is a strange argumentative approach by the minority (government) towards the proposal of the majority. They argue that the majority's emphasis on the word *public* would not encompass (and thereby protect) internal whistleblowing. This seemingly odd argument is later debunked in the parliamentary discussion from parliament June 6th, 2005, where the true intent of the minority is revealed. The minority wants to omit the use of *public* as it opens up to potential difficulties for businesses and institutions having to deal with public utterances.

My assessment here is that the minority (the author of the white paper) in a failed attempt are trying to hide the fact that they do not want to make it explicit that *public* whistleblowing ought to be a right. Again, this coincides with the findings in the foregoing segment. The first report applied a biopolitical approach on how to govern, whereas the white papers risk management dispositif emphasized the potential financial loss a public media exposure following a case of whistleblowing might have on businesses and institutions. It seems odd that the parties from the government, behind the white paper, now all of a sudden are concerned over whether or not the word *public* also encompasses less controversial internal whistleblowing. When comparing what they seek to govern with how they seek to govern, it is evident that government parties are attempting to curb the potential risks businesses might be exposed to with a new §2-4.

This brings me to the second interesting point - the new process. Both the majority and the minority agree that the rules are unclear and that they need further clarification. Both agree on a new process creating legislation on whistleblowing specifically. This was, however, suggested in the white paper, in sharp contrast to the arguments of the NOU-report. It is interesting here how, in the last document and the following parliamentary discussion, there is no concerns or disagreements voiced over why whistleblowing was not fully accommodated in this piece of legislation. Even more interesting to investigate is which arguments, from this period, manifest themselves in the next period. Will it take on the biopolitical dispositif from the NOU, the risk management dispositif from the OTP, or will it manifest itself any other way? In any case, it will be interesting to see if the legislation is able to deliver on the promise of providing clarification and better protection for employees on whistleblowing as emphasized in the white paper, the Official proposal and in the parliamentary discussion.

4.3 Question 3: why do they seek the subject's involvement?

The NOU 2004:5 is seeking the subject's involvement for three reasons. Primarily they argue that employees are those closest to the operation of the institution they are part of and have valuable insight into what is going on at the bottom of the organisation (NOU 2004:5, p.178). Second, harassment and ostracising from the workplace can cause mental and physical injuries. Preventing it requires cooperation between employees and employers. Again, they argue it is the responsibility of employers to facilitate such a working environment, but the committee emphasizes that employer's need information to act on (p. 178). Employees are vital to reporting such instances in order to contribute to "*prevent health issues and ostracising due to bullying among colleagues"* (p. 179) (own translation). They argue no one should be bystanders in cases of harassment and should all, from a moral and compassionate perspective (to the best of their ability), attempt to prevent harassment and ostracising at the workplace (p. 179). Last, they emphasize the public interest in public and private institutions. They argue that it is in public interest to know if businesses or public offices are mismanaged or are involved in illegal activities (p. 445). From a democratic perspective, it is important that people with knowledge on a certain subject, such as employees in a business and public officials are able to partake in the public debate (p. 445). Increased flow of information and transparency is essential to providing an open debate able to inform and facilitate a responsive public.

In the white paper, Ot.prp. nr. 49 (2004–2005), they emphasize three different subjects: the employee (whistleblower), employer, and the public (Ot.prp. nr. 49 (2004–2005), 2005, p. 132). As with the former report, they argue that employees can contribute to solve issues of working environment, illegal activities, pollution, corruption, and mismanagement, but are also an important democratic tool and asset to the employer and society. (p. 132). Employers experience an increasing number of rules and regulations on the labor market asking for greater transparency but the ministry argues that this also increases vulnerability for the companies. This is furthered by technological advances and a faster and more efficient media culture (p. 132). Publication may, in some instances, be the only solution to overcome issues, but it is important to give the employers a chance to deal with the issues first and protect them from unnecessary harm (p. 132). The public interest in dealings of public and private institutions are increasing as societal change is shifting the populations focus towards a consumer and user based focus. At the same time, the interest of the public is crucial for monitoring and keeping checks and balances on the inner workings of businesses and institutions (p. 132). In essence, the report argues that all three subject have a vested interest in participating and contributing to the system, but at the same time, emphasis has to be on preventing unnecessary harm to businesses (p. 132). Innst. O. nr. 100 (2004–2005) did not have anything specific to add on why they seek the subjects involvement, except for employees ability to unveil illegalities, corruption, or other illegal activities (Innst. O. nr. 100 (2004–2005), 2005, p.27-28).

4.3.1 Partial Discussion

The first report continues in the same direction as the former period, highlighting the value of information and influence provided by employees. The democratic aspect is prevalent but is overshadowed by the reports emphasis on health and safety issues following what I have remarked as a biopolitical optic in public governance. The employer is responsible for the well-being of employees, but employees to have a moral obligation to contribute to an inclusive environment. The white paper's emphasis on the dynamic relationship between the responsibilities of the employee, employer and public is not new, but what is new is how they frame it. What they are highlighting is the increased vulnerability to companies and institutions following a greater influx of policies emphasising transparency and openness. Where the NOU emphasized the vulnerability of employees, companies are here subjectified as potential victims of ever-increasing rules and regulations along with the inherent dangers of technological advanced in a rapidly changing media environment. It is this subjectification which is carried over into the next period, as it is the mandate from this period

that sets the stage for the legislative process on whistleblowing specifically. The final decisions from the last document challenges the arguments in the white paper and eventually lands on an approach in conjunction with the notion from the first report, putting extra emphasis on the vital role employee's play in terms of the democratic aspect and uncovering wrongdoing as emphasized in the former period. The panoptic aspect from the previous report is reintroduced here with emphasis on preventing employees from becoming victims when they whistle blow. Establishing a subject of an active and potentially vulnerable employee acting on behalf of society when publicly whistleblowing.

4.4 Discussion Period Two

In this period, we have seen two radically different approaches to whistleblowing and employees freedom of speech. These two, the biopolitical and the risk management dispositifs condition public management, the public approach, and the combination of assessments, discourses, and regulations the two reports propose. In a recent article by Erik Mygind du Plessis, on whistleblowing as a historical phenomenon in organizations, whistleblowing is considered in terms of a democratic perspective and the risk management perspective (du Plessis, 2014, p. 139). His main argument is that the classic interpretation of whistleblowing has based itself on democratic principles. In a conflict between society and the organization, emphasis was put on public whistleblowing able to inform the population, utter critique and promote individual freedom and agency (p. 149). In recent years, however, emphasis has been put on keeping society and the public from partaking in conflicts related to the workplace and establishing a clear schism between the realm of the organization and the realm of society (p. 149). Instead, whistleblowing is redefined, on an organizational level, as a tool able to secure fluid and effective operations of the organization – minimizing risks and uncovering instances of errors on behalf of the organization (p. 149).

The same trend, however, du Plessis arrived at in his paper, is evident in this period. The democratic considerations of employees freedom of speech and whistleblowing from the former period are somewhat downplayed in this period, in favor of a biopolitical approach and the risk management approach. The democratic aspect is not omitted, but it is either interwoven in solid relationship with biopolitics in the NOU or as parasitic relationship with risk management in the OTP. What I am aiming at here, with a solid versus a parasitic relationship, is how the different dispositifs interplay with each other in order to balance different or paradoxical considerations (Andersen, 2008, p. 174; Raffnsøe & Gudmand-Høyer, 2014, p. 155). One dispositif cannot deter-

mine outcomes, as several dispositif are always present (Raffnsøe & Gudmand-Høyer, 2014, p. 155). The interplay between different dispositifs shape the potential outcome through social interaction (or in this case legislative processes) (p. 155). In a solid relationship the two dispositifs interplay through a mutual consideration and inclusion of the other dispositifs core principles, discourses, assumptions and power dimension (Andersen, 2008, p. 175). We see this clearly in how the authors behind the first report considers how new laws might gridlock the natural democratic development of the loyalty principle, and they instead opt to leave the loyalty aspect as is. A parasitic relationship is where one dispositif uses the core discursive aspects of the other dispositif only instrumentally in order to promote its own assertions through submission or subversion of the other dispositif (p. 174). We saw how this manifested itself when the government-backed parties in the proposal questioned the use of *public* in the legal text from the majority. They argued that they the use of *public* should be omitted to also include internal whistleblowing, but evidently the main reason was the risk management of businesses in cases of whistleblowing.

The same relationship we can see manifest itself in terms of the panoptic effect of whistleblowing. The first report emphasizes how increased transparency, individual moral commitment, and a system of whistleblowing not only is good for democratic processes and the populations' ability to make well-founded democratic decisions. It is also a system which will secure individuals' ability to shape their own workplace, give notice about mishaps, and create a working environment which increases productivity through an inclusive working environment. Maintaining the assertions in both the dispositif of biopolitics and democracy. In the case of the white paper, the democratic outcomes of the panoptic effect - hereunder transparency, oversight, democratic information, and public intervention – is only considered legitimate if the business or organization first was able to rectify the situation themselves or if potential damages were considered and minimized. Democratic assumptions are applicable, but only as far as businesses are able to deal with consequences they deem negative first.

In the next period, we will observe the development of the final policy proposal to the Norwegian law on whistleblowing. What will be interesting to pay attention to is what dispositif (hereunder interplay and considerations) manifest themselves in the final legislation.

5 Period three: Protecting the Employer – Two Towers

As mentioned, during the work with Ot.prp. nr. 49 (2004–2005), the Work and Social Ministry were tasked with a new work on whistleblowing. The work was asked to assess whistleblowing and provide new legislation on the subject, in relation to WEA. The preliminary work was presented, at what is not a Norwegian Official Report, but can best be described as an internal group report, which they called "*Employees Freedom of Speech"* (own translation). This report was officially presented to the Work and Social Ministry on December 21st 2005. The Ministry delivered their Ot.prp. nr. 84 (2005-2006) with an assessment of the report and answers from a consultation process in response to the report. Ot.prp. nr.84 (2005-2006) was delivered to parliament in June 2006. The political committee delivered their response, Innst. O. nr. 6 (2006-2007), in late October 2006 and it was finally passed through parliament in mid to late November of 2006 before taking effect January 1st, 2007.

5.1 Question 1: what do they seek to govern?

Employees Freedom of Speech from 2005 did not enjoy the status of a full Official Government Report and was not provided its own mandate. The report had to develop its mandate differently, first finding some of its mandate in Ot.prp. nr. 49 (2004-2005) which argued that further investigation into the limits of employees freedom of speech and the loyalty duty needed to be assessed. (Ot.prp. nr.49 (2004-2005), 2005, p. 134). Second, they refer to a letter sent to different actors in the labor market to explain the process. Here they argue that the overall goal is to come up with suggestions on how to strengthen employees freedom of speech and assess how to better enable workers to use it (*Employees Freedom of Speech* ,2005, p. 3). In addition, the letter argued that the report assess how to increase the protection whistleblowers received in the already established §2-4 to WEA. Especially, how the law could improve guidance on whistleblowing and freedom of speech for employees to employers and employees (p. 3). Last, the report promotes their own interpretation of their mandate arguing that it wants to describe the current legal climate on employees freedom of speech and at the same time come up with new policy mean to strengthen employees freedom of speech (p. 1). They argue that the report should provide a clear overview of the playing field for whistleblowing and employees freedom of speech by outlining the current rules, regulations and legal practice present. From this perspective, the report should assess if there is a need for further legislation to improve employees' freedom of and if the current limitations to freedom of speech for employees should further be developed (p. 3).

There seems to be a key difference in argumentation here between the focus on the limits of employees freedom of speech in terms of loyalty, as laid out in the proposal from the former period, and the following notion to strengthen employees and whistleblowers rights in terms of freedom of speech. The action group attempts to bring these two notions together by arguing that there needs to be a sense of realistic expectations about legislation and its impact in terms of whistleblowing (p. 10). Freedom of speech, they argue, is dependent on the attitudes and culture in the labor market. As such, new rules and regulations need to be clear about what freedom of speech entails and what the constitution and international human rights state on the matter (p. 9). For one, the constitution is quite clear that any limitations in freedom of speech must be made clear in the law. They argue that the rules on whistleblowing are unclear and in such limitations for employees freedom of speech needs more clarification (p. 9).

At the same time, they argue, a new law on whistleblowing specifically could have a signalling effect which would, in and of itself, provide employees with the notion that freedom of speech is a strong idea in society, and that freedom of speech for employees is a topic that should be top of mind for institutions and society (p. 10). They argue that the signalling effect alone will increase awareness, increase the flow of information and debate on labour conditions, and education for people involved with whistleblowing (p. 10). Increased transparency and internal communication is a goal worth pursuing to avoid situations of conflict (p. 10). Critical utterances ought to be part of everyday interaction and communication, as well as cooperation at the workplace (p. 10). The action group argues that new legislation needs facilitate the same access to free utterances as the current situation (p. 10). The essence of a new law should be that it is clearer in terms of the right to voice ones opinion and where the limits of freedom of speech are, but at the same time that it makes sure that free speech is approached in a way that does not limit the interests of the employer (p. 11).

The following Government White paper, Ot. prp. nr. 84 (p.2005-2006), is clearer on what they are trying to govern than the former document. The ministry argues for the strengthening of freedom of speech, hereunder, democracy, truth-seeking and the individuals' free formation of opinion (Ot. prp. nr. 84 (2005-2006), 2006, p. 33). The Ministry argues that there is need for strengthening freedom of speech in the workplace as a central aspect when it comes to openness and flow of information (p. 33). The new §2-4 is not able provide a coherent regime for whistleblowers and observe that many employees refrain to report such cases because they are unsure or do not know who or where to report or how they should go forth. *"The Ministry emphasizes that some em-*

ployees do not alert about critique-worthy conditions due to uncertainty or ignorance of when, to whom, and how they should whistleblow." (p. 37) (own translation).

The main difference, in terms of what they are seeking to govern, is a shift from governing freedom of speech and protection of whistleblowers, to governing how whistleblowing ought to be conducted. As a result, there is increased emphasis on the liability of the newly implemented §2-4. In a non-ranked list over how to assess whistleblowing, the first condition is "*Damages to the interests of employers"* (p. 17) (own translation). This factor is listed prior to, among others, the interest of the public, whether or not the action was done in good faith, whether it was external or internal whistleblowing, or what the motives was behind the whistleblowing (pp. 17-20). The Ministry's emphasis on the impact whistleblowing might have on employers continues throughout the document:

"*The ministry argues that only one reference to other laws, as §2-4 reads today, will not be sufficient in protecting employers from such unjust actions. The rules on confidentiality agreements etc. in other laws, do not necessarily protect employers, as employers, but instead third party interests such as, for example, personal information about clients or patients, the national security, the reputation of individuals (regardless of their role as manager or employer) or inside information creating unbalanced competitive conditions in the stock market." (p.38) (own translation).*

They argue that paragraph 2-4 is not fully able to protect employers from harm. This is caused by a lack of policy facilitating a protective environment for businesses and institutions. The ministry in such argues that there needs to be some rules regulating how the interplay should work between employers and employees when conditions are uncovered (p. 38). Employers have a rightful claim, they argue, to how whistleblowers might choose to approach the situation (p. 38). Some nuisances employers might experience are financial loss, loss of customers, business secrets, loss of goodwill and business reputation, worsening of internal cooperation, and publication of how the internal working conditions are at the workplace (p. 38). If the media gets involved, these nuisances might increase in severity – especially if these are conditions without substance or easily fixed by the workplace in the first place (p. 38). It is out in the businesses and institutions, they argue, that the most important work on whistleblowing has to be done, and as such, business and institutions should have the ability to deal with the critique-worthy conditions first (p. 33).

In sum, what they are trying to govern here is not increased protection of whistleblowers and clarification surrounding limitations of free speech. Nor is their focus to increase the amount of whistleblowing through greater awareness and information to combat uncertainty and ignorance. Instead, they seek rework §2-4 to facilitate greater protection for employers and creating new policies making it easier for institutions to handle whistleblowing. A goal that will become increasingly apparent in terms of how they seek to govern.

As with the two former periods, there was considerable disagreement over the proposals made in Ot. prp. nr. 84 (2005-2006) to parliament. The Standing Committee on Labour and Social Affairs delivered their response in Innst.O. nr.6 (2006-2007). This document is divided by the government backed majority and a minority from the opposition parties. The essence to which they are in disagreement is over the notion of "reasonability" in whistleblowing. Essentially, the majority of the committee agree with the former Ot. prp. nr. 84 (2005-2006) that there is a need for guiding principles between employee and employer when critique-worthy conditions in the institution are uncovered (Innst.O. nr.6 (2006-2007), 2006, p. 10). These rules should emphasize *reasonable whistleblowing*. The majority, therefore, supports creating a system able to condition the approach whistleblower may alert the internally or externally (p. 10). The minority, on the other hand, argues that the proposed law fails to create a clear and precise legal protection for whistleblowers. Failing to create laws for anonymous whistleblowing, create clearer and more precise language and lastly that the reasonability aspect colludes the situation further as is vague and unprecise (p.11). In essence, they fear this new legislation will deter whistleblowers forth. A deterrence strengthened by a shift in focus from focusing on the critique-worthy condition, to the approach of the whistleblower (p.11).

5.1.1 Partial Discussion:

In the initial report, they seem somewhat bewildered in terms of what the actual goal of the report is and what the legislation is actually meant to do. As we have seen, this is partly caused by the multiplicity of ideas given to them by the former white paper, letters about the process and other potentially forms of pressure. In essence, the conceptualization of the task landed between strengthening protection of whistleblowers and defining limitations to employees' freedom of speech. It is my assessment here that this pronounced bewilderment, in terms of what they are seeking to govern, might have been avoided if this process was given a clear mandate through a full process of an Official Norwegian Report.

Nevertheless, the report sets out to strengthen not only whistleblowers but employees freedom of speech as a whole. In such, taking an approach emphasising the democratic aspect in whistleblowing. At the same time, they want to clarify rules and regulations to make it easier for whistleblowers to act but adds that there needs to be realistic expectations about legislation, especially in terms of interests of employers. In such, rule clarification and expansion needs a proper definition of how whistleblowing ought to be conducted. This creates a dualistic relationship between strengthening the rights of whistleblowers and creating greater regulation with realistic expectations. As we will see, in how they seek to govern, combining these two notions is paradoxical in nature and the resulting legislations moves primarily in the direction of, what they consider, *realistic expectations*.

The White Paper is a whole different ball game. As we have seen, they start out by arguing from a democratic dispositif, emphasising truth-seeking and clarification on behalf of the whistleblower. As we saw in the Ot. prp. nr. 84 (2005-2006), however, this democratic dispositif is only instrumental to the risk management dispositif. The share magnitude and direction of emphasis on the consequences whistleblowing might have on employer's interest far outweigh the democratic dispositif. They promote clear and reasonable laws on whistleblowing, but essentially *clarifying* and *reasonability* means establishing risk management controls on whistleblowing. Nothing makes this more apparent than how they seek to rework §2-4 in order to create greater protection for employers and institutions in cases of whistleblowing. In comparison to the former periods, this work shifts emphasis from explaining how there can be exceptions to freedom of speech (and how these can be justified) to focusing on how whistleblowing ought to be done or later assessed. In essence moving the object of government from creating a system to uncover critique-worthy conditions to creating a system to control the whistleblower.

This shift from governing issues in the labor market, to governing whistleblowers specifically does not go unnoticed in the final proposition from the standing committee. With the government here controlling the majority of the committee, not much changes in between the white paper and this proposal. In such, we need to look at the minority to find the resistance. The main take-away here, from this document and the following parliamentary debate is whether or not the concept of reasonability is bringing something new and clarifying over the already established loyalty principle. It is my assessment here that, how they seek to govern is not by clarification, or making it easier to whistle blow. Reasonability is a concept on top of the already established loyalty principle.

Increasing the complexity and, as a result, the difficulty in whistleblowing. This increases the various aspects a whistleblower has to take into consideration and more importantly inhibiting the natural legal development of loyalty and whistleblowing emphasized in the last period.

5.2 Question 2: how do they seek to govern?

As mentioned, the main goal of the first report is to assess the current climate and come up with new legislation on the topic of whistleblowing. In short that entails redrawing the current §2-4. In order to do so, they start by developing and defining categories necessary to understand and assess whistleblowing as a concept. Among others, these categories are: *employee, critique-worthy conditions, utterance, whistleblowing, retribution, loyalty and loyalty duty, democracy and truth-seeking, need for openness in public governance, the free agency of the individual to develop opinions and, lastly, the interests of the organization/ employer* (Employees Freedom of Speech, 2005, pp.19-22). Compared to previous periods, these definitions move away from a providing merely a description, to making them part of a system to assess whistleblowing in. Creating what will become a preface for a wholehearted social construction surrounding whistleblowing. It creates a language to which we can assess and think about whistleblowing by assessing them in terms of these categories. Within these categories they ask: What is the definition of it? Why is it problematic / what is the inherent problem? How can we overcome this problem?

As an example, in the chapter on utterance, they first describe the differences between different types of utterances such as internal vs. external, whistleblowing, political and professional utterances, and speaking on behalf of the company or as an employee (p. 14). This solves the question of what utterance is and how it relates to whistleblowing. They then move on to the problems inherent in these sub-categories, arguing, that it is problematic if utterances made by an employee is recognized as coming from the company itself (p. 14). This problem of affiliation might be higher, they argue, dependent on what kind of position the employee has (p. 14). Lastly, they provide a solution to the problem. In the case of affiliation, they argue that the employer ought to be given full discretion to control utterances on behalf of the company – what to say, when to say, and how to say it (p. 14). In an event where there are blurred lines in terms of affiliation in a whistleblowing case, the employer retains the discretion to decide the approach of employees (p. 14).

What is special here is not necessarily what is written under each specific category but what we are observing here is, the development of a regime to administer, assess and finally control whistleblowing through the erection of categories and definitions. Through the erection of this regime, the report starts to identify what whistleblowing as a concept ought to become at a paradigm level. Creating a concept of "the ideal whistleblower". This is where we start to see the outlines of a regime aimed at creating rules and regulations for "correct whistleblowing". Not the definition or limitation of freedom of speech for employees from the first period, nor the protection of whistleblowers and public health from the second period. Instead, what we observe here is how they condition and create a system for "correct" whistleblowing and how to control it. We will see this phenomenon strengthen in Ot.prp. nr.84 (2005-2006) under what eventually is coined *reasonable whistleblowing*.

This term, reasonable whistleblowing, seems to find its birthplace here in this report, though not as a concept in its own right. It is developed through *"the utterance being performed in good faith"*-benchmark (p. 50) (own translation). Essentially, reasonability, as a concept, is introduced to argue that whistleblowers need a reasonable substance for their claims (p. 50). A notion that leads to §2-5, which states that whistleblowing shall be reasonable and, when whistleblowing publicly, special precaution should be applied to consider if it is based on reasonable evidence, it is in public interest, and if internal whistleblowing has been attempted (p. 145). Reasonability goes from a concept about the whistleblower having reasonable evidence for their claim, to reasonability becoming a term to encapsulate all the definitions and benchmarks previously mentioned (p. 105). Aimed at replacing the concept of loyalty.

Another main concern of this report is how to deal with whistleblowing to the media. In the legislation from the former period, they made a point out of protecting whistleblowers who came out to the public with their information. Nevertheless, in this report, we see legislation to limit public whistleblowing and push back on whistleblowing to the public. When talking about potential damages to the employer, they argue that the employee has no way of knowing how the media will deal with the whistleblowing case if it goes public (Employees Freedom of Speech, 2005, p. 44). This entails greater precaution taken by the employer when considering going public to the media (p. 47). Most notably, they argue:

In terms of whistleblowing to the media, it is where we find the core challenges on whistleblowing. This is in turn because, among other things, the damage potential is greater and it can be questionable if the publication contributes to rectify the condition. (p. 49) (own translation).

It is interesting here how they refer to whistleblowing to the media as the core problem with whistleblowing and that this form of whistleblowing should be limited more than other types of whistleblowing. It is under this notion they propose more assessment markers for whistleblowing: *damages to employers interests (p. 48), the difference between internal and external whistleblowing and whistleblowing to the media (p. 49), internal procedures need to be attempted first (p. 49), acting in good faith and reasonable whistleblowing (p. 50), approach and medium (p. 51), public interest (p. 52), appropriate measure assessment (p. 52), the motive behind the action (p. 53).* Strictly discouraging public whistleblowing.

From what has been described here, we can assess that the first report not only comes up with new legislation to the old §2-4, but replaces it with an entirely different law. As mentioned, one of the most important innovations they argue, is highlighting employees right to political and professional utterances under a new §2-4 (p. 97). Political and professional utterances are permissible as long as they do not cause unnecessary risk to the interests of employers (p. 101). The old §2-4 is moved to §2-5, replacing the old text with a right to whistle blow, with public whistleblowing subject to the abovementioned limitation of reasonable, built on solid evidence, with conditions sparking public interest, and a notion that internal whistleblowing should be attempted before going public (p. 104). In addition, they have created a new §3-6 ensuring that employers create an internal system, in relation to their HSE-regime, able to facilitate whistleblowing. Lastly, they added a protection against retribution towards whistleblowing and professional and political utterances (with specified liability regulations) as long as the employee adhered to §2-4 and §2-5 (p. 121).

In the partial discussion above, I argued that the main intent of the white paper was not to clarify or strengthen the rights of whistleblowers but to streamline and control whistleblowing to prevent potential negative effects for employers. Most of that work was done in the internal group report, but the white paper takes this one step further. The Ministry argues that the old §2-4 from the last period, assumed whistleblowers would adhere to certain unwritten principles when whistleblowing (Ot.prp. nr.84 (2005-2006), 2006, p. 38). This reports aim is to make these principles visible in the legal text, arguing that it would be misleading not to have them made clear here (p. 38).

This, they argue, will signify the right to whistle blow, at the same time as it signifies that this right comes with certain limitations (p. 38).

The reasonability aspect is key to describe these limitations. As mentioned, the internal report never provides a core definition for *reasonable whistleblowing*. However, under Ot.prp. nr.84 (2005-2006) we find the full establishment of the *reasonable whistleblowing* concept. The main problem they argue is not if but how people whistle blow (p. 39). *Reasonable whistleblowing* is when a whistleblower has a solid foundation for their claim and has taken into considerations the legitimate interests of the institution they work for (p. 39). The ministry argues that the emphasis on *reasonable whistleblowing* in itself highlights that whistleblowing is a right, as long as the employee is aware of how they go about it (p. 38). With this concept, they hope to maintain the interests of employers and institutions, while at the same time give better information about the right whistle blow (p. 38). Their hope is that the new *reasonable whistleblowing* should circumvent the loyalty principle and prevent strict informal demands of loyalty from the employer (p. 38). Nevertheless, they argue that it is a continuation of the loyalty principle and they refer any interpretation or validation of the *reasonable whistleblowing* back to the principle of loyalty (p. 50).

Another issue becoming increasingly important is the separation between internal and external whistleblowing. They argue that the new law will encompass both forms of whistleblowing, but adds that there is inherent difference in permissibility of when to choose one over the other (p. 37). They argue that in almost any case internal whistleblowing, to a representative of management, trustee from the union, or HSE-representatives, are permissible, but adds that this too is bound by the *reasonable whistleblowing* concept (p. 39). Notifying public authorities should always be permissible arguing that public authorities have the ability to distinguish good alerts from bad ones (p. 40). Whistleblowing to state authorities should result in a reasonable assessment but whistleblowing to authorities is still subject to the same abovementioned assessment for *reasonable whistleblowing* (p. 40).

In terms of external whistleblowing, the idea that media is the main problem manifests itself again. External whistleblowing is here discussed under the headline *"Whistleblowing to the media etc."* (p. 40) (own translation). They argue that public whistleblowing is whistleblowing meant for or potentially able to reach a large number of people outside the control of the sender (p. 40). Such might entail media, blogs, or emails to people outside the institution (p. 40). The damage potential of external whistleblowing is substantial. External whistleblowing should only be considered if the

whistleblower has followed the internal procedures of the institution, considered other forms of whistleblowing and taken into account the legitimate interests of the employer (p. 41).

To facilitate better internal whistleblowing §3-6 from the internal report is continued here. Obligating businesses to create a system for whistleblowing, within the organization, in relation to their HSE-system (p. 45). The specificity of such a system is not made explicit, and the employer is given discretion to design such a system fitting to the institutions needs and size (pp. 48, 54). The main intent is to give the employer the ability to handle critique-worthy conditions internally and, as such, they are not obligated to make a system for external whistleblowing (pp. 41, 54).

As mentioned, one of the main innovations and policies meant to facilitate better protection for whistleblowers and employees freedom of speech in general in the internal report was the special emphasis to political and professional utterances in the new §2-4. The white paper argued for its removal because introducing these two utterances would dilute the protection on utterances of whistleblowing. This, however, also removed the protection and compensation this law would have provided for political and professional utterances. In terms of protection for whistleblowers, the ministry argues "*Under no circumstance will it be permissible for an employer to react against a person who "follows the rules" and conducts their duty"* (p. 40) (own translation). However, what they fail to comment on is that the protection against retribution only applies if you follow the regulation in the new §2-4, hereunder, *reasonable whistleblowing*. The following protection against retribution and possible reparations for retributions is only applicable if the act of whistleblowing is considered correct in relation to *reasonable whistleblowing* (pp. 52-53). In such, when whistleblowing, you have to act in accordance with and later be assessed in terms of the *reasonable whistleblowing* condition before protection and compensation may be considered.

In the last document, Innst. O. nr.6 (2006-2007), the majority agrees and defends the abovementioned legislation proposals. They believe the emphasis on reasonability in terms of approach is a better and more precise concept for whistleblowing. The minority disagrees and argues that this concept might deter potential whistleblowers (Innst. O. nr.6 (2006-2007), 2006, pp. 11-13). Arguing that this legal proposal is not able to create a coherent legal protection for whistleblowers – making it harder for whistleblowers (p. 11). They argue that the current legal climate gives people free access to speak out and participate in debates regarding conditions at their workplace. The Majority responds by arguing that the entire standing committee agrees that there needs to be some guiding principles in whistleblowing cases and the new proposals emphasis on approach encom-

passes clarification, a better legal protection for whistleblowers, better protection from retaliation, and a signal effect making it clear that whistleblowing is a right (p. 13).

5.2.1 Partial Discussion:

In the former to periods, we have seen small developments and conceptualizations on what whistleblowing is and ought to become. Up until this period, however, such conceptualizations were kept outside the actual legal text and the last period even made it a point to prevent such inclusion in the legal text. In this period, we have seen how these categories and assumptions become an inherent part of the legal text, as part of what eventually becomes known as *reasonable whistleblowing*.

Essentially, what is happening here is the development of a system to decrease exposure to potential damages for institutions through the erection of a system to allow for only "ideal whistleblowers". Everyone who do not fall within that category are exposed to scrutiny or subject to investigation and retribution. The categories and assumptions emphasize under what circumstances (and with what approaches) you are allowed to whistle blow. By removing "to the public" in the legal text, they ensure that *ideal whistleblowing* is only applicable in cases of internal whistleblowing. The new §3-6 ensures that the business have the ability to control where and how the internal whistleblowing should be conducted. This ensures that employers have the ability to create their own parameters and approaches for *ideal whistleblowing*. The protection and potential of reimbursement is conditioned on reasonable whistleblowing to incentivize *ideal whistleblowing*. In addition, removing the proposed §2-4 from the report seems necessary, as the control and judgement inherent to reasonability would be challenged if political and professional utterances would be subject to the same benchmarks as whistleblowing. The removed §2-4 would jeopardize the limitations on whistleblowing, not dilute the protection of whistleblowing as they claim.

In the first period, we saw how they created an exception to the exception. The limitations to free speech of employees were mitigated through the establishment of whistleblowing as a final exception to the concept of loyalty. Whistleblowing was established as a panoptic technique to ensure transparency and prevent illegality through the potential of employees rightfully alerting the public of discrepancies. In period two, we saw how this was further included in the temporary §2-4. Here, we see how whistleblowing is curbed through a series of practices, rules, and regulations. What they are creating however, is not a clarification, nor a strengthening of whistleblowers rights or protection. They are establishing a system of assessment for whistleblowing with no single factor

being determinative – only the concept of reasonability built in addition to the loyalty principle. The whole legislation relies on a context-sensitive and open-ended judgement of the court system. This means that it will be increasingly difficult for potential employees to self-assess if they are acting reasonable or not. Even in an event where they actually are able to self-assess their reasonability, they are now obligated to archive all factors necessary to prove their own *reasonability*. This is due to the fact that in the event whistleblowing becomes a professional or legal conflict, you have to prove that the act was reasonable.

In a bigger perspective, how they seek to govern, is through the erection of a second panoptic technique. It is a technique aimed at subjugating potential whistleblowers to adhere to certain established norm (the ideal whistleblower) and its categories, benchmarks, and instruments. It is a panoptic technique aimed at alleviating risk management of businesses and institutions when facing whistleblowing. It is panoptic in the way it creates a system for employees, the employer, and society to assess the whistleblower. It is in the interest of the employer to early assess if the whistleblowing was in accordance principle of *reasonability*. Transparency in difficult cases will therefore fall upon the whistleblower and his or her actions.

The law is not, as they claim, strengthening or clarifying the right of whistleblowers. While the initial panoptic technique of whistleblowing was established to curb discrepancies in the labor market, this panoptic technique is set to curb negative consequences for businesses by limiting non-ideal whistleblowing. Clarification here is only clarifying that you are not allowed to whistle blow unless you do it in accordance with the rules and regulations in the law. These law, however are, as we have seen, not final in nature and subject to the open-ended and context-sensitive nature of the potential judgement from the workplace, employer, and judicial system. In such, this law does not create stronger and clearer rights for whistleblowers, as the legislators claim, but establishes a great panoptic technique alleviating the risk potential for businesses in whistleblowing cases.

5.3 Question 3: why do they seek the subject's involvement?

In terms of why they seek the subjects involvement, the internal report from 2005 argues that employers, from a management perspective need "*a safety valve"* (own translation) able to provide information about issues in their organization that they are not aware of (Employees Freedom of Speech, 2005, p. 11). Such issues might hurt the interest of employers if they are not uncovered (p. 11). Whistleblowing will ensure that employees contribute to and participate in a system which that

maintains oversight and is able to uncover, fix and prevent present and future issues (p. 66). Involvement from employees is especially important in uncovering corruption and other financial misconducts (p. 106). Asking institutions to create a system for whistleblowing should create a better milieu for open dialogue within the institution.

For the white paper, the Ministry argues that employees in the public sector have a unique ability to provide information leading to greater control over public services and spending (Ot. prp. nr. 84 (2005-2006), p. 33). Arguing that whistleblowing is a great tool for uncovering corruption and other forms of financial misconduct (p. 33). In such, it is important to create a system enabling employees to report on the critique-worthy conditions so that they are uncovered or potentially dealt with (p. 37). They argue that it is vital for businesses that these conditions are uncovered and are terminated as quickly as possible (p. 37). In the end, they argue, it will also be in the best interests of institutions to uncover these conditions (p. 37). A culture facilitating free speech should promote a healthy working environment and potentially lead to greater efficiency (p. 37). Lastly, the arguments from the standing committee are mostly in accordance with the assessments made in the two foregoing documents (Innst. O. nr.6 (2006-2007, pp. 9-11). The minority adds that whistleblowing has been vital in several cases of corruption and financial crime in recent years and that the publics' involvement has been crucial in highlighting these issues (p. 12).

5.3.1 Partial Discussions:

It is interesting, considering the findings from this period, that we don't find greater discrepancies in between the different periods when it comes to why they seek the subject's involvement. The general consensus between each period has been that employees provide a vital role in uncovering illegalities and mischiefs. They provide transparency and reveal information hidden from view. It establishes an open dialogue that creates better and more well-informed decisions. This should create a healthy working environment reducing ostracising and it uncovers corruption and financial misconduct. What is different, however, is not what employees might provide in terms of information, but whom that information should benefit. In the first period, whistleblowing would benefit society. The increased transparency and information would avoid and uncover conditions dangerous to society and the population in general. In the second period, increased transparency and information would also benefit society, but primarily, it would benefit the individual worker by protecting it from potential harmful activities in the labor market. Enabling the individual worker to reduce

ostracising from the labor market and benefit society through increased available labor and productivity.

In this period, whistleblowing is reduced to a management perspective. Whistleblowing has become a *safety-valve* for businesses to relieve pressures and negative opinions within the organization. Where the company itself should be able to police their own organization and the potential problems within it, without external intervention or public attention. Where, greater than ever, the institution now has a mechanism to control the flow of information within the organization. What could have been inherently negative for institutions is now turned into something positive. Whistleblowing might be time-consuming and elaborate in the short run, but top management should come to understand that handling whistleblowing should be in their best interests.

5.4 Discussion Period Three

In sum, the first document seems somewhat bewildered in terms of what it sets out to do. It attempts to facilitate both the democratic value of whistleblowing and at the same time curb the negative consequences whistleblowing might inflict. Most prevalent here is the innovation on whistleblowing as a democratic asset, when they seek to professional and political statements under the same coverage as work related whistleblowing. At the same time, however, they seek to create a regime aimed at limiting the negative consequences whistleblowing might have on employers. This first document attempts to maintain an uncoupled relationship between democratic and risk-management dispositif where both assumptions are included without the two being structurally intertwined (Andersen, 2008, p. 174).

The democratic considerations made in the first report is, however, actively omitted in the two next documents. Re-establishing the parasitic relationship of the risk management dispositif over both the democratic and biopolitcal dispositifs. Highlighting this shift is the removal of political and professional utterances from the WEA, under the assumption that such protection would only dilute the protection of work related whistleblowers. This establishes whistleblowing as organizational work related instances and not as democratic assets relevant outside the realm of the labor market. The final two documents still emphasize the role of whistleblowing as a democratic aspect, however only to underscore the importance of risk management or risk management considerations. Essentially, all that is left is a legislative process whole-heartedly focused on governing the way whistleblowing is conducted and limiting potential negative consequences for employers.

Under the final law, whistleblowing is no longer conceptualized under democratic or biopolitical considerations. Instead, the final law on whistleblowing emphasized moving whistleblowing from a societal issue to an organizational one. Letting institutions, businesses and organizations use whistleblowing as a safety-valve to develop better organizations and a better labor market. This risk management approach brought with it the establishment of a regime to limit unwanted or potentially ignorant whistleblowing through the erection of a panoptic technique of *reasonable whistleblowing*. Establishing an ideal whistleblower and an ideal approach to whistleblowing. The reward for coherence to this ideal was potential protection and reimbursement for potential retributions. Failure to comply with the abovementioned ideal is less ambiguous; however, there is reason to believe that greater scrutiny is implied the further a whistleblower diverges from the ideal.

This briefly covers the findings in the three first parts of the analysis. Further implications and discussion on the findings above will be covered in the discussion following the analysis of telos.

6 Telos of Government

In this final analysis, we will focus on the telos of government. Considering the scale and the detailed overview presented in the three foregoing chapters, this analysis will only focus on the telos from the final proposal to parliament in each period as stated by the relevant standing committee. This approach to a the analysis might omit important nuisances, nevertheless, the final proposal to parliament is where we find the final conditioning of what society the law is supposed to create. This enables us to understand how each period condition their legislation on whistleblowing and compare the three periods to understand how the telos from the third period ends up promising more than it can keep. This analysis and subsequent discussion will be more subjective in nature in order to look behind what they are saying and find the true intent of the legislation (Dean, 1995b, p. 577).

6.1 Period One: A Society of Competitive Freedoms

Essentially, the first period conditions a society where freedom of speech applies to the entire population. A society where employees ought to share the same protection §100, to the constitution, provides the population in general (Innst. S. nr. 270 (2003-2004), 2004, p. 9). §100 aims to provide an even playing field where citizens are protected against short-term majority opinion of what is normative or proper conduct (p. 9). In such, they profess a society where people are able to endure notions they don't necessarily agree with (p.9). Opposition to opinions should be met arguments and a proper debate, rather than exclusion of opinion and punishment (p. 9). Only in events where individuals are not able to protect themselves (for instance privacy), or in terms of national security, should it be viable to limit freedom of speech (p. 8). Such limitations, however, need to be made clear in the law to underscore and not prevent freedom of speech.

The society politicians envision is a society where freedom of speech is a fundamental right. Freedom of speech should be met with more freedom of speech, not less. In some instances, it is viable to limit freedom of speech but the general idea is that limiting freedom of speech should only be attempted to promote more freedom of speech. For instance, limitations to employees freedom of speech is acceptable within the loyalty principle, because the loyalty principle encourages trust between the employer and the employee. Generally, businesses should deal with utterances from employees in accordance with the intent of §100 (p. 39). Answering critique with rational arguments and coherent reasoning, not ramifications and punishment. The intent of §100 puts great trust in the individual and emphasizes individuals impact on the democratic process. Emphasising active partic-

ipation, openness to opinions and increased transparency in society. A society built upon rational arguments and active citizenship – limited only by competitive freedoms. In this game of competitive freedoms, the committee acknowledges the weaker position held by employees, arguing society should favor their right to freedom of speech.

6.2 Period Two: A Healthy Working Environment

The biological dispositif observed in period two defines the telos of the second period. The WEA has been and is intended to provide the best foundation for a healthy and valuable working environment – establishing a healthy labour market is fundamental to the well-being of the population (Innst. O. nr. 100 (2004-2005), 2005, p. 5). The WEA should be a law of protection - ensuring that everyone are given the ability to perform at his or her best (p. 6). Rising costs for the welfare state, caused by aging demographics and people ostracized from the labor market, necessitates a law enabling more productivity, preventing ostracising and getting those ostracized back to work (p.6). On whistleblowing specifically, they observe a society where employers overestimate how much loyalty they should be able to demand from their employees (p. 27). A demand that challenges the interests of society and the well-being of employees. Whistleblowers should be enabled to provide vital information on matters of the state and society in general.

The society envisioned here is a society of fragile individuals. Work is imagined as a relationship between the possible injury to body and mind, and the positive health benefits stemming from personal productivity and its impact on self-worth (p.7). Employees are victimized in what becomes considered a subordinate position to that of the employer. Institutions and businesses are stronger entities, packing more resources and damage potential. The law wants to create a society where employees can go to work without fear of harassment, bullying, dangerous conditions and malicious practices. A society where, if someone observes something and whistle blows, that person can do so without fear of it affecting his or her professional and personal life.

6.3 Period Three: Protection from Ignorance

The final legislation envisions a law, signalling that whistleblowing is both legal and sought after (Innst. O. nr. 6, (2006-2007), 2006, p. 9). Where employees are able to provide information on critique-worthy conditions at the workplace. This, they hope, could potentially lead to an open and healthy culture of internal communication at the workplace (p. 9). The main challenge facing whistleblowing is that employees do not know where, how, and who to whistle blow to – in turn leading

to less whistleblowing (p.9). Such clarification is best facilitated if there are certain guiding principles for cooperation between the employee and the employee. Employees should enjoy great freedom in choosing their approach to whistleblowing. The most important aspect should be if the employee acted in good faith – believing that the information provided was correct (p. 10). For businesses, the standing committee understands the damage potential media coverage and innovations in information technology could impose (p. 10). This threat should be reduced as internal whistleblowing becomes the norm and external whistleblowing only a becomes a last resort (p. 10). §3-6 to the WEA ensures a system facilitating internal whistleblowing and ensures that employees do not unnecessarily step out of line - a system where employers are able to attend their own problems.

In sum, the telos of the final law is preventing businesses from becoming victims of ignorant whistleblowers and protecting employees through enlightenment on the potential pitfalls to whistleblowing. They envision a society where the interest of employees and employers can work in conjunction, as long as there are some guiding principles to how whistleblowing ought to be approached. The law signals a strong message that whistleblowing is both legal and sought after, as long as it is done in coherence with the interests of employers. Employers are the best entity to ensure proper handling of whistleblowing and it should be in their best interest to solve the issues themselves and for their employees.

6.4 Comparison

At the onset of this thesis, I stated that I observed a mismatch between what the law was supposed to do and how whistleblowing is observed by whistleblowers and scholars alike. In the former, we have seen what kind of legislation was built and the challenges to it. Here we have observed how politicians portray what the law is actually supposed to do. This development, from the ideas set forth in §100 to the final legislation, contribute to the discursive movements of what whistleblowing is and what the law on whistleblowing is supposed to do. When looking back at the statements made by whistleblower Pål Stenstad, I believe we can conclude on three different observations in terms of why there is a mismatch between what was promised and what the law established.

The first explanation might be that the telos of the first and the second period, has been mistaken for that of the third period. The classical democratic aspect of whistleblowing and the biopolitical considerations are quite prevalent in the first two periods. Both of which clearly highlight the weaker position employees have in cases of whistleblowing and attempts to create a society where

whistleblowers are protected from potential harm. The proximity between the periods might explain why some people, like Stenstad, have not picked up on the victimization of businesses and the damage potential posed by media in the third period. Failing to understand that the law actually does what it has set out to do: solving conflicts at the lowest level possible within the organization and preventing unnecessary conflicts caused by publicity. The telos of the third period is not out to protect whistleblowers and solve conditions through state intervention, rather protection comes from reducing the level of conflict between employer and employee through latent rules preventing unnecessary public attention. Stenstad's perception of what the law actually accomplishes could, partially, be attested to failure of understanding the shift in discourse on whistleblowing from 2004 to 2007.

The second explanation, is that the telos of government in the third period is somewhat hard to grasp, due, in part, to challenges legislators had in overcoming the telos of the two former periods. The classical interpretation of whistleblowing as a democratic asset seems to have been a popular among all participants in the legislative process. It seems, even in the final proposal to parliament, that politicians agree that whistleblowers should enjoy extensive protection and agency in whistleblower processes (9-10). Nevertheless, the bold and unhinged policy from the second period demanded a push-back to ensure the interests of employers. Arguing for this push-back, they seem to have found it hard to combine the classical with the modern conceptualization of whistleblowing. In part, I proved some of this discrepancy by highlighting the parasitic relationship of the risk-management dispositif over the biopolitical and the democratic dispositif. The parasitic relationship established itself in order to provide better framing of the shift from classic to modern interpretation of whistleblowing. In essence, the shift is hard to grasp because legislators attributed qualities to the new legislation, reimagined from the two former periods, which legislators were not able to keep - in part confirming some of Stenstad's observation.

The third explanation might be in the emergence of (unintentional) power relations established after the implementation of the final legislation. These power relations might explain the perception held by whistleblowers and their supporters but, even more importantly, it might provide us insight into the negative trend in whistleblowing as described in Trygstad & Ødegård (2016). Such an analysis does not fit within the framework of this analysis, but would be a worthwhile extension of the findings here – investigating the micro-, meso-, and macro-level ramifications the law has at an organizational or individual level.

7 Discussion

Over three distinct periods we have traced and analyzed the development of the law on whistleblowing. In order to organize the vast amount of issues and details discussed, I have chosen to divide the discussion into different topics of inquiry. First, loyalty and clarity. Second, the protection and reimbursement. Third, changing dispositif and the paradox of revolution. Fourth, what does the final legislation actually entail and what does the erection of the second panopticon imply for the law on whistleblowing. Finally, we will discuss the future of whistleblowing in terms of the temporary legislation made in 2017 and the mandate to a new NOU on whistleblowing due March 2017.

7.1 Loyalty and Clarity

After reading the documents and analyzing the three periods individually, it is my assessment that the main problem for the law on whistleblowing, overall, is the failure to properly problematize and create legislation on loyalty, from the ground up. They fail to address the shortcomings in the non-statutory and case law based loyalty principle. I am no legal scholar, but it is evident from the documents, in these three periods, that the loyalty principle is not able to properly encapsulate the inherent challenges to limits on employee's freedom of speech, nor whistleblowing. Over the whole period, from the first NOU in 1999 to the last proposal to parliament in 2006, they emphasising the lack of clarity in whistleblowing cases but, nevertheless, ultimately fail to provide such clarity.

In the first period, they argue that laws limiting freedom of speech needs to be put into law. Emphasising that the loyalty principle is not sufficient in its current form to support limits to employee's freedom of speech. As employee's freedom of speech nor the loyalty principle is not included in the Constitutions' §100, they send the issue of loyalty to following processes. The natural destination for that process lands on the already planned revision of the WEA, however, the WEA revision is not equipped to give the loyalty principle the rigorous rework highlighted in period one. Instead of dealing with the loyalty aspect head on, the second period cuts its legislation short to emphasizes how they want to avoid blocking the natural legal development on employee's freedom of speech and loyalty in the court system. Again, this doesn't bring any further clarity to the loyalty principle, but moves the problem of clarity to the legal system.

The last period too fails to address the shortcomings inherent in the loyalty principle. Instead of dealing with it head on, they create a new legal concept - *reasonability*. As witnessed in the fore-

going segments, the reasonability aspect does not bring further clarity to the matter. One, as already mentioned, reasonability is an ambiguous term with non-ranked and unclear assessment markers. The reasonability aspect opens up a completely new legal process on whistleblowing in what can only be considered a new process of open-ended and context-sensitive court proceedings without a clear outcome for whistleblowers. Second, the *reasonability* concept is supposed to replace loyalty in whistleblowing cases, however, as already highlighted, the *reasonability* concept still relies on the loyalty aspect. Both for validation in terms of §100 to the constitution and for clarification where there is ambiguity over the *reasonability* concept and its components. Clarification could never be achieved without addressing the loyalty aspect. As highlighted in the very first document, the non-statutory and case law based principle of loyalty was not established to facilitate limits to employee's freedom of speech nor whistleblowing. It was first established as a principle in a court case where employees in one company had gathered information and assets they would use to start a competing company (NOU 1999:27, p.170). The loyalty principle has been developed further in labor market agreements and other court cases, but can still not be considered relevant to the loyalty a whistleblower exhibits in cases of whistleblowing. It is, from this notion, that it is easy to understand how this concept is not able to provide clarity for employees, the employers or the court-system.

To achieve greater clarity, they argue, the reasonability concept brings about new components able to clarify limits on whistleblowing. As we have already seen, however, the reasonability aspect, in its own right, increases complexity in whistleblowing cases with its open-ended and context-sensitive assessment benchmarks. In addition, it being dependent on the loyalty aspect for validation and clarification further increases the overall complexity and sources used to interpret what the actual limits are. Last, the reasonability aspect necessitates new legal practices which increasing complexity even further. The new §3-6 to the WEA was created to alleviate uncertainty in terms of where whistleblowers would apply their concerns but this doesn't change the fact that there are no clarification on what will actually happen after an utterance has been made and the situation escalates. In sum, failing to address the loyalty aspect creates limits on the public policy process and shapes potential outcomes - limiting ability to bring clarity on whistleblowing and employee's freedom of speech for employees, employers and society.

7.2 Protection and Reimbursement

In addition to clarity, the process on whistleblowers was supposed to establish greater protection for whistleblowers and increase the likelihood that employees would come forward (Ot. Prp. Nr. 84 (2005-2006), 2006, p. 33). In part, this was supposed to be facilitated through a combination of protection from retribution and potential reimbursement for whistleblowers experiencing such retribution. In the second period, they establish §2-5 to emphasize that all retributions against whistleblowers who follow current laws are protected against retributions. The scope of what retributions were included and who the protection applied to was limited only by current laws.

In the final legislation, as I have already highlighted, they do add the compensation for retribution, however, this compensation and the protection against retribution is dependent on the aspect of reasonability. What I want to draw attention to here is that the legislation claims that it has created one of the most progressive legislations protecting whistleblowers and encouraging more whistleblowing. However, as we saw in period three, the conditioning needed for protection and reimbursement is dependent on the court system for effect. In the event that a case escalates, it will eventually be dependent on legal judgement of several factors. First, was this actually whistleblowing or was this professional or political utterances not covered by the protection? Second, if considered whistleblowing, does it live up to the expectations of reasonability? Third, the employer is responsible for providing evidence that the whistleblowing was unreasonable, but this doesn't circumvent the fact that it is the employee who needs to collect evidence to prove it was reasonable and in addition provide evidence of any retributions he or she faced after whistleblowing. Arguing that the burden of evidence is on the employer is only correct if pre-supposing that no trial will take place. If a whistleblower wants protection and potential reimbursement for damages, they need to provide evidence that they acted reasonably and jot down and prove what kind of retributions they experienced. This comes in addition to providing evidence for the critique-worthy conditions they whistle blew about it the first place.

This begs the question, is the law able to protect whistleblowers and encourage more whistleblowing? Is the protection and reimbursement able to create a signalling effect that prevents unnecessary retribution against whistleblowers and compensates whistleblowers for their potential losses in relation to their case? Statistics report that whistleblowers experience reprisals and many argue that they would refrain from or discourage others from whistleblowing (Trygstad & Ødegård, 2016, p. 4) (Eriksen, 2016, p. 129). This, in addition to several high-profile whistleblower cases

with negative outcome for the whistleblower (for instance the "Norwelt-case" and "Sandviken-case")[3], seem to suggest that problems with conditioned protection and reimbursement are a major obstacle to facilitating more whistleblowing (Eriksen, 2016, pp.226-233).

7.3 Dispositif and Paradox of Revolution

Much of the abovementioned discrepancies between what they say they want to achieve and what they actually end up creating can be attributed to the change in dispositif and paradox of revolution. From the very start, we saw how the paradox of revolution limited the scope on freedom of speech and employee's freedom of speech but led to the development of whistleblowing. Dependence on historical, social, or structural factors limit the scale and scope of the new legislation. In policy-making, the paradox of revolution also manifests itself in between different periods of legislation. The social constructions developed in one legislation conditions future development on the topic.

The paradox of revolution explains why §100 to the constitution didn't become a ground-breaking legislation on free speech, however, it also explains why the last legislation still emphasizes protection and viability of whistleblowing while inherently trying to limit whistleblowing. It seems legislators were unable to escape the social pressures built up within the earlier two periods. The emphasis on the benefits to society and the emphasis on protection of whistleblowers forced the hand of the last legislative process. We saw this clearly in how the last report used both the democratic dispositif and the biopolitical dispositifs knowledge structure instrumentally to support the risk management dispositif. Key societal pressures from the knowledge structures built up in the first and the second period were inevitably hard to completely dismantle in the third period. As a result, the risk management rationalization of the last period used the knowledge structure in the democratic and biopolitical dispositif, hereunder goals, rationalization and justification of the two last periods, only instrumentally to justify its own risk management dispositif.

The challenge to the law on whistleblowing is that the parasitic relationship portrays legislation aimed at facilitating more democracy and greater care taking of whistleblowers – while the law properly aims to protect companies from harm. Expectations established in period one and two are hard to overcome, but instead of neglecting them, legislators embraced the expectations without actually including them in the final legislation. This creates a mismatch between public expectation

[3] See Eriksen, 2016, pp. 226-233 for more information on these cases.

and the actualities of the law. Inevitably, this does not necessarily affect the effectiveness of the risk management approach in the law, but will lead to frustration from those whistleblowers who believed that it would actually protect their right to free speech and protect them from retributions.

7.4 The Two Towers - Panopticon

Last, I want to touch upon the most severe challenge the current law on whistleblowing faces, from a public policy standpoint. This period I coined two towers, marking the erection of a second panopticon aimed at disciplining whistleblowers to relieve potential damages to the interests of employers. In its own right, it is a great piece of legislation to do just that. Providing business with the ability to police their own organization and make whistleblowing an asset rather than a problem. From a public policy standpoint, this approach to whistleblowing is sound. You move the complexity, hereunder responsibility, oversight, control and handling of conditions from the state-level down to the institutional/ management level. Emphasis on internal whistleblowing and businesses ability to handle such instances could potentially mean that fewer cases have to be handled by state authorities, police, and the court system. Alternatively, end up in the media.

While these are positive aspects, the main problem with the erection of a second panopticon, and moving responsibility from the state level to the institutional level, is that you are weakening the positive aspects from the panopticon of whistleblowing. First, by moving the level of responsibility to the employer the employer now has priority access to information and ability to handle it as they see fit. You are diminishing the ability of the state to establish controls on businesses, institutions and government bodies. In addition, by making whistleblowing primarily a management issue you are undermining the importance whistleblowing might have in other facets of life such as civil society, national security, or other matters of interest. In part because you are undermining society's access to information and transparency.

Second, you remove the disciplining factor inherent to the panopticon whistleblowing establishes. When the employers know that they most likely gets the information first or are able to act upon the information before it becomes a problem, the incentive to avoid misconduct and mismanagement is weakened. It becomes a classic example of the fox guarding the henhouse when employers are able to police themselves. Without the potential threat of a whistleblower being anywhere in the organization and the potential threat of pre-emptive publication, the incentive to be

proactive is weakened. Proactivity now entails greater attention to avoiding whistleblowing from ever taking place, not actually stopping critique-worthy conditions.

Third, weakening the panoptic value of whistleblowing is furthered by the rigorous system companies can build to make sure that whistleblowing stays internal. As there are no limits to how extensive the internal system can be, companies and institutions can build internal systems deeming nearly all forms of external whistleblowing unreasonable. The Norwegian Armed Forces created an anonymous whistleblower system on top of its already substantial internal system for whistleblowing (Norwegian Armed Forces, 2015). Management consulting companies and legal firms are selling independent whistleblowing services to companies where employees ought to report whistleblowing instead of going public (Ernst & Young AS, 2016). Inevitably, the design of the legislation allows businesses unlimited expansion of their internal system – rendering external whistleblowing impossible. This further weakens panoptic technique in whistleblowing aimed at preventing critique-worthy conditions from taking place.

I am not arguing that the two panopticon cannot coexist, but it requires acknowledging and embracing how each panopticon operates. Such an approach requires reintroduction of accountability and government oversight. Internal whistleblowing could remain the primary mode of entry for whistleblowers, but it requires that government set forth rules regulating how institutions register and handle whistleblowing and critique-worthy conditions. Reintroducing government oversight and accountability over how institutions handle cases of whistleblowing. This, in combination with consequences for failure to comply with the abovementioned prescriptions could potentially rectify the disciplining traits inherent in whistleblowing.

7.5 Final Remarks: The Temporary Law and Future of Whistleblowing in Norway

In the third period, they added that the law should be given an evaluation a few years after its implementation (Innst. O. nr. 6 (2006-2007), 2007, p. 11). Ten years later, a government initiative on whistleblowing is now underway. The temporary legislation, ratified June 2017, has attempted to rectify at least some of the findings in this thesis. First, they made it explicit in the legal text that temporary workers are given the same right to whistleblow as everyone else. It seems employment status has been yet another benchmark to which employers could avoid whistleblowing being considered *reasonable*. This obstacle has now, at least temporarily, been tended to.

Second, the new §2-A3, which replaces the old §3-6, extends the responsibility employers have to create a system for whistleblowing, but, even more importantly, in §2-A3 (5c) it makes it a matter of law that this system should include provisions on how the employer is supposed receive, assess, and follow up instances of whistleblowing (WEA, 2017, §2-A3). At least, for this temporary legislation, they have attempted to rectify government control on how whistleblowing ought to be handled. Employers are now required to develop and present routines on how they handle whistleblowing and the conditions that were reported on. Such a provision will reintroduce accountability for employers in whistleblower cases and possibly give potential whistleblowers some clarity and confidence in terms of how their case is supposed to be handled.

This temporary legislation will be in place until the new process on whistleblowing hands over their proposals in 2018. The mandate of this process makes me optimistic in terms of dealing with the key issues mentioned above. First, I am glad to see that the report is supposed to give special attention to both what are "critique-worthy conditions" and "reasonability" (Jarbo, 2017). In addition, I am glad that they should consider the implications inherent to placement of whistleblowing in relation to the WEA. This, in part, seems to reintroduce democratic considerations in terms of whistleblowing. Nevertheless, I am afraid that the intentions and social structures built into the whistleblowing law from 2007 have become quite established and, considering the paradox of revolution, could prove very hard to overcome. This could, in turn, limit a rigorous assessment of the loyalty aspect.

8 Conclusion

Tracing the development of policy on whistleblowing, from 1999-2007, has provided a coherent overview of the various discursive movements and policy outcomes on whistleblowing as a concept and governmental technique. Period one showed a high degree of discursive movement between democratic and risk-management approaches to whistleblowing. Framing whistleblowing within the revision of the WEA in the second period led to a bold biopolitical approach on whistleblowing. Dispute over the biopolitical approach in the second period carried over into the third period. Here, a risk management approach to whistleblowing became prevalent – establishing a final legislation to prevent unnecessary harm to employers caused by ignorant whistleblowing.

Criticism of the whistleblower law and observed mismatch between policy goals and outcomes, by whistleblowers and scholars, can be attributed to the abovementioned development history, inability to overcome discrepancies in the loyalty aspect, inadequacy to bring clarity to the rules on whistleblowing and challenges faced by policy makers when trying to overcome telos of former periods. Most important, however, is the failure to acknowledge whistleblowing as a panoptic technique of government. Whistleblowing is no longer conceptualized as a state asset of power over the population, rather, it is redefined as an organizational tool of control for businesses and institutions.

In turn, the risk management approach to whistleblowing draws attention away from the condition that caused alarm. Instead, the primary focus is directed towards the validity of the measures chosen by the whistleblower. This leaves the whistleblower vulnerable to scrutiny from the employer and colleagues. Legislation protecting whistleblowers fails because protection and potential reimbursement is dependent on the validity-assessment of the initial whistleblowing. This, in combination with the complexity in rules governing whistleblowing, has weakened the status of whistleblowers and accessibility to whistleblowing. This, in part, explains the downward trend in whistleblowing from Trygstad & Ødegård.

The final policy on whistleblowing established proficient protection for the interests of employers but met strong criticism from proponents of whistleblowing as a democratic asset. The future success of the law, however, is dependent on the approach held by legislators in the current process and their willingness to recognize whistleblowing as a panoptic technique – reintroducing accountability to institutions.

9 Bibliography

NOU 1999:27 "Ytringsfrihed bør finde Sted". [Freedom of Speech Should Take Place]. Statens Forvaltningstjeneste. (1999).

St. meld. nr. 26 (2003-2004) "Om endring av grunnloven § 100. [On Changes to the Constitution §100]. Statens Forvaltningstjeneste. (2004).

Innst. S. nr. 270 - "Innstilling om endring av Grunnloven § 100". [On Changes to the Constitution §100]. Statens Forvaltningstjeneste. (2004).

NOU 2004:5 - "Et arbeidsliv for trygghet, inkludering og vekst". [A Labor Market for Safety, Inclusion, and Growth]. Statens forvaltningstjeneste. (2004).

Ot.prp. nr. 49 (2004–2005) - "Om lov om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)". [On Law Regarding Working Environment, Working Hours and Job Security etc. (The Working Environment Act)]. Statens Forvaltningstjeneste. (2005).

Innst. O. nr. 100 - " Innstilling om lov om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)". [On Law Regarding Working Environment, Working Hours and Job Security etc. (The Working Environment Act)]. Statens Forvaltningstjeneste. (2005).

Working Group Report - "Ansattes ytringsfrihet". [Employee's Freedom of Speech]. Statens Forvaltningstjeneste. (2005).

Ot.prp. nr. 84 (2005–2006) - "Om lov om endringer i arbeidsmiljøloven (varsling)". [On law regarding changes to the Working Environment Act (whistleblowing)]. Statens Forvaltningstjeneste. (2006).

Innst. O. nr. 6 - "Innstilling om lov om endringer i arbeidsmiljøloven (varsling)". [On law regarding changes to the Working Environment Act (whistleblowing)]. Statens Forvaltningstjeneste. (2006).

Aml. [WEA] Lov om arbeidsmiljø, arbeidstid og stillingsvern mv.,[Working Environment Act] (2017).

Almassy, K., Basby, J. S., & Norstrand, S. (2016). *Forsvarlig Varsling?* [Reasonable Whistleblowing?]. Copenhagen Business School.

Andersen, N. Å. (1999). *Diskursive analysestrategier: Foucault, Koselleck, Laclau, Luhmann*: [Discursive Analytical Strategies] .Nyt fra samfundsvidenskaberne.

Andersen, N. Å. (2008). *Legende magt*: [Playfull Power] Hans Reitzels Forlag.

E. Y. AS. (2016). Varsling –"whistleblowing". In E. Young (Ed.). (retrieved 01.09.2017)

Dean, M. (1995). Governing the unemployed self in an active society. *International Journal of Human Resource Management, 24*(4), 559-583.

Dean, M. (2010). *Governmentality: Power and rule in modern society*: Sage publications.

Dean, M. (2013). *The signature of power: Sovereignty, governmentality and biopolitics*: Sage.

du Plessis, E. M. (2014). Whistleblower-ordninger: Offentlighed, kritik og risikohåndtering. [Whistleblower-systems: Publicity, Critique and Risk Management]. *Slagmark, 2014*(69).

Eriksen, B. (2014). *Å bekjempe et samfunnsonde* (B. Eriksen Ed. 1 ed.). [Combatting a Societal Vice]. Gyldendal Forlag.

Eriksen, B. (2016). *Arbeidstakers rett til å varsle om "kritikkverdige forhold" etter arbeidsmiljøloven § 2-4(1). Med særlig vekt på varsling i aksjeselskap.* (Ph.D), [Employee's Right to Whistleblow on "Critique-Worthy Conditions" in accordance with WEA § 2-4(1). With Special Emphasis on Whistleblowing in Corporations]. Universitetet i Bergen.

Eriksen, B. (2016, 15. October 2016). ETTER RIKSADVOKATENS VEDTAK. [Following the Decision of the Attorney General]. Retrieved from http://birthesmening.blogspot.dk/2016/10/etter-riksadvokatens-vedtak.html (Retrieved .16.08.2017).

Norwegian Armed Forces, N. A. (2015). Forsvarets Varslingskanal.[Norwegian Armed Forces Whistleblower Line]. Retrieved from https://forsvaret.no/hjelp/varslingskanalen. (Retrieved 01.09.2017)

Foucault, M. (1970). Diskurs og diskontinuitet.[Disourse and Discontinuity] *I: Madsen, Peter (red.): Strukturalisme. En antologi. København: Bibliotek Rhodos*, 145-163.

Foucault, M. (1972). *The Archeology of Knowledge, trans*. London: Tavistock.

Foucault, M. (1977). *Discipline and Punish, trans*.

Foucault, M. (1978). The history of sexuality, trans. Robert Hurley. *New York: Random House, 1*, 137.

Foucault, M. (1980). *Power/knowledge: Selected interviews and other writings, 1972-1977*: Pantheon.

Foucault, M. (1982). The subject and power. *Critical inquiry, 8*(4), 777-795.

Foucault, M. (1991). *The Foucault effect: Studies in governmentality*: University of Chicago Press.

Foucault, M. (2007). *Security, territory, population: lectures at the Collège de France, 1977-78*: Springer.

Foucault, M. (2008). *The birth of biopolitics: lectures at the Collège de France, 1978-1979*: Springer.

Huber, C., & Scheytt, T. (2013). The dispositif of risk management: Reconstructing risk management after the financial crisis. *Management Accounting Research, 24*(2), 88-99.

Høilund, P. (2010). *Frygtens ret*: [Court of Fear]. Hans Reitzels Forlag.

Jarbo, E. M. (2017). "*Varslingsutvalget*". [Whistleblower Committee]. Retrieved from http://varslingsutvalget.no/

Jørgensen, M. W., & Phillips, L. (1999). Diskursanalyse som teori og metode. [Discourse Analysis as Theory and Methodology]

Kirkebøen, S. E. (2014). Å varsle er som å spille russisk rulett. [To Whistleblow is like Playing Russian Roulette]. *Aftenposten*. Retrieved from https://www.aftenposten.no/osloby/i/ng7gJ/-A-varsle-er-som-a-spille-russisk-rulett (Retrieved 13.07.2017).

Lemke, T., Casper, M. J., & Moore, L. J. (2011). *Biopolitics: An advanced introduction*: NYU Press.

Otterlei, S. S. (2017). Mener Riksadvokaten «tryller bort» alvoret i hendelsene han ble utsatt for. [Believes the Attorney General "Magically Erased" the Serious Nature of Events he Faced]. *NRK*. Retrieved from https://www.nrk.no/hordaland/mener-riksadvokaten-_tryller-bort_-alvoret-i-hendelsene-han-ble-utsatt-for-1.13305068 (Retrieved 13.07.2017).

Raffnsøe, S., & Gudmand-Høyer, M. (2014). *Dispositivanalyse-en historisk socialanalytik hos Foucault*: [Dispositif Analysis – a Historic Social Analytics in Foucault]. Roskilde Universitetsforlag.

Sundvor, O., Ulvik, R., & Bjørndal, D. (2015). Varsleren: – Det er en grense for hvor mye urett jeg kan se andre tåle. [Whistleblower: - There is a Limit to How Much Injustice I can Witness Other People Experience] *Nettavisen*. Retrieved from

http://www.nettavisen.no/nyheter/innenriks/varsleren--det-er-en-grense-for-hvor-mye-urett-jeg-kan-se-andre-tale/8542175.html (Retrieved 01.09.2017).

Trygstad, S. C., & Ødegård, A. M. (2016). Varsling og ytringsfrihet i norsk arbeidsliv 2016 [Whistleblowing and freedom of speech in Norwegian working life 2016]. *Fafo-rapport 2016, 33*.

Villadsen, K. (2006). Genealogi som metode–fornuftens tilblivelseshistorier. [Genealogi as a Methodical Apporach – the Development History of Reason]. *Bjerg & K. Villadsen (red.): Sociologiske metoder. Fra teori til analyse i kvantitative og kvalitative studier. Frederiksberg: Forlaget Samfundslitteratur*.

Villadsen, K. (2013). Foucaults teknologier: det ny jernbur eller virtuelle diagrammer. [Foucault's Technologies: the New Iron Cage or Virtual Diagrams]. *Nordiske Organisationsstudier (NOS), 15*(2), 55-77.

Villadsen, K. (2015). Governmentality - Foucault's concept for our modern political reasoning. *Education Policy and Contemporary Theory: Implications for Research*, 147-159.