

Whistleblowing and Democratic Values

edited by
David Lewis
Wim Vandekerckhove

Whistleblowing and Democratic Values

edited by David Lewis & Wim Vandekerckhove

Published by the International Whistleblowing Research Network

© 2011 The International Whistleblowing Research Network

ISBN 978-0-9571384-0-7 e-book

Contents

<i>Introduction</i>	4
David Lewis & Wim Vandekerckhove	
<i>About the authors</i>	9
<i>Whistleblowing as Fearless Speech: The Radical Democratic Effects of Late Modern Parrhesia</i>	12
Abraham Mansbach	
<i>An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics</i>	27
Richard Moberly & Lindsey E. Wylie	
<i>Whistleblowing Management is Risk Management</i>	56
Eva Tsahuridu	
<i>The Value of an Ombuds System in Whistleblowing Situations</i>	70
Björn Rohde-Liebenau	
<i>Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia</i>	86
AJ Brown	
<i>The UK Bribery Act 2010, Business Integrity and Whistleblowers</i>	102
Indira Carr	
<i>Whistleblowing, Risk and Regulation</i>	115
Cathy James	
<i>Preventing and Dealing with Retaliation Against Whistleblowers</i>	127
Brita Bjørkelo & Stig Berge Matthiesen	

Introduction

David Lewis & Wim Vandekerckhove

Those interested in this ebook may like to know some of the background to its publication. In June 2009 a conference was held at Middlesex University to mark the fact that whistleblowing legislation had been in force in the UK for a decade. This event included a public lecture and attracted delegates from a range of backgrounds, including academics, legal and management practitioners, trade unionists, whistleblowers and students. At the end of the conference the decision to establish an International Whistleblowing Research Network was taken. People can join this network simply by consenting to their email address being put on a list and used for distribution purposes. At the time of writing, November 2011, there are over 80 names on this list. The current convenor of the network is David Lewis who can be contacted via d.b.lewis@mdx.ac.uk. Another outcome of this conference was the preparation of an edited book based on the papers presented. This was published by Edward Elgar in 2010 under the title 'A global approach to public interest disclosure: what can we learn from existing whistleblowing legislation and research?'.

There have been many developments in the law and practice of whistleblowing since 2009. Legislation has been introduced in some countries (for example, Ghana and Malaysia) and amended in others (for example, Australia). Empirical research in the USA and UK has shown that employers are increasingly recognising both the need and desirability of having effective whistleblowing policies and procedures in place. Of course, some will be responding in order to comply with the law, for example the requirements of the Sarbanes – Oxley and Dodd –Frank legislation in the US, but others may have acted out of enlightened self-interest. Another development has been the disclosure of information by Wikileaks. This has led to questions being asked about the relationship between whistleblowing and leaking and about how people can be persuaded to raise their concerns internally rather than internationally. One particular problem for organisations is that many individuals have come to realise that if whistleblowers are not protected by law it might be wiser to leak information anonymously than to use official channels. The problem of being identified is amply demonstrated by the case of Bradley Manning, who was arrested in May 2010 on suspicion of having passed restricted material to Wikileaks. At the time of writing, this soldier is still being detained in solitary confinement by the US government.

One other trend worth highlighting is the more widespread acceptance that whistleblowing is an important tool in the fight against fraud and corruption. For example, the Budgetary Control Committee of the European Parliament commissioned a full report on this topic and

invited experts to contribute to a half-day hearing in May 2011. Fundamental principles were discussed at this public event, including that whistleblowing should be treated as a human right and EU Anti –Discrimination Directives should be amended to provide specific protection for whistleblowers. Following on from all this activity, in June 2011 Middlesex University hosted a second international whistleblowing research conference. It was attended by more than forty delegates and speakers from eighteen different countries. The sessions were inter-disciplinary and involved contributions from academic philosophers, psychologists and lawyers as well as NGO's and management consultants. This Ebook is based on the papers presented. A notable feature of this event was the public launch of the Middlesex University annual UK Whistleblowing Award. This award is intended to highlight the positive role that whistleblowers can play and will be made to an individual or organisation in recognition of outstanding achievement in making a disclosure of information in the public interest. The award consists of a £500 cash prize and the opportunity to give a talk in order to raise awareness of the importance of speaking out against wrongdoing.

Democracy stands for self-government and human autonomy, for participating in decisions that affect our lives. We often think about democracy only as a political system where we elect those who will make laws that affect us. Yet everyday decisions taken in all kinds of organisations impact on us just as much. Therefore we have to know when decisions taken in organisations are going to affect us in ways that differ from the official organisational discourse. Whistleblowing plays a role in providing that knowledge and thus is a means to democracy.

Abraham Mansbach draws our attention to this political vision that the act of whistleblowing embodies and represents. In his chapter he examines whistleblowing as 'parrhesia', a practice of 'fearless speech' which was a crucial element in the democracy of ancient Greece, and draws parallels with principles and values of contemporary liberal democracy. Yet in discussing the political facet of whistleblowing, Mansbach uncovers a tension between the socio-political and the private sphere. People become whistleblowers as they go through the process of disclosure, from being uncertain to re-appropriating speech. Mansbach argues that whistleblowing facilitates such re-appropriation and thus enables us to have a say about what affects our lives.

This process of disclosure and the tension between the socio-political sphere (how do we make whistleblowing work for democracy?) and the private sphere (what happens to people who raise concerns?), is what binds the chapters of this book together. The early whistleblowing activism in the US in the 1970s tried to break through organisational secrecy. It claimed that such secrecy should not be considered as normal or obvious, but rather that the interests of society must take priority over those of organisations. If someone poses a

risk to society, then society has a right to know about it. During the 1990s a consensus started to grow among policy makers in some countries that the way to balance organisational and public interests was to get people to raise concerns inside their organization. In this way malpractice could be remedied without causing a public scandal and protection against reprisals could be provided. Research led by Marcia Miceli, Janet Near, and Terry Dworkin in the US supported that consensus. This research showed that internal and external whistleblowing are linked. In the vast majority of cases external whistleblowing is preceded by the raising of concerns internally, and a deaf ear or harsh reaction to this by the organization is likely to result in people going to the media. Hence, how organisations manage internal whistleblowing is important, not just in the interests of the organisation but also in the interests of the public good and democracy.

Research on the management of whistleblowing has been developing slowly since the mid 2000's. This book offers three chapters that move further along this path. *Richard Moberly and Lindsey Wylie* examine whistleblowing provisions in codes of conduct of US publicly traded corporations. How do US private sector organisations persuade or even instruct their employees to take up 'fearless speech', and how credible is this? Their results indicate that a consensus seems to have emerged among US corporations regarding the scope and content of internal whistleblowing provisions. Moberly and Wylie further speculate that these provisions may provide broader and better whistleblower protection than current U.S. statutory and tort law. However, they also point out that whistleblowers may be unable to enforce many, and possibly most, of these provisions because of the prevalence of the at-will rule in U.S. employment law.

Eva Tsahuridu also discusses the management of whistleblowing through codes of conduct but looks at it from an organisational culture perspective. More precisely, she asks what rationale there is for internal whistleblowing from a risk management point of view. She argues that a paradigm shift is taking place. Traditionally, risk management was seen as a strategy to reduce risk, whereas whistleblowing was looked upon as a risk generator. Recently, there is evidence which suggests that risk management would welcome whistleblowing as a risk identifier rather than a risk itself. This new paradigm is named Enterprise Risk Management (ERM). In her chapter, Tsahuridu traces ERM in policy documents of the European Commission, the OECD, the Australian Securities Exchange, Standards Australia, and the UK Corporate Governance Code. She concludes that while there is every reason for risk management to include whistleblowing, there is as yet little explicit recognition of this.

The chapter by corporate communication specialist, *Bjorn Rohde-Liebenau*, makes an important bridge from the internal management of whistleblowing to how this is relevant at

the societal level. He puts forward his vision of the role of an ombuds-system in whistleblowing about corruption as a way of showing how internal systems can be made to work for the benefit of both the enterprise and a democratic society.

The next three chapters discuss how we can make whistle blowing - fearless speech - work for democracy. *A.J. Brown* writes about the new Queensland legislation, the Public Interest Disclosure Act 2010(Qld). In his previous research on whistleblowing in the Australian public sector, Brown identified statutory acknowledgement of the role of public whistleblowing (i.e. to the general public via the old and new media) as a key legal driver for change in the culture and leadership of institutions. In this chapter, Brown reviews the state of whistleblowing law reform in Australia. In doing so, he offers a valuable analysis of how recognition of the role of public whistleblowing can both secure democracy as well as be democratic in its own right.

Whistleblowing is widely recognized as an effective means of exposing corruption and increasing the integrity and accountability of institutions. As a result many of the international anti-corruption conventions require or recommend the adoption of whistleblower protection legislation by contracting parties. In her chapter, *Indira Carr* examines the provisions on whistleblowing in the anti-corruption conventions that the UK has ratified in order to provide the context for a discussion of the Bribery Act 2010 and the accompanying Guidance Document issued by the Secretary of State. This Guidance Document addresses the procedures that commercial organisations can put into place to prevent bribery, including whistleblower protection.

Cathy James comments on the protection afforded to workers who make external disclosures under the UK Public Interest Disclosure Act 1998 (PIDA, now Part IVA of the Employment Rights Act 1996). She argues that further regulation is needed for the proper operation of any law or system intended to protect whistleblowers, and how civil society is a vital element in that. In her chapter, James describes how the charity *Public Concern at Work* has campaigned for the principles of open justice to be applied to claims under PIDA. She insists that more information should be made available about claims lodged at employment tribunals so that PIDA complaints can be monitored and reviewed. Currently, it would seem that far too many whistleblowers who make a claim under this legislation are silenced before their efforts to seek justice are on public record.

This brings us back to the micro politics of whistleblowing, fearless speech, and democracy. If whistleblowing is an instrument for democracy, and hence for self-governance and human autonomy, we need to be conscious and vigilant about the risks posed to individuals who raise concerns about wrongdoing. We close this book with a chapter on the micro politics

within organisations. The chapter by *Brita Bjørkelo and Stig Berge Matthiesen* complements the well-established U.S. research stream that focuses on the whistleblower. Bjørkelo and Matthiesen outline the background to and the impact of their research in Norway. They then describe the link between whistleblowing, retaliation, workplace bullying and health. Their overview of the micro-politics of whistleblowing is well theorised with a typology of retaliation, and a description of common symptoms reported after exposure to reprisals and workplace bullying. They end on a more optimistic note by portraying different ways in which we can prevent and deal with retaliation against whistleblowers.

It is our hope that the readers of this book will understand that the tension between the private and the socio-political sphere manifests itself at all levels: the macro level (democratic societies versus how little protection whistleblowers get); the meso level (accountability and transparency of organisations versus the ways people are encouraged to remain silent); and the micro level (the hopes and trust whistleblowers put in their colleagues and managers versus the harm they suffering return). It is the aim of the International Whistleblowing Research Network not only to facilitate research at these three levels but also to foster the notion that whistleblowing involves democratic values at all of them.

November 2011

About the authors

Brita Bjørkelo is a licensed Clinical Psychologist and has written a PhD on 'Whistleblowing at work: Antecedents and consequences'. She has also contributed to papers and book chapters about bullying, workaholism and sexual harassment. Dr Bjørkelo is project manager of a research project on Ethics, Social Media and Teacher Education and works as an Associate Professor at the Department of Post Graduate Studies, The Norwegian Police University College, Oslo, Norway. (+47) 23 19 98 58. brita.bjorkelo@phs.no

A.J. Brown is John F Kearney Professor of Public Law at Griffith University, Australia. As a constitutional scholar and expert in public integrity and accountability, he is established at the forefront of the interdisciplinary political and legal governance research. A former Senior Investigation Officer for Australia's national Ombudsman, A.J. has served as director of the 'Integrity & Corruption Research Program' for the Key Centre for Ethics Law Justice and Governance, when he lead an interdisciplinary national team of researchers from four universities to complete Australia's first national integrity system assessment. A.J. was also project leader on the 'Whistling While They Work' project where he designed and lead the world's largest multidisciplinary research project into whistleblowing, with extensive impacts on institutional and law reform in Australia and internationally.

Indira Carr is Professor of Law, University of Surrey and Honorary Visiting Professor, University College, London. She would like to thank the Arts & Humanities Research Council (AHRC) for their generous funding of her project on "Corruption in International Business: Limitation of Law" which inevitably led her to examine the various measures to increase transparency and accountability including the protection of whistleblowers. She would like to thank Professor David Lewis for his kind invitation to give a paper at the Middlesex Whistleblowing Conference in July 2011. For further information on the AHRC project visit <http://www.surrey.ac.uk/corruption>.

Cathy James is Executive Director of Public Concern at Work. A whistleblowing NGO established in 1993, Public Concern at Work has led the new approach to whistleblowing that - both in the UK and internationally - recognises the key role whistleblowing can play in anticipating and avoiding serious risks that arise in and from the workplace. For more information visit <http://www.pcaw.co.uk>.

David Lewis is Professor of Employment Law at Middlesex University. In addition to writing textbooks, he has contributed to and edited three specialist works on whistleblowing. David

has been researching the subject of employment protection for whistleblowers since 1994 and has published internationally in law, business ethics, information technology and human resource management journals. His empirical studies have been funded by the British Academy, the Nuffield Foundation and SAI Global. David is currently convenor of the International Whistleblowing Research Network.

Abraham Mansbach is a Senior Lecturer at the Department of Philosophy, Ben-Gurion University of the Negev, in Beer-Sheva, Israel. His field of research is in continental philosophy specializing in the questions of identity, language and praxis. He is the author of *Beyond Subjectivism: Heidegger on Human Language and the Human Being* (2002), 'Keeping Democracy Vibrant: Whistleblowing as Truth-Telling in the Workplace' (2009), 'Drifting Away from Democracy: A Micropolitical Critique of the Relation between the "I" and the "We"' (2011). His current research focuses on the ways in which identity is configured through acts that embody social solidarity. mansbach@bgu.ac.il

Stig Berge Matthiesen, PhD, is full professor in Work & Organizational psychology at the University of Bergen, Norway. He made his PhD on a thesis about workplace bullying. He has been interested in the topic of whistleblowing for more than a decade, and has contributed to several papers and book chapters about this research subject.

Richard Moberly is Associate Dean for Faculty and an Associate Professor of Law at the University of Nebraska College of Law. Professor Moberly has published numerous articles on whistleblowing and retaliation, including an empirical study of Sarbanes-Oxley claims published in the William & Mary Law Review and an analysis of the Supreme Court's approach to retaliation cases, which was published recently in the Case Western Reserve Law Review. He also has testified before the United States House of Representatives on whistleblower protection in the U.S. and spoken internationally on whether corporate codes of ethics provide protection to whistleblowers. Professor Moberly graduated magna cum laude from Harvard Law School and served as an editor of the Harvard Law Review.

RA Björn Rohde-Liebenau is an attorney, a mediator and a whistleblowing ombudsman for an international governmental organisation (GIZ) with more than 20 years of professional experience as corporate general counsel and staff lawyer in the public administration. In 2004/2005 he supported the UN Secretary General's efforts to establish an Ethics Office and to improve whistleblowing policies. Amongst others he has counselled the European Parliament, the European Investment Bank and the German Bundestag on whistleblowing related subjects. He is regularly mandated to evaluate, (re)construct, install, and handle compliance, corporate ethics and whistleblowing systems, and provides coaching and training. Since 2008 he has been teaching Integrity Management and Corruption Prevention

at the Bremen College for the Public Administration (HfÖV). He wrote three books and numerous articles on compliance, risk, integrity, and conflict management. Until 2004 he had been Deputy Executive President of Transparency International, Germany. He serves on the Jury of the Bi-Annual Whistleblower Prize. rcc@risk-communication.de

Eva E. Tsahuridu, Eva E. Tsahuridu, PhD, is the Professional Standards and Governance Policy Adviser of CPA Australia. Before she joined CPA Australia, Eva was an academic in Australian and European universities developing and teaching business ethics and governance courses and managing undergraduate and postgraduate programs. Eva has published extensively in the areas of business ethics, governance and management. etsahuridu@yahoo.com

Wim Vandekerckhove has a PhD in Applied Ethics and is Senior Lecturer in Organisational Behaviour at the University of Greenwich Business School where he teaches business ethics and organisational behaviour. He researches and publishes on business ethics, socially responsible investment, and global justice. wim.vandekerckhove@gmail.com

Lindsey E. Wylie is a J.D./Ph.D. student at the University of Nebraska-Lincoln Law/Social Psychology program, with a minor in research methods and statistics. She received her B.S. degree in Psychology, cum laude, from the University of Florida and her M.A. in Forensic Psychology from CUNY John Jay College of Criminal Justice. Her research interests include how the law balances paternalism and autonomy within vulnerable populations.

Whistleblowing as Fearless Speech: The Radical Democratic Effects of Late Modern Parrhesia

Abraham Mansbach¹

The last decades have witnessed a substantial growth in the research on whistleblowing, and we have learned a great deal about the topic, particularly about its legal, moral, organizational, and work-related aspects.² With this chapter, I would like to contribute to this body of knowledge by examining the political facet of whistleblowing. Here the main focus of attention will be on the political vision that the act of whistleblowing embodies and represents.

Rather than cover all forms of whistleblowing, my analysis will concentrate on what I call 'fearless speech,' which is the disclosure of the illegal or morally wrong deeds or practices by powerful actors that result in harm to the public. This speech is fearless because, even though the wrongdoers are in a position to hurt the individual making the disclosure, he or she chooses to do it anyway. I would suggest that we view this act as akin to *parrhesia*, a practice of truth-telling in ancient Greece.

My argument here is that whistleblowing as fearless speech is a practice that ensures that the principles and values advocated by liberal democracies are implemented in material life while simultaneously creating a productive tension between the private sphere and the socio-political sphere. At the heart of this tension is the re-identification that whistleblowers undergo as they travel through the process of the disclosure, from its initial uncertainties and subsequent upshot to the re-appropriation of speech that the act of whistleblowing enables.

I conclude by arguing that, though whistleblowing as fearless speech is a micropolitical practice, and as such, does not have the same political effects as collective democratic action, such as voting, demonstrating, or going on strike, it nonetheless keeps liberal democracies vibrant.

¹ The author would like to thank the participants of the International Conference on Whistleblowing, hosted by Middlesex University, London, in June, 2011, for their stimulating comments on an earlier version of this chapter. Special thanks to David Lewis and A.J. Brown for their invaluable suggestions and criticism. I am much indebted to Margaret Ries for her insightful comments, and to the work of my colleagues, Brita Bjørkelo, Cathy James, Stig Matthiesen, Marcia Miceli, Joyce Rothschild, Eva Tsahurdi, Tina Uys, and Wim Vandekerckhove, from which I drew much inspiration for this chapter. All errors, however, are mine.

² On the moral aspects of whistleblowing see for example, Bok 1983, James 1984, De George 1992, and Alford 2001. On some of the legal issues related to whistleblowing see Dworkin and Near 1997, Bowers, Fodder, Lewis and Mitchell 2007, Callahan, Dworkin, and Lewis 2003-2004, Lewis 2010. On whistleblowing in the workplace and in organizations, see Lewis 2001, Tsahuridu and Vandekerckhove, 2008.

1. Speaking Truth to Authority

Modern democracies have several mechanisms for exposing illegal or immoral acts and practices that damage the public. These include the police, income-tax agencies such as the Internal Revenue Service (IRS) in the US, the HM Revenue and Customs (HMRC) in the UK, the Australian Taxation Office (ATO), as well as organizations of social accountability. In addition to institutional means, there are individuals who, acting on their own account, choose to disclose such acts. We call them 'whistleblowers.'

The term refers to several forms of disclosure. In some acts of whistleblowing, the whistleblower's objective is to receive an economic benefit or some other type of reward. He or she might turn state's witness in order to avoid prosecution, for example. The concept also covers simple complaints to relevant authorities about, say, a neighbor littering on public property. But the present analysis will be confined to a third category, to those acts of whistleblowing where individuals, by exposing illegal practices, challenge the existing powers that be and put themselves at risk. The main reasons for the disclosure are to stop the harmful behavior and to prevent such conduct in the future. Included in the category are individuals who report on their own employers, as well as those who may not be employees of the organization guilty of wrongdoing, but are nevertheless challenging a significant, often political power. A common characteristic is that the individuals and/or organizations being confronted are in a position to do harm to the whistleblower.

By disclosing wrongdoing that results in public harm, all the forms of whistleblowing protect the community, promote the public good, and extend the rule of law. Whistleblowing as fearless speech has additional characteristics that differentiate it from the others, however, which will be outlined below. Indeed, this practice is akin to *parrhesia*, a form of truth-telling that was practiced in ancient Greece and Rome. Consequently, we should see the whistleblower as a late-modern *parrhesiast*.

Usually translated as 'free speech' or 'frank speech,' *parrhesia* has been described by Michel Foucault as:

'...a kind of verbal activity where the speaker has a specific relation to truth through frankness, a certain relationship to his own life through danger, a certain type of relation to himself or other people through criticism (self-criticism or criticism of other people), and a specific relation to moral law through freedom and duty. More precisely, *parrhesia* is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself).' (2001, p.19)

The messenger who brings the news of a lost battle at the risk of his (or her) own life is a classic example of a *parrhesiast*. Other examples - where life is not lost, but where the *parrhesiast* stands to lose something extremely valuable - include a politician who voices an unpopular truth, jeopardizing the support of his or her constituency, and a person who risks losing a close friend by criticizing his or her behavior.

Like *parrhesia*, whistleblowing as fearless speech operates from a position of weakness. When employees expose illegal acts or omissions by their employers, their position is vulnerable as they may be demoted or even be fired. Indeed, researchers generally report that acts of reprisal are common practice against whistleblowers (Glazer & Glazer 1989; Neary 1992; Rothschild & Miethe 1994). Research on this topic shows that in the civil service such individuals are frequently transferred to inferior positions or dead-end jobs and are denied promotions (Near & Micel 1986; Martin & Rifkin, 2004; Mesmer-Magnus & Viswesvaran 2005). Meanwhile, in the private sector, whistleblowers often end up unemployed, having either been fired or having left because their work environment became unbearable (Alford 2002; Johnson 2003). There to can be exceptions, of course, when labor relations foster communication and the free exchange of opinions, which in turn may create a favorable environment for whistleblowing (Skivenes & Trygstad 2010). But typically, whether in the public or the private sector, whistleblowers in most democratic societies rarely receive the recognition and tribute that their actions merit.³

Individuals who disclose the illegal or immoral practices of powerful actors such as politicians, armies, or governments, without being their direct employees, are also in danger. Consider Mark Felt, Watergate's famous 'Deep Throat' who exposed the illegal activities undertaken by members of U.S. President Richard Nixon's re-election team, who did not reveal his identity – likely out of fear – for more than 30 years (Felt & O'Connor 2006). David Christopher Kelly, the biological warfare expert in the British Ministry of Defence and former weapons inspector in Iraq, revealed material from the British government's dossier on weapons of mass destruction in Iraq (Hutton 2004). He subsequently committed suicide in the wake of the interrogations and intense pressure that followed the disclosure. Suspected of leaking over 250,000 U.S. diplomatic cables as well as footage of gunfight involving an Apache helicopter to the website WikiLeaks, private Bradley Manning is awaiting trial on 22 charges including the capital offense of aiding and abetting the enemy (The Hague Justice Portal). And in Israel a young female soldier, Anat Kam, was charged with having copied and

³ A study in the United States (Culp, 1995) found that 82% of whistleblowers suffered harassment of some kind and that 60% were fired. Similar numbers were found by Rothschild and Miethe (1999). For the different forms and extent of retaliation on whistleblowers in Australia's public sector, see Brown and Olsen 2008. One of the occasions when whistleblowers received public tribute was in the cases of Cynthia Cooper (WorldCom), Sherron Watkins (Enron) and Coleen Rowley (FBI). These women briefly became American heroines when *Time* magazine named them Persons of the Year for 2002.

later leaked classified military documents to a journalist – documents that suggest the Israeli military breached a court order regarding targeted killings in the occupied West Bank. Kam is awaiting sentence after agreeing to plead guilty to unauthorized retention of government property and documents, in return for the government's treason charges being dropped (Hider 2011).

The whistleblower's position of weakness is counterbalanced by the factual truth he or she possesses and by his or her personal bravery. Either in spite or in response to the threats and harassment they often suffer as a result of their actions, they refuse to back down or to withdraw their allegations. Research has shown that there are different reasons for such persistence. Some have argued that personality traits such as extraversion and high domineering may account for this tenacity (Miceli 2004; Bjørkelo et. al. 2010). Brown and Olsen (2008 p. 148) assert that the 'need for achieving substantive vindication' and to emerge as a 'winner' rather than a 'loser' might explain such resilient conduct. It may also be suggested, following Vandekerckhove and Commers (2008), that whistleblowers' perseverance comes out of a commitment and loyalty to family, professional values, and consumers. From the political-personal perspective of this analysis, however, and in addition to these psychological, organizational, or ethical motives of persistence, I wish to consider the parrhesiastic blend of truth and courage as crucial to the act of the whistleblower as well as to his or her tenacity.

In ancient times, the meaning of *parrhesia* changed throughout the years; under the Hellenic monarchs, for example, the king's advisor was required to use it to help the king make decisions and as a means of tempering his power (Foucault 2011). Whistleblowing as fearless speech is similar to *parrhesia* in that it also is an act intended to change the decisions made by more powerful actors. In the corporate and organizational world, the disclosures target management and superiors, and are usually directed towards the way in which work is carried out (Rothschild & Miethe 1999). The disclosures can also affect earnings or management's control over employees. In the public and political sphere, the revelations of practices by individuals running for or holding high governmental positions, are aimed at changing the way politics is performed.

2. The Benefit of Fearless Speech

Fearless speech also differs from other forms of whistleblowing in the political vision that it embodies. All forms of whistleblowing can be used in both democratic and non-democratic regimes, though not necessarily for the public good. In totalitarian regimes, such as in former East Germany, it usually was not. By contrast, fearless speech is an effective and beneficial practice in liberal democracies; i.e., in social arrangements where not only are violations of

law punished, but values such as freedom of speech, transparency, and accountability are cultivated; where liberty and truth are esteemed, and personal autonomy, the public good, and the struggle against corruption encouraged.

The practice helps prevent illegal acts that could harm the general public or a specific group, such as consumers. It might entail disclosing a pharmaceutical company's violations of the law, an act that would save the lives of patients who trust that such companies and the agencies that regulate them are honest (Glazer & Glazer 1989; Rost 2006). Imagine the lives that could have been saved, and the ecological devastation that could have been prevented, if someone had pursued the concerns Dr. Masashi Goto, a nuclear engineer working for the Toshiba Corporation, raised about the safety of the Fukushima reactor when it was being built. The reactor was severely damaged in the earthquake and subsequent tsunami that hit Japan in the month of March 2011 (McDermont 2011).

Fearless speech can also have beneficial results in the political and legal spheres. Here there are cases with great resonance and broad impact, such as that of Mark Felt, whose disclosure ultimately brought about Nixon's resignation. The Enron case unleashed a public campaign and led to the passage of major legislation pertaining to corporations, such as the Sarbanes-Oxley Act 2002. This, in turn, had worldwide ramifications, including the strengthening of regulations on global corporations in order to protect the public from similar fraud in the future.⁴

Fearless speech can also have political value beyond the local effects that stopping a particular wrong has for the workplace or the wider community. Some whistleblowers are politicized by the aftermath of their disclosures. Their politicization stems from the hardship and suffering to which they are subjected at the hands of management, on the one hand, and the whistleblower's desire for vindication and the restoration of their good name, on the other (Rothschild & Miethe 1994). The result of this process is that whistleblowers later join or found organizations in civil society that address issues of transparency, environmental degradation, and social accountability, thereby extending their personal autonomy and the social solidarity they exhibited in the initial act of public whistleblowing (Uys 2000; Mansbach 2007). In so doing, such individuals benefit the body politic as a whole.

It has been argued that, from the organization's point of view, whistleblowing can be detrimental because it breaks the bonds of trust and loyalty between employees and damages the company. (Flanagan & Finger 2006). Other scholars have argued, however,

⁴ The Sarbanes-Oxley (SOX) Act, passed in the United States in 2002 following the corporate scandals of such as those involving Enron and WorldCom, obliges all subsidiaries of US public companies, all over the world, to comply with the SOX provisions, which stresses internal reporting procedures and whistleblowing. See Cherry, 2004; Colapinto, 2004; Dworkin, 2006.

that procedures to allow potential whistleblowers to raise the matter internally enable the organization and the workplace to pursue its goal and mission (Vandekerckhove & Commers 2004; Lewis 2011). It may also be claimed that disclosures such as those of David Christopher Kelly, Bradley Manning, and Anat Kam weaken the security of the countries in question. To be sure, whistleblowing in its many forms creates difficult dilemmas, with fearless speech in the political sphere being perhaps the most contentious area. But if the message is heard and corrective action is taken, then the disclosure has served its purpose to benefit the organization, the body politic, and/or the general public.

3. Extending Democracy

Fearless speech not only preserves the value structures of modern democracies, it extends them. Indeed, its 'logic' coincides with the radical democratic project elaborated by scholars such as Ernesto Laclau and Chantal Mouffe (1985). Radical democracy presents a vision and political program that highlight the moral worth of human beings and combine the liberal values of autonomy, freedom, and pluralism with fundamental social premises like equality and social justice. A central feature of the project is that it does not invoke a final state or closure; it is an open-ended endeavor. The basic premise is that the principles of liberty and equality, which are at the core of this project, exist in irreconcilable tension and that any equilibrium or balance between them is virtually impossible. The radicalization of liberal democracy does not mean its replacement by other forms of social arrangement, but rather it consists of trying to extend equality and liberty to an increasing number of social relations. The ultimate objective is to maintain a living, vibrant democracy.

One of the ways to keep democracy vibrant is to continually critique these principles and values - politically, publicly, through the organs of civil society, and through internal regulatory or supervisory bodies. This undertaking ensures that the values are implemented in material life, on the one hand, and that they do not become mere elements of ideological manipulation, on the other. Radical democracy is committed to the principle that liberal democratic societies must be held accountable for professed ideals. The practice of fearless speech takes up the challenge.

But fearless speech extends the democratic principles and practices in another critical respect related to identity and identification. Radical democracy conceives of social space as constructed by ongoing social conflict. It also conceives of social and political identities as being constantly transformed by the actions, practices, roles, and functions of individuals in the different components of society, such as family and work. For radical democracy to be realized, a new identity informed by the principles of liberty and equality must be created or constituted.

Radical democracy demands a change in identification and of identity. The change is two-pronged, occurring at both the collective and individual levels. The first constitutes a radical, democratic *we*, and the other a radical, democratic *I*. While there is a distinction between collective vis-à-vis individual autonomy – i.e., between the public sphere (*respublica*) and the private one – it is important to remember that the distinction is analytical. The two spheres intersect and, in this respect, co-exist in tension:

The distinction and tension between these two spheres and identities, essential to the project of radical democracy, is the flip side, so to speak, of the distinction and tension between liberty and equality. 'This tension is the very life of modern democracies, and what makes them vibrant.' (Mouffe 1992 p. 236) The way to invigorate this tension is through an intensification of democratic action. This action is for the 'we,' and includes those struggles waged against inequality in the spirit of radical democracy. Collective political identities are created through a collective identification of the democratic demands of a specific social movement, be it for women, workers, the environment, or an ethnic or religious group.

In addition to the collective struggles for liberty and equality that constitute a collective identity, there are struggles that affect the individual's identity, either by recreating it or by preserving it. These are struggles where personal liberty is envisioned and personal autonomy is exercised. Fearless speech, I argue, is just such an endeavor. It is a personal act that re-creates the individual's identity, yet simultaneously, by being beneficial to the public, is not antagonistic to the 'we.' I will examine this in detail by focusing on fearless speech in the workplace.

4. Identity, Identification, and Fearless Speech

While there are exceptions, such as workers co-operatives and voluntary communitarian arrangements like the Israeli Kibbutz, the workplace is typically a hierarchical organization where ideological and material elements are combined with a variety of tactics designed, among other things, to obtain workers' compliance (Korczynski et al. 2006). Nevertheless, and in spite of the apparent insularity of this system, studies of the 'logic' of labor and organizational processes have identified different forms of resistance that appear in its crevices (Perrucci et al. 1980). Resistance in the workplace can take many forms, such as outright sabotage, foot-dragging, and other work-avoidance strategies, such as when employees spend time on personal activities while at work (Certeau 1984; Scott 1985; Jermier 1988).

Whistleblowing in the workplace has also been identified as one of these forms of resistance, and whistleblowers have been called, appropriately, 'ethical dissenters' (Elliston 1982). But this form of resistance is unique in contrast with other types: the personal-organizational

position of the whistleblower is special. Some believe these individuals naïve for assuming that organizations adhere to their stated missions and will consequently want to know about and rectify illegal activities. In reality, whistleblowers are usually highly competent and respected and have stronger than normal allegiance to organizational as well as extra-organizational principles and norms (De Maria 1996; Brown 2008; Miceli et al. 2008).

Whistleblowers stop being obedient to the organization at that moment when companies demand that they collaborate directly or indirectly in illegal activities and/or reprehensible, antisocial workplace norms or behavior. Such dissent, I want to argue, is related to the question of identity and identification. That is, to the way in which the whistleblower perceives his or her self - the self image - and to the way in which he or she is identified by others. There are different ways in which identity and identification intertwine with fearless speech. In one, which I will lay out briefly, identity, compliance and oppression converge.

The nexus between work and identity is a well-known social fact. While there is a debate about the extent to which the social and economic realities of late capitalism have transformed this relationship, the workplace continues to be a powerful source of identity and identification (Leidner 2006). In the case of workplace whistleblowers, this sense of identification is revealed in the acceptance of the way in which work is organized. Its hierarchical structure and attendant system of control are seen as beneficial to the company's efficiency, and whistleblowers demonstrate their identification with the company by complying with them (Collinson 2006).

We could say that the position whistleblowers occupy in the organization is one of 'voluntary subordination.' As Laclau and Mouffe suggest, the meaning of subordination here does not entail antagonism; rather, it reflects 'a set of differential positions between social agents ... which constructs each social identity as *positivity* ...' (1985 p. 154).

Fearless speech is a case of resistance to the process of subjectivation (Foucault 1983). As a witness to an illegal or immoral act in the workplace, the whistleblower resists in order to preserve the integrity of the organization. This struggle is motivated not only by the damage that the act might cause to a third party, but also, and perhaps more importantly - by the powerful source of identification that the workplace represents for its employees.

In this sense, fearless speech occurs at the point where compliance or voluntary subordination turns into involuntary servitude or even oppression. In both compliance and oppression, a social agent is subjected to the will of another, but it is only during oppression that this subjection becomes a 'site of antagonism' (Laclau & Mouffe 1985, p. 154). For whistleblowers, it is misidentification in or through the workplace that transforms compliance,

or voluntary subordination, into a form of oppression and the workplace into a site of antagonism.

The importance of identity to the act of whistleblowing may be further appreciated in cases where whistleblowers have a staunch identity outside of their occupational lives, one that serves as a source of courage on which they must draw in order to disclose the damaging practices of powerful actors. This was evident during the latest economic crisis in the United States, when efforts of the Federal Bureau of Investigation (FBI) and the Securities and Exchange Commission (SEC) to uncover fraud, Ponzi schemes, bribery, money laundering, and other financial crimes shifted into high gear. The role of whistleblowers in the financial sector was all over the media, and they were seen as a social and economic value. In a series of articles for the business website, CNBC, an investigative journalist reported significant similarities among individuals who became whistleblowers: all possessed solid sources of identity outside of their corporate lives and all perceived those external sources as crucial to their decision to blow the whistle. One was a former soldier and claimed that the army supplied him with the sense of integrity that lay beneath his actions. Many were religious, which, by their own accounts, was their primary identity and gave them the courage to act (Javers 2011).

Given that the question of identity is at the core of fearless speech, we should not be surprised that it is often the identity of the whistleblower that becomes the target at which powerful actors aim their reprisals. Damaging the reputation of whistleblowers and personally discrediting them are common practices powerful actors use to invalidate what has been revealed. There are cases in which hostile employers have portrayed whistleblowers as mentally unstable (Draper 1994; Mansbach 2009), and physicians employed by corporations have reported incidents of managers accusing dissident employees of 'unbalanced behavior' (Rothschild & Miethe 1994).

5. Reappropriation of Speech

Many employees witness acts at work that damage a third party and do not report them. Undoubtedly there are also journalists and other professionals who have information about political corruption but do not disclose it. For some whistleblowers, however, remaining silent in the face of an unjust or even criminal act, knowing the harm that could come from it, is simply not an option. The whistleblower's action, aimed at reappropriating his or her identity as well as the process of subjectivation, is a verbal and public act. Like that of the ancient - *parrhesiast*, it is a public testimony about a factual truth. For the whistleblower, it signifies the reappropriation of speech. Let us remember that speech is part of the structure of power in the workplace. It is not only that those who are higher up in the hierarchy tell those below

them what to do. More crucially, in some types of work, employees are prohibited from revealing any information relating to production, finances, clients, prices, etc. (Rothschild 2008). In virtually all organizations it is strictly forbidden to reveal a trade secret, and in some cases it is against the law (Lewis and Spencer 2001). Whistleblowers violate this proscription and re-appropriate speech in an individual struggle to shape and/or reinforce their identity and the way in which others identify them. The re-appropriation of speech in conjunction with the public's right to know explains – and morally justifies – whistleblowing in cases like those of David Christopher Kelly, Bradley Manning, and Anat Kam.

In ancient Greece, *parrhesia* granted certain individuals the 'right to express their views in matters of interest to the city' (Foucault 2011, p. 34). In so doing, it positioned the *parrhesiast* in public and in personal space. Similarly in our times, whistleblowing as fearless speech represents a discursive weaving of the social, the political, and the personal.

6. A Micropolitical Act

Power in contemporary society is not only evident in the relations between the government and groups or individuals, it is also relayed in the seemingly trivial incidents and transactions of everyday life (Certeau 1984; Connolly 1999; Foucault 2003). In addition to friendship, closeness, and familiarity, everyday social relations also contain subterranean conflicts, competition, and rivalry. The everyday practices inherent in these relations are micropolitical since they posit and re-posit the individual in society. Furthermore, they (re)define personal-political identity, – the 'I,' as well as collective identity – the 'we.'

With regards to social and political dynamics, this means that intervention in liberal democratic societies does not reside solely in collective action, such as voting, signing petitions, demonstrating, or going on strike. There are non-collective practices of political intervention as well, and fearless speech is among them. Moreover, it has the potential to radicalize democracy. Indeed, this form of whistleblowing cannot be collectivized on a mass scale and maintain its liberal-democratic nature. In my view, a liberal democratic social space *ipso facto* does not have need of a mass movement of whistleblowers. Such a case would imply that wrongdoing is so widespread that the spirit and practices of liberal democracy have deteriorated to the point of being all but non-existent. It would also mean that the institutions that democracies have for exposing immoral and illegal acts that damage the public – the police, the tax agencies, etc. – are ineffective. In such a case we cannot expect that individuals, or groups of individuals, acting of their own accord will solve the problems faced by society.

Nonetheless, the personal and collective political value of whistleblowing should not be underestimated. It is a micropolitical practice that holds liberal democratic societies

accountable for their ideas, and influences how subjectivities are produced. If corrective actions are not taken, the message transmitted to the public will be that such wrongdoing is acceptable and the damage to the public will increase. If, however, corrective actions follow from whistleblowing – whether in the workplace or in the public sphere – the public will benefit. In such case whistleblowing as fearless speech will keep liberal democracies vibrant, and might produce radical democratic subjects and politics.

References

- Alford, C. F. (2001). Whistleblowers and the narrative of ethics, *Journal of Social Philosophy* 32, pp. 402-418.
- Alford, C. F. (2002). *Whistleblowers: broken lives and organizational power*. Cornell University Press.
- Bjørkelo, B. Einarsen, S and Matthiesen, S. B. (2010). Predictive proactive behavior at work: exploring the role of personality as an antecedent of whistleblowing behavior, *Journal of Occupational and Organizational Psychology* 83, pp. 371-394.
- Bok, S. (1983). *Secrets: On the ethics of concealment and revelation*. Pantheon Books.
- Bowers, J. Fodder, M. Lewis, J. and Mitchell, J. (eds) (2007). *Whistleblowing: law and practice*. Oxford University Press
- Brown, A. J. and Olsen, J. (2008). Whistleblowers mistreatment: identifying the risk. In A. J. Brown (ed) *Whistleblowing in the Australian public sector*. Canberra: Australian National University, pp. 137-161.
- Brown, A. J. (ed) (2008). *Whistleblowing in the Australian public sector*. Australian National University
- Callahan, S. E., Dworkin, M. T., and Lewis, D. (2003-2004). Whistleblowing: Australian, UK and United States approaches to disclosure in the public Interest, *Virginia Journal of International Law* 44 (3), pp. 879-912.
- Certeau, d. M. (1984). *The practice of everyday life*. Translated from French by S. Rendall. University of California Press.
- Cherry, A. M. (2004). Whistling in the dark? Corporate fraud, whistleblowers, and the implications of the Sarbanes-Oxley Act for employment law, *Washington Law Review* 79, pp.1029.
- Colapinto, K. D. (2004). *A guide to legal protection for corporate employees*. Praeger Publishers.

Collinson, D. (2006). Strategies of resistance: power, knowledge and subjectivity in the workplace. In J. Jermier et al. (eds) *Resistance and power in organizations*. Routledge, pp. 25-68

Connolly, E. W. (1999). *Why I am not a secularist*. University of Minnesota Press.

Culp, D. (1995). Whistleblowers: corporate anarchists or heroes? Towards a judicial perspective, *Labor Law Journal* 13: 65-75.

De George R. T. (1992). Agency theory and the ethics of agency. In N. E. Bowie and E. R. Freeman, eds. *Ethics and agency theory: an introduction*, 3rd ed. Oxford University Press, pp. 59-74.

De Maria, W. (1996). The welfare whistleblower: in praise of troublesome people, *Australian Social Work* 49, pp. 15-24.

Draper, E. (1994). *The company doctor: risk, responsibility, and corporate professionalism*. Russell Sage Foundation.

Dworkin, M. T. (2006). SOX and whistleblowing, *Michigan Law Review* 105, pp. 1758-1780.

Dworkin, M. T. and Near, P. J. (1997). A Better Statutory Approach to Whistle-Blowing, *Business Ethics Quarterly* 7, pp. 1-16.

Elliston, A. F. (1982). Civil disobedience and whistleblowing: a comparative appraisal of two forms of dissent, *Journal of Business Ethics* 1, pp. 23-28.

Felt, M. and O'Connor, D. J. (2006). *A-G man's life: the FBI, being "Deep Throat" and the struggle for honor in Washington*. Public Affairs.

Flanagan, N. and Finger, J. (2006). *The management bible*. Plum Press.

Foucault, M. (1983). The subject and power. Afterword to Dreyfus, H. and Rabinow, P. *Michel Foucault: beyond structuralism and hermeneutics*, 2nd ed. University Press. pp. 208-228.

Foucault, M. (2001). *Fearless speech*. Semiotexte(s).

Foucault, M. (2003). *Society must be defended*. Translated from French by D. Macey. Picador.

Foucault, M. (2011). *The courage of truth: the government of self and others II*. Translated from French by G. Burchell. Palgrave, Macmillan.

Glazer, M. and Glazer, P. M. (1989). *The whistleblowers: exposing corruption in government and industry*. Basic Books.

- Hider, J. (2010). Israel arrests soldier Anat Kam over targeted killings 'leak.' *The Sunday Times*, April 3, http://www.timesonline.co.uk/tol/news/world/middle_east/article7086417.ece [Accessed, 5 Aug, 2011].
- Hutton, B. (2004). Lord Hutton inquiry. <http://www.the-hutton-inquiry.org.uk/content/report/> [Accessed 5 August, 2011].
- James, G. G. (1984). Whistleblowing: its moral justification. In M. Hoffman and R. E. Frederick. *Business ethics: readings and cases in corporate morality*. McGraw-Hill, pp. 290-300.
- Javers, E. (2011). Religion, not money, often motivates whistleblowers. http://www.cnbc.com/id/41494697/Religion_Not_Money_Often_Motivates_Corporate_Whistleblowers. [Accessed 10 April 2011].
- Jermier, J. (1988). Sabotage at work: the rational view. *Research of the Sociology of Organizations* 6, pp. 101-34.
- Johnson, A. R. (2003). *Whistleblowing: when it works and why*. L. Reinner Publishers.
- Rothschild, J. and Miethe, T. (1999). Whistle blower disclosures and management retaliation, *Work and Occupations* 26, pp. 107-128.
- Korczynski, M., Hodson, R. and Edwards, P. (eds) (2006). *Social theory at work*. Oxford University Press.
- Laclau, E. (1994). Introduction. In E. Laclau, ed. *The making of political identities*. Verso, pp. 1-8.
- Laclau, E. and Mouffe, C. (1985). *Hegemony and socialist strategy: towards a radical democratic politics*. Verso.
- Leidner, R. (2006). Identity at work. In M. Korczynski, R. Hodson and P. Edwards, eds. *Social theory at work*. Oxford University Press, pp. 424-463.
- Lewis, D. (ed) (2001). *Whistleblowing at work*. Continuum International Publishing Group.
- Lewis, D. (ed) (2010). *A global approach to public interest disclosure: what can we learn from existing whistleblowing legislation and research*. Edward Elgar Publications.
- Lewis, D. (2011). Whistleblowing in a changing legal climate: is it time to revisit our approach to trust and loyalty in the workplace? *Business Ethics: A European Review* 20(1), pp. 71-87.
- Lewis, D. and Spencer, M. (2001). The law relating to whistleblowing. In D. Lewis (ed) *Whistleblowing at Work*. Continuum International Publishing Group, pp. 10-24.

- Mansbach, A. (2007). The political surplus of whistleblowing: a case study, *Business Ethics: A European Review* 16(2), pp. 124 –130.
- Mansbach, A. (2009). Keeping democracy vibrant: whistleblowing as truth-telling in the workplace, *Constellations: An International Journal of Critical and Democratic Theory* 16(3), pp. 363-376.
- Martin B. and Rifkin, W. (2004). The dynamics of employee dissent: whistleblowers and organizational jiu-jitsu, *Public Administration Review: A Global Journal*, 4, pp. 221-238.
- McDermont, Q. (2011). Whistleblower slams Japan nuclear regulations. <http://www.abc.net.au/news/2011-03-21/whistleblower-slams-japan-nuclear-regulation/2651854?section=world> [Accessed, 7 August 2011].
- Mesmer-Magnus, J. R. and Viswesvaran, C. (2005). Whistleblowing in organizations: an examination of correlates of whistleblowing intentions, actions and retaliation, *Journal of Business Ethics*, 62(3), pp. 266-297.
- Miceli M.P., Near, J.P. and Dworkin, T.M. (2008). *Whistle-blowing in organizations*. Routledge/Taylor & Francis Group.
- Miceli, M. P. (2004). Whistle-blowing research and the insider: lessons learned and yet to be learned, *Journal of Management Inquiry*, 13(4), pp. 364-366
- Mouffe, C. (ed) (1992). *Dimensions of radical democracy*. Verso.
- Near, J. P. and Miceli, M. P. (1986). Retaliation against whistle-blowers: Predictors and effects, *Journal of Applied Psychology*, 71, 137-145.
- Neary, V. (1992). *The trials of a whistleblower: interim report on victimization and harassment for blowing the whistle*. V. Neary.
- Perrucci, R., Anderson, R. M., Schendel, D. E. and Tractman, L. E. (1980). Whistleblowing: professionals' resistance to organizational authority, *Social Problems* 28(2), pp. 149-164.
- Rost, P. (2006). *The whistleblower: confessions of a healthcare hitman*. Soft Skull Press.
- Rothschild, J. (2008). Freedom of speech denied, dignity assaulted: what the whistleblowers experience in the US, *Current Sociology* 56(6), pp. 884-903.
- Rothschild, J. and Miethe, D. T. (1994). Whistleblowing as resistance in modern work organizations. In J. M. Jermier, D. Knights and W. R. Nord, eds. *Resistance and power in organizations*. Routledge, pp. 252-273.

Rothschild, J. and Miethe, D. T. (1999). Whistle-blowers disclosures and management retaliation – the battle to control information about organization corruption, *Work and Occupations* 26, 107-128.

Scott, J. (1985). *Weapons of the weak: everyday forms of peasant resistance*. Yale University Press.

Skivenes, M. and Trygstad C.S. (2010). When whistle-blowing works: the Norwegian case, *Human Relations* 20(10), pp. 1-27.

The Hague Justice Portal. 'The United States Army vs. Bradley Manning.' <http://www.haguejusticeportal.net/eCache/DEF/12/444.html> [Accessed 5 Aug, 2011].

Tsahuridu, E. E. and Vandekerckhove, W. (2008). Organizational whistleblowing policies: making employees responsible or liable? *Journal of Business Ethics* 82, pp. 107-118.

Uys, T. (2000). The politicization of whistleblowers: a case study, *Business Ethics*, 9(4), pp. 259-267.

Vandekerckhove, W. and Commers M.S.R. (2004). Whistle Blowing and Rational Loyalty, *Journal of Business Ethics* 53, pp. 225-233.

An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics

Richard Moberly & Lindsey E. Wylie

Companies have issued Codes of Ethics (also called Codes of Conduct) for decades, and these Codes increasingly have contained provisions related to whistleblowing. For example, Codes often encourage or even require corporate employees to report incidents of misconduct they witness. Code provisions describe the types of misconduct employees should report and provide numerous ways for employees to make reports. Moreover, companies use Codes to promise employees that they will not retaliate against whistleblowers. Indeed, because these whistleblowing provisions have become an important part of a corporation's internal control and risk management systems, they merit closer examination to determine exactly what they require and promise. Accordingly, this chapter describes the results of the first comprehensive empirical study of whistleblower provisions contained in United States corporate Codes of Ethics.

Section 1 of the chapter provides a brief history of whistleblower provisions and Codes of Ethics. Although companies once issued Codes voluntarily, beginning in the 1990s, companies received substantial legal incentives to issue Codes, resulting in an explosion in popularity. The Sarbanes-Oxley Act of 2002, however, for the first time required publicly-traded companies in the United States to issue Codes. Subsequent regulation mandated that these Codes contain, among other things, provisions related to encouraging and protecting whistleblowers.

Section 2 describes the methodology from a study of these whistleblower provisions. This study replicates and extends previous studies while also utilizing a methodology that distinguishes it from its predecessors. By focusing on companies listed on U.S. stock exchanges, this study provides an important extension of previous studies, which focused on whistleblower provisions in corporate Codes of European companies (Hassink et al. 2007) and of companies listed on the London Stock Exchange (D. Lewis & Kender 2007; D. Lewis & Kender 2010). However, in contrast to the methodology utilized by those prior studies, which relied on self-selected responses to surveys, this study used public documents to obtain Codes from a stratified sample of 90 publicly-traded companies. We examined over 100 variables related to the whistleblower policies we located.

We present the results of the study in Appendix A, and we discuss some of the more interesting findings in Section 3 of the chapter. First, the results indicate that a consensus

has emerged among U.S. corporations regarding the scope and content of the whistleblower provisions in their Codes. Second, these provisions may provide broader and better whistleblower protection than current U.S. statutory and tort law. This conclusion, however, is subject to the considerable qualification that whistleblowers may be unable to enforce many, if not most, of these provisions because of the prevalence of the at-will rule in U.S. employment law.

Finally, Section 4 of the chapter discusses some of the study's limitations and presents some suggestions for further research.

1. Whistleblower Provisions in Codes of Ethics⁵

In the 1970s, U.S. corporations voluntarily adopted broad corporate Codes of Ethics in response to various scandals of the time, including bribery of foreign government officials, fraud and overbilling in the defense industry, and insider-trading allegations. (Pitt & Groskaufmanis 1990, pp.1582-99; Krawiec 2003, p.497) These Codes proscribed a wide range of illegal conduct to send a message to outsiders (such as shareholders and government regulators) that companies were addressing potential problems, and also to clarify legal boundaries for their employees. (Berenbeim 1987, pp.13-14; Jackall 2007, p.1134; Pagnattaro & Peirce 2007, pp.383-84) However, these early Codes rarely included whistleblower provisions or identified how employees could report corporate misconduct. (Moberly 2008, p.990)

The federal Organizational Sentencing Guidelines (OSG), which the U.S. government released in 1991, changed the emphasis corporations placed on Codes of Ethics because the OSG provided reduced penalties for a corporate criminal defendant that could demonstrate it implemented an 'effective' compliance system prior to engaging in misconduct. (Krawiec 2003, pp.498-99; Pagnattaro & Peirce 2007, p.384) Issuing a corporate Code of Ethics became an important way for corporations to demonstrate the effectiveness of its compliance system, in large part because the OSG's commentary section specifically suggested that companies must communicate their ethical regulations to its employees. (U.S. Sentencing Guidelines Manual 1991, s. 8A1.2, Application Note 3(k)(5)) Moreover, in 2004, the OSG expanded the requirements for an 'effective' system to specifically mandate that organizations publicize a system for employees to 'report or seek guidance regarding potential or actual criminal conduct.' (U.S. Sentencing Guidelines Manual 2004, s. 8B2.1(b)(4)(A)) The OSG also required that companies offer a reporting system that employees can use 'without fear of retaliation.' (U.S. Sentencing Guidelines

⁵ Parts of this section summarize a history of Codes of Ethics presented more fully in Richard Moberly, *Protecting Whistleblowers By Contract*, 79 COLO. L. REV. 975, 988-95 (2008).

Manual 2004, s. 8B2.1(b)(5)(C)) These OSG requirements naturally led corporations to use Codes both to communicate the companies' expectations to their employees and to inform their employees that they would not be retaliated against if they reported wrongdoing to the company.

A series of court cases in the 1990s supplemented the OSG incentives to use Codes of Ethics as part of an overall legal compliance system. For example, the Delaware Chancery Court held that a corporate director could avoid a breach of fiduciary duty of care claim if the director implemented a sufficient 'corporate information and reporting system.' (In re Caremark Int'l Inc. 1996, p.970) Further, the U.S. Supreme Court determined that a company that implemented an internal grievance procedure would have an affirmative defense to sexual harassment claims. (Burlington Indus. Inc. v. Ellerth 1998, p.765, Faragher v. City of Boca Raton 1998, p.807) Later, the Equal Employment Opportunity Commission advised that grievance systems would not satisfy the Supreme Court's test unless the employer 'make[s] clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints.' (U.S. Equal Employment Opportunity Commission 1999) Ultimately by the year 2000, corporate 'best practices' for internal reporting systems included a 'comprehensive whistleblower policy that encouraged employees to report misconduct and that included a promise not to retaliate against them.' (Moberly 2008, p.993) Indeed, at least one survey of human resources professionals, conducted in 1993, found that about two-thirds of companies with internal disclosure policies promised protection from retaliation for employee whistleblowers. (Barnett et al. 1993, p.131)

The passage of the Sarbanes-Oxley Act of 2002 brought new attention to corporate Codes and to the importance of whistleblowing. Section 301 required every publicly-traded company to provide an anonymous route for employees to disclose questionable accounting or auditing matters to the company's audit committee. (15 U.S.C. s. 78f(m)(4)) Section 406 of the Act required publicly-traded companies to disclose whether the company had a Code of Ethics that applied to senior financial officers, and, if it did not have such a Code, to provide a public explanation of why it did not. (15 U.S.C. s. 7264(a)) Subsequently, the Securities and Exchange Commission (SEC) issued regulations under the Act that expanded upon these baseline statutory requirements in three significant ways. First, companies must disclose Codes applying to principal executive officers as well as to senior financial officers. Second, the regulations expanded Sarbanes-Oxley's definition of 'Code of Ethics' to include written standards that promote the 'prompt internal reporting of violations of the code to an appropriate person or persons identified in the code.' Third, companies must provide their Codes of Ethics to the public in one of three ways: as an exhibit to its publicly available

annual report, by posting it on its website, or by providing a copy without charge to any person requesting it. (17 C.F.R. s. 229.406)

The SEC also asked the U.S. stock exchanges to evaluate their listing standards related to corporate governance. In response, three of the largest stock exchanges issued new listing standards that, among other things, made new requirements of listed companies related to whistleblowing policies and Codes of Ethics. Interestingly, although the exchanges promulgated similar standards, they all vary in significant ways from each other, as well as from Sarbanes-Oxley's statutory requirement and the SEC's regulatory rules.

The New York Stock Exchange (NYSE) now requires its listed companies to issue a Code of Ethics that applies to all its directors, officers, and employees – a significant change from Sarbanes-Oxley's application of Codes to senior financial officers. The NYSE also states that corporate Codes should 'encourage' good faith reporting of 'violations of laws, rules, regulations or the code of business conduct' to 'supervisors, managers or other appropriate personnel.' (on 'good faith' see section IV below) Codes also should encourage reports when an employee is 'in doubt about the best course of action in a particular situation.' With regard to protections for whistleblowers, the NYSE requires that the 'company must ensure that employees know that the company will not allow retaliation.' NYSE companies must make the Code of Ethics available on the company's website or in print to any shareholder who requests it. (NYSE Listing Manual, s. 303A10)

The NASDAQ makes similar, but slightly different, requirements of its listed companies. Like the NYSE, NASDAQ company Codes must apply to all directors, officers, and employees and the Code must ensure 'prompt and consistent enforcement of the code' by encouraging the reporting of violations and protecting from retaliation persons who report 'questionable behavior.' However, the NASDAQ rules provide fewer specifics than the NYSE requirements. For example, the NASDAQ rules do not explicitly protect 'good faith' reports, nor do they provide a detailed definition of the type of misconduct that should be reported. Also, the NASDAQ rules do not mandate to whom whistleblower reports should go. Finally, NASDAQ companies only have to make the Code 'publicly available' – the NASDAQ rules do not require posting to the company website. (NASDAQ Interpretative Manual Online, s. IM-4350-7)

Finally, the American Stock Exchange (AmEx) took a different approach by not expanding significantly upon the SEC regulations. Other than requiring its listed corporations to apply their Codes of Ethics to all directors, officers, and employees (similarly to the NYSE and NASDAQ), the AmEx requirements simply mirrored the SEC regulations by mandating a

Code of Ethics that requires reporting violations of the Code to 'an appropriate person.'⁶ Although companies must make the Code 'publicly available,' the AmEx standards did not mention protection from retaliation. (AmEx Company Guide, s. 807)

By 2007, then, the combination of Sarbanes-Oxley, the SEC regulations, and the stock exchange listing standards effectively moved the corporate practice of producing a Code of Ethics from a voluntary or incentive-based system to a mandatory requirement for publicly-traded companies. (Moberly 2008, pp.988-95) Furthermore, the stock exchange listing standards required companies to encourage employees to report misconduct through whistleblower reporting channels described in corporate Codes of Ethics. In addition, new mandatory provisions of the NYSE and the NASDAQ went even further by requiring company Codes to include a promise to protect employees from retaliation for reporting corporate misconduct through those internal channels.

2. Methodology

This study used content analysis to examine the types of protections provided by U.S. corporate Codes of Ethics now that these substantial changes have had time to take effect. It differs from previous studies of Codes of Ethics in two important ways. First, most other studies of Codes catalog various provisions contained in Codes of Ethics generally. This study focuses discretely on a Code's whistleblower provisions. Only two other studies of corporate Codes have a similarly narrow focus. Hassink, et al. examined whistleblower provisions issued by European companies, and Lewis and Kender have on two separate occasions examined provisions issued by companies listed on the London Stock Exchange. (Hassink et al. 2007; D. Lewis & Kender 2007; D. Lewis & Kender 2010) This study provides an important extension of those studies by focusing on companies listed on U.S. stock exchanges.

Second, this study's methodology differs from Hassink and from Lewis & Kender. The Hassink study sent emails to the largest European listed companies asking whether they had a whistleblower protection program and, if so, whether the company would send the text of the program. The researchers accepted specific policy documents as well as Codes of Conduct with a whistleblower provision. After receiving a response rate of 25%, the authors added whistleblower policies from 26 other companies listed on the Dutch AEX index and the SWX Swiss exchange, bringing their total sample size to 56 companies. (Hassink et al. 2007, p.31) Lewis and Kender's studies sent questionnaires to companies on the FTSE 250, which contains the 101st to the 350th largest companies with their primary listing on the London

⁶ In 2008, after this study was completed, the NYSE purchased the AmEx.

Stock Exchange. In 2007, 32% of the companies responded with information about their whistleblowing procedures, (D. Lewis & Kender 2007, p.9), while the 2010 survey had a slightly lower response rate of 26% (D. Lewis & Kender 2010, pp.8-9).

The current study, by contrast, used public documents to obtain Codes from a randomly-selected sample of thirty publicly-traded companies from each of the three largest U.S. stock exchanges, the NYSE, the NASDAQ, and the AmEx, providing a sample of ninety companies. The random sample was obtained from a list generated by searches of annual SEC filings for the calendar year 2007. The searches were run on 10kwizard.com, a fee-based subscription service that collects corporate filings. We found the company Codes in each company's annual filing (called the Form 10-K or 10-KSB, collectively the 'Form 10s') or on the company's website.

The first author developed a Code Book containing numerous variables, many of which were based on variables used in Hassink's study of whistleblower provisions in European Codes. (Hassink et al. 2007) The Codes were examined with regard to their (1) general content, scope, and tone; (2) the nature of the corporate violations that whistleblowers were instructed to report; (3) the officials to whom the Codes indicate that wrongdoing should be reported; (4) any reporting guidelines or formalities; (5) any provisions related to confidentiality or anonymity; (6) the extent of the protection from retaliation provided by the Codes; and (7) details regarding the investigation of any whistleblower report.

After extensive training, two research assistants (RAs), both upper-class law students at a Midwestern law school, reviewed and coded each Form 10 and Code from all the companies contained in the sample. Their inter-coder reliability for all ninety cases across all the variables was 92.4%. After the coding, the two RAs met and resolved the differences for the remaining variables. When they were unable to reach an agreement, the first author determined the code that would be used in the study. Although Form 10s for all ninety companies were examined, one AmEx company refused to provide its Code of Ethics, so coders ultimately examined eighty-nine Codes of Ethics.

3. Discussion

Appendix A provides a table with the frequency distribution for the variables mentioned above. This section will highlight two of the more interesting findings from the study.

An Emerging Consensus

First, the results indicate that U.S. corporations have developed a consensus regarding the contents and scope of whistleblower provisions in corporate Codes. This consensus has emerged despite the facts that U.S. statutory and regulatory law provides little guidance

regarding the Codes' contents, and that the stock exchanges differ widely on the requirements they impose upon corporations.

Who Do the Codes Cover?

As noted above, Sarbanes-Oxley, the SEC regulations, and the stock exchange listing requirements all contain slightly different mandates on who should be covered by a company's Code of Ethics. Sarbanes-Oxley mentions only senior financial officers, the SEC regulations add principal executive officers, and all three stock exchanges require the Code to cover 'all directors, officers, and employees.' The majority of Codes comply with the stock exchanges' broad requirements: 98.9% cover all employees, 78.7% cover officers and senior management, and 82.0% cover directors. Interestingly, only 22.5% of the Codes specifically cover 'financial officers,' the one group mentioned by both Sarbanes-Oxley and the SEC regulations. About a quarter of the Codes (25.8%) permit contractors (i.e. people who are not 'employees' but provide work for the company, such as self-employed consultants) to report wrongdoing and over half (53.9%) explicitly mention that the Code covers subsidiary corporations or the entire corporate family of companies.

Is Reporting Required or Encouraged?

Although some exceptions exist, the law rarely requires employees (or any individual) to report illegal behavior. (Tippett 2007, pp.11-12; Feldman & Lobel 2010, pp.1163-67; Tsahuridu & Vandekerckhove 2008, p.108) The SEC follows this norm and only mandates that companies 'promote' internal reporting of misconduct. U.S. corporations, however, have responded to this regulatory mandate by going beyond merely 'promoting' whistleblowing. Instead, corporations require employees to report misconduct: 96.6% of these Codes make whistleblowing a duty of employment. Thirty-six percent also 'encourage' employees to report misconduct. In other words, U.S. companies recognize the importance of whistleblowing to their own internal control mechanisms by demanding that every employee become a whistleblower if the employee witnesses misconduct.

What Violations Matter to the Companies?

Whistleblowers must always determine whether the misconduct they witness is the type of wrongdoing the company wants reported and whether the company will protect them for disclosing. To resolve the question of what violations should be reported, the SEC and the listing standards provide a variety of suggestions. The SEC states that 'violations of the code' should be reported - no other types of misconduct, such as illegal or unethical behavior, are mentioned. As for the listing standards, the NYSE requires companies to encourage reports of 'violations of laws, rules, regulations or the Code of business conduct'

and the NASDAQ encourages reports of 'questionable behavior.' The AmEx simply adopts the SEC regulation approach by addressing only reports of Code violations.

A large percentage of companies (93.3%) follow the SEC regulations precisely and indicate that the misconduct to be reported are violations of the Code itself. However, many companies expand this basic requirement and require employees to report a broader range of wrongdoing. For example, 76.4% broaden the reporting requirement to include violations of the law or regulations and more than half (52.8%) mandate reporting 'unethical' or 'improper' conduct. Taken together, the Codes' requirement that employees report violations of the Code, illegal conduct, and unethical behavior indicate that companies want employees to report an extremely broad range of potential misconduct. Perhaps not coincidentally, these three areas mirror the seminal definition of 'whistleblowing' set forth by Janet Near and Marcia Miceli in 1985: whistleblowing involves the reporting of 'illegal, immoral, or illegitimate' behavior. (Near & Miceli 1985, p.4)

Interestingly, many corporations went beyond these general instructions to point out specific types of misconduct that should be reported. These categories may shed some light on the type of misconduct corporations truly think will be beneficial to have reported. Indeed, from one perspective, the Codes identify specific areas to be reported that align with the corporation's self-interest. For example, the most frequently identified misconduct to be reported was conflicts of interest – either one's own conflict or the conflict of others – by 79.8% of the Codes. This outcome was followed by requests that employees report 'financial reporting problems, including accounting, internal controls or auditing problems' – by 65.2% of the Codes – and fraud (36.0%). By contrast, Codes did not identify areas that might have broad societal benefits nearly as frequently. Health and safety issues were the highest (29.2%), but other areas were remarkably low, such as environmental issues (7.9%), criminal offenses (3.4%), insider trading, bribery, and money laundering (9.0%).

Only 21.3% of the Codes identified harassment and discrimination as problems that should be reported. This result seems low, because a pair of 1998 U.S. Supreme Court cases gave companies who implement internal reporting mechanisms for complaints about harassment an affirmative defense in cases in which harassment has been alleged. (*Burlington Indus.Inc. v. Ellerth* 1998, *Faragher v. City of Boca Raton* 1998) The conventional wisdom after those cases was that companies would implement complaint channels in order to utilize the affirmative defense. (Callahan et al. 2002, pp.192-93; Sturm 2001, p.557) According to the results of this study, although companies utilize complaint channels, only about 1 in 5 specifically identify harassment as one of the problems that should be reported. One explanation may be that procedures for harassment complaints are identified more thoroughly in other documents, such as an employee handbook.

Who Should Receive Reports of Misconduct?

The SEC regulations and the AmEx listing standards are vague on who should receive reports of misconduct. Both state that reports should be made to 'an appropriate person ... identified in the code.' The NASDAQ standard does not identify a person to receive reports, while the NYSE states that reporting should be to 'supervisors, managers, or other appropriate personnel.' Given this variety among different regulatory regimes, the study examined who Codes said should receive a whistleblower's disclosure of wrongdoing.

Contrary to the vagueness of the SEC Regulations, as well as the AmEx and NASDAQ listing standards, many Codes listed several possible recipients of whistleblower reports, either as a primary contact for whistleblowers or a secondary option. By far the most popular person identified as a potential recipient is the employee's supervisor, who was listed in 75.3% of the Codes. This result seems to indicate that corporations, by and large, would still prefer that employees make whistleblower reports through the chain of command. Perhaps not coincidentally, employees tend to prefer reporting to supervisors as well: one recent survey found that 46% of whistleblowing reports were given to supervisors, far more than any other source. (Ethics Resource Center 2010, p.5)

Two types of recipients were listed by almost half of the Codes: the corporate audit committee (55.1%) and an employee hotline (47.2%). The popularity of these options may be a reflection of Sarbanes-Oxley's requirement that publicly-traded companies provide a disclosure channel directly to the company's audit committee. (Sarbanes-Oxley Act of 2002, s. 301) On the other hand, a 1999 study of Fortune 1000 companies found that 51% of those companies had an ethics hotline for employees to report misconduct before Sarbanes-Oxley was passed in 2002. (Weaver et al. 1999, p.290)

Moberly has theorized that a disclosure channel like a hotline should increase the number and quality of whistleblower disclosures over time. (Moberly 2006, pp.1141-50) Whether this is true remains to be seen, as hotlines have received mixed reception from actual employee whistleblowers. For example, the same survey mentioned above found that only about 3% of internal reports of misconduct went to company hotlines. (Ethics Resource Center 2010, p.5) Regardless, clearly some corporations have adopted this approach and begun advertising their hotlines through their Codes of Ethics. Indeed, some scholars have indicated that companies have responded to Sarbanes-Oxley's requirement by contracting with an independent, third-party hotline to receive employee reports. (Miceli et al. 2008, p.158) This study confirms that view in part, as many (36.7%) of the companies that indicated a hotline should receive an employee report also indicated that the hotline was managed by a third-party. That said, more than half (57.1%) of the companies that mentioned a hotline did not

provide any contact details for the hotline, which seems to undermine the company's reliance on this channel to receive valuable information.

We also examined whether companies listed recipients of whistleblowing reports as 'primary' or 'secondary' options, because often companies mention that reports should first be made to a particular recipient, but then could also be made to others. In fact, 98.9% of the companies mention a secondary contact. However, about 2/3 of the companies did not provide any reason for reporting to a secondary contact.

Of the remaining companies, we examined when companies told their employees a secondary contact should be used. The most frequent response was if the whistleblower felt 'uncomfortable' or wanted 'anonymity' (58.6%). Other reasons, in descending order of frequency were:

- if the whistleblower thought that after reporting to the primary contact, the report was not handled 'properly' or if the whistleblower was not 'satisfied' with the response from the primary contact (48.3%);
- if the primary contact was not 'appropriate' or if there were difficulties with 'communication' (34.5%);
- the absence of a primary contact (for example, if the committee does not exist); (10.3%);
- if the report contains a serious violation of the law (3.4%).

Not surprisingly, all of the Codes focused almost exclusively on internal recipients. (Only two of the 89 Codes mentioned an external recipient, such as a regulatory authority or Congress.) Although scholars debate whether whistleblowers should report internally or externally, it clearly is in a corporation's best interest to encourage internal reports. (Callahan et al. 2002, p.195) Corporations can address wrongdoing at an earlier stage and perhaps avoid negative publicity that can surround disclosure of illegal behavior. (Dworkin & Callahan 1991, pp.300-01) Additionally, by providing employees with direction on how to report internally, companies may avoid employees going externally in the first place. As Janet Near and Marcia Miceli have noted, '[p]reliminary research evidence indicates that whistle-blowers use external channels when they don't know about the internal channels and when they think the external channels will afford them protection from retaliation.' (Near & Miceli 1996, p.515) Moreover, studies demonstrate that employees typically are better off reporting internally because internal whistleblowers experience less retaliation than external whistleblowers. (Dworkin & Callahan 1991, pp.301-02)

The results also indicate that perhaps employees receive confusing message on who should receive a whistleblowing report. Over two-thirds of the Codes provide different recipients for reports depending on a variety of factors. Over half (56.2%) vary the recipient by the type of misconduct being reported. For example, 49.4% of the companies identify a special contact for reporting financial problems specifically. Some vary by who is engaging in misconduct (14.6%), while others vary because of who is doing the reporting (18.0%). That said, some variability is beneficial. For example, as noted above, numerous companies provided a secondary contact to whom a whistleblower could report if the whistleblower was not comfortable with the primary person identified or the whistleblower was not satisfied with the response from the primary option. Having several options – such as a supervisor, HR manager, and hotline – is important so that employees can avoid what Moberly has called the ‘blocking and filtering of whistleblower reports’ that often describe the reaction of middle management to whistleblower reports. (Moberly 2006, p.1121)

Do Companies Promise Not to Retaliate Against Whistleblowers?

Almost all (91.0%) of the companies either promise that the company will not retaliate against an employee whistleblower or affirmatively prohibit retaliation against whistleblowers. Almost one-third (30.3%) also state that the company will punish anyone who retaliates against a whistleblower. These promises go well beyond anything required by Sarbanes-Oxley or the SEC, neither of which require any sort of corporate promise regarding retaliation.⁷ Of the stock exchanges examined by the study, the NYSE and the NASDAQ explicitly mention that Codes of Conduct should include protection from retaliation.

None of the legal sources, however, give much guidance on the type of reports that will receive protection. Only the NYSE states that reports should be made in ‘good faith’ – no other listing exchange makes any other requirement. In that vacuum, companies seem to be incorporating several consistent practices. Over three-fourths of the companies (76.4%) adopt the NYSE ‘good faith’ requirement, while only 11.2% use the more rigorous ‘reasonable belief’ standard found in many whistleblower statutes. Companies claim to protect reports of ‘suspected’ violations (68.5%) as well. In addition to these carrots, companies use the stick as well: 21.3% state that they will punish false or malicious reports.

Are Confidentiality or Anonymity Guaranteed?

Neither Sarbanes-Oxley, the SEC regulations, nor the stock exchange listing requirements address whether Codes need to ensure confidentiality or anonymity for whistleblower reports generally. Despite this lack of guidance, a majority of the company Codes claim that all

⁷ That said, Sarbanes-Oxley does prohibit retaliation against employees who report various types of financial fraud. (18 U.S.C. s. 1514A)

reports made by whistleblowers will be kept confidential (59.6%) and that all violations can be reported anonymously (56.2%). That said, a quarter of the companies do not address confidentiality (25.8%) or anonymity (27.0%). Another group of Codes only permit confidentiality and anonymity in some cases – 14.6% and 16.9%, respectively. Indeed, 76.4% of the Codes state affirmatively that the company will investigate whistleblower reports, and 27.0% state that they expect employees to cooperate with the investigation. Perhaps the desire to investigate explains why 13.5% of the companies actually discourage anonymity in reporting.

Whistleblower scholars take different views on the value of confidentiality and anonymity as part of the whistleblowing process. Citing a study reporting a 20% decline in whistleblowing after Sarbanes-Oxley's passage, Miceli, Near, & Dworkin assert that 'there is scant evidence that anonymity promotes whistle-blowing.' (Miceli et al. 2008, p.158) They also cite a report from a hotline provider that employee requests for anonymity have decreased from 78% to 48% in the past twenty years 'as employees become more comfortable about reporting.' (Miceli et al. 2008, p.158) Moreover, these same scholars note that anonymity and confidentiality can cause numerous problems, including difficulty in following-up on reports of wrongdoing and problems maintaining confidentiality under certain circumstances. (Miceli et al. 2008, pp.158-59; Miceli & Near 1992, pp.74-76)

On the other hand, studies typically find that individuals are more likely to voice dissenting views if they can do so anonymously. (Miethe 1991, pp.54-57; Sunstein 2003, p.20) This research would predict that Codes that refuse to guarantee anonymity or at least confidentiality may be less successful at encouraging whistleblowing.

The trend in the law seems to be to promote anonymity in order to encourage whistleblowers. The primary example of this trend is Sarbanes-Oxley's requirement that U.S. publicly-traded corporations must provide a channel for employees to report financial fraud to the board of directors anonymously. (15 U.S.C. s. 78f(m)(4)) Companies clearly have responded to this requirement by instituting ways in which employees can make anonymous and confidential reports.

In sum, despite little direction from U.S. statutory or regulatory law, companies in this study seem to have developed whistleblower provisions for their Codes of Ethics that have remarkable consistency. The provisions generally apply to all company employees, and seem to require employees to report a broad range of misconduct to the company. The Codes identify numerous potential recipients of a whistleblower's report, including primary and secondary contacts. In return, the Code provisions promise protection from retaliation for employees who report violations of the code itself, the law, or even ethical violations.

Additionally, companies consistently permit whistleblowers to remain anonymous or keep their disclosures confidential.

Better Protections Than Statutory and Tort Law?

In addition to demonstrating that U.S. companies seemed to have reached a consensus about the content and scope of their Code of Ethics' whistleblower provisions, the study also provides an opportunity to compare the retaliation protection provided by most companies with the protections to whistleblowers afforded by U.S. law generally. That said, we recognize that one of the study's limitations is that it does not present any evidence of how these whistleblower programs are implemented. This study examined what U.S. companies tell the world – it does not provide much information regarding how things actually operate inside the company. Finding a way to get at this 'operational' information would be an important next step to examine how these whistleblower provisions effect a whistleblower's or potential whistleblower's experience inside a U.S. corporation. However, even with this limitation, the study can give some insight into how the combination of these provisions and U.S. law might affect whistleblowers as a formal legal matter. In other words, knowing the scope and extent of these protections allows us to make an argument that these provisions should play some role in legally protecting whistleblowers. Assuming the law has some impact on the behavior of both whistleblowers and corporations, this legal analysis should have some practical impact on the whistleblower's experience.

In fact, given the breadth and consistency of these whistleblower provisions, one conclusion that could be drawn from these results is that U.S. corporate Codes of Ethics may *better* protect whistleblowers from retaliation than statutory or tort law, two areas of law to which we traditionally have looked to provide whistleblowers protection.⁸ Statutory and tort whistleblower protections in the United States contain numerous exceptions and loopholes. (Miethe 1999, pp.147-48; Moberly 2008, pp.980-87) As the Senate noted when it passed Sarbanes-Oxley's whistleblower provision, corporate whistleblowers were 'subject to the patchwork and vagaries' of current law. (S. Rep. No. 107-146 2002, p.19) The corporate Codes, however, across the board, fill these gaps in coverage. Indeed, the data from this study paint a picture of whistleblower protections very different than the protections provided by statute or tort. Companies appear to require more of themselves through their Codes than U.S. law requires for protecting whistleblowers. We set forth three examples below.

Broader Definition of 'Protected Conduct'

⁸ This section reviews and summarizes topics Moberly has addressed previously in *Protecting Whistleblowers by Contract*, 79 COLO. L. REV. 975 (2008). The data from this study support and enhance the arguments he made in that article.

First, the Codes protect a wider variety of whistleblower reports than under current U.S. law. Whistleblower protections in the private sector protect only a limited type of report about very specific illegalities. For example, Sarbanes-Oxley protects only reports about certain types of fraud (18 U.S.C. s. 1514A), while the Surface Transportation Assistance Act of 1982 protects only whistleblower reports related to the safety of commercial vehicles (49 U.S.C. s. 31105(a)). Statutes addressing a specific topic, like nuclear power or clean water or corporate fraud, often will attach a whistleblower provision protecting from retaliation employees who report violations of that particular act. Despite having over 35 of these individualized whistleblower and anti-retaliation statutes, in the U.S. there is no over-arching, generalized whistleblower statute for employees who report any type of illegality or wrongdoing. To be protected under a particular statute's antiretaliation provision, an employee must report the 'right' (i.e., protected) type of misconduct – a whistleblower who reports something different, even if it is illegal, might fall through the gaps in the various statutes' protections. (Moberly 2008, pp.981-83)

A similar problem arises with state tort law. This type of law often provides a remedy for whistleblowers who are fired – they can bring a tort claim for wrongful discharge in violation of public policy. This tort protects employees who act 'in the public interest' by reporting misconduct that the public would want reported. The gaps in this tort coverage, however, are significant. (Westman & Modesitt 2004, p.131) Each of the U.S.'s fifty states has a different definition of what an employee must report in order to be protected – in other words, state courts define the 'public policy' that matters very differently from one another, and not always in a way that is completely predictable. One judge's public policy might appear to another judge to be a private matter, such as petty internal corporate squabbling. (Estlund 1996, p.1657; Moberly 2008, pp.984-86) Furthermore, because tort law is judge-made common law, no official codification of the rules exist for employees to consult before blowing the whistle and the courts' holdings are subject to change on a case-by-case basis.

In short, in order to bring a claim for retaliation or wrongful discharge, an employee must blow the whistle on the 'right' (meaning protected) type of conduct. This leads to landmines for the unwary and a situation in which whistleblowers may have difficulty predicting ahead of time whether they will be protected.

U.S. corporate Codes, however, differ from the current law because they appear to encourage employees to report a much broader range of misconduct. Protecting reports of illegal behavior generally (76.4% of Codes provide this protection) goes well beyond any current statutory protections for reporting misconduct. Many companies go even further by instructing employees to report violations of the Code (93.3%) as well as 'unethical' or 'improper' conduct (52.8%). Codes that speak broadly of reporting 'illegal' or 'unethical'

conduct may better protect whistleblowers and encourage reporting because whistleblower will not have to worry about whether their report falls into the class of reports protected by a particular statute. In fact, these broad provisions could stop what has become a common occurrence in U.S. retaliation cases: the employer trying to demonstrate that what the employee reported was not protected and the employee trying to fit his report into pre-defined legal boxes. Unwary employees inevitably get caught in a game of 'gotcha' after the fact because too often the legal retaliation case focuses on whether the employee reported the right type of misconduct, rather than focusing on whether the employer retaliated in response to that report. (Moberly 2007, pp.113-20) The Codes' broad definitions of what should be reported would place the emphasis in retaliation cases where it should be: on whether the employer retaliated against an employee based upon the employee blowing the whistle.

More Consistent Protections

Second, the law differs from jurisdiction to jurisdiction and from statute to statute regarding other aspects of a whistleblower's protection, such as the person to whom the whistleblower reports. Some laws require a whistleblower to report internally first for certain types of misconduct, others require external reports. (Westman & Modesitt 2004, p.143) Many allow for either, but there is often uncertainty, particularly with some older federal statutes. For example, in the most recent term of the U.S. Supreme Court, the Court refused to decide whether the Fair Labor Standards Act's antiretaliation provision protected internal reports of wrongdoing, leaving employees uncertain regarding whether they will be protected from retaliation if they tell their manager or the company president about violations of the minimum wage or overtime provisions of U.S. law. (*Kasten v. Saint-Gobain Perf. Plastics Corp.* 2011, p.1336)

By requiring company-wide policies for whistleblowers, the listing standards could avoid an increasingly problematic situation: employees in the same company being provided with different instructions as to whom they should give reports depending upon the state or jurisdiction in which the employee is located. The company-wide policies would apply the same standards to all company employees regardless of their physical location, and make it clear that reporting internally is protected. Moreover, by identifying specific individuals, and several different individuals, these corporate Codes give much better instruction to employees than the more formal legal protections provided by statute and tort.

This information is even more valuable to the extent we believe employees do not know about or understand their more formal legal protections and the intricacies and gaps those involve. By contrast to the difficulty an employee may have traversing through the maze of

federal and state legal protections, it appears that employees could easily find the whistleblower provisions of a company's Code. Indeed, Sarbanes-Oxley's Section 406 clearly intended to make Codes of Ethics more publicly available by requiring their disclosure. Only one of the ninety companies in the sample did not make the Code publicly available, even in response to a specific request from the authors. Thus, it seems that Sarbanes-Oxley and the SEC regulations fulfilled their purpose of having companies disclose their Codes of Ethics publicly. An interested and diligent employee likely could find and read the whistleblower provisions of a corporate Code in order to figure out how to report misconduct.

Good Faith Belief

Third, most whistleblower protection statutes and tort claims require a whistleblower to have a 'reasonable good faith belief' that the misconduct the whistleblower reports actually violates the law. (Moberly 2008, pp.1002-03) This standard, of course, means that the whistleblower does not necessarily have to be right, but that the whistleblower's belief must be objectively reasonable and subjectively made in good faith. Problems can result from this standard, however, because U.S. courts sometimes interpret this requirement strictly by holding everyday lay employees to very high standards regarding their knowledge of the intricacies of the law. (Moberly 2010, pp.448-51) For example, Title VII of the Civil Rights Act of 1964 makes racial and sexual harassment illegal. (42 U.S.C. s. 2000e-2) However, one instance of harassment typically is not 'severe and pervasive' enough to be illegal. (Faragher v. City of Boca Raton 1998, pp.787-88) As a result, courts have not protected a whistleblower from retaliation when he reported a single instance of harassment because he could not have had a 'reasonable belief' that the conduct violated Title VII. (Jordan v. Alternative Resources Corp. 2006, pp.339-43) Even if the employee reported the harassment in good faith (meaning the employee truly believed the harassment violated the law) – unless an objectively reasonable person would conclude that the wrongdoing violated the law, the employee would not be protected.

Codes of Ethics seem to ignore this high legal standard of both subjective good faith and objective 'reasonable belief' that what an employee reports violates the law. Instead, corporations generally tell employees that they will be protected from retaliation as long as they report misconduct in 'good faith'; 76.4% of the companies use this language to describe the type of report that must be made. Compare that statistic to the companies that use language such as 'employees will be protected who report what they reasonably believe to be misconduct.' Only 11.2% use that language, even though it would seemingly require employees to be more certain about the misconduct they report. Instead, by using the broader 'good faith' language, companies seem to encourage employees to report even concerns about which they are less certain. However, companies rarely, if ever, explain what

they mean by 'good faith,' which could mean either that the whistleblower has an 'honest' belief that what they report is true or it could mean that the whistleblower have a pure motive in making the disclosure. Should it mean the later, whistleblowers might be deterred from reporting if they know their motive will be questioned.

However, to the extent Codes focus on the subjective intent of the employee – the more forgiving standard – Codes should better protect whistleblowers because courts should not engage in an ex post evaluation of whether the conduct an employee reports actually violated the law. That review can be tricky because events seem much clearer in hindsight than they might to an employee who is trying to make a judgment call about whether misconduct has occurred. Additionally, the line between illegal and legal might seem much clearer to a legally-trained court than to a lay person on an assembly line, for example. Corporations clearly have decided that they would rather have people report earlier and with less information. This gives corporations the chance to investigate and to let the experts in the corporation determine whether activities violate the law instead of relying on an individual employee to decide whether conduct is sufficiently egregious to report.

To summarize these points, in several important ways, the non-retaliation promises corporations make in their corporate Codes of Ethics offer employees broader and stronger protection from retaliation than US statutory and tort law. This might encourage more employees to report the misconduct they see, knowing that they will be protected by the corporation's promise. Indeed, other scholars have argued that internal whistleblowing should increase under these circumstances, i.e., when a company provides a specific channel for an employee disclosure, identifies a specific person to receive the disclosure, and promises not to retaliate against an employee for disclosing misconduct. (Near & Dworkin 1998, p.1557; Barnett et al. 1993, p.133; Miceli & Near 1992, p.290) This conclusion, however, is undermined if employees cannot actually enforce these corporate promises in court should the company breach their promise. In other words, can employees rely on these Codes of Ethics' promises? Will courts enforce them by giving damages to employees who are retaliated against in violation of the promises?

Disclaimers May Undermine a Code's Promise of Protection

The answer to those questions is 'probably not.' In a previous article, Moberly detailed several reasons why a Code's promise of protection from retaliation may be difficult to enforce. (Moberly 2008, pp.1012-21) Here, we will briefly discuss one reason given the results of this study.

Most U.S. workers are 'at will' employees. That is, employers can discharge employees at any time, for any reason. Some exceptions to this background rule exist, but courts generally

presume that employers have great discretion to fire employees. This presumption makes it difficult for employees to enforce any type of employer promise, and, accordingly, the at-will rule makes enforcing the types of antiretaliation promises found in Codes questionable.

One prominent exception to the at-will rule, however, is that many courts will enforce promises found in employee handbooks. This doctrine has been developed in the last several decades as a state law doctrine – usually under a theory of either breach of contract or promissory estoppel – and today a majority of U.S. jurisdictions accept that at-will employees may enforce some employee handbook provisions. (Dau-Schmidt & Haley 2007, p.344)

Whistleblowers have tried to enforce antiretaliation promises in Codes of Ethics by equating these Codes with employee handbooks. Courts have had little problem equating the two: both Codes of Ethics and more detailed employee handbooks serve the same purposes of informing employees about employer expectations and encouraging employee loyalty by outlining the benefits employees gain by working for that particular employer. As a result, some U.S. courts have upheld employee claims that they were fired in violation of the antiretaliation promise in a Code of Ethics. However, this result is far from the norm, and in fact it will very often be the case that courts refuse to enforce these promises, based on several different legal doctrines. (Moberly 2008, pp.1012-21) Here, we will focus on the primary reason: the existence of an at-will disclaimer.

Courts typically will not enforce handbook provisions if the handbook contains a ‘clear and conspicuous’ disclaimer that proclaims the employment relationship to be at-will. (Fischl 2007, p.195) For example, a New York court dismissed an employee’s breach of contract claim based upon a Code’s whistleblower provision because the company stated in the Code that ‘[t]his code of conduct is not a contract of employment and does not contain any contractual rights of any kind . . . [the company] can terminate employment at any time and for any reason.’ (Lobosco v. New York Telephone Co./NYNEX 2001, p.464) Thus, an employer’s ability to include a disclaimer reaffirming the employee’s at-will status could undermine enforcement of a Code’s anti-retaliation provision.

We examined the extent to which companies in our study incorporated an at-will disclaimer into the company Code of Ethics. Interestingly, at the same time that companies made promises of non-retaliation, almost half of the companies (44.9%) also claimed that employees are at-will. Companies do not publicize this at-will disclaimer anywhere but in the Code itself. None of the companies put the at-will language on their Form 10 public filing with the SEC or even on the website from which the Codes can be downloaded.

Additionally, for the Codes that do not have at-will disclaimers, we speculate that other employment materials likely have disclaimers somewhere – such as in an actual employment handbook or some other document handed out to employees. This study does not measure that, but it seems likely that the percentage of employees subject to an unenforceable non-retaliation promise is even higher than 44.9%. And, those employees' situation might be even worse: they have one document that clearly promises them protection from retaliation, yet another document informs them that they are at-will employees and therefore cannot rely on any promise made to them.

4. Limitations

This study's methodology has benefits and drawbacks compared to the survey method used by Hassink and Lewis & Kender. As a benefit, this study was not dependent upon respondents to receive information, which makes the results less skewed by a non-response bias. The listing requirements of the U.S. stock exchanges require public posting of corporate Codes of Ethics, which provides a unique opportunity to examine the details of corporate policy. A survey might produce results skewed in favor of strong whistleblowing policies as companies with strong policies might respond readily, while those with weak policies may not. Moreover, by reviewing the actual documents, as opposed to a corporation's description of the document, this study might present a less-biased view of the contents of corporate whistleblowing policies (although it should be noted that many respondents in the Lewis & Kender surveys sent the authors relevant documents or made them available on their website). Finally, drawing the sample randomly also provides the benefit of surveying a greater diversity of corporations than surveying only the largest companies on a particular stock exchange or those who self-select by returning survey materials.

On the other hand, by relying only on public documents and not a detailed questionnaire, this study did not evaluate the manner in which companies actually implemented their Codes. By using surveys of companies, Lewis & Kender were able to gather information about how Codes were utilized and how companies trained their employees and supervisors. (D. Lewis & Kender 2010, p.31) Additionally, companies may address whistleblowing issues in documents not made public – such as in employee handbooks. This study did not have access to those materials. Finally, several studies recently have tried to evaluate whether Codes of Conduct are effective at reducing corporate misconduct, and the results of those studies have been mixed. (Schwartz 2002, pp.27-28; Newberg 2005, pp.264-66) This study, however, does not attempt to answer whether whistleblowing policies found in corporate Codes are effective.

All of these limitations could be addressed by further research. For example, surveys could follow up on the information received as part of this study. Moreover, although it may be difficult to structure, a study could attempt to determine whether whistleblowing policies actually help reduce corporate wrongdoing.

5. Conclusion

In the book arising out of the previous International Whistleblower Research Network conference, held in 2009, David Lewis outlined an 'agenda for further research' in which he noted that 'much of the existing research on the use and contents of employers' confidential reporting/whistleblowing procedures has tended to focus on the public sector and there is a need to obtain more information about how whistleblowing is managed in the private sector.' (Lewis 2010, p.163) The research described in this chapter provides an initial view of the ways in which the private sector in the United States attempts to manage whistleblowing. We found that, on paper at least, U.S. corporations have similar ways in which to encourage employees to report misconduct. Companies make whistleblowing a duty of employment and provide detailed instructions on how to blow the whistle internally. Numerous people in the organization can receive employee reports. And, perhaps most importantly, companies promise to protect whistleblowers from retaliation.

However, because of the strength of the at-will rule in the United States, employees will have a difficult time enforcing these promises, particularly if companies continue to include disclaimers in their Code of Ethics. These disclaimers essentially negate the companies' promise to protect whistleblowers from retaliation. This result seems counter-productive and ultimately, simply unfair. As the study shows, corporate Codes of Ethics make reporting a duty - a requirement of employment. In fact, this requirement is one of the most consistent provisions of these codes across the board: 96.6% tell their employees that they must report misconduct. Protecting employees from retaliation – enforcing the promise made by almost all corporations – is a simple matter of fairness. Companies should not be able to make whistleblowing a job requirement, and then be permitted to retaliate when the employee does exactly what the employee is told to do.

Further research is needed to examine how companies actually implement these policies. Employees may have difficulty enforcing promises not to retaliate legally, but the practical effects of such promises are still understudied. Now that we know the content and scope of private sector whistleblower policies, attention needs to turn to how companies implement these policies and whether they effectively encourage whistleblowing and reduce misconduct.

References

AmEx Company Guide.

Barnett, T., D.S. Cochran and G.S. Taylor (1993). The Internal Disclosure Policies of Private-Sector Employers: An Initial Look at Their Relationship to Employee Whistleblowing, *Journal of Business Ethics*, 12, 127-36.

Berenbeim, R.E. (1987). Corporate Ethics. Conference Board.

Callahan, E.S. et al. (2002). Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment, *American Business Law Journal*, 40, 177-215.

Dau-Schmidt, K.G. and T.A. Haley (2007). Governance of the Workplace: The Contemporary Regime of Individual Contract, *Comparative Labor Law & Policy Journal*, 28, 313-49.

Dworkin, T.M. and E.S. Callahan (1991). Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society, *American Business Law Journal*, 29, 267-308.

Estlund, C.L. (1996). Wrongful Discharge Protections in an At-Will World, *Texas Law Review*, 74, 1655-92.

Ethics Resource Center (2010). Blowing the Whistle on Workplace Misconduct.

Feldman, Y. and O. Lobel (2010). The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, *Texas Law Review*, 88, 1151-1211.

Fischl, R.M. (2007). Rethinking the Tripartite Division of American Work Law, *Berkeley Journal of Employment & Labor Law*, 28, 163-216.

Hassink, H., M. Vries and L. Bollen (2007). A Content Analysis of Whistleblowing Policies of Leading European Companies, *Journal of Business Ethics*, 75, 25-44.

Jackall, R. (2007). Whistleblowing and Its Quandaries, *Georgetown Journal of Legal Ethics*, 20, 1133-36.

Krawiec, K. (2003). Cosmetic Compliance and the Failure of Negotiated Governance, *Washington University Law Quarterly*, 81, 487-544.

Lewis, D. and M. Kender (2007). A Survey of Whistleblowing/Confidential Reporting Procedures in the Top 250 FTSE Firms, Manuscript on file with author.

Lewis, D. and M. Kender (2010). A Survey of Whistleblowing/Confidential Reporting Procedures in the Top 250 FTSE Firms, Manuscript on file with author.

Lewis, D.B. (2010). Conclusion. In *A Global Approach to Public Interest Disclosure*. Edward Elgar, 159-65.

Miceli, M.P. and J.P. Near (1992). *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*. Lexington Books.

Miceli, M.P., J.P. Near and T.M. Dworkin (2008). *Whistleblowing in Organizations*. Routledge.

Miethe, T.D. (1999). *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job*. Westview Press.

Moberly, R. (2008). Protecting Whistleblowers By Contract, *Colorado Law Review*, 79, 975-1042.

Moberly, R. (2006). Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers, *BYU Law Review*, 2006, 1107-80.

Moberly, R. (2010). The Supreme Court's Antiretaliation Principle, *Case Western Reserve Law Review*, 61, 375-452.

Moberly, R. (2007). Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, *William & Mary Law Review*, 49, 65-155.

NASDAQ Interpretative Manual Online.

Near, J.P. and T.M. Dworkin (1998). Responses to Legislative Changes: Corporate Whistleblowing Policies, *Journal of Business Ethics*, 17, 1551-61.

Near, J.P. and M.P. Miceli (1985). Organizational Dissidence: The Case of Whistle-Blowing, *Journal of Business Ethics*, 4, 1-16.

Near, J.P. and M.P. Miceli (1996). Whistle-blowing: Myth and Reality, *Journal of Management*, 22, 507-26.

Newberg, J.A. (2005). Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct, *Vermont Law Review*, 29, 253-95.

NYSE Listing Manual.

Pagnattaro, A. and E.R. Peirce (2007). Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws, *Berkeley Journal of Employment and Labor Law*, 28, 375-428.

Pitt, H.L. and K.A. Groskaufmanis (1990). Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, *Georgetown Law Journal*, 78, 1559-1654.

Schwartz, M.S. (2002). A Code of Ethics for Corporate Code of Ethics, *Journal of Business Ethics*, 41, 27-43.

Sturm, S. (2001). Second Generation Employment Discrimination: A Structural Approach, *Columbia Law Review*, 101, 458-568.

Sunstein, C. (2003). *Why Societies Need Dissent*. Harvard University Press.

Tippett, E.C. (2007). The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law, *Employee Rights and Employment Policy Journal*, 11, 1-52.

Tsahuridu, E.E. and W. Vandekerckhove (2008). Organisational Whistleblowing Policies: Making Employees Responsible or Liable?, *Journal of Business Ethics*, 82, 107-18.

U.S. Equal Employment Opportunity Commission (1999). *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*.

U.S. Sentencing Guidelines Manual (2004).

U.S. Sentencing Guidelines Manual (1991).

Weaver, G.R., L.K. Trevino and P.L. Cochran (1999). Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000, *Journal of Business Ethics*, 18, 283-94.

Westman, D.P. and N.M. Modesitt (2004). *Whistleblowing: The Law of Retaliatory Discharge*, 2nd ed. Bureau of National Affairs, Inc.

Cases, Statutes, and Regulations

17 C.F.R. s. 228-406 (2003)

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

In re Caremark Int'l Inc., 698 A.2d 959 (Del Ch. Ct. 1996).

Jordan v. Alternative Resources Corp., 458 F.3d 332 (4th Cir. 2006).

Kasten v. Saint-Gobain Perf. Plastics Corp., 131 S. Ct. 1325 (2011).

Lobosco v. New York Telephone Co./NYNEX, 751 N.E.2d 462 (N.Y. 2001).

Sarbanes-Oxley Act of 2002, codified in scattered sections of 11, 15, 18 and 29 U.S.C.

S. Rep. No. 107-146 (2002).

Surface Transportation Assistance Act of 1982, 49 U.S.C. s. 31105(a).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. s. 2000e-2.

APPENDIX A

Table 1. Location of the Full Code

	% of Codes
Form 10K or 10KSB	2.2%
Company website	85.4%
Annual report	5.6%
Sent to a person who requests it	43.8%

Table 2. Code Applicable To:

	% of Codes
All employees	98.9%
Subsidiaries/ Entire group	53.9%
Officers/Senior/Exec. Management	78.7%
Directors	82.0%
Financial officers	22.5%
Contractors	25.8%
Former employees	0.0%
Local application by subsidiaries	0.0%

Table 3. Tone of Code

	% of Codes
Reporting is a requirement/duty (e.g., employees 'must' or 'should' report)	96.6%
Employees are explicitly encouraged to report	36.0%
Neutral tone about reporting (e.g., employees 'can' or 'may' report)	11.2%

Table 4. Nature of the Violations to be Reported

	% of Codes
Violations of code itself	93.3%
Violations of law/other regulations	76.4%
Unethical/improper conduct	52.8%
Financial reporting problems	65.2%
Failing to report violation	23.6%
Criminal offenses	3.4%
Health and safety threats	29.2%
Environmental issues	7.9%
Corruption/mismanagement/abuse of authority	1.1%
Misinformation (including on reports to the SEC or involving other government reporting requirements)	15.7%
Miscarriage of Justice	0.0%
Theft/misappropriation/misuse of company assets	22.5%
Insider trading/bribery/money Laundering	9.0%
Harassment or discrimination	21.3%
Other violations, not mentioned [†]	58.4%
<i>Conflicts of interest</i>	
Conflicts of interest of <i>others</i> should be reported	4.5%
Employees should report <i>their own</i> conflict of interest	38.2%
States that conflicts should be reported, but is vague on whose conflict	52.8%
Code does not mention conflicts of interest	20.2%

Note. † Some examples of other violations include: 'fraud' (36.0%), 'anti-trust violations'; 'dishonest conduct'; 'tax violations'; 'boycott requests'; or 'infringing on copyrights, patents, or trademarks'.

Table 5. Officials or Bodies To Whom Wrongdoing May Be Reported

	% of Codes
<i>As a Primary Contact</i>	
Direct or indirect supervisor	75.3%
Compliance or ethics officer	29.2%
Special hotline [†]	47.2%
Board of directors	16.9%
Audit committee	55.1%
Human resources department	33.7%
Legal department	36.0%
Corporate governance department	1.1%
Internal audit department	16.9%
Company secretary	2.2%
Risk management department	0.0%
Chief executive officer	19.1%
Chief financial officer	15.7%
Complaints committee	0.0%
Others to receive complaints	50.6%
<i>As a Secondary Contact</i>	
Direct or indirect supervisor	0.0%
Compliance or ethics officer	2.2%
Special hotline [†]	5.6%
Board of directors	2.2%
Audit committee	4.5%
Human resources department	3.4%
Legal department	4.5%
Corporate governance department	1.1%
Internal audit department	2.2%
Company secretary	1.1%
Risk management department	0.0%
Chief executive officer	4.5%
Chief financial officer	2.2%
Complaints committee	0.0%
Others to receive complaints	54.5%

Note. † We also coded for how the hotline was run. Of the 49 companies that mentioned hotlines, 36.7% used a 3rd party, 6.1% run it internally; and 57.1% did not provide this information.

Table 6. Reporting Guidelines and Formalities

	% of Codes
Code provided the contact details to report misconduct	66.3%
Code states that the contact details can be found elsewhere	5.6%
<i>Reporting channels vary by</i>	
Type of misconduct being reported	56.2%
Who is engaging in misconduct	14.6%
Who is reporting the misconduct	18.0%
The channels do not vary	32.6%
Code identifies a separate contact for reporting <i>financial</i> problems	49.4%
Why a secondary contact should be used [†]	32.6%
Report should be in sufficient detail to permit an investigation	18.0%
Specific details that should be reported	6.7%
Reporting system is multilingual	3.4%
A special reporting form should be used	1.1%
A whistleblower should adequately explain their suspicion	0.0%
Code provides a checklist for criteria of ethical behavior	0.0%
Code provides a graphical representation of the reporting system	1.1%
Code bans employee investigation	5.6%
Requires whistleblower to translate the complaint into a specific language	0.0%

Note. † The reasons for reporting to a secondary contact clustered around five themes for the 29 Codes that provided reasons: because the employee felt 'uncomfortable' or wanted 'anonymity' (58.6%); the complaint was not handled 'properly' or the employee was not 'satisfied' with the response from the primary contact (48.3%); the primary contact was not 'appropriate' or there were difficulties with 'communication' (34.5%); the primary contact was absent (10.3%); or the report involved a serious violation of the law (3.4%).

Table 7. Protection from Retaliation and Qualification for Protection

	% of Codes
'No retaliation' promise or Code prohibits retaliation	91.0%
Retaliation will be punished	30.3%
Reports must be made in 'good faith'	76.4%
Reports must be based on a 'reasonable belief'	11.2%
Report must be of a genuine concern	3.4%
Report can included 'suspected' violations	68.5%
No retaliation even if the report is unfounded or factually untrue	3.4%
Making a false or malicious report is punishable	21.3%
Whistleblowers will have liability toward subject of malicious complaint	0.0%
Involvement – immunity for reporting one's own involvement	0.0%
Involvement – protection only provided if employee did not receive any personal gain from reported misconduct	0.0%
Involvement – disclosure will be credited if whistleblower is involved in misconduct	3.4%
Involvement – no retaliation even if whistleblower is involved in misconduct but with good faith	1.1%
Right of protection may be lost if report is made externally	0.0%

Table 8. Confidentiality and Anonymity

	% of Codes
Some or all reports will be treated confidentiality [†]	74.2%
Report will be kept confidential, <i>except</i> as required for investigation	24.7%
Report will be kept confidential, <i>except</i> as required by law or regulation	19.1%
Company will make its 'best efforts' to keep confidentiality or 'to extent reasonably possible'	30.3%
Violations can be reported anonymously ^Δ	73.1%
Anonymity is discouraged	13.5%
Whistleblowers are not able to make their concern publicly unless certain conditions are met	0.0%
Publicity is not permitted	1.1%
No anonymity for third parties	0.0%

Note. † This number includes a combination of Codes in which *all* violations are guaranteed confidentiality (59.6%) and *some* violations are guaranteed confidentiality (14.6%); Δ This number includes a combination of Codes in which *all* violations are guaranteed anonymity (56.2%) and *some* violations are guaranteed anonymity (16.9%).

Table 9. Investigation Details

	% of Codes
Company will investigate or give serious treatment to whistleblower disclosure	76.4%
Cooperation expected of employees in investigation	27.0%
Company will keep an investigation log	20.2%
Company will provide feedback on investigation to employee	12.4%

Table 10. At-Will Disclaimers

	% of Codes
Form 10 contains an at-will disclaimer	0.0%
Code contains an at-will disclaimer	44.9%

Whistleblowing Management is Risk Management

Eva Tsahuridu⁹

The latest high profile organisational crises and governance failures increased the focus on risk management. The European Commission (2011, p. 2) comments that 'corporate governance is one means to curb harmful short-termism and excessive risk-taking' while the OECD (2010, p. 3) reports that 'corporate governance weaknesses in remuneration, risk management, board practices and the exercise of shareholder rights had played an important role in the development of the financial crisis'. These weaknesses, argues the OECD, spread from some companies to the market in general. Broader efforts to improve corporate governance focused on internal control and risk management. The attempts to improve corporate governance did not only increase the emphasis on risk management but also on the protection of whistleblowers. Despite the overlap between whistleblowing and the identification of risk, these attempts appear to be independent and to have different processes and objectives. Risk management forms part of an enterprise's attempts to protect itself and ensure that it can identify and manage risk, while whistleblowing focuses primarily on the protection of the whistleblower and the compliance with legal and regulatory frameworks with little focus on the potential organisational benefits of whistleblowing in identifying and managing risk. On the contrary, whistleblowing is arguably seen as a risk generator rather than an element of the risk management infrastructure. Management is more likely to perceive whistleblowing as disloyal and/or costly, despite research evidence about the benefits of whistleblowing and appropriate management responses to it (Miceli, Near & Dworkin, 2009), making ineffective whistleblowing more likely when top management perceives whistleblowing as a threat to the organisation's authority structure (Miceli & Near 2002).

The primary focus of much of the whistleblowing literature is on the person blowing the whistle, how and when the whistle is blown, the effect of the issue on the intentions of a potential whistleblower and the protection of the whistleblower from retaliation. This body of work supported legal developments in the areas of whistleblowing protection. These emphases, however, provided only limited assistance for the development of whistleblowing as an organisational risk management tool that can assist the organisation to identify and resolve wrongdoing or malpractice that is occurring in or by the organisation.

⁹ The views and opinions expressed in this chapter are those of the author and do not necessarily represent the views of, and should not be attributed to, CPA Australia.

This chapter provides an overview of risk management and the management of whistleblowing. It provides examples of the separation of whistleblowing and risk management in regulation and also looks at how whistleblowing service providers deal with whistleblowing and risk.

1. Risk Management

The management of risk is an organisational strategic driver because it validates performance (Carrel, 2010). The Committee of Sponsoring Organizations of the Treadway Commission (COSO) is considered the leading voice in internal control and risk management. It describes itself as 'providing guidance on critical aspects of organizational governance, business ethics, internal control, enterprise risk management, fraud, and financial reporting' (COSO 2011). COSO defines risk management as: 'a process, effected by an entity's board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives' (COSO 2004, p. 2). Risk appetite is a commonly used term in the risk management literature and while its problematic nature is acknowledged its analysis is beyond the scope of this chapter (see Power, 2009). Generally, risk appetite suggests that the level of appropriate or desired risk varies between organisations but there is evidence that some activities are regarded as risky across organisations and even countries. Antonides et al. (1997, cited in Coleman, 2006) surveyed 200 subjects each in Hungary, the Netherlands, Poland and the UK to determine what kind of activities are considered risky. Low risk activities were judged to be in order of importance: moral, beneficial, known and prestigious, although there is no certainty that activities with these characteristics are considered less risky because they are considered to be positive.

Over the last 15 years, risk management moved from peripheral functional areas of the organisational hierarchy to the top management level and the board (Arena, Arnaboldi & Azzone 2010). The transition of risk management to the strategic level of the organisational hierarchy has turned it into 'a fluid and poorly defined instrument' that 'can be different things in different organisations, or even within the same organisation at different time' (Arena et al. 2010, p. 659). Similar to the fact that there isn't a best model of corporate governance, the European Commission (2011) comments that given the diversity of risks it is not possible to propose a risk management model that all companies can adopt. It does argue, however, that what is crucial is that the board has a proper oversight of the risk management process. It also explains that for risk management to be effective it must be set at the top of the

organisation and it must also be monitored by the top with clearly defined roles and responsibilities of all parties involved in the risk management process.

The OECD report (2010) proposes that the risk management function should report directly to the board and consider any risks that arise from the reward systems that exist. It outlines a number of findings and good practice in improving the governance of risk management in order to enhance the implementation of its principles. The key findings that arose from the financial crisis include the widespread failure of risk management, the piecemeal approach to the management of risk and its isolation from corporate strategy. Further, boards were ignorant of the risks the company was facing. According to OECD (2011), the risk management function continues to be more commonly found in internal audit rather than an independent risk management function. This is something that may challenge the ability of the internal audit function to focus on the management of corporate risks rather than financial control.

Enterprise Risk Management (ERM) focuses on achieving the following organisational objectives (COSO 2004, p.3):

- Strategic – high-level goals, aligned with and supporting its mission
- Operations – effective and efficient use of its resources
- Reporting – reliability of reporting
- Compliance – compliance with applicable laws and regulations.

It seems that ERM and the emphasis on whistleblower protection are limiting whistleblowing to the last category of objectives (i.e. compliance) and miss the contribution whistleblowing can make to other objectives. As far as the author is aware, there is no research that explores managers' perceptions of whistleblowing in relation to the contributions it can make to the accomplishment of organisational objectives and ERM. This is an area where research will help us understand how management perceives and treats whistleblowing in organisations.

COSO (2004, pp. 3-4) describes the following interrelated components of ERM:

- Internal Environment – Includes the tone of an organisation, the perceptions of risk and the way risk is addressed. The internal environment includes the risk management philosophy and risk appetite, integrity and ethical values, as well as the organisational environment.
- Objective Setting – An organisation can identify potential risk if it has first identified its objectives, i.e. what it is trying to achieve. ERM ensures that an objective setting process exists and the objectives set are aligned with the organisation's mission and risk appetite.

- Event Identification – Internal and external events that may affect the achievement of an organisation's objectives must be identified and risks and opportunities distinguished. Identified opportunities can further inform the objective setting process.
- Risk Assessment – Risks are analysed, giving consideration to the likelihood of occurrence and impact, as well as how they should be managed.
- Risk Response – Management selects risk responses (avoiding, accepting, reducing, or sharing risk) and develops a set of actions to align risks with the entity's risk tolerances.
- Control Activities – Policies and procedures are established and implemented to help ensure the risk responses are effectively carried out.
- Information and Communication – Relevant information is identified, captured and communicated to enable people to carry out their responsibilities. Effective communication also occurs in a broader sense throughout the enterprise.
- Monitoring – ERM is monitored and modified as necessary.

These eight components should be carried out across strategy development and implementation, operations reporting and compliance, across all levels of the organisation. ERM provides for the management of risk in an integrated way throughout the organisation. An analysis of ERM in relation to whistleblowing reveals that the latter can assist the former in event identification thus enabling the assessment of and response to the risk. Whistleblowing also helps in information and communication, as well as monitoring, because effective management of whistleblowing will affect the internal environment and send clear messages to all employees of the organisation's risk management philosophy, integrity and ethical values, thus creating an environment where wrongdoing is addressed.

Risk management, which involves the identification, assessment and mitigation of risk, has become an organisational wide issue. It needs to involve every level of the organisational hierarchy and risk must be managed as a corporate culture 'brought as a core value to the forefront of corporate strategies' (Carrel 2010, p. 9). Such an approach to risk management requires risk based information flow throughout the organisation and renders every business manager a risk manager (Carrel 2010). Carrel proposes that every manager must be aware and responsible for risk but also accountable for it. This developing understanding of risk creates opportunities for the management of whistleblowing because those who understand risk and are accountable for its management will be expected to be more receptive to disclosures of wrongdoing and more willing to address it if it exists. Such behaviours will in turn affect the reaction of other observers of wrongdoing.

Despite the obvious relationship between whistleblowing and risk management, there are very few examples where this relationship is identified and discussed in the literature. Moeller (2011) is one of those who discuss whistleblowing in relation to ERM. He states that whistleblowing programs can be a useful tool for ERM but also that 'whistleblowing cases can inflict serious damage to an enterprise's reputation as well as on the careers of accused managers' (p. 204). Moeller emphasises the risk that the ineffective management of whistleblowing programs may create while mentioning that 'whistleblowing provisions are primarily designed to protect employees...rather than provisions to increase enterprise internal controls or to cover identified risks' (p. 205).

2. Whistleblowing

Whistleblowing is 'the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to affect action' (Near and Miceli 1985, p. 4). Research on whistleblowing focuses on who blows the whistle, the conditions that enable whistleblowing, what factors are predictive of retaliation and when whistleblowing is likely to be effective (Mesmer-Magnus & Viswesvaran 2005; Near et al. 2004; Near & Miceli 2008).

The literature on power, justice, prosocial behaviour, attribution and emotion (Gundlach, Douglas & Martinko 2003) have been used to develop theory and models of whistleblowing, with the first three being the most frequently used. There is, however, increasing awareness in the literature of a shift in managerial perceptions about whistleblowing and an increased, but still anaemic focus on the management of whistleblowing (see e.g. Vandekerckhove & Tsahuridu 2010). Whistleblowing as a threat to an organisation's authority, cohesiveness and public image that leads to the need to protect whistleblowers from retaliation, is slowly being replaced with a perception of whistleblowing as a means of organisational protection. Whistleblowing is increasingly seen as enabling organisations to correct unsafe products and work practices and curb fraudulent activities, thus improving organisational effectiveness and profitability (Keenan 2002; Rothwell and Baldwin 2007, p. 341). Despite this shift in perceptions about whistleblowing, there is very little evidence that it is developing in the academic literature as a process that offers organisations protection by facilitating more effective risk management or evidence that management and boards perceive whistleblowing as a risk management tool that forms an integral part of the risk management function. While the risk management and whistleblowing literatures are developing their integration remains atrophic.

Whistleblowing laws assume that observers of wrongdoing would be more inclined to report it if they knew that they were protected from retaliation (Near et al. 2004; Near & Miceli 2008).

Survey data suggests that whistleblowing and incidents of retaliation increased as legal protection increased (Near et al. 2004; Miceli et al. 1999). This indicates that fear of retaliation does not deter whistleblowing. However, as Near et al. (2004) and Brown, Mazurski and Olsen (2008) found, inactive observers do not report wrongdoing primarily because they think that the wrongdoing will not be stopped and the situation will not be remedied. Near and Miceli (2008) suggest that policy and the law that focuses on increasing penalties for wrongdoing and improving awareness of what constitutes wrongdoing will be more effective in improving whistleblowing than laws that focus on the protection of whistleblowers from retaliation because when complaint recipients terminate wrongdoing more subsequent observers of wrongdoing are likely to blow the whistle. Further, Near and Miceli suggest that complaint recipients are more likely to terminate the wrongdoing if they are clear about what constitutes wrongdoing and if they are aware of the penalties they will incur if the wrongdoing continues.

Miceli, Near and Dworkin (2009) outline three important reasons why disclosures of wrongdoing should be addressed appropriately by their recipients for organisations to benefit. Firstly, wrongdoing that is corrected by the organisation in a timely manner will avoid external disclosures and the potential reputational and financial damage. Secondly, appropriate management response to disclosures of wrongdoing enhances the organisational culture and employee satisfaction and commitment. Thirdly, when disclosures are not made by employees or management does not respond when they are, legislation may be introduced to ensure organisational misbehaviour is limited. Lewis (2011) comments that whistleblowing legislation and procedures could be seen as attempts to deter wrongdoing and control risk. 'Whereas in the past measures to encourage whistleblowing might have been regarded as obsessive efforts to control risk, today, few would doubt that such measures could survive cost-benefit analysis' (p. 79).

There is ample evidence of the role whistleblowing can play in managing risk. The Association of Certified Fraud Examiners (ACFE), for example, indicates that 'tips' have been found to be the most common form of fraud detection in all their research undertaken since 2002. The ACFE research examines occupational fraud, which involves any case where an occupational position is used for personal gain, in all levels of the organisation. In 2010, tips accounted for 40.2% of the initial detection of fraud. Management review was the second form uncovering 15% while internal audit was third uncovering 14% of frauds. The ACFE 2010 report, which is based on 1,843 cases of fraud reported by the Certified Fraud Examiners in more than 100 countries, found that 49.2% of fraud tips were provided by employees and 13.4% were provided anonymously. Organisations that had fraud hotlines

where employees can report suspected wrongdoing without fear of retaliation had a higher fraud detection rate (47%) than those that did not (34%).

Similarly the Australian research undertaken by Brown, et al. (2008) in the public sector found that whistleblowing is the most effective means to stop wrongdoing. Reporting of wrongdoing by employees was rated as more effective by managers and case handlers than internal controls, internal audits or external investigations in detecting fraud. Further, the KPMG (2010) biannual fraud and misconduct survey for Australia and New Zealand found that most frauds are found from internal controls and reports from internal and external sources. In addition, it was found that fraud warnings were not addressed or ignored in 38% of cases of major frauds in 2010 (22% in 2008) and the time it took to uncover a fraud increased from 342 days in 2008 to 372 days in 2010. The rate of fraud detection by employees is found to be declining (20% in 2010 from 22% in 2008), something that the KPMG survey attributes to the absence of anonymous reporting lines in most organisations.

Lewis (2001) sees whistleblowing as 'part of a system to maintain and improve organisational quality' with whistleblowers 'benefiting their employers by offering solutions to work problems' (p.170). Despite the evidence that whistleblowing can assist in risk management, they remain separate not only in the literature but in regulation as well. The Corporate Governance Principles and Recommendations of the Australian Securities Exchange (2007) will be used as an example to illustrate the division between risk management and whistleblowing.

Principle Seven of the Corporate Governance Principles and Recommendations of the Australian Securities Exchange (2007, p. 32) deals with recognising and managing risk. It defines risk management as 'the culture, processes and structures that are directed towards taking advantage of potential opportunities while managing adverse effects' and should 'identify, assess, monitor and manage risk' as well as 'identify material changes to the company's risk profile'. The Corporate Governance Principles and Recommendations further suggest that 'companies should establish policies for the oversight and management of material business risks and disclose a summary of those policies' and the 'board should require management to design and implement the risk management and internal control system to manage the company's material business risks and report to it on whether those risks have been managed effectively' (p. 33). Internal controls, internal audits and the risk management committee are identified in Principle 7 as the main elements of risk management in companies. Some of the risks that a company should consider include operational, environmental, sustainability, compliance, strategic, ethical conduct, reputation or brand, technological, product or service quality, human capital, financial reporting and market-related risks. Principle 7 further states that 'the board is responsible for reviewing

the company's policies on risk oversight and management and satisfying itself that management has developed and implemented a sound system of risk management and internal control' (p. 32).

Raising a concern or whistleblowing is covered in Principle 3 that deals with promoting ethical and responsible decision making. The recommendations for this principle include the establishment of a code of conduct. Suggestions for the content of the code of conduct includes: 'Identify measures the company follows to encourage the reporting of unlawful or unethical behaviour and to actively promote ethical behaviour. This might include reference to how the company protects those, such as whistleblowers who report violations in good faith, and its processes for dealing with such reports' (p.22).

A footnote referring to the Australian Standard AS 8004 (Standards Australia 2003) is provided for guidance on the provision of a whistleblowing service. The Australian Standard describes a whistleblowing protection program as 'an important element in detecting corrupt, illegal or other undesirable conduct' and it is 'a necessary ingredient in achieving good corporate governance' (p. 4). The standard provides a list of potential benefits that can result from an effective whistleblowing program. There is no explicit reference to risk management in this list, but there are implicit references in relation to 'more effective compliance with relevant laws', 'more efficient fiscal management through, for example the reporting of waste and improper tendering practices' (p.4).

While risk management is seen as an important element of corporate governance, it is not clear if whistleblowing is still seen as something that creates organisational responsibilities rather than benefits. This may be a consequence of the laws and regulations that address whistleblowing, as well as the language used. Commonly, legal provisions that cover whistleblowing emphasize the protection of whistleblowers and do not refer to the protection of the organisation that results from whistleblowing. In Australia, for example, the CLERP 9 reforms introduced Part 9.4 AAA – Protection for Whistleblowers in the Corporations Act. This new part deals exclusively with the protection of whistleblowers. The Sarbanes Oxley Act requires that the audit committee of a corporation receives, records and deals with whistleblowing that occurs in relation to accounting, internal controls and auditing issues. The audit committee must ensure that appropriate systems are in place so that anonymous submissions can be made.

The UK Bribery Act 2010 (the Act), that came into effect in July 2011, provides some integration between risk management and whistleblowing but again whistleblowing is not identified as a key element of risk management but only as a possible example of a procedure that could protect organisations from liability. The Act applies to bribery and

facilitation payments in the private and public sectors and makes the failure to prevent bribery by an organisation an offence. Maton (2010) explains that the Act creates an obligation to implement, maintain and enforce effective anti-bribery policies, systems and controls because unless an organisation can demonstrate that it implemented adequate procedures to prevent bribery, it will be liable. However, an organisation will not be liable if it can prove that it had 'adequate procedures'. The Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (Ministry of Justice 2011) published by the Secretary of State as required by Section 9 of the Act, emphasises that the 'procedures should be proportionate to the risks faced by an organisation.' It is not clear what this requirement means for the 'risk appetite' view that ERM adopts. The Guidance requires that the 'procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons.' Whistleblowing or speak up procedures are listed as an example of procedures that may be adopted depending on risks faced. In relation to communicating top level commitment to zero tolerance to bribery the Guidance suggests that formal statements are likely to include: 'reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing).'

Interestingly, references to whistleblowing are limited not only in the risk management but also in the corporate governance literature and regulation. In the risk management literature there appears to be an almost complete absence of whistleblowing as a risk management process, while in corporate governance the issue of terminology arises. The term 'raise concerns' is mentioned in the UK Corporate Governance Code (Financial Reporting Council, 2010) and communicate concerns is used in the Code of Ethics for Professional Accountants. The different language used between the whistleblowing literature and the risk management literature and regulation may contribute to the view that whistleblowing is a threat that creates risks for organisations while raising concerns is a risk management tool that can help organisations manage risk. Whistleblowing is raising concerns and a key element of risk management because it enables the organisation to address wrongdoing in a timely manner and as close to its source as possible. It also enables future disclosures of wrongdoing and potentially creates an environment where wrongdoing is not tolerated.

Unlike the academic literature and regulations which fail to identify the relationship between risk management and the management of whistleblowing, this relationship is evident in trade publications and in business consultancy where whistleblowing management services are

promoted explicitly as risk management services. The Net Lawman (no date) webpage, for example, describes whistleblowing as a way to risk management because as

‘an early warning system, whistleblowing can help alert employers to risks such as:

- * A danger in the workplace
- * Fraud in, on or by the organisation
- * Miss-selling or price fixing
- * Offering, taking or soliciting bribes
- * Dumping damaging material in the environment
- * Misreporting performance data

Risk comes with the running and management of every business. Any early warning system such as a whistleblowing policy should be welcomed. Whenever such a situation arises, the first people to know of the risk will usually be those who work in or for you. Yet while these are the people best placed to raise the concern before damage is done, they often fear they have the most to lose if they do speak up.’

Control Risks (no date) offers independent and confidential whistleblowing lines that enable organisations to:

- * Comply with legislation
- * Facilitate early detection of fraud and other problems throughout their global operations
- * Reduce the risk of financial loss, damage to reputation and litigation’

Interestingly, Control Risks does not mention whistleblower protection even though it offers anonymous reporting lines to organisations.

Similarly, STOPline (no date) an Australian whistleblowing service, which has the slogan: ‘Protecting your Assets, People and Reputation’ describes its core business as ‘supporting your risk management and corporate governance strategy’. Again there is no mention of whistleblower protection.

Miceli et al. (2008) suggest that concerns must be addressed appropriately because not only will they reduce the organisation’s exposure to lawsuits and potential damage but also because such behaviour means that good employees will be less likely to leave, thus reducing dysfunctional turnover and promoting organisational self interest. Appropriate resolution by management of concerns raised appears to be a good defence and a good offence by organisations, limiting harm and improving effectiveness and competitive advantage. Miceli et al. further comment that encouraging whistleblowing is a positive

response to the negative circumstances of wrongdoing. It is necessary not only to deal with it appropriately and without retaliation towards the whistleblower but to also ensure through the development of the necessary organisational climate and structures that wrongdoing is not condoned and employees understand what constitutes wrongdoing. Similarly to dealing appropriately with wrongdoing, preventing it leads to not only the absence of risk but to benefits such as more satisfied and committed employees and less turnover and other forms of employee withdrawal, demoralisation and distress. Unreported or uncorrected wrongdoing signals to employees that reporting a wrongdoing is not going to achieve anything (Miceli et al. 2008) resulting in the elimination of the reporting of wrongdoing and the possible loss of good employees.

3. Conclusion

While it is axiomatic that whistleblowing enables organisations to identify and manage risk, whistleblowing remains largely absent from the developments in the risk management arena. An organisation that has an appropriate internal ethical climate where concerns can be discussed and resolved will need neither whistleblowers nor legislation to protect them. As Hampton (2009, p. 222) puts it, 'the need for a whistleblower is also a failure of governance and risk management. If an organization has an effective central risk function, the whistleblower is an added control but should not be necessary. Everybody should be empowered to report wrongdoing and unethical or illegal behaviour'. Grant (2002) also claims that whistleblowing would not be necessary if organisations could effectively deal with concerns raised.

Organisational wrongdoing should not occur or it should be corrected as soon as the organisation becomes aware of it (Miceli et al. 2009). Whistleblowing is a way of becoming aware of possible wrongdoing and it can improve the effectiveness of risk management.

Research and scholarship on whistleblowing and risk management should be integrated to explore how whistleblowing can assist organisations in the management of risk and how risk management can benefit whistleblowing in order to improve organisational governance. The calls for whistleblowing training to become part of normal work training and the US government's requirement for whistleblowing training despite the lack of research on it (Miceli et al. 2009), are encouraging and may shift management's perceptions about whistleblowing. These attempts also offer opportunities to educate employers about the role whistleblowing can play in the management of risk and organisational performance.

There is a need to look at whistleblowing and risk management as elements of the same process, one that ensures that organisations manage risk and the risk management process appropriately. An integral part of that risk management process is whistleblowing.

References

Arena, M., Arnaboldi, M. & Azzone, G. (2010). The Organizational Dynamics of Enterprise Risk

Management, *Accounting, Organizations and Society*, 35, 659-675.

Association of Certified Fraud Examiners. (2010). Report to the Nations on Occupational Fraud and Abuse: 2010 Global Fraud Study, Austin, TX. Available at <http://www.acfe.com/rtn/rtn-2010.pdf> (accessed 30 May 2011).

Australian Securities Exchange. (2007). Corporate Governance Principles and Recommendations, 2nd edition, ASX Corporate Governance Council.

Brown, A. J., Mazurski, E. & Olsen, J. (2008). The Incidence and Significance of Whistleblowing in AJ Brown (Ed) Whistleblowing in the Australian Public Sector. Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations. The Australian National University E Press, pp. 25-52.

Carrel, P. (2010). The handbook of risk management: Implementing a post-crisis corporate culture. John Wiley & Sons.

Coleman, L. (2006). Why Managers and Companies Take Risks. Physica-Verlag.

Committee of Sponsoring Organizations of the Treadway Commission. (2004). Enterprise Risk Management - Integrated Framework, Executive Summary. AICPA.

Committee of Sponsoring Organizations of the Treadway Commission. (2011). Committee of Sponsoring Organizations of the Treadway Commission. Available at <http://www.coso.org/default.htm> (accessed 28 February 2011).

Control Risks. (no date). Compliance Lines – Whistleblowing. Available at <http://www.control-risks.com/default.aspx?page=1489> (accessed 25 May 2011).

European Commission. (2011). The EU Corporate Governance Framework, Green Paper, Available at http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf (accessed 20 May 2011).

Financial Reporting Council (2010) The UK Corporate Governance Code. Available at http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf (accessed 25 May 2011).

Grant, C. (2002). Whistleblowers: Saints of Secular Culture. *Journal of Business Ethics*, 39(4), 391-399.

Gundlach, M. J., Douglas, S. C., & Martinko, M. J. (2003). The Decision to Blow the Whistle: A Social Information Processing Framework. *The Academy of Management Review*, 28(1), 107-123.

Hampton, J. J. (2009). *Fundamentals of Enterprise Risk Management*. AMACOM.

Keenan, J. P. (2002). Whistleblowing: A Study of Managerial Differences. *Employee Responsibilities and Rights Journal*, 14(1), 17-32.

KPMG (2010) *Fraud and Misconduct Survey: Australia and New Zealand*. Available at <https://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Fraud-Survey/Documents/Fraud-and-Misconduct-Survey-2010.pdf> (accessed 21 May 2011).

Lewis, D. (2001). Whistleblowing at Work: On What Principles should Legislation be Based? *The Industrial Law Journal*, 30(2), 169-193.

Lewis, D. (2011). Whistleblowing in a Changing Legal Climate: Is it Time to Revisit our Approach to Trust and Loyalty at the Workplace? *Business Ethics: A European Review*, 20(1), 71-87.

Maton, J. (2010). The UK Bribery Act 2010. *Employee Relations Law Journal*, 36(3), 37-45.

Mesmer-Magnus, J. & Viswesvaran, C. (2005). Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation. *Journal of Business Ethics*, 62(3), 277-297.

Miceli, M. P. & Near, J. P. (2002). What Makes Whistle-Blowers Effective? Three Field Studies. *Human Relations*, 55(4), 455-479.

Miceli, M. P., Near, J. P. & Dworkin, T. M. (2008). *Whistle-blowing in Organizations*. New York: Routledge.

Miceli, M. P., Near, J. P. & Dworkin, T. M. (2009). A Word to the Wise: How Managers and Policy-makers can Encourage Employees to Report Wrongdoing. *Journal of Business Ethics*, 86(3), 379-396.

Miceli, M.P., Rehg, M., Near, J.P. & Ryan, K. (1999). Can Laws Protect Whistleblowers? Results from a Naturally Occurring Field Experiment. *Work and Occupations*, 26, 129-151.

Ministry of Justice. (2011). *The Bribery Act 2010 Guidance about Procedures which Relevant Commercial Organisations can Put into Place to Prevent Persons Associated with them from Bribing*. Available at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf> (accessed 13 September 2011).

Moeller, R.R. (2011). *COSO Enterprise Risk Management: Establishing Effective Governance, Risk, and Compliance Processes*, 2nd ed. John Willey.

Near, J. P. & Miceli, M. P. (1985). Organizational Dissidence: The Case of Whistle-blowing. *Journal of Business Ethics*, 4(1), 1-16.

Near, J. P. & Miceli, M. P. (2008). Wrongdoing, Whistle-Blowing, and Retaliation in the U.S. Government: What Have Researchers Learned From the Merit Systems Protection Board (MSPB) Survey Results? *Review of Public Personnel Administration*, 28(3), 263-281.

Near, J. P., Rehg, M. T., Van Scotter, J. R. & Miceli, M. P. (2004). Does Type of Wrongdoing Affect the Whistle-Blowing Process? *Business Ethics Quarterly*, 14(2), 219-242.

Net Lawman. (no date). Whistle blowing: A way to risk management? Available at <http://www.netlawman.co.uk/info/whistleblowing-risk-management.php> (accessed 25 May 2011).

OECD (2010) Corporate Governance and the Financial Crisis. Available at <http://www.oecd.org/dataoecd/53/62/44679170.pdf> (accessed April 25, 2011).

OECD (2011) Corporate Governance: Board Practices Incentives and Governing Risks.

Available at http://www.keepeek.com/Digital-Asset-Management/oecd/governance/board-practices_9789264113534-en (accessed 25 May 2011)

Power, M. (2009). The Risk Management of Nothing. *Accounting, Organizations and Society*, 34, 849-855.

Rothwell, G. R. & Baldwin, J. N. (2007). Ethical Climate Theory, Whistle-Blowing, and the Code of Silence in Police Agencies in the State of Georgia. *Journal of Business Ethics*, 70(4): 341-361.

Standards Australia (2003) Whistleblowing Protection Programs for Entities- AS 8004-2003. Standards Australia.

STOPline. (no date). The STOPline - Protecting your Assets, People and Reputation. Available at http://www.stopline.com.au/index.php?option=com_content&view=article&id=7&Itemid=13 (accessed 25 May 2011).

Vandekerckhove, W. & Tsahuridu, E. E. (2010). Next please!, or why we should focus our research on the whistle-receiver instead of the whistle-blower? Paper presented at the 27th International Congress of Applied Psychology.

The Value of an Ombuds System in Whistleblowing Situations

Björn Rohde-Liebenau

Whistleblowing regulations in statutes or as part of codes of conduct will often be judged as imperfect or ineffective by default. This chapter, far from suggesting an ombudsperson as a panacea, concludes from the author's experience that an ombuds-system as a backup channel in risk communication might at least be the second best choice to improve the situation for whistleblowers, and for the organisations in which they work. The basic questions of an ombudsperson 'what, why, how, and what next ?' change the perspective completely from the more traditional 'who donnit, who's to blame, we'll kick'm out' typically ending with the whistleblower as scapegoat. Obviously, a fresh approach to risk communication coupled with an ombudsperson does not come in 'one size fits all.' Nevertheless this chapter offers some general conditions for its success in facilitating risk communication. Since allegations of corruption are a standard subject of whistleblowing, this chapter focuses on how whistleblowing has a place in risk communication on corruption.

The chapter proceeds as follows. The first section briefly sketches an effective approach to do away with corruption and the place of whistleblowing in that fight. Section two recommends mainstreaming whistleblowing as risk communication, highlighting the demands of internal communication and knowledge management. The third section argues how an ombuds-system can protect whistleblowers, facilitating risk communication. The practice of ombudspersons in Germany gives an example in section four. As a conclusion, section five names conditions for making an ombuds system more effective.

1. Fighting Corruption?

Up into the early 1990s, mainstream economists as well as business practitioners considered 'grease money' a relatively easy, cheap, and effective way to facilitate business, especially in otherwise burdensome environments. Even Transparency International, the international NGO priding itself in having put corruption on the agenda, preferred in its early days to focus on 'grand corruption,' seeing many a justification for 'petty' bribing in 'systematically corrupt' countries. Since then, an ever growing number of experts have come to a reassessment of corruption.

Corruption in all its forms kills in many ways:

- it lets those bleed, who cannot participate – the poorest;
- it promotes a tendency for zero output at an infinite price;

- it defrauds the next generation of development opportunities.

Corruption has a tendency to perpetuate itself and the lack of transparency accompanying it. The early movers of Transparency International led the way in showing that corruption causes transaction costs to increase incessantly. One of them, Graf Lambsdorff, suggested a formula to break the corruption cycle: raise its cost.¹⁰ There are unlimited ways to make corruption more expensive; some of the more obvious ones involve raising the probability of detection.

Corruption is defined as a hidden crime. While increasing the control density would arguably raise the costs of countermeasures for corrupt actors, external controls themselves are expensive without necessarily being effective. Therefore, policing corruption cannot be the only solution. Insider information could often initiate investigations more efficiently. Unfortunately we cannot usually expect a large number of independent witnesses for 'hidden crimes', let alone insiders volunteering their knowledge in this way.

Hence we focus here on information provided by persons who either have become part of the corrupt system, or have found themselves in close proximity to the scene of the crime, usually their workplace. If they decide to come forward with this type of information, they may not want to address their immediate superiors because they might suspect personal involvement, lack of control, or even conspiracy. Even general questions regarding potential for improvement may sometimes prove to be difficult subjects in an organisation. Since risk and opportunity are only two sides of the same coin, it seems reasonable to frame the subject as 'risk communication.' However, touching upon an allegation of corruption is beyond ordinary risk communication, both at the sending and the receiving end.

What we also observe is that organisational cultures, codes of conduct and even laws require workers to turn first to their supervisors if they suspect corruption. In the standard case of communication where the purpose is to identify or assess and eventually manage organisational risk or quality issues, the normal reporting line to the immediate supervisor with one or two by-pass channels remains best practice. Some call this whistleblowing, for others it is ordinary (internal) professional communication. It seems to serve the true whistleblowing dilemma better to normalise this type of communication. The by-pass option is obvious and obligatory in any contemporary work environment – even in the military.

Where there are allegations of corruption, this may still be the best course if the supervisor is clearly not involved. Even if the whistleblower does not suspect his or her supervisor to be

¹⁰ This was the contribution of Graf Lambsdorff in Pieth/Eigen (eds.), *Korruption im internationalen Geschäftsverkehr*, 1999), Graf Lambsdorff also managed the well-known Corruption Perception Index for many years.

involved, what would an experienced investigator recommend? What seems advisable in the light of research and statistics? For the sake of loyalty, i.e. not to put workers under undue pressure, it would seem acceptable to permit reporting to immediate supervisors if the worker has no reason to believe that this person is involved in the misdeeds. In other cases, the recommendation would be to address an independent specialist outside the reporting lines, for example auditors, an external ombudsperson, or even someone wholly unconnected to the organisation.

Unfortunately, the typical requirement for exclusively internal reporting is often bolstered by a promise not to harass if a concern is raised. The viciousness of this situation is exposed, if we look at what exactly is behind the message when whistleblowers are first required to report internally to persons who may not be beyond suspicion. Is this not logically similar to saying: 'eat sweets – don't worry, we'll protect you from harassment, if you do.'¹¹ Even if originally you would have honoured the obligation without hesitation, wouldn't you have serious second thoughts after such a promise? It is an approach that sends out mixed messages. Is it an example of 'good faith' to set up a requirement and promise non-harassment to anyone who complies? What if we believe this promise to cover only the organisation itself, possibly its board, certainly not its associates? How exactly will this protection take effect? Is there evidence of harassment in such cases? Does the history of such protection inspire confidence in the programme or does it send yet another ambiguous message?

In reality, there is not much evidence about how whistleblowing is received. This is a strong plea to share more positive experiences, to send the only right message unmistakably: the whistleblowers' disclosures are welcome. We could go even further: how often is someone in a given organisation promoted for sharing valuable risk information? People do not get promoted for 'just' doing the right thing? Well, some do... - and research shows that others get demoted.¹² Summing up the message and the reality behind it, what is promised is not 'protection' but rather avoidance of an act of victimising – and even that promise comes with such conditionality that it serves as a warning, not as an assurance. In short, we see a situation where

- even positive remarks (suggestions for improvement) may appear to be less than welcome,
- a hidden crime (corruption) may be suspected, with few sources of information,

¹¹ This effect has been explained in much more detail in the author's 2006 study (Rohde-Liebenau, 2006).

¹² An example was presented for the Bank of America in a recent OSHA (2011) decision, further explored by the author in a German blog: Nächstes Jahr kommt die gesetzliche Regelung zum Whistleblowing – ist Deutschland bereit? Posted 21. September 2011.

- a requirement to contact a person one may suspect of involvement in the crime,
- an abstract promise not to cause extra harm to those in compliance with this requirement;
- a generally understood message: 'don't report, just mind your own business.'

Since allegations of corruption are a typical subject of whistleblowing, some background on corruption as a strategy and on the choices that may lead to whistleblowing will be set out below. Conventionally, corruption is 'illegal.' Some countries have legislation making it illegal to harass those who blow the whistle on corruption. A somewhat different approach would be to add value to internal risk communication through the introduction of an ombuds-system. The assumptions underlying that are:

- (1) corrupt agents act on the basis that corruption is 'functional' to their purposes;
- (2) making corruption illegal does not immediately serve a business purpose. Indeed, it is unlikely to serve that purpose at all, unless stringent sanctioning is accompanying such a move. Investigations, let alone sanctions, cannot be expected to have the accustomed effect in the case of this hidden crime. However, if the precise function of corruption is understood as a strategy in a specific system, it can be replaced (or displaced);
- (3) corruption is expensive and it can be priced out of its market if costs are further raised. However, without the sanctioning/displacing indicated above, one type of corruption would only be replaced by another less costly or more efficient one;
- (4) if people want to put the spotlight on corruption and stop it, whistleblowing needs to be understood within this system;
- (5) listening to whistleblowers and replacing the function of corruption with sanctioning may still not serve the purpose, unless the creation of 'wilfully blind' organisations is discouraged in a way that management receives the message.

If we follow the above line of thought, we may assume corruption is used as a strategy in transactions because the corrupt actors have at least one of the following motives:

- to facilitate, ease, and secure transactions (mostly of the economic type, but equally in political, social, environmental and personal transactions);
- to avoid risks, ambiguity, competition or negotiating on the transaction or losing out because of the corruption of others;
- to lower transaction costs, or to make them more calculable.

Choosing the short cut corruption seems to provide, corrupt agents follow a general, very human desire to make life easier and more predictable, albeit at the expense of others. They

count on getting more wealth and business than without corruption (or simply acquiring some business). They start to bet against the odds of getting caught. Excluding third parties, keeping partners in, concealing acts, all involve considerable expense – and even more as the system keeps growing incrementally. Society's aim should be to ensure that those who corrupt lose this bet in a fair and transparent process.

If we follow assumptions (1) – (5) above, the recipe for what we can do against corruption adds up to this:

- provide more appropriate means for facilitation, ease and security in transactions;
- make risks more calculable, reduce ambiguity, make competition more transparent, facilitate open negotiations - and create corruption free processes;
- raise the costs of corruption and make it less calculable.

In addition to this simple, systemic model of corruption prevention, the following supportive measures might be taken:

- making (keeping) corruption illegal. This step will be effective in as much as it promotes making risks more calculable and competition more transparent, and insofar as there are alternative ways for facilitation and secure transactions. However, corruption will not be regarded in practice as criminal behaviour as long as investigations, prosecution and credible sanctioning are lacking. Therefore, sanctions should be like proper feedback: precise, personal, prompt, and public;
- addressing further management concerns, e.g. by providing for lower transaction costs, fairness in competition, transparent markets, integrity in markets and individually,
- facilitating responsible/responsive risk management and communication,
- promoting early risk detection.

If its price tag rises, corruption will eventually become too costly. However, like for the frog in the slowly heating water, it may be very difficult to escape before it's too late.

Whistleblowers have a role in many elements of the corruption prevention measures outlined above. Generally speaking, they will provide information concerning an operational risk. Therefore, they engage in risk identification, risk communication and risk assessment, which form a considerable part of risk management. To obtain this information is an asset for the enterprise's risk management system. It makes governance, risk management and compliance a bit easier. It is also cheaper because the organisation's existing resources can be put to use, instead of buying extra control functions of dubious value (Rohde-Liebenau 2010). It seems obvious that even the potential for whistleblowing is likely to negatively

influence the occurrence of corruption because whistleblowing makes corruption less calculable and more expensive.

From another perspective, the role of the whistleblower is that of a witness. In the context of this hidden crime, any bit of information may be desperately needed and should not be pushed aside without proper evaluation. Therefore, it is clearly necessary to keep this type of communication flowing. It is also vital to improve the listening capabilities of potential recipients, one of whom might be an ombudsperson. The role of ombudspersons is discussed in section three below but their scope for acting as a facilitator can be described as follows:

- primarily for communication within the system – opening a space for informal testing, possibly reframing and eventually opening ears, making the organisation more receptive to things that may otherwise be difficult to hear,
- promoting the shared goal of quality production, which means full ‘compliance.’ Hence, for stopping and preventing corruption;
- helping to clarify values, strategies and roles in the system, especially when they may seem to conflict;
- possibly also as an interface with outside stakeholders and regulator

2. Whistleblowing as risk communication

Whistleblowing is risk communication coming from an insider- in the sense of a person with inside information. This includes not only business partners but also complete strangers who happen to come across insider information (e.g. independent witnesses). Regarding corruption, whistleblowing is by far the most likely source of information.¹³ Therefore in many cases whistleblowing will be indispensable; in others it is at least likely to provide useful information in the process of identifying the risk of corruption, investigating, or preventing it.

Such information is typically not entrusted to the immediate supervisor. If the information was gained about an incident of corruption at or near the workplace, it would be unprofessional behaviour to involve another person at this workplace, unless it is absolutely clear that what is happening is without the will or support of the supervisor. Even under this condition, there may be good reasons for having somebody more neutral look at the case first. Thus, while other types of risk communication (the ‘normal risk information’) may

¹³ This is consistently reported by ‘big four’ consultants’ surveys Bannenberg may serve as an example. Sources called ‘insiders’ belong to the category ‘whistleblowing’ unless the insider is in a position to manage the perceived situation immediately. Also, parts or all of categories like ‘random’ or ‘chance’ detection need to be included, because successful whistleblowers often manage to hide by making the detection seem ‘random.’

usually be best placed with the immediate supervisor, where corruption is suspected there needs to be a by-pass mechanism and at least one potential extra internal recipient of information.

The whistleblower is not 'complaining' - the primary concern of complainants is their own situation. Whereas the personal situation of a whistleblower may be extremely deplorable and justify raising a grievance, the act of whistleblowing addresses something beyond a person's own situation. Therefore, directing the whistleblower to a complaints or grievance handling process would send the message of focussing on the personal while ignoring the concern. The whistleblower has a concern, or possibly a suggestion, and is likely to have a certain perspective. In risk assessment all available perspectives are needed. However, since most risk management departments are still not well equipped to handle operational risks, they will not often be the recipient of choice. Quality Management, Continuous Improvement, Idea and Knowledge Management might be similarly reasonable addressees for other risks - but not in regard to allegations of corruption.

Eventually, the neutral, yet internal, preliminary evaluation of whistleblower information is more likely to happen in the audit, legal, or compliance department – if these exist. There may always be internal rules or other good reasons why one of these should be preferred over the other. From the whistleblower's perspective, it would seem advisable to turn to the person that seems most trustworthy as well as skilled to understand and then handle the issue. We should not forget that this is what happens in most organisations in 95% of 'risk communication' situations, or else they would no longer exist. The audit department picks up the issue and brings it to a successful close, everybody is relieved and the whistleblower gets recognition.

So why do we need whistleblower protection and when would an ombudsperson actually be necessary? The reason is not to be found in any assumed deficiency of those involved. If we look at another quite 'normal' situation, it may become clearer: a couple falls in love, deepens their relationship, marries, further deepens the relationship, and suddenly discovers there are things they haven't talked about in years. Conflict is not the issue: a good relationship grows with daily conflicts that are successfully handled. However, when they discover the gaps in their conversation, the conflicts in some areas may already have come to a point where they are destructive and difficult to handle for the couple left to their own devices.

The workplace, while supported by mutual loyalty, is not the place for romance.¹⁴ This may or may not render conversation easier, arguably more focussed. However, when it comes to work subjects which are experienced as 'difficult', we can observe the same quiet zones: it does not necessarily cause surprise, if a department has not contributed to the continuous improvement process in a year. Still, this is certainly a red flag for internal knowledge and innovation management.

You may have the greatest leaders as managers; and expert communicators as employees. However, as in marriage, even with the best of skills and intentions, as the years go by blind spots and non-communication will develop. In the sense of Watzlawick,¹⁵ this is not 'non-communication' but rather a more or less explicit, sometimes consensual definition of subjects unfit for an exchange; i.e. taboo.

What is 'taboo' may vary from workplace to workplace, certainly with corporate cultures. Typically anything that might be interpreted as critique will be taboo if coming from a lower position and unless explicitly invited. Therefore, much information that could lead to improvements is withheld. Corruption in itself has been a social taboo in most societies well into the 1990s. Probably in most organisations it still is. Clearly, an allegation of corrupt dealing against someone in a higher position would be a very difficult subject to raise. Terharn (1996) revealed how information management in organisations generally suffers from information barriers. This German study identified organisational and personal factors causing barriers, the organisational ones being:

- specialisation in capacities,
- centralisation of decision-making,
- fragmentation of responsibilities;

the personal factors being:

- emotional (fear, insecurity, mistrust);
- motivational (lack of interest, rejection, sense of meaninglessness);
- communicative (lack of common language).

As a remedy, the study identified gatekeepers – specifically in information management functions as well as in controlling, together with an elaborate model of organisational change towards supporting the flow of information. In a fragmented, highly specialised organisation this gatekeeper ('facilitator' might be a preferable term), may be necessary or useful in

¹⁴ No allusions to the German labour court ruling against Walmart intended (LAG Düsseldorf, Beschluss vom 14.11.2005 Aktenzeichen: 10 TaBV 46/05).

¹⁵ 'man kann nicht nicht kommunizieren' – 'You cannot not-communicate', Watzlawick et al (1969, 53).

mediating the flow of information (comparable to an IT router). His/her work would help improve the organisational culture and, to some extent, the structures, promoting process-oriented teamwork and reducing barriers. A mutually informing process would then lead to reduced insecurities in a more flexible organisation. The gatekeeper's role is until the organisation learns to allow the information to flow as needed. At that point the role is reduced to something like a stand-by, possibly transforming into a coaching function.

Organisational Knowledge Management 3.0 (the most recent version according to von Guretzky 2010) is similarly defined as: 'Deregulate, integrate, and empower self organisation in complex situations.' This definition could equally serve as a brief recipe for proper structures in internal communication.

The quoted study focussed on the default barriers to information flows in typical organisations. It did not specifically analyse barriers at the receiving end of internal communication. However, it is exactly this side that needs to be looked after in a whistleblowing situation involving corruption.

If there are barriers under 'ordinary circumstances', these are likely to be much higher where corruption is suspected. It may be safe to assume that managers receiving information may create obstacles because they

- do not expect any gain from the extra information;
- already suffer from information overflow;
- would rather acquire information as needed, rather than having it forced onto them;
- believe they have the information already;
- believe, the information to be irrelevant;
- assume that with the information they could find themselves in a more difficult situation than without it (e.g. exposed to liability risks) (Rohde-Liebenau 2007).

One or any of these assumptions may be generally applicable, unless managers are overwhelmingly receptive. Even then, some extra barriers are likely to exist if the information in the pipeline refers to alleged corruption.

The barriers may be highest at the level of the immediate supervisor, especially if s/he feels implicated. However, obstacles may exist anywhere in the organisation. Thus a whistleblower, even in corruption cases, may choose to approach the internal legal or auditing department if she or he has reason to believe the information will be handled there in a responsible way. Yet, even there an internal facilitator with high credibility would be useful and advisable. This role was called 'gate keeping' in Terharn (1996) but it could also

be termed an internal ombudsperson if the role is properly defined. The desired credibility of this internal facilitator should be furthered by visible independence. Trust can build up as a result of the following features:

- a direct reporting line to the top executives;
- no operative managers between him/her and the top executives;
- direct access to the non-executive board and/or an audit committee;
- the power to keep things confidential if requested by a whistleblower;
- the power to communicate with anonymous whistleblowers;
- no personal interest (involvement) in the further treatment of the information;
- prompt and precise feedback to the whistleblower;
- personal accessibility and continuous communication with the constituency;
- frequent reports and interactions reflecting professional experience in the role.

3. The Role of the Ombudsperson: supporting whistleblowers and facilitating risk communication

If an organisation wants to be very confident that sensitive information leaves the organisation only through authorised channels, it should use its best endeavours to ensure that these channels receive all the internally available information. This would require a barrier-free information organisation. It would specifically require employees to fully trust at least one of a range of potential internal recipients to manage the information responsibly. Again, this is not just a problem for whistleblowers but also for those at the receiving end. Such trust seems rather unlikely in the light of the discussion above.

Regulations internal and/or external to an organisation may classify external whistleblowing as illegal. At a point when employees have become convinced that 'something needs to be done about a serious risk', or are in a situation that has become intolerable (e.g. crime at the workplace), and internal remedies don't seem promising, whereas external addressees (e.g. prosecutors or the media) are perceived as responsive, it will only be a matter of time until the employee (or any bearer of insider information) will disclose the information externally.

Research on whistleblowing has consistently shown that one of the many reasons for not reporting concerns is that whistleblowers fear their action would not make a difference (Alford 2002; Brown 2008; Devine 2004; Near et al. 1993). If they are convinced that a situation needs urgent rectification and they see an opportunity to facilitate change, laws and

even the expectation of harassment may not deter them from whistleblowing. Sadly, the harassment is often more intense than anticipated.

If the above analysis is correct, whistleblowers cannot be stopped from raising concerns. It will not even be possible to prevent external whistleblowing. The chances, however, can be greatly reduced if an organisation implements measures to become an information friendly organisation, employing information facilitators at critical interfaces. The 'final' facilitator will be an independent, external ombudsperson, accepting anonymous whistleblowing and protecting privacy, as needed.

The position of the external ombudsperson is at the interface between the inner organisation and the outside world. The role of ombudspersons as facilitators will otherwise be similar to what internal facilitators are, or should be doing. He or she will be having very good ears so that whistleblowers eventually feel heard. They will have a working infrastructure that provides some trust in a low trust environment.

On the receiving end, ombudspersons will help make the information a lot more digestible. They will be intermediaries between whistleblowing source and receiver in order to facilitate the easy and secure communication of information and address the concerns of management e.g. information overflow, relevance etc. They can find and specifically address the right person in the organisation – or support the whistleblower in doing so.

Even escalated cases relating to corruption can be 'normalised' when treated as welcome risk information, i.e. be accepted responsibly assessed, addressed and acted upon. This is should be expected in all cases, where

- the top management wouldn't condone shortcuts, or
- management can be convinced to return to compliance;
- management is sensitive to grey areas and decision-making under ambiguity;
- management is willing to ask questions, listen, and evaluate information,
- and the organisational culture can be described as generally 'fault-friendly,' i.e. interested in root cause analysis and collective learning instead of individual blaming.

Appreciative Inquiry, as introduced by David Cooperrider, as a communicative attitude that supports a change of perspectives (Cooperrider et al. 2003); empathic listening as highlighted in Marshall B. Rosenberg's four steps of Non-Violent Communication (Rosenberg 2003), and Steve de Shazer's solution-focussed short term coaching skills (de Shazer 2003) round off the ombudspersons profile as facilitator perfectly. In fact, facilitation is not a minute, almost neutral invention or leadership technique. Based on decades of

research at the Institute of Intercultural Affairs in Brussels, it belongs to a set of leadership attitudes and techniques for a world in which change is the norm and everyone's input is needed. Obviously, the ombudsperson will equally support the organisation and its sustainable future, as he or she works with the whistleblower in this way.

If corruption is not the policy, the organisation, its management and all associates as potential whistleblowers will need a systemic risk communication system – and will be able to make the best of it. Such a risk communication system contains a whistleblowing procedure, which in turn includes an ombudsperson. It is set up with clearly defined communication channels, by-passes for each and possibly by-passes for the by-passes to work around the ubiquitous bottlenecks. It respects and promotes responsibility in its users – including their choice for an effective communication channel.

In actual cases of corruption responses may well be more complex. The ombudsperson is not in a position to set everything right or to guarantee the whistleblower protection from reprisals. His or her predominant form of assistance may be the independent provision of informal advice to the whistleblower about how far the system can be trusted and what the alternatives are.

If corruption is the policy and there is an ombudsperson (and/or seemingly whistleblowing friendly declarations), there are enough reasons to suspect a dangerous double-bind. It is not the experience of this author that such organisations actually exist. In case they do, the advice to potential whistleblowers could be:

- don't blow – at least not just now!
- try to find out whether corruption is the 'overall, general policy' and whether the external/internal ombudsperson(s) are part of it;
- if you are unable to find out but willing to take the risk, go to the facilitator or ombudsperson and try to build up trust;
- if the ombudsperson is part of the corrupt system (or you have reasons to believe so), flee!

In this situation, effective rules on external whistleblowing would be badly needed, while in practice they are almost certain to be lacking. A 'rule of thumb' would be to leave the system before starting to make oneself visible; and to refrain from blowing without good advice and a high level of trust. If corruption is the policy and there is no ombudsperson (nor a whistleblowing procedure), hopefully the whistleblower has a chance to leave the organisation immediately. An effective legal and social system would be a prerequisite but is

typically lacking in these situations. Those involved may at that point want to check if they need to start constructing their personal support system in lieu.

If corruption is not the policy and there is an ombudsperson, whistleblowers still need to figure out how the internal risk communication system can work for them. They should consciously work with the ombudsperson.

Continuing with the bottleneck formula, defining a proper role for the ombudsperson means looking in at least three different directions:

- the whistleblower as carrier of the information;
- the management as recipient of the information;
- the system which includes both of them.

4. Ombudspersons and compliance practice in Germany

The author keeps a list and is aware of at least 72 bodies making use of a whistleblowing ombudsperson. With all the usual caveats about their statistical relevance, some observations may be useful in order to highlight the diversity of such programmes in Germany. Germany has a civil law system, largely consisting of statutory law. Labour Law is the largest exception to the rule, with much of the protection against employee dismissal developed in precedents. In regard to whistleblowing, the situation can fairly be summarised as a theoretically very high standard of protection with a system similar to the first two tiers of reporting outlined in the UK legislation i.e. internally or to an industry regulator. However, the third tier is missing, as Vandekerckhove (2010) rightly observes, and in practice the first two tiers may be unknown to corporate lawyers and possibly even to the attorneys whose counsel whistleblowers may seek.

At least four out of the 16 states ('Länder') forming the Federal Republic have an anti-corruption ombudsman (sometimes called 'Beauftragter' – best translated as 'commissioner'). They typically cover the public servants in their respective states and can occasionally also be approached by citizens. These ombudspersons have a background as retired judges (2), former police commissioner (1), or attorney (1). There are at least two city governments and numerous public utility companies who offer similar services to their staff; all of their ombudspersons seem to be attorneys.

At least 64 enterprises employing more than 1.5 million people are covered by the other ombuds systems. The forerunner was Deutsche Bahn (public rail), whose ombuds system was set up more than 10 years ago, although they have subsequently changed their original two ombudspersons. Most of these schemes name one attorney (external lawyer) as

ombudsperson. Again, there are two former judges, one former Federal Minister, and one former technical company director (without attorney privileges). As far as visible, two companies seem to name a law firm and a public accountant as ombudspersons. A large number of the corporations publicising their external ombudspersons are companies that are predominantly or solely in state ownership.

The leading light in this field, an attorney with a career as police chief of a city near Frankfurt, commands approximately a third of the market. A relatively large number of the attorneys involved have their practice in criminal defence, although others (Joussen 2010) discourage this connection to avoid the appearance of a potential conflict of interest. Several ombudspersons have a background as public prosecutors, one in family law. None of them (apart from the author) seem to clarify that they refrain from any other commercial or consulting relations with the employer. None of them seem to stress communication or mediation skills, and very few specifically mention ethics as a basis of their vocation. Only a handful of them appear to have published something remotely related to their role as ombudspersons. The qualifications for the job that seem to emerge from the context in which they work are as follows:

- patron's trust (all);
- criminal defence experience (clear majority);
- attorney privileges (nearly all).

Some companies do not provide any public information about their external ombudsperson and very few allow him or her to communicate transparently with the public about their background or terms of reference. If any of these ombuds-systems appear to fail or become involved in a public scandals, it will be because they did not properly address the existing bottlenecks – or in the worst case, because they were designed as fig leaves. Thus attorney privileges are highlighted as a confidence builder for users, although it is unclear how these privileges would protect the whistleblower when the company is the client – attorneys ombudspersons enjoy a trusting relationship with those persons that either did not permit whistleblowers to address them directly or who would not be deemed trustworthy by the whistleblowers. It is sad to state that employees will usually know which schemes are trustworthy and will refrain from using those that are not. In the author's opinion, all of them could do better in both assessing and addressing the bottlenecks, and communicating much more actively.

5. Conclusion: Some conditions for making an ombuds-system more effective

The ombudsperson should be empowered to fill the specific gaps that are identified in the particular organisation. This empowerment needs to come from management. The ombudsperson should also be able to give feedback on how the internal risk communication (and then management) system actually works. The whistleblower should be helped with an informal evaluation of the information, to assure proper context and relevance. This should occur before an issue needs to be judged by anyone as abuse, malpractice, mismanagement, or corruption.

Thus trust, meaning and security can be provided by the ombudsperson while facilitating the flow of risk communication. The German experience has shown that the skills of a good mediator or coach are probably just as needed as the legal protection an attorney could offer in the role of an ombudsperson. As a facilitator of the flow of information, as well as a trustworthy expert, he or she will make whistleblowing a lot safer and internal risk communication more effective. Whistleblowers are not under-motivated. If they remain silent, it is because they fear their whistleblowing would not make a difference. Therefore, more than anything else, the act of providing information about serious risks needs to be appreciated a lot more. Legislation promoting the responsible use of available risk information and discouraging wilful blindness may prove to be the best protection for whistleblowers.

References

- Alford, F.C. (2002). *Whistleblowers: Broken Lives and Organizational Power*. Cornell University Press.
- Bannenberg, B. & Schaupensteiner, W.J. (2004). *Korruption in Deutschland : Portrait einer Wachstumsbranche*. 2nd ed. Beck.
- Brown, A.J. (2008) *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organizations*. ANU Press. Available at http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf (accessed 25 August 2011).
- Cooperrider, D. L., Whitney, D. & Stavros, J. M. (2003). *Appreciative Inquiry Handbook*. LakeshorePublishers
- De Shazer, S. (2003). *More Than Miracles, The State of the Art of Solution-Focused Brief Therapy*. Haworth.

Devine, Th. (2004). Whistleblowing in the United States: the Gap between vision and lessons learned. In R. Calland and G. Dehn (eds.) Whistleblowing Around the World – Law, Culture and Practice. ODAC and PCaW in partnership with the British Council, 74-100.

Görling, H., Inderst C. & Bannenberg, B. (2010). Handbuch Compliance: Aufbau-Management - Risikobereiche. C.F. Müller.

Graf Lambsdorff, J. (1999). Korruption als mühseliges Geschäft. In M. Pieth & P. Eigen (eds) Korruption im internationalen Geschäftsverkehr – Bestandsaufnahme, Bekämpfung, Prävention. Luchterhand, 56 -89.

Joussen, E. (2010). Sicher handeln bei Korruptionsverdacht – Leitfaden zur schnellen Aufklärung in der Praxis. Schmidt.

Near, J.P., Dworkin, T.M. & Miceli, M.P. (1993). Explaining the Whistle-blowing Process: Suggestions from Power Theory and Justice Theory, Organization Science, 4(4), 393-411.

Rohde-Liebenau, B. (2006). Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions, Study commissioned by the EU Parliament, presented in May 2006. Available at <http://www.europarl.europa.eu/comparl/cont/site/calendrier/documents/3mai06/etude.pdf> (accessed 25 August 2011).

Rohde-Liebenau, B. (2007). Förderung der Corporate Compliance - mehr Zuckerbrot als Peitsche? (Promoting Corporate Compliance: 'More Carrot than Stick?'). ERA Forum, 8(2).

Rohde-Liebenau, B. (2010). Whistleblowing, risk communication as core feature of sustainable management. In S. Menoni (ed) Risks Challenging Publics, Scientists and Governments. Taylor & Francis, 137 – 143.

Rosenberg, M. (2003). Nonviolent Communication: A Language of Life. PuddleDancer Press.

Terharn, J. (1996). Innerbetriebliche Informationsbarrieren. Lang, zugl. Diss. U. Bremen 1995

Vandekerckhove, W. (2010). European whistleblower protection: tiers or tears? In D. Lewis (ed.) A Global Approach to Public Interest Disclosure. Edward Elgar, 15-35.

von Guretzky, B. (2010). Knowledge management 3.0, Open Journal of Knowledge Management (online), <http://www.community-of-knowledge.de/open-journal-of-knowledge-management/ausgabe-ii2010/>

Watzlawick, P., Beavis, J.H. & Jackson, D.D. (1969). Menschliche Kommunikation. Huber.

Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia

A J Brown

If you scare a flying fox out of its roost, you face a maximum penalty that is six times worse than if you are found guilty of taking reprisal action against a whistleblower. ... [I]s that fair? Is that sending the right message to the people who take reprisal action or think of taking reprisal action against whistleblowers? Who needs greater protection: flying foxes or whistleblowers?

Rob Messenger MP, Legislative Assembly of Queensland (Australia),

16 September 2010¹⁶

On 16 September 2010, in debate on the Public Interest Disclosure Bill 2010 (Qld) the Legislative Assembly of Queensland, Australia was challenged to consider the adequacy of its next attempt to facilitate and protect whistleblowing in the state's public sector. In fact, as pointed out by the Premier, Hon Anna Bligh MP, the Queensland penalty for action against officials who make public interest disclosures is not necessarily weaker than the penalty for disturbing flying foxes (a form of large native Australian bat). The maximum penalty also includes two years' imprisonment, as against one year for destroying a flying fox roost. The new Act also extends this offence to one for which any person can now be held liable, and not just public servants as under the previous Whistleblower Protection Act 1993 (Qld). But the unexpected comparison with flying foxes gives a taste of the twists that can befall the legislative process, when leaders engage in debate about whistleblowing law reform – just one detail, in one of the efforts within Australia and around the world to recognise the role of whistleblowing in the integrity and accountability systems of modern societies.¹⁷

In this effort, what are the key legal drivers for change in the culture and leadership of institutions, for the prosocial value of whistleblowing to be recognised? This chapter reviews the state of whistleblowing law reform in Australia, focusing on three key elements of legislative change. These emerged as the most important legal mechanisms among the recommendations of the Australian Research Council-funded project Whistling While They

¹⁶ Queensland Parliamentary Debates (Hansard), Brisbane Australia, 16 September 2010, pp. 3419-3420.

¹⁷ Whistleblowing is used throughout this paper to mean the 'disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action' (Miceli & Near 1984, p. 689); and usually to mean 'public interest' whistleblowing in the sense described at Brown (2008, pp. 8-13).

Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations, conducted by the author and colleagues in 2005-2009:¹⁸

- Statutory recognition of the role of public whistleblowing (i.e. disclosure not just via official channels, but to the general public via the old and new media);
- Better operational systems for more productive management of internal and regulatory whistleblowing, especially through strong lead agency support and oversight; and
- Practical remedies for public officials whose lives and careers suffer as the result of their having blown the whistle – including criminal deterrents to reprisal, as mentioned above, but more especially, compensation for damage flowing from organisational failures to act, support and protect.

The research underpinning the recommendations has been reported elsewhere.¹⁹ This chapter examines implementation, especially in the two years since 2009 when the resulting law reform was already at a ‘crossroads’ (Roberts & Brown 2010). It focuses on the first of the above ‘drivers’, although brief remarks will also be made at the end about progress in respect of the other two. The first part of the chapter provides some background to the most significant step taken by the Queensland Parliament in its Public Interest Disclosure Act 2010 (Qld) – not the extension of the criminal offence of reprisal, but the long overdue statutory recognition of public whistleblowing as a valid disclosure avenue, together with a new threshold for when this may legitimately occur. As explained in the second part, the 20 year road to the new Queensland provision, intertwined with federal Australian and international developments, appears to have resulted in perhaps the simplest test of its kind in the world today.

Against this positive backdrop, the third part of the chapter summarises the equally long, as yet unfinished road towards a federal (or Commonwealth) Public Interest Disclosure Bill. Almost four years since commitment to such reform was reactivated, a further self-imposed deadline (30 June 2011) was extended to the end of 2011 without the government having made any recent detectable progress. Further, as briefly reviewed in the fourth part of the chapter, Australia’s potential advances in the recognition of public whistleblowing sit within

¹⁸ See Brown et al (2008). On other outlines of legislative principles, see Lewis (1996); Banisar (2009/2011); Osterhaus & Fagan (2009).

¹⁹ The research included survey and interview data drawn from 8,800 public servants across 118 federal, state and local government agencies, along with analysis of the practices and procedures of a further 186 agencies (total 304 agencies) – see Brown (2008), Mazerolle & Cassematis (2010). A second report, Roberts, Brown & Olsen (2011), is shortly to be published by ANU E-Press. The research was made possible by support from the Australian Research Council (Linkage Project LP0560303) and the partner organisations to the project, whom the author thanks along with his colleagues on the research team (see www.griffith.edu.au/whistleblowing). The findings and views expressed are those of the author and do not necessarily represent the views of the Australian Research Council or the partner organisations in the project.

the context of the other key legislative 'drivers'. The greatest challenges are in bringing Australian law into line with the world's best practice for compensating whistleblowers whose lives and careers are adversely affected. The Australian government has also made only marginal progress towards comprehensive whistleblower protection in the business and non-government sectors.

Together these results make for a mixed report card. On one hand, Australian governments have been restating and strengthening their 'in principle' commitments to values of transparency and integrity in government, and continuing to innovate in important respects, especially in respect of public whistleblowing by public servants. On the other hand, maintaining the momentum has become a real challenge, with the future of federal recognition of public whistleblowing sitting on something of a knife-edge at the time of writing, and other important elements of reform guaranteed to be an ongoing process.

1. The new recognition of public whistleblowing

For decades if not centuries, public whistleblowing through the media has provided the quintessential example of what whistleblowing is all about. Among researchers, there has been debate about whether disclosures which do not reach the public domain should be categorised as whistleblowing at all (Miceli et al. 2008). In Australia, it was initially presumed that a whistleblower might not need explicit protection with respect to public disclosures, given the common law principle that a person may always assert a public interest defence to a criminal or civil breach of confidentiality. However by 1994, a Senate Select Committee on Public Interest Whistleblowing concluded that while the principle survived, the category of cases to which it applied had 'by no means been described exhaustively', nor had judicial definition 'provided any degree of certainty' (Senate 1994 par 8.27; see Lewis 1996).

In response to the obvious case for statutory clarification, Australia's first whistleblowing laws nevertheless took different, confusing approaches. South Australia's Whistleblowers Protection Act 1993 (SA) did not necessarily disturb the common law position. However the Whistleblower Protection Act 1994 (Qld) tended to go the other way, neutralising any remaining common law principle by excluding the media from the persons to whom protected disclosures could be made about anything. The Protected Disclosures Act 1994 (NSW) was the first and until recently, the only one of eight Australian State and Territory laws to expressly recognise public whistleblowing, by including a 'journalist' among the

persons to whom a disclosure could be made – as a last resort, and provided the disclosure was ‘substantially true’.²⁰

However imperfectly, New South Wales was thus the first jurisdiction – apparently worldwide – to legislate what is now known as a three-tiered model of internal, regulatory and public whistleblowing (Vandekerckhove 2010). Four years after the NSW Act, a three-tiered model was enacted in Britain under the Public Interest Disclosure Act 1998 (UK), and became widely recognised. This legislation extended employment protection and compensation rights to employees who make ‘further’ disclosures beyond the employer and regulators.²¹ While the logic of the three-tiered model is now clear, the slow pace of reform in most countries is testimony to the natural inertia, or resistance, that attaches to the desires of government and employers to keep such matters in-house. Among those countries which have legislated for public sector whistleblower protection of any kind, even fewer have expressly authorised and protected disclosures at the third tier of the media and general public (Osterhaus & Fagan 2009; Vandekerckhove 2010). The continuing ‘unease’ of Australian governments in embracing this model, as described by Vandekerckhove (2006), has also remained evident, notwithstanding the NSW precedent. In 2006, Queensland’s public service authorities again recommended against the model, citing the risks that even if made as a reasonable last resort – as recently demonstrated to be necessary²² – allegations aired in the media could ‘unjustly’ bring persons against whom allegations are made into ‘disrepute’, prejudice official investigations and ‘unnecessarily disrupt the workplace’ (OPSC 2006, p. 18; see Brown 2009a, 2009b).

Finally, in 2007, the three-tiered model was endorsed at Australia’s national or federal level (also known as the Commonwealth), where no attempt at any equivalent measure had been made. The shift stemmed from a change of federal government, with the incoming Rudd Labor government committed to greater transparency, including reversal of an increasingly draconian approach to the treatment of both whistleblowers and journalists.²³ The government undertook to at least match the NSW approach, including protections for public interest disclosures where a ‘whistleblower has gone through the available official channels, but has not had success within a reasonable timeframe and ... where the whistleblower is

²⁰ *Protection Disclosures Act 1994* (NSW), s 19. Now *Public Interest Disclosures Act 1994* (NSW), s 19. ‘Journalist’ was and is defined to mean ‘a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media’ (s 4).

²¹ *Employment Rights Act 1996* (UK), ss 43G and 43H, as inserted by *Public Interest Disclosure Act 1998* (UK); see explanatory guide by Public Concern At Work, www.pcaw.co.uk.

²² The principal scandal about serial medical negligence resulting in death was acted upon after a senior public sector nurse, Toni Hoffman, took her concerns to the member of parliament mentioned earlier, Rob Messenger MLA. For accounts of the scandal, see Davies (2005), esp p.472, par 6.512; Thomas (2007).

²³ For an overview of these cases, including that of Alan Kessing, see Brown (2007).

clearly vindicated by their disclosure' (ALP 2007). The shift also reflected pressure from a coalition of media organisations (Right To Know), including an audit of government secrecy by a former NSW Ombudsman, Irene Moss. This recommended that public interest disclosure legislation 'should at least protect whistleblowers who disclose to the media after a reasonable attempt to have the matter dealt with internally or where such a course was impractical' (Moss 2007, p.73).

Whistleblowing in the Australian Public Sector, launched by the federal Special Minister of State, Senator John Faulkner in September 2008, recommended similarly (Brown 2008). In February 2009, an inquiry by the House of Representatives Committee, chaired by Mark Dreyfus QC MP, recommended comprehensive reform based on a new Public Interest Disclosure Act, in line with the Whistling While They Work findings. The Dreyfus committee reported that public whistleblowing must be part of this scheme: 'experience has shown that internal processes can sometimes fail... [that] the disclosure framework within the public sector may not adequately handle an issue and that a subsequent disclosure to the media could serve the public interest' (House of Representatives 2009, p.162-4); any other approach would simply 'lack credibility' (House of Representatives 2009, p.162).

2. The Queensland 'Leapfrog'

With this background, the Queensland government also moved in 2009 to review its 1993 whistleblowing legislation, leading to passage of the Public Interest Disclosure Act in September 2010 (Brown 2009a, 2009b, 2010). Unease was still evident. Although senior public service agencies supported significant improvements to the regime, they again briefed against recognising public whistleblowing. In an act of leadership, the Bligh Labor government nevertheless decided to expand the scheme onto the three-tiered model, using a simplified form of the NSW formulation from 16 years earlier, and thus to recognise public whistleblowing.

The Act provides that public officials will continue to receive legal protections if they take a public interest disclosure to a journalist, provided they have first taken it to an official authority – and that authority has:

- (i) 'decided not to investigate or deal with the disclosure'; or
- (ii) 'investigated the disclosure but did not recommend the taking of any action'; or
- (iii) 'did not notify the person, within 6 months [of the disclosure], whether or not the disclosure was to be investigated or dealt with'.²⁴

²⁴ Section 20(1), *Public Interest Disclosure Act 2010 (Qld)*. 'Journalist' is defined to mean 'a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media': s 20(4).

This provision compares favourably with existing precedents in a number of respects. On one hand, it presupposes that a whistleblower must always first attempt to make their disclosure within “official channels”, before ever being entitled to blow the whistle publicly. As such, it might appear to offer less protection than the equivalent UK provision, which recognises that it may be unreasonable to expect employees to first use internal disclosure procedures, especially if none exist. Certainly, the principle should be that even if internal whistleblowing is to be encouraged, and public whistleblowing identified as normally an avenue of last resort, there may always be situations where prior internal disclosure is impossible, unreasonable or pointless.

However, two features of the Queensland provisions also mitigate this problem. First, the legislation provides a flexible framework for how internal and regulatory disclosures may be made. Contrary to some legislative schemes, disclosures can be oral, need not be explicitly identified as a disclosure under the Act, and can always be made to anyone in the management chain from an immediate supervisor to the chief executive, and out to a range of independent integrity agencies (e.g. Crime and Misconduct Commission, Ombudsman, Auditor-General). Consequently, simply telling someone with any responsibility that there is a concern within the definitions of the scheme, constitutes a first disclosure. This increases the responsibility on agencies to put in place the systems for recognising and dealing with concerns, but also matches the apparent experience and preferences of most employees with public interest concerns, in most situations. The provision thus makes sense within the integrity system in which it sits (Head, Brown & Connors 2008).

The second mitigating factor is flexibility with respect to when an employee may elect to go public. As in NSW, there is a requirement to wait six months if the whistleblower simply does not know whether anyone is doing anything. However, there is no specified waiting period if the whistleblower gets a negative response to their first disclosure – for example, if a supervisor or higher manager simply dismisses a concern, ignores it or tells them not to worry about it. If the employee receives a negative response from an internal investigation, they can similarly go public, provided they retain an honest and reasonable belief that the information they are disclosing is about official misconduct, serious maladministration or the like.²⁵ In other words, if an agency’s response is professional, and the outcome is properly explained, the whistleblower still needs to have a reasonable basis for believing that outcome is wrong. However, provided this is the case, then if an agency is not dealing with a disclosure, or as soon as the agency has completed its inquiries and decides not to do anything, then a reasonable public servant can go to the media immediately. This could be

²⁵ *Public Interest Disclosure Act 2010 (Qld)*. ss. 12(3), 13(3).

days, hours or even minutes after the original disclosure. In debate on the Bill, in response to questions from the Liberal-National Opposition, the Premier confirmed her interpretation that this includes an ability for public employees to go public in the face of a 'deemed refusal' to act:

'[M]y understanding is that one could argue that that has effectively been decided under provision (1) of this clause. ... You can actually effectively make a decision by failing to make it, if you understand my point, and that would be relied upon reasonably in those circumstances' (Queensland Parliamentary Debates 2010, p. 3413).

In context, therefore, it is arguable that this element of the new Queensland legislation provides the simplest and clearest provision to date for public servants to be able to go public with serious concerns about wrongdoing, if official authorities fail to act – not just in Australia, but worldwide. As discussed later, other elements of the reformed regime do not yet accord with international best practice. However, on the issue of public whistleblowing it may have helped set a new standard. The logic of this reform now extends beyond simple clarification of a confused common law position, and the reality that even in societies with sophisticated integrity systems, public whistleblowing is going to occur and be valued. Statutory recognition of the media as a third tier of the disclosure regime also represents a deliberate 'driver' for organisational change. It provides official sanction to the risk of the "front page test" if public institutions fail to improve their own integrity systems, including their own support for employees who speak up. It institutionalises the principle stated by a veteran Australian political journalist, Laurie Oakes, that 'leaks are the difference between a democracy and an authoritarian society... The risk of being found out via leaks makes those in authority think twice about telling porkies [lies], performing their duties sloppily, behaving badly, or rorting the system' (Oakes 2005, 2010, p. 295). 'Leaking' is best defined to mean the unauthorised disclosure of inside information, and not all leaking is necessarily whistleblowing, any more than all whistleblowing necessarily involves leaking – but when it comes to public whistleblowing, the effect is the same.

3. Federal law reform on a knife-edge

As outlined above, the move to recognise public whistleblowing in Queensland paralleled commitments by Australia's new federal Labor government in 2007-2009 to introduce comprehensive public interest disclosure legislation. On the detail of how public whistleblowing should be recognised, however, federal legislators have revealed themselves to be somewhat conflicted. While the House of Representatives Committee endorsed a broad principle, its recommendation was that public whistleblowing should only be authorised in limited circumstances: 'where the matter has been disclosed internally and

externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety.²⁶ Many forms of serious wrongdoing, including outright corruption, do not fit this definition.

Fortunately, common sense prevailed in the Rudd Labor government. When the government announced its policy response to the House of Representatives inquiry in March 2010, it confirmed that all types of wrongdoing covered by the Public Interest Disclosure Bill could be the subject of further disclosure – provided that:

- (a) (i) the matter disclosed has previously been disclosed to the responsible agency and the integrity agency, or the integrity agency directly; **and**
- (ii) the disclosure relates to a serious matter; **and**
- (iii) the disclosure was not acted upon in a reasonable time or the discloser has a reasonable belief that the response was not adequate or appropriate; **and**
- (iv) no more information than is reasonably necessary to make the disclosure is publicly disclosed; **and**
- (v) the public interest in disclosure outweighs countervailing public interest factors (e.g. protection of international relations, national security, cabinet deliberations);

OR

- (b) (i) the discloser has a reasonable belief that a matter threatens substantial and imminent danger or harm to life or public health and safety; **and**
- (ii) there are exceptional circumstances explaining why there was no prior internal or regulatory disclosure.

The government also announced that public whistleblowing would not be protected where it related to ‘intelligence-related information’, or was to a foreign government official (Commonwealth Government 2010).

This position represented a significant advance on the legislative inquiry, and reflected detailed consideration of qualifications that might be placed on the extra step of public disclosure (as reflected in adoption of the Canadian proviso regarding only information

²⁶ House of Representatives (2009), Recommendation 21. This was similar to the position recommended but not enacted in Queensland in 1993, and to some more recent overseas legislation, such as that in Manitoba, Canada: *Public Interest Disclosure (Whistleblower Protection) Act 2006*, C.C.S.M. c. P217 (Manitoba). Section 14(1). Cf. Canada’s federal *Public Servants Disclosure Protection Act 2005*, S.C. 2005, c. 46. Section 16(1), which provides that a public servant may make a disclosure to the public ‘if there is not sufficient time’ to disclose through official channels, but only in respect of imminent, substantial and specific dangers to life, health, safety or the environment, or a ‘serious offence’ under law – noting, unhelpfully, that this also provides that public whistleblowing is not authorised for any information ‘the disclosure of which is subject to any restriction created by or under any Act of Parliament’ (s 16(2)).

‘reasonably necessary to make the disclosure’).²⁷ However, especially as events have unfolded, the extent of these qualifications means that, once translated into legislation, the proposal could mean much less than it appears. Unrestricted caveats on ‘intelligence-related’ information may place substantial areas beyond the public disclosure safety-valve, irrespective of the public interest. More importantly, if it is presumed that any issue of ‘protection of international relations’ or ‘Cabinet confidentiality’ outweighs any public interest in disclosure, then the proposed balancing test may be weighted heavily against many disclosures to whom the public safety-valve should logically apply. Being confident that they have the benefit of such a balance is an onerous and uncertain test for an individual public servant to meet. Plainly, such a detailed set of hurdles and hoops also stands in sharp contrast to the much simpler test provided for in the new Queensland legislation.

On top of these challenges – and others identified in the next part of the chapter– the policy position of March 2010 represents the last point at which anything is known about the content of the proposed federal Bill. While drafting is understood to have occurred, the government suffered a change in leadership and therefore Prime Ministership, an election was held in August 2010, and a minority Labor government formed, dependent on the support of three Independent members and the Australian Greens. Initially, this state of affairs appeared to preserve the chances of a federal Public Interest Disclosure Bill, since all the formal agreements underpinning the government included commitments to open and transparent governance, and two included specific commitments to ‘introduce legislation to protect whistleblowers and seek to have such legislation passed by 30 June 2011’.²⁸ The first of these agreements was with Andrew Wilkie MHR, a former military officer who came to public prominence in 2002 when he resigned his position as a national security analyst to publicly blow the whistle on the lack of evidence to support Australia’s imminent participation in the war in Iraq. This deadline passed without any Bill having been introduced, nor any private consultation between the government and key stakeholders for over 12 months on many outstanding issues for the design of the Bill. Instead, on 27 June 2011, the government announced that it expected the legislation to be ‘finalised’ by the end of the year (Hon Gray 2011).

In the meantime, there have been other developments. The current federal Parliament succeeded in passing a federal ‘shield law’ for journalists, strengthening their ability to protect the identity of confidential sources, including but not limited to whistleblowers, by

²⁷ *Public Servants Disclosure Protection Act 2005*, S.C. 2005, c. 46. Section 15.1.

²⁸ *Agreement between Hon Julia Gillard, Prime Minister and Andrew Wilkie MHR*, 2 September 2010, clause 3.4. See similarly, *Agreement between Hon Julia Gillard, Prime Minister et al and Tony Windsor MHR and Rob Oakeshott MHR*, 7 September 2010, clause 3.1(e).

affording journalists a legal privilege which can entitle them to refuse to reveal the identity of sources in court.²⁹ However, this positive step is at best an indirect and fragmentary one. For many legislators, it may appear to represent a substantial step towards the protection of whistleblowers who go public, but it remains a law that shields journalists from prosecution for contempt, and does nothing, in itself, to protect whistleblowers from prosecution for releasing information.

The conflicted responses of authorities to the internet publisher WikiLeaks, including its Australian founder Julian Assange, also underscore the difficulties. In December 2010, within days of WikiLeaks' publication of a large volume of U.S. diplomatic cables, Australia's Prime Minister agreed publicly with U.S. leaders that Assange must have 'broken the law' (Sydney Morning Herald 2010), even though this quickly proved to be a premature over-reaction (Fowler 2011, Turnbull 2011). She then defended her claim on the basis that the 'foundation stone' of publication lay in the 'illegal act' of unauthorised disclosure. However, whether or not new rules are needed to regulate how and by whom confidential information is published, it is well established that new rules are needed to govern when it may be disclosed without liability to the officials who disclose. This is for the very reason that automatic, blanket prosecution of leakers, irrespective of the public interest in the disclosure, is no longer a sustainable response – as recognised by the Australian government's own policy support for public interest disclosure legislation.

These controversies have thus reinforced the rationale for a new legislative framework for whistleblowing, so that current unworkable presumptions against any disclosure are removed, and such conflicts made more manageable. Faced with the challenges of the new media age, the present conflicted responses reinforce the need to maintain a clear, long-term vision about the role of public whistleblowing in maintaining government integrity. In turn this reinforces why Australian leaders, and perhaps others, need to hold their nerve and course in putting in place the type of public interest disclosure legislation to which they have committed. However if the timetable continues to slip as it has, there is little prospect of these issues being resolved in time for the Bill to be introduced, debated and passed within the life of the present, unstable parliament. If that happens, then past events, and normal institutional inertia and resistance to reform within the public sector may mean that many years pass before the opportunity is regained.

²⁹ *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth). For background to this reform, see Tracey (2010); Media Entertainment and Arts Alliance (2007), *Official Spin: Censorship and Control of the Australian Press 2007*, pp.8-10; Brown (2007); C Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009; 'Coalition promise to introduce shield laws prompts labor to re-examine its position', *The Australian*, 20 August 2010.

4. Public whistleblowing in context

So far this chapter has simply reviewed key developments bearing on the acceptance of whistleblowing to the media, or public whistleblowing, as a 'driver' of political and institutional change through new public interest disclosure legislation. However, this is just one of the three main drivers introduced at the outset, supported by the Australian research. Overall conclusions about the state of Australian reform can only be reached having regard to all these drivers.

When it comes to lead agency support and oversight, Australian jurisdictions are also experiencing both innovation and stasis in the establishment of better operational systems for managing internal and regulatory whistleblowing. Further analysis from the Australian research has confirmed this issue to be crucial (Annakin 2011). The leading example in reform since September 2010 is the Public Interest Disclosure Act 1994 (NSW), an extensively amended and retitled version of the Protected Disclosures Act 1994 (NSW). Under the amendments, the New South Wales Ombudsman has been tasked, equipped and resourced to lead the implementation and independent monitoring of whistleblowing systems and outcomes across all NSW public sector agencies, in a far more ambitious way than previously attempted in Australia, and possibly anywhere in the world.

The proposed federal Bill is expected to allocate comparable responsibilities to the Commonwealth Ombudsman, but it is as yet unknown whether its powers will be sufficient, or whether the function will be adequately resourced. By contrast, the Public Interest Disclosure Act 2010 (Qld) has allocated comparable responsibilities to the Queensland Public Service Commission. Whether this will prove effective is similarly yet to be seen, given the reduced level of independence of such an agency relative to an Ombudsman's office in Australia, and reduced experience in substantive investigations. In other jurisdictions, similar questions apply, or the relevant provisions are yet to be reformed. Consequently, ongoing work is required to support change, and to establish which new arrangements make for better practice and which may have simply involved a rearrangement of deck-chairs.

The greatest challenges appear to be in bringing Australian whistleblowing law into line with world's best practice for compensating those whistleblowers whose lives and careers are adversely affected by their prosocial service – whether the whistleblowing is internal, regulatory or public in nature. As mentioned at the outset, the criminalisation of reprisals against whistleblowers may both encourage whistleblowing and discourage reprisals, but absence of prosecutions is easily cited as evidence that legislation has failed. In fact, we now know that while criminalisation of reprisals remains important symbolically, in Australia it

has at best indirect relationships with other important elements. Contrary to some expectations, empirical research suggests that criminal penalties may have been a distraction – or even a mask – from the main game of whistleblower protection (Smith & Brown 2008). It is now clear that prevention and remediation of detrimental outcomes cannot rely simply on the criminalisation of reprisals, irrespective of how the penalties compare to those involving flying foxes, because most of the adverse actions experienced do not, and are unlikely to ever satisfy the characteristics of a criminal offence. The priority lies in replacing current general compensation provisions with more tailored, lower-cost, specialist procedures for securing meaningful and exemplary compensation for the types of adverse employment action, victimisation and damage to well-being that flow most commonly from organisations' failures to support and protect those who make disclosures.

On this issue, no Australian jurisdiction has yet approached the standard set in unitary jurisdictions by the UK Public Interest Disclosure Act. While it improved the criminal provisions dealing with reprisal, the Public Interest Disclosure Act 2010 (Qld) did not take up the opportunity to provide a low-cost compensation avenue for detrimental action short of dismissal through the state's system of employment law. Instead, it provided a new mechanism for complaining of victimisation under anti-discrimination legislation – a mechanism which has not proved effective in South Australia or Western Australia. The most worrying jurisdiction is the federal one, where the government's policy position of March 2010 recognised that compensation mechanisms were needed, but provided no guidance on how the federal legislation will meet that need. As it stands, this is a major and could yet be a fatal flaw to a workable federal whistleblowing regime.

Finally, this chapter has dealt only with the government sector. By contrast, only marginal progress has been made in Australia towards any comprehensive whistleblower protection in the business and non-government sectors. A seamless system of protection across all sectors of employment, such as through the UK PIDA approach, is not especially feasible in federal countries such as Australia, where the systems of public and private sector employment law have traditionally been fragmented between federal and state jurisdictions. Nevertheless, major restructuring of Australia's workplace relations system, under the Fair Work Act 2009 (Cth), along with new uniform national health and safety laws, now makes the potential for more seamless regulation possible. So too, steps are being taken in some areas of employment to see whistleblower protection built into collective agreements, and thus into enforceable employment law, in a bottom-up fashion.

At present, the only top-down legislative recognition of whistleblowing in the private sector remains Part 9.4AAA of the Corporations Act 2001 (Cth), which is Australia's equivalent to the much criticised U.S. Sarbanes-Oxley disclosure provisions. The Australian provisions

are widely accepted as badly framed, irrelevant to the day-to-day practice of companies and their chief regulator (the Australian Securities and Investments Commission), and in need of revision. In October 2009, the Assistant Treasurer issued an options paper for reform of the provisions, as part of a review by the federal Treasury and Attorney-General's Department (2009). However, the review was limited to compliance and enforcement of the corporations law, rather than any comprehensive approach to whistleblowing concerning all major types of potential wrongdoing within or by non-government employers. The review has not been finalised or publicly reported on, apparently while the relevant agencies await the outcome of federal action on the public sector's Public Interest Disclosure Bill.

5. Conclusion

Australian research has continued to reinforce the importance of strong legislative drivers if governments and powerful institutions are to take whistleblower protection more seriously. Extending protection to whistleblowers who go public, if government does not act, is just one of the key drivers for change reviewed in this chapter. Substantial legislative reform in Queensland and New South Wales, and potential reform federally could make a difference. However, many challenges remain. Together these results make for a mixed report card. On one hand, Australian governments have been restating and strengthening their 'in principle' commitments to the values of transparency and integrity in government, and continuing to innovate in legislative and policy responses to whistleblowing in important respects. On the other hand, international political pressure and vacillations in leadership, combined with natural institutional resistance to change, mean that key reforms also hang in the balance.

References

- Annakin, L. (2011). In the public interest or out of desperation? The experience of Australian whistleblowers reporting to accountability agencies, PhD Thesis, University of Sydney, March 2011.
- Attorney-General's Department (2009). Improving Protections for Corporate Whistleblowers: Options Paper. Attorney-General's Department Canberra.
- Australian Labor Party (ALP) (2007). Government Information: Restoring trust and integrity, Australian Labor Party Election 2007 Policy Document.
- Banisar, D. (2009/2011). Whistleblowing – International Standards and Developments. Background paper written for Transparency International (2009); also in I. E. Sandoval (ed), Corruption and Transparency: Debating the Frontiers Between State, Market and Society,

World Bank Institute for Social Research, UNAM. Available at <http://ssrn.com/abstract=1753180> (accessed 25 August 2011).

Brown, A. J. (2007). Privacy and public interest disclosures – when is it reasonable to protect whistleblowing to the media? *Privacy Law Bulletin* 4(2), 19-28.

Brown, A. J. (2008) (ed.). *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*. Australia & New Zealand School of Government / ANU E-Press.

Brown, A. J. (2009a). Returning the Sunshine to the Sunshine State: Priorities for whistleblowing law reform in Queensland, *Griffith Law Review*, 18(3), 666-689.

Brown, A. J. (2009b). Whistleblowing legislation in Queensland: the agenda for reform, Report prepared for the Queensland Government Integrity and Accountability Review. Available at <http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/submissions/submissions-161-180/a-j-brown.aspx> (accessed 14 October 2009).

Brown, A. J. (2010). Whistle can now be blown louder, *The Australian: Legal Affairs*, 17 September 2010, 33-34.

Brown, A. J., Latimer P., McMillan J. & Wheeler, C. (2008). Towards Best Practice Whistleblowing Legislation for the Public Sector: the Key Principles. In A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organisations*. ANU E Press, 261-288.

Commonwealth Government (2010). Government Response: Whistleblower protection: A comprehensive scheme for the Commonwealth public sector. Tabled by Senator J Ludwig, Special Minister of State, 17 March 2010. Canberra: Commonwealth of Australia.

Commonwealth Parliamentary Debates (Hansard), House of Representatives, Canberra.

Davies G, Hon (2005), Report of Queensland Public Hospitals Commission of Inquiry. Queensland Government.

Electoral and Administrative Review Commission (EARC) (1991). Report on protection of whistleblowers. Queensland Government.

Fowler, A. (2011). *The Most Dangerous Man in the World: A Definitive Account Of Julian Assange And Wikileaks*. Melbourne University Press.

Hon Gary Gray AO, Special Minister of State (2010). Public Interest Disclosure Bill, Media Release GG 24/11, 27 June 2011. Available at http://www.smos.gov.au/media/2011/mr_242011.html (accessed 25 August 2011).

Head, B., Brown, A.J. & Connors, C. (eds) (2008), *Promoting Integrity: Evaluating and Improving Public Institutions*. Ashgate.

House of Representatives Standing Committee on Legal and Constitutional Affairs (2009). *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector*. Commonwealth of Australia.

Lewis, D. (1996). Employment Protection For Whistleblowers: On What Principles Should Australian Legislation Be Based?, *Australian Journal of Labour Law*, 9, 1-27.

Mazerolle, P. & Cassematis, P. (2010). *Whistle While You Work: lessons to be learned from the pan-Australian research*. In D. Lewis (ed), *A Global Approach to Public Interest Disclosure*. Edward Elgar.

Miceli, M. P., Near, J. P. & Dworkin, T. M. (2008). *Whistleblowing in Organisations*. Routledge.

Miceli, M. P., & Near, J.P. (1984). The relationships among beliefs, organisational position, and whistle-blowing status: A discriminant analysis, *Academy of Management Journal*, 27(4), 687-705.

Moss, I. (2007). *Report on the Independent Audit into the State of Free Speech in Australia*. Australia's Right to Know Committee.

Oakes, L. (2005). Pillars of democracy depend on leaks, *The Bulletin / National Nine News*, 24 August 2005.

Oakes, L. (2010). *On the Record: Politics, Politicians and Power*. Hachette Australia.

OPSC (2006). *Review of the Whistleblowers Protection Act 1994 (Qld)*. Office of the Public Service Commissioner, Queensland Government. Available at <http://www.psc.qld.gov.au/library/document/catalogue/equity-ethics-grievance/review-whistleblowers-protection-act-report.pdf> (accessed 25 August 2011).

Osterhaus, A. & Fagan, C. (2009). *Alternative to Silence: Whistleblower Protection in 10 European Countries*. Transparency International.

Queensland Parliamentary Debates (Hansard), Government Printer, Brisbane.

Roberts, P. & Brown, A. J. (2010). The Australian legislative experience. In D. Lewis (ed), *A Global Approach to Public Interest Disclosure*. Edward Elgar.

Roberts, P., Brown A. J. & Olsen J. (2011). *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*. ANU E-Press.

Senate Select Committee on Public Interest Whistleblowing (1994). In the public interest: Report of the Senate Select Committee on Public Interest Whistleblowing. The Parliament of the Commonwealth of Australia.

Sydney Morning Herald (2010). PM can't say what law WikiLeaks has broken, Sydney Morning Herald, 7 December 2010. Available at <http://www.smh.com.au/national/pm-cant-say-what-law-wikileaks-has-broken-20101207-18nfn.html> (accessed 25 August 2011).

Smith, R. & Brown, A. J. (2008). The Good, The Bad and The Ugly: Whistleblowing Outcomes. In Brown, A. J. (ed), Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations. Australia & New Zealand School of Government / ANU E-Press.

Tracey, M. (2010). Journalist Shield Laws, Communications Law Bulletin, 29(2), 12.

Thomas, H. (2007). Sick to Death. Allen & Unwin, Crow's Nest.

Turnbull, M. (2011). Reflections on Wikileaks, Spycatcher and freedom of the press, Keynote speech held at Sydney University Law School, 31 March 2011.

Vandekerckhove, W. (2010). European whistleblower protection: tiers or tears? In D. Lewis (ed), A Global Approach to Public Interest Disclosure. Edward Elgar.

The UK Bribery Act 2010, Business Integrity and Whistleblowers

Indira Carr

There are plenty of reports of corruption in the business sector in newspapers all over the world. Not all of them relate to emerging economies such as India and Russia (Phenal 2011, Swallow 2010). They include developed nations as well. For instance, a recent Canadian report exposed the level of corruption in the construction sector (Bron 2011). This is not unique to this business sector. The defence sector is notorious for its share of corrupt dealings (e.g. see Shali-Esa 2011). One need only mention corruption in this sector and immediately people are reminded of the alleged bribes paid by BAE to Saudi public officials and the sudden dropping by the UK Serious Fraud Office (SFO) of the investigation on grounds of national security. The reason for this about turn was that Saudi Arabia threatened to withhold vital intelligence reports on possible terrorist activity which were of primary importance to UK national security (Carr and Outhwaite 2008). Since then BAE has been the subject of investigations for alleged corruption in Tanzania, for instance, which resulted in an agreement with the SFO that BAE would plead guilty to the offence of failing to keep accounting records (s. 221 Companies Act 1985).

Equally, a relatively recent newcomer, the technology sector is also touched by the 'cancer of corruption'. In September 2011, a technology services company Accenture agreed to 'pay US\$63.7 million to the US Department of Justice to resolve whistleblower allegations that it participated in a large-scale kickbacks scheme involving U.S. government contracts' (Gross 2011). It would not be an exaggeration to state that even a quick trawl through newspapers and journals in the English language reveals there are at least one or two reports of corruption on a daily basis with businesses as suppliers of bribes to the public sector. This does not include donations for political campaigns since such payments are not regarded as corrupt payment in the laws of many jurisdictions. The high prevalence of business corruption-related material in newspapers endorses the findings of a World Bank (WB) survey measuring bribery from the private sector to the public sector worldwide conducted in 2000. This survey estimates it at US \$ 1 trillion per annum (WB 2004). According to Daniel Kaufmann 'the main point is that [bribery] is not a relatively small phenomenon of a few billion dollars – far from it' (Kaufman nd).

The international community has responded to the role of the business sector in corrupt activities by adopting conventions such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997 (OECD Anti-Bribery Convention), the Council of Europe Civil Law Convention on Corruption 1999 (COE Civil

Convention), the Council of Europe Criminal Law Convention 1999 (COE Criminal Convention), and the United Nations Convention against Corruption, 2003 (UNCAC). The scope of these conventions inevitably vary but all of them require the contracting states to criminalise bribery from the supply side though the OECD Anti-Bribery Convention is restricted solely to bribery of foreign public officials in the context of international business transactions. The success of any convention lies in its being ratified, implemented and enforced. The issue of enforcement is a major problem – the reason being the secretive nature of corrupt activities. It is extremely unlikely that a business giving (supplying) a bribe and a person receiving a bribe are going to engage in this activity in the open for all to see or make mistakes in their account books for an auditor, be it internal or external, to spot immediately. In many cases of bribery by businesses, intermediaries such as employees and commission agents are likely to be used for the purposes of communicating the willingness to supply and receive a bribe. In these circumstances, the relevant state authorities require information that can initiate investigation and result in subsequent prosecution. There are a range of sophisticated investigative techniques available ranging from the overt to the covert, from scrutiny of bank accounts to surveillance (Ashworth 1994, Marx 1988). But these types of proactive activities may at times be challenged on grounds of breach of human rights, right to privacy and right against self-incrimination. It is often the case that police authorities in many jurisdictions cultivate informers but there is always the possibility that such information obtained, for a consideration, may be unreliable. Similarly, information from outsiders such as business competitors may be suspect on grounds of the competitor's motivation for starting an investigation. This is where whistleblowers play a unique role. They are able to provide information of better quality since they are exposing malpractices from within their institution.

The focus of this chapter is to examine whether and to what extent the recently enacted Bribery Act 2010 and the Guidance Document tackle the issue of procedures within an organisation and the protection of whistleblowers. Given that the UK Bribery Act 2010 must be seen in the context of other international anti-bribery and anti-corruption regulation, Section 1 examines the approaches to whistleblower protection in the OECD Anti-Bribery Convention, the UNCAC and the COE Conventions and Section 2 examines the recent developments in respect of the combating bribery and improving business integrity in the UK.

1. Whistleblower Protection in the UNCAC, COE Criminal Law and Civil Law Conventions and the OECD Anti-Bribery Convention

This section considers the provisions for whistleblower protection in the four above mentioned conventions, to which the UK is a contracting party.

UNCAC

The UNCAC has had a noticeable impact on the international scene and has been ratified, according to information currently available, by 154 states. The Convention aims to combat corruption not only through the criminalization of certain types of behaviour ranging from bribery of national officials, foreign public officials, officials of public international organizations, bribery in the private sector, embezzlement and trading in influence to illicit enrichment and the laundering and concealing the proceeds of corruption but also through prevention mechanisms. Greater transparency is seen as the tool to prevent corruption and as part of this drive institutions are expected to establish codes of conduct. While voluntary adoption of codes of conduct are seen as an important part of combating corruption, the expectation that institutions follow their codes is strengthened by giving protection to whistleblowers. The UNCAC in its Art 33 provides that

‘Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention’.

There are a number of striking features in this provision. Firstly, the provision requires contracting states to consider adopting legislation that will provide protection to those who report. The language of this provision is not mandatory so there is no obligation to put legislation protecting such informants in place. This is in contrast to some of the other provisions which are of a mandatory character. For instance, Article 16 on the bribery of foreign public officials and officials of public international organizations which obliges state parties to put regulation in place:

‘Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business’

This means that many states are unlikely to adopt laws that protect whistleblowers and it is no surprise that not many of the states that have ratified the Convention have such legislation in place. This is the case even amongst developed countries. For instance, according to a study by the Council of Europe (CoR 2009) many of their member states are yet to have whistleblower legislation in place. Of the developing and emerging economies South Africa and Ghana have legislation on whistleblower protection. India is in the process

of considering a bill and it ratified the UNCAC recently after much pressure from the civil society.

The other feature that stands out in this provision is the absence of the word 'whistleblower'. It only refers to 'persons reporting in good faith' and this class can be fairly extensive. It need not only refer to a whistleblower reporting from within an organization about the malpractices within the institution in which the whistleblower is located but also to those informants who are external to an institution. The omission of the word 'whistleblower' is indeed odd given that there is reference to it in the Travaux Préparatoires to UNCAC. Article 43 of the Negotiation Texts is titled 'Protection of whistle-blowers, witnesses and victims'. Also according to the Travaux Préparatoires during the first reading of the draft text, at the second session of the Ad Hoc Committee, there was a proposal from India to include a definition of whistleblowers and 'to include in that category those individuals who provide information that leads to the prevention of an act of corruption and to provide effective protection for those persons from potential retaliation or intimidation' (UNODC 2001, fn 10 p 281). However during the course of the negotiations the term 'whistle-blower' was dropped and the following text (Art 43 *bis*) was arrived at which read:

'Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and with reasonable grounds to the competent authorities any incident concerning offences covered by this Convention'.

This was the text finally adopted by UNCAC in Art 33 and is sufficiently broad. It must be added that there is a separate provision dealing with the protection of witnesses, experts and victims. It must also be noted that the suggestion by India for a definition was not taken any further.

The protection of whistleblowers also appears in the Negotiation Texts of Art 13 relating to civil society and there was a proposal for rewarding whistleblowers by the Republic of Korea as follows:

'If 'whistle-blowing' has resulted in the direct recovery or increase of revenues belonging to public agencies or in savings on their part, the 'whistle-blower' may request the competent authorities to pay him or her a reward and the requested authorities shall pay him or her an appropriate reward.'

There is no reference to whistleblowers in the adopted Art 13 and the suggestion from Korea was not progressed. It must, however, be noted that the Korean suggestion for paying a reward to the whistleblower is not uncommon. For instance, the US in 1863 enacted the False Claims Act (FCA - 317 US 57 (1943), the aim of which was to encourage informers to come forward with information about fraud against the Government in return for a share of

the damages recovered. The FCA empowers citizens to bring suit on behalf of the Government for fraud against the Government. This Act has been extremely successful and it was heralded in 2005 by the Assistant Attorney General of the US Department of Justice as giving 'ordinary citizens the courage and protection to blow the whistle on government fraud'.³⁰

It is not very clear as to why the term 'whistle-blower' was dropped when there seemed to some support for the use of the term. A possible reason is the failure to find a definition of 'whistle-blower' that would be commonly accepted or a reluctance by some states to accept the term owing to different culture-driven understandings of it. A recent report from the Council of Europe entitled 'The Protection of 'Whistle-Blowers,' which examined the laws of 26 European nations, is revealing when it states:

'The problem in appropriately defining the term whistle-blower leads to a wider problem in most countries under analysis to the extent that, when asked about their national legislation in the field of protection of whistle-blowers, many countries refer to their witness protection laws (Bulgaria, Estonia, Italy, Poland, Turkey, etc.), which cover some aspects of the protection of whistle-blowers, but which may not take the place of a broader law covering the protection of all different aspects of whistle-blowing. Witness protection laws can and indeed should extend to whistle-blowers, if and when they appear before a court to testify as witnesses. But the notion of whistle-blower should not be confused with or limited to that of a witness. A whistle-blower will not necessarily wish to, or need to appear in a court of law, considering that whistle-blowing measures are designed to deter malpractice in the first place or to remedy it at an early stage.

What also transpires from these 26 replies is that the question of whistle-blowing is closely intertwined with the countries' legal cultures in general. Political and administrative norms in most European countries do not value whistle-blowing. In Poland or in France, for example, whistle-blowing can be quite easily considered as a denunciation, which is strongly condemned in both cultures. In some countries, the cultural argument is put forward as a justification for not enacting specific legislation to protect whistle-blowers, it often being considered that the few provisions scattered among various other pieces of legislation are enough to ensure any protection needed.' (CoR 2009, paras 27-28)

In this context it is also easy to understand why Art 32 of UNCAC contains a separate provision on the protection of witnesses, experts and victims. This indicates that Art 33 is referring to a type of informant who is not a witness, expert or a victim and that this type of informant also needs to be specifically protected.

³⁰ 'Justice Department Recovers \$1.4 Billion in Fraud and False Claims Act in Fiscal Year 2005' available at <http://www.usdoj.gov>. (Accessed 1 January 2011.) See also for whistleblower protection and rewards the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act 124 Stat. 1376 Public Law 111–203–July 21, 2010. Also available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>. (Accessed 11 September 2011)

Another feature that stands out in Art 33 is the requirement that the informant reports in good faith and with reasonable grounds. Why include the phrase 'good faith?' It is generally understood that the whistleblower, despite being perceived by the institution and fellow employees as a deviant actor, is not acting out of self-interest but for the greater good or in the public interest. It is possible that the whistleblower may have acted in a self-interested manner, for instance, to exact revenge and so the emphasis on good faith is to discourage reports of a vexatious nature. The emphasis on 'reasonable grounds' is to ensure that the report has some rational backing and not merely done on the basis of pure conjecture.

The UN recently published its review document on the implementation of UNCAC and in respect of Art 33 found that 'there was considerable variation among the States Parties with regard to [its] implementation' and that '[s]everal States Parties had not established comprehensive measures to implement the article, though legislation was pending in some cases.' (UN 2011, para 30) So it seems the situation is not that different from that reported by the Council of Europe. Also a number of states seemed to think that they need not have specific legislation to protect whistleblowers though they had legislation protecting witnesses.

COE Conventions

Article 9 of the COE Civil Law Convention addresses the protection of employees and states that '[e]ach Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities'. Like the UNCAC, the COE Civil Law Convention also refrains from using the term 'whistleblower'. However, unlike Art 33 of UNCAC Art 9 refers solely to employees and leaves those who do not fall within this class outside its ambit. By restricting Art 9 to employees the approach taken by this Convention towards protecting whistleblowers reflects the more restrictive approach taken towards defining whistleblower in the academic literature. There is also a provision in Art 22 of the COE Criminal Convention protecting informants entitled 'Protection of collaborators of justice and witnesses', which states:

'Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

a those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b witnesses who give testimony concerning these offences'.

Even though this article is not directed at employees of an institution who report wrongdoing internally it is possible that Art 22 will affect employees who act as informants and/or act as witnesses.

In a sense the distinction drawn between informants who are likely to be regarded as whistleblowers in common parlance and those who are not, in both the UNCAC and the COE Conventions, are reflective of (1) the indeterminacy indicated in arriving at a uniform definition of whistleblower in both academic and non-academic literature, and (2) the negative connotations associated with the term 'whistleblower' in many cultures.

OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention is not comprehensive in its scope and does not contain any provision recommending that member states enact legislation protecting whistleblowers. Despite the lack of whistleblower protection in the Convention, in its Phase 2 Reports the OECD Working Group on Bribery (OECD 2005) addresses the protection of whistleblowers in its recommendations.

The theme on protection of whistleblowers also appears in other OECD documents. For instance, Recommendation V of a recent publication on business integrity and anti-bribery legislation in African countries (OECD 2011), entitled 'Strengthening Business Integrity and Accountability,' states:

'Another important cornerstone in the fight against bribery of public officials in business transactions is through legislation aimed at increasing business integrity, transparency and accountability. Businesses can also set guidelines for improving their integrity and put in place mechanisms within their organisations for reporting bribery and training staff on detecting bribery, following good accounting practices and undertaking best practices when engaging in public procurement bids. A number of countries have adopted business codes of conduct but these best practices still need to be widely publicised and adopted across the twenty countries. Countries are therefore recommended to strengthen these initiatives by addressing the following:

Adoption of whistleblower legislation that protect employees who report suspicions of bribery or other unlawful activities in good faith and on reasonable grounds to competent authorities from discriminatory or disciplinary actions ...'.

The question now is, given the ratification of these four conventions by the UK, what has it done in the recently enacted Bribery Act to embed or promote whistleblower protection? After all the OECD Working Group in its Phase II Report (OECD 2005, para 49) did recommend that 'the United Kingdom pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public'. They also encourage 'business organisations to promote internal mechanisms in this respect.'

2. Business Integrity in the UK Bribery Act 2010

The UK Bribery Act 2010 came about as a result of intense criticisms from the international community when the Serious Fraud Office (SFO) dropped its investigation of corruption

allegations in the BAE arms deal with Saudi Arabia on grounds of national security. At the time the SFO took this decision the UK was already facing intense criticism from the OECD Working Group examining the implementation of the OECD Anti-bribery Convention by the UK. The Working Group highlighted a number of shortcomings in the anti-corruption legislation existing at the time and these included the unsatisfactory nature of the law relating to criminal liability of legal persons. They recommended that the UK revisit the narrow application of the 'directing mind' test used for finding companies liable. The 'directing mind' principle was formulated in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co* in holding that the fault of the director involved in the operation of the company was the fault of the company. According to Viscount Haldane,

'A corporation ... has no mind of its own any more than it has body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'. ([1915] AC 705 at 713)

However, the identification of the acts and states of mind of officers within a company with that of the company is applied narrowly to officers higher up the command chain. For instance, in *Tesco Supermarkets Ltd v Natrass* ([1972] AC 153) it was held by the House of Lords (as it was then called) that a manager of one of the Tesco supermarkets where goods were sold at a price higher than that advertised at that branch was not a directing mind. Other jurisdictions, such as Canada, that have adopted this approach to finding corporate fault seem more ready to find the directing mind further down the command chain (Hanna 1988). The UK approach in looking for the directing mind at higher levels of management is a centralised one and is unsuited to the current operational procedures of companies which are diffused geographically and functionally (Wells 1993). Since the current approach is dependent on the identification of that one individual within a company, it does not allow for the aggregation of the mental states of more than one person within the organisation.

However, the question of examining and revising the 'directing mind' approach to the criminal liability of legal persons was left for another day by the Law Commission. Instead, Section 7(1) of the Bribery Act 2010 establishes the following offence:

'A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending –

to obtain or retain business for C, or

to obtain or retain and advantage in the business for C.'

However, under s.7(2) it is possible for a relevant commercial organisation,³¹ in its defence, to show that it had adequate procedures in place to prevent persons associated with it from undertaking such conduct.

It is evident from making a commercial organisation liable for the acts of bribery by persons associated with it that the Act is focusing on raising business integrity and expecting the organisation, by allowing a defence, to seriously adopt procedures to address the risks of corruption. As part of this, one would expect that some mention would be made of whistleblowers since they are acknowledged as an important tool in raising integrity and accountability of an organisation.

The Act itself does not mention whistleblower protection and neither does it provide any details of the procedures to be followed by companies. The issue of procedures to be put in place by a company was left to the Secretary of State, who produced a Guidance Document under s. 9(1) of the Act (Ministry of Justice 2011). The silence in respect of whistleblower protection in the Act could perhaps be explained due to the already well established whistleblower protection law in the UK. It is one of the countries with whistleblower protection legislation and the Public Interest Disclosure Act 1998 (PIDA) seems to be working well according to the statistics published by Public Concern at Work (PCAW 2010).

It would be reasonable to expect that the Guidance Document, in addressing procedures for preventing bribery, would provide an enabling environment for employees to voice their concerns to senior management and protect such employees from reprisals from their institution and other employees. The Guidance Document sets out the following six principles:

Principle 1 entitled 'Proportionate Procedures' sets out that '[a] commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced';

Principle 2 entitled 'Top-Level Commitment' sets out that '[t]op level management in a commercial organisation (be it board of directors, the owners or any other equivalent body or person) are

³¹ 'Relevant commercial organisation' is defined in s. 7(5) as

'(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.'

committed to preventing bribery by person associated with it. They foster a culture within the organisation in which bribery is never acceptable’;

Principle 3 entitled ‘Risk Assessment’ sets out that ‘[t]he commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented’;

Principle 4 entitled ‘Due Diligence’ sets out that ‘[t]he commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services on behalf of the organisation, in order to mitigate identified bribery risks’;

Principle 5 entitled ‘Communication (including Training)’ sets out that ‘[t]hat the commercial organisation seeks to ensure that bribery prevention policies and procedures are embedded and understood throughout the organisation through external and internal communication, including training, that is proportionate to the risks it faces’; and

Principle 6 entitled ‘Monitoring and Review’ sets out [t]hat the commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and make improvements where necessary’.

Each principle is supplemented by a commentary and the issue of whistleblowing is taken up under Principles 2 and 5. Under Principle 2, in communicating commitment to ‘zero tolerance’ to bribery internally and externally, it is expected that the organisation will put in place procedures and protection for confidential reporting of bribery or whistleblowing. Under this Principle it is also expected that there will be procedures for ‘speaking-up’ or ‘whistleblowing’. Under Principle 5, reference is again made to the usefulness of speak-up procedures as an important management tool for improving the detection and prevention of bribery and that if such procedures were to be used adequate protection must be given to those who report concerns.

Even though whistleblowing and whistleblower protection is not included as a separate principle for increasing business integrity and accountability, it is gratifying to see the acknowledgment of whistleblowing as an important tool within the commentaries to two of the six Principles. Further detail about how whistleblowers are to be protected or the procedures that a whistleblower has to follow to raise concerns is not provided in the Guidance Document. This is understandable to some extent since the Guidance Document covers all commercial organizations and must therefore be flexible and of general application. The expectation is that the application of the Principles will vary across organisations depending on factors such as size, nature of their business, and geographic presence. The expectation of the Guidance Document is outcome-oriented in that ‘the outcome should always be robust and effective anti-bribery procedures’. Since the emphasis is on effective anti-bribery measures then whistleblowing procedures and whistleblower protection should

form important aspects of anti-bribery arrangements in virtually all relevant commercial organisations.

The next question is whether in the absence of details on the whistleblowing procedures an organisation must have, are there any standardized rules that could be used by an organization? In the international commercial context the ICC Guidelines on Whistleblowing may provide a framework. Another document that may provide practical assistance is the *Whistleblowing Arrangement Code of Practice* which is very detailed in its advice and recommendations. However, as with all frameworks, these are general in nature but provide some directions for an organisation to work out the details to suit its needs. Vandekerckhove and Lewis (2011) provide a comparative analysis of these and other guidelines.

3. Conclusion

This chapter started out with the premise that business corruption is a global problem that undermines global development and promotes poverty and that whistleblowers play an important role in exposing corrupt activities taking place in their organisations. Given that the anti-corruption conventions ratified by the UK have all promoted the protection of whistleblowers, either in the body of the text or in the recommendations post implementation review, it would be reasonable to expect that the recently enacted UK Bribery Act would address this issue vigorously by weaving it into the fabric of the statute. There is no doubt that the Bribery Act by including the new s.7 offence will force businesses to address integrity and accountability. While the Act does not integrate whistleblowing mechanisms, the Guidance Document does promote whistleblowing procedures and protection for those who speak out. Unfortunately these suggestions are hidden in the commentaries. This is disappointing because whistleblower protection could have been promoted more energetically by making reference to the availability of PIDA both in the statute and in the Guidance Document. After all, did not the OECD (2005) recommend that the 'United Kingdom pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public'? It is early days to see what whistleblowing procedures are being put in place by relevant commercial organisations but it will be worth visiting this issue when the Guidance Document has been in effect for a few years. It is hoped that businesses will become more transparent and make their anti-corruption arrangements publicly available so that researchers can assess the effectiveness of s.7 of the Bribery Act and the Guidance Document in promoting integrity and preventing bribery.

References

- Ashworth, A. (1994). *The Criminal Process*. OUP.
- Bron, I. (2011). Leaked Report on Quebec Construction Industry Corruption Shows Sickness in the System. Available at <http://canadians4accountability.org/blog/2011/09/16/leaked-report-on-quebec-construction-industry-corruption-shows-sickness-in-the-system/> (accessed 10 October 2011).
- Carr, I. (2006). The United Nations Convention on Corruption: Improving the Quality of Life of Millions in the World? *Manchester Journal of International Economic Law* 3(3), 3 – 44
- Carr, I. (2007). Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer? *Journal of Business Law*, 111- 136.
- Carr, I. and Outhwaite, O. (2008). The OECD Anti-Bribery Convention Ten Years On, *Manchester Journal of International Economic Law* 5(1), 3 – 35.
- Carr, I. (forthcoming). Use of Plea Bargaining in Corruption Cases – A Desirable Development?
- CoR (2009). Council of Europe ‘The Protection of ‘Whistle-Blowers’’ Doc. 12006, 14 September 2009. Available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm> (accessed 10 September 2011).
- Gross (2011). Accenture Pays \$63.7 Million to Resolve Gov’t Kickbacks Case, *PC World Business Center*, 12 September 2011. Available at http://www.pcworld.com/businesscenter/article/239866/accenture_pays_637_million_to_resolve_govt_kickbacks_case.html (accessed 30 September 2011).
- Hanna, D. (1988-89). Corporate Criminal Liability, *Criminal Law Quarterly* 31, 452-470.
- Kaufman (nd). Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann. Available at <http://go.worldbank.org/KQH743GKF1> (accessed 31 October 2011).
- Lotz, A. (2011). BAE Systems & Tanzania: Investigating 1999s Suspect Radar Deal, *Consultancy Africa Intelligence* 17 January 2011. Available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=642:bae-systems-and-tanzania-investigating-1999s-suspect-radar-deal&catid=60:conflict-terrorism-discussion-papers&Itemid=265 (accessed 1 February 2011).
- Marx, G.T. (1988). *Undercover: Police Surveillance in America*. University of California Press.

Ministry of Justice (2011). *Guidance about Procedures which Relevant Commercial Organisation can Put in Place to Prevent Persons Associated with them from Bribing (Section 9 of the Bribery Act 2010)* was adopted in March 2011. Available at <http://www.justice.gov.uk/guidance/bribery/htm> (accessed 10 April 2011).

OECD (2005). Phase II Report UK. Available at <http://www.oecd.org/dataoecd/62/32/34599062.pdf> (accessed 21 October 2010).

OECD (2011). *Stocktaking Report on Business Integrity and Anti-bribery Legislation, Policies and Practices in Twenty African Countries*. Available <http://www.oecd.org/dataoecd/7/18/47655067.pdf> (accessed 10 June 2011.)

PCAW (2010). *Where is Whistleblowing Now?* Available at http://www.pcaw.co.uk/policy/policy_pdfs/PIDA_10year_Final_PDF.pdf (accessed 1 October 2011).

Phenal, J. (2011). India Journal: Companies Need to Ride the Anticorruption Wave, *The Wall Street Journal* 13 September 2011. Available at <http://blogs.wsj.com/indiarealtime/2011/09/13/india-journal-companies-need-to-ride-the-anticorruption-wave> (accessed 24 September 2011).

Shali-Esa, A. (2011). FBI Eyes Corruption in Aerospace, Reuters, 9 September 2011. Available at <http://www.reuters.com/article/2011/09/09/us-aero-arms-summit-bribery-idUSTRE78876G20110909> (accessed 30 September 2011).

Swallow, D. (2010). Russia: bribery: corruption & the High Price of Bad Business. Available at <http://www.deborahswallow.com/2010/05/24/russia-bribery-corruption-the-high-price-of-bad-business/> (accessed 24 September 2011).

UN (2011). 13CAC/COSP/2011/2, 25 August 2011.

UNODC (2001). *Travaux Préparatoires of the Negotiations for the Establishment of the United Nations Convention against Corruption*. UNODC

Vandekerckhove, W. & Lewis, D. (2011). The content of whistleblowing procedures: A critical review of recent official guidelines. *Journal of Business Ethics*. DOI 10.1007/s10551-011-1089-1

WB (2004). Costs of Corruption. Available at <http://go.worldbank.org/Z3GLCT0RP1> (accessed 31 October 2011).

Wells, C. (1993). *Corporations and Criminal Responsibility*. Clarendon Press.

Whistleblowing, Risk and Regulation

Cathy James

'We engage with dissent as a sign of freedom.' - Aung San Suu Kyi - BBC Reith lectures 2011

As the storm surrounding News International has unfolded, engulfing regulators and law makers alike, one cannot help but see the irony at the heart of the scandal. Those meant to be holding the rich and powerful to account were themselves engaged in underhand, if not illegal practices. It demonstrates the real dilemma of the whistleblower writ large – how to speak up when the entire organisation is looking the other way. Countless journalists – truth seekers themselves – knew about the mobile phone hacking being undertaken at the News of the World (NY Times 2011) and yet no-one openly questioned matters. Untruth layered upon untruth so that regulators, the police and even Parliament itself, failed to take the matter seriously. What we are starting to see is the gradual process of accountability playing out in practice. The scandal also demonstrates how corporate culture will dictate whether or not workers feel able to speak up and this is illustrated in the case study set out below. What is also clear in all of this is that the role of regulation is essential in strengthening accountability throughout the system.

In this chapter, I am going to highlight the vital role that regulation should play in the proper operation of any law or system intended to protect whistleblowers. I will explain the way in which the UK law, the Public Interest Disclosure Act (PIDA)³², attempts to achieve this and how the reasonable external disclosure of information is protected under PIDA.

I will set out how Public Concern at Work (PCaW)³³ has campaigned for the principles of open justice to be applied to claims under PIDA and how more information should be available about claims made to the Employment Tribunal, so that claims under PIDA can be monitored and reviewed. It may be a surprise to some to know that PIDA is not being reviewed by the UK government and that there is no public access to claims made under the Act. This is an issue about which Public Concern at Work has long campaigned. I will also set out the compromise position on open justice taken by the UK government and our attempts to check whether the new system is working. Finally, I will be asking whether

³² Note that PIDA was inserted into existing UK legislation and is also referred to as Part IVA of the Employment Rights Act 1996.

³³ Public Concern at Work, the whistleblowing advice line, is an independent charity set up in 1993. It provides free, confidential advice to those concerned about malpractice or wrongdoing in the workplace. For more information please visit www.pcaw.org.uk.

enough is being done by government and regulators to promote the principles behind the legislation.

1. The statutory framework under PIDA

It is worth remembering that when PIDA was introduced it was hailed as having a new approach - one in which the UK government was giving individuals a robust legal safety net with a piece of legislation that is about accountability and responsibility. At the outset the legislation was praised by Lord Nolan for 'so skilfully achieving the essential but delicate balance between the interest of employers and the public interest' (Hansard 1998). The legislation was introduced as a Private Member's Bill and then adopted by the Government as it had not only cross -party support, but also the support of unions and the business lobby.

PIDA introduced a stepped disclosure regime – one in which it is easiest to be protected by making a disclosure to the employer, but which also recognises wider accountability and provides a relatively easy route for individuals to take a concern outside of their organisation. PIDA recognises that workers are in a unique position as they are: a) often the first to know about wrongdoing, crime, risk or malpractice and b) vulnerable, in that they can be deprived of their livelihood if they try to bring suspected wrongdoing or malpractice to their employer's attention or to the attention of the appropriate authorities. PIDA covers most workers in the UK and is not limited by sector or type of wrongdoing – including its cover-up. It protects *external* disclosures both to regulators and wider disclosures (for example, to the press, to an MP, or to an NGO). It also makes it clear that any attempt to gag a whistleblower from raising a genuine concern about wrongdoing – for example, in an employment contract or compromise agreement – is void (See section 43J Employment Rights Act 1996). Finally, those within the scope of the Official Secrets Act 1989 (apart from those working in the armed forces or intelligence services who are not protected by the Act) will only lose the protection of PIDA if convicted of breaching the Official Secrets Act or an employment tribunal is satisfied, to a high standard of proof approaching the criminal standard, that the offence was committed.

The statutory framework recognises that the existing UK regulatory system should be the first port of call for an external disclosure. The legislation provides a prescribed list of such regulators, which includes the Health and Safety Executive (HSE), the Financial Services Authority (FSA), and the Care Quality Commission (CQC). There are 44 regulators prescribed by PIDA, although the list includes local authorities in relation to specific categories of disclosures (for example, safeguarding vulnerable adults and children, issues to do with licensing and trading standards).

The statistics coming out of the Tribunal system show that 8 out of 10 concerns are first raised with an employer, with 8% going to a regulator (PCAW 2010, 4). This is not an official figure but arises from our research into PIDA judgments. It is difficult to get a sense of how many concerns go to regulators overall as no official body is tracking this. PCaW's research shows that not even regulators are looking at this vital bellwether of the entities they regulate and this is an issue I will return to later in this chapter.

2. Winterbourne View – a case study

Before discussing these matters further, I will highlight a recent case which illustrates how crucial whistleblowers are, how they can assist regulators, but also how regulators ignore whistleblowers at their peril. The case involves a care home in Somerset and a whistleblower, Terry Bryan, who went to the media with information about poor standards of care in a home for the learning disabled. The case has resulted in many questions being asked of the CQC (the UK regulator of health and social care), including a Health Select Committee inquiry into its performance (Green 2011, Meikle 2011).

Terry Bryan is a nurse who was working as a supervisor in the care home which cared for adult patients with difficult mental health problems, such as autism, schizophrenia and other complex conditions. Terry raised concerns about the behaviour of some staff members and their abusive attitude towards patients and the way the home was being run, with management within the care home and subsequently with the CQC. Having little faith in the response from the care home or the regulator, Mr Bryan decided he could not work at the home and left. He contacted an investigative journalist working for the Panorama team at the BBC. They sent in an undercover reporter, who filmed conditions at the home for a number of weeks. The resulting TV programme was truly shocking.

The care home was supposed to be an environment in which the needs of very vulnerable adults were assessed and was meant to provide a therapeutic environment for these sometimes challenging individuals. The reality was a cruel and abusive environment in which physical violence was regularly used as a means to control the patients. Vulnerable adults were being bullied, tormented, teased and abused. From the film, this appeared to be accepted as the norm by staff in the unit. A number of clearly abusive individuals were leading the way and others either followed or turned a blind eye. Almost as shocking was the fact that problems within the home had been raised not only by Terry Bryan, but also by other nursing staff. This situation is bound to result in further questions being asked about the role of the regulator and the way in which information received from whistleblowers is approached by those with regulatory oversight of the care home industry.

What has been the outcome? Quite rightly, numerous staff members are now being investigated and charged by the police – within weeks of the programme the home was closed down and all the patients have been moved. Significantly all those staff who were trying to do a good job (and there must have been some) have now lost their livelihoods. Why didn't the organisation or the CQC listen? If they had, then damage could have been prevented, not only to individuals, although this would clearly be the priority, but also to the industry as a whole.

One good thing to come out of the scandal is that the CQC is now being questioned about its systems. If this results in a closer look at the way in which such critical information is handled by the CQC and they are expected to do better in future, then at least one positive outcome may have been achieved.

This story has echoes of other shocking scandals where authorities missed the chance to step in before the damage was done:–the Baby P scandal in Haringey in which warning signs were missed by hospital and local authority management alike (The Telegraph 2011); the Victoria Climbié scandal in which the safeguarding system for vulnerable children was called into question (BBC News 2003); the Mid Staffordshire hospital inquiry in which high death rates were picked up by the regulator, but in which no staff members appeared to be questioning low standards of care of the elderly (BBC News 2009). There are other examples too numerous to list but time and again such scandals result in questions of our regulatory authorities.

All of this has been a driver in PCaW's recent work to encourage regulators to think about how whistleblowing can help with the difficult task of regulation, how to make sure that vital information is not missed, knowing the limits of their role and help to ensure that the rights of those approaching regulators can be protected. Regulators are missing a trick if they do not see that whistleblowing can help to assess risk. As will be seen in our most recent research (set out below), it is not clear how far this potential has been realised.

3. Lack of Transparency in the Employment Tribunal

The most recent development in terms of the law protecting whistleblowers and regulators is the referral of PIDA claims to those regulators prescribed under the legislation. This measure came into force in April 2010 following a sustained campaign by PCaW to open up information about the nature and type of claims presented by workers under PIDA. The provision followed not only a successful judicial review of the employment tribunal by the charity³⁴ but also a complaint of maladministration about the way in which the government

³⁴ *R v Secretary of the Central Office of the Employment Tribunals (England and Wales) Ex Parte Public Concern at Work*, [2000] IRLR 658

department responsible for the legislation – the Department for Trade and Industry (DTI)³⁵ had behaved. The complaint to the Parliamentary and Health Service Ombudsman was successful and resulted in an award of £130,000 to the charity for the wasted costs in pursuing the matter.

At the heart of the dispute was the fact that a huge number of PIDA claims were known to settle. Our 10 year review of the cases coming out of the employment tribunals show that over the first ten years of the legislation, 70% of all claims issued in the employment tribunal under PIDA were settled. When PIDA was enacted, it was the case that information about matters brought before the Employment Tribunal would be on the public record, in line with the prevailing open justice approach. However, this was reversed by the Government in 2000 through the introduction of regulations to close the employment tribunal register – the subject of the maladministration complaint referred to above. The situation today remains - there is no public information about a PIDA claim unless and until there is a full hearing and a full judgment. In practice, what this means is that there is only information available for public scrutiny in 30% of PIDA claims.

When asked, the Employment Tribunal Service sends all PIDA judgments to PCaW. In our analysis of judgments between PIDA's inception in 1999 and 2008 we analysed all 3,000 cases sent to us by the Employment Tribunal Service. Only 532 cases contained sufficient information to identify the concern at the heart of the claim.³⁶ Overall this means we can see information about the concern in only 5% of all PIDA claims. PCaW has long said that this cannot be right when we are talking about a piece of legislation that is about protecting the public interest. The fact that the operation of the legislation which protects individuals who speak up about serious wrongdoing in the workplace is subject to an effective gag must surely be wrong.

4. Consequences of secrecy

Perhaps this issue would be less pressing if there were only a handful of claims made under PIDA each year. But the number is high and rising rapidly. As the table below illustrates, there has been a steady increase in the number of PIDA claims.

³⁵ Now known as the Department for Business, Innovation and Skills (DBIS).

³⁶ Other judgments could be only a Pre-Hearing Review, a one page document saying the claim had been withdrawn or settled, or be wholly focussed on other heads of claim.

Year	Number of PIDA Applications
1999 / 2000	157
2000 / 2001	416
2001 / 2002	528
2002 / 2003	661
2003 / 2004	756
2004 / 2005	869
2005 / 2006	1034
2006 / 2007	1356
2007 / 2008	1497
2008 / 2009	1761
2009 / 2010	2000

Table 1. *Number of applications made to an Employment Tribunal under the Public Interest Disclosure Act since the Act came into force (Source DTI/DBS).*

On any level this illustrates that the Act is being used by a large number of claimants, and it would be good to know exactly what those claims are about, and what trends might be underpinning the steep increase. Questions about the types of claims issued under PIDA remain unanswered. What types of malpractice or wrongdoing are more common than others? Is the law being used to settle private disputes? Are good faith issues being levelled regularly? Are claims particularly prevalent in the public or private sector and what is happening on an industry by industry basis? None of this information is available unless the matter proceeds to a full hearing.

5. Underlying public concern left unaddressed

From our analysis of those cases we have obtained from the Employment Tribunal Service, we have identified a large number of cases where a serious public concern lay behind the claim to the Tribunal and we have published extracts of such cases on our website and in our biennial reviews.³⁷ The secrecy shrouding the remaining 95% of cases allows an employer to buy off a genuine whistleblower as the cheaper alternative to addressing the underlying wrongdoing, thereby allowing the public interest to be traded for private gain and perpetuating abuse of the Act.

Of course, it is not just the respondent who may hope to benefit from reaching a settlement. There may well also be claimants who unscrupulously seek to exploit their information for a

³⁷ See http://www.pcaw.co.uk/policy/policy_pdfs/PIDA_10year_Final_PDF.pdf for extracts of pertinent cases from the first decade of PIDA.

large settlement, thereby trading the public interest for private gain. Though in many cases the unrepresented claimant may consider the risks of proceeding to a hearing to be too great, and may accept the blandishments and incentives to settle. While we applaud the courage of those prepared to raise a public concern, we also recognise the extreme pressure and sacrifices this can entail. Whatever the motivation of the parties to settle, the end result is that the opportunity to address the public concern is lost.

6. How can we afford not to know?

How many care home concerns are buried in these settlements? How many financial firm frauds and how many environmental, workplace and other health and safety risks? We operate a confidential advice line which receives more than 1900 calls a year from individuals wishing to know whether and, if so, how they should raise their concern. We do not know what happens where those concerns are repudiated by the employer and then suppressed in a settlement.

But given the risks to the public interest which are at stake and the commitments to better regulate and better protect that public interest – how can we afford not to know? This is not about increasing burdens on employers, it is about supporting well-run, safe and successful businesses. What this situation demonstrated was that, at a minimum, someone needed to be looking at PIDA claims to the Employment Tribunal and referring on those which need to be brought to a regulator's attention.

After some considerable negotiation with DTI (and subsequently DBERR and now DBIS), a compromise situation was agreed so that where the Employment Tribunals Service (ETS) identify a public interest concern, and where the claimant consents, the ETS will pass the claim form to the appropriate regulator. This answers the employment lobby concern that there should be no 'untested allegations' in the public domain, while at the same time making sure that regulators become aware of PIDA claims at an early stage and can pick up issues and trends from the forms.

7. The numbers

So what is happening with this provision one year on from commencement? How many cases are being referred to the appropriate prescribed regulators? How is the provision working in practice? In order to answer these questions, we made freedom of information requests in April 2011 to all 44 regulators prescribed under the legislation covering England, Wales and Scotland to see how many claim forms they had received. We also wrote to the ETS to find out how many claim forms (or ET1s) they had forwarded to those regulators

prescribed under PIDA. In addition, we asked each regulator how many cases had resulted in or lead to an investigation.

The responses were mixed. Seven regulators refused our request claiming that to answer it would exceed the 'appropriate limit' in relation to time and costs (Section 12 Freedom of Information Act 1998). The General Social Care Council, HMRC, the Care Quality Commission (CQC) and, interestingly, the Information Commissioner's Office, all responded by saying they did not record the ET1s they received on a central database and would have to access all files, which would take them outside the appropriate limit.

As the table below indicates, there were some discrepancies between the responses we received from the regulators we contacted and that of the Employment Tribunal Service. A possible explanation for this is that some regulators may have misinterpreted the nature of our request. We received emails asking for clarification of our request from the Office of Rail Regulation, the CQC, the Foods Standards Agency, the Care and Social Services Inspectorate Wales, Audit Scotland and the Information Commissioner's Office. In response we provided a detailed explanation of the changes to the law and the information we were requesting. These regulators were seeking clarification as to whether we were asking for the number of ET1s received by their employees specifically, which was not the nature of our request.

In the process of undertaking this exercise it became apparent that a significant number of regulators were not aware of the change in the law or that they could now be receiving ET1s in this capacity at all. It may also provide an explanation as to why receipt of ET1 forms are not recorded by some regulators. This is hardly encouraging for whistleblowers opting to have their forms sent off in the hope that their concerns will be looked into.

Organisation	No. of ET1 forms Received	Number of ET1 forms sent from Tribunal Service
Health and Safety Executive	Refused Request	32
Care Quality Commission	Refused Request	29
HM Revenue & Customs	Refused Request	10
Information Commissioners Office	Refused Request	10
General Social Care Council	Refused Request	1
Equality and Human Rights Commission	Refused Request	0
London Stock Exchange	Refused Request	0
Independent Police Complaints Commission	6	7
National Audit Office	5	5
Audit Commission	4	3
Department for Transport	4	0
Financial Services Authority	2	13
Charity Commission	2	7
Civil Aviation Authority	1	1
Office of Communication	1	1
Department for Business, Innovation & Skills	0	3
Care and Social Services Inspectorate Wales	0	1
Food Standards Agency	0	1
Office of Fair Trading	0	1
Office of Rail Regulation	0	1
Serious Fraud Office	0	1
Tenant Services Authority	0	1
The Standards Board for England	0	1
Accounts Commission for Scotland & Aud. Gen. for Scotland	0	0
Care Council for Wales	0	0
Certification Officer	0	0
Children's Commissioner for Wales	0	0
Criminal Cases Review Commission	0	0
Environment Agency	0	0
HM Treasury	0	0
Lord Advocate Scotland	0	0
Office of Gas and Electricity Markets	0	0
Office of the Scottish Charity Regulator	0	0
Office of Water Services	0	0
Public Services Ombudsman for Wales	0	0
Scottish Criminal Cases Review Commission	0	0
Scottish Environment Protection Agency	0	0
Scottish Information Commissioner	0	0
Scottish Social Services Council	0	0
Social Care and Social Work Improvement Scotland	0	0
Standards Commissioner for Scotland	0	0
The Pensions Regulator	0	0
Wales Audit Office	0	0
Water Industry Commissioner for Scotland	0	0

Table 2. Outcome of PCaW FOI request to regulator and ETS – July 2011

As can be seen from table 2, it seems that there is a mismatch between the responses provided by each regulator and the response from the Employment Tribunal Service. The first observation is the fact that, of the 7 regulators who have refused to provide a response to our Fol request, four were recorded by the ETS as having received the most claim forms (81 of the 129 sent by the ETS to relevant regulators came from these four regulators: the Health and Safety Executive, the Care Quality Commission, HMRC and the Information Commissioner's Office). It is somewhat astonishing that the Information Commissioner and the Care Quality Commission are two of the four who do not collect this information as a matter of course.

What this exercise clearly demonstrates is that, despite having a statutory function under PIDA, the great majority of regulators within the UK do not appear to be actively monitoring claims being passed to them under the new referral system prescribed by the government. When this is coupled with research undertaken in May 2011 (Lewis & Lavery 2011), which highlights a lack of information available via regulators websites about whistleblowing and PIDA, the emerging picture is not reassuring. There are some instances of good practice (notably the Financial Services Authority and the Civil Aviation Authority) but much more needs to be done given the key role that regulators are expected to perform under the legislation.

When all of this is taken into account, it is no surprise that criticism is levelled at our regulatory system every time a scandal hits the newspapers. We would hope that by shining a light on this issue and reporting annually on it, we may encourage regulators to take this issue more seriously and to better monitor this key indicator in the industries they regulate. We also hope they will start to gather (and make publically available) information on how the referral system works in practice.

8. More needs to be done

Public Concern at Work welcomes the opportunity to work with regulators to develop whistleblowing guidance to help them respond to the often evolving and shifting demands of their role and the public interest. We are in the process of engaging with a key group of regulators for this purpose. We hope to help regulators think through the following key themes for them to consider in relation to whistleblowing arrangements:

- help ensure that within regulated entities real risks are detected and wrongdoing is deterred because senior managers are more likely to be informed of such issues if their employees are more confident about raising concerns;

- enable regulators to effectively distinguish higher-risk businesses and markets from those with a demonstrable record of compliance. This will facilitate better targeting of inspection activity and highlight when early inspections are needed;
- ensure that, where necessary, regulators have access to intelligence about real risks in a way that maximises the prospects for effective and timely intervention;
- allow appropriate penalties to be imposed, as whistleblowing can provide the evidence of motive or intent that is needed for any serious charge to stand up.

We would hope that this initiative will mean that, the next time we look at the role of regulators as prescribed persons under PIDA, there is a better understanding of what this means in practice.

9. Government action?

What about the UK Government and PIDA? Is it right that there is such scant public information about a piece of legislation that is meant to be about protecting the public interest? Should the Government take a closer look at how regulators prescribed by the legislation are responding to whistleblowers and whether their potential to prevent damage is being realised? Undoubtedly more needs to be done by the Government to promote the principles behind the legislation and the effect it should be having on the public interest. Regulators are arguably failing in their prescribed role and the Government simply looks the other way. If this is the perceived approach of Government, how can we hope to embed better corporate practice and culture?

References

- BBC News (2003). Climbié report urges childcare reform. Available at <http://news.bbc.co.uk/1/hi/uk/2698295.stm> (accessed October 2011).
- BBC News (2009). NHS trust inquiry chiefs resign. Available at <http://news.bbc.co.uk/1/hi/england/staffordshire/7921767.stm> (accessed October 2011).
- Green, M. (2011). CQC must shoulder some responsibility regarding Winterbourne view. Available at <http://www.careindustrynews.co.uk/2011/07/cqc-must-shoulder-some-responsibility-regarding-winterbourne-view/> (accessed October 2011).
- Hansard (1998). Hansard HL, 5 June 1998, col. 614.
- Lewis, D. & Laverty, A. (2011). A Survey of information about whistleblowing provided on the websites of persons prescribed under Part IVA Employment Rights Act 1996. Middlesex University.

Meikle, J. (2011). CQC says it was misled by owners of 'culture of abuse' private hospital, *The Guardian* 18 July 2011. Available at <http://www.guardian.co.uk/society/2011/jul/18/cqc-misled-by-abuse-hospital-bristol> (accessed October 2011).

NY Times (2011). *New York Times* interview BBC Newsnight 18 July 2011.

PCAW (2010). Where is whistleblowing now? 10 years of legal protection for whistleblowers. Public Concern at Work. Available at http://www.pcaw.co.uk/policy/policy_pdfs/PIDA_10year_Final_PDF.pdf (accessed 20 October 2011).

The Telegraph (2011). Baby P reports reveal how social services missed warning signs, *The Telegraph*. Available at <http://www.telegraph.co.uk/news/uknews/baby-p/8087191/Baby-P-reports-reveal-how-social-services-missed-warning-signs.html> (accessed October 2011).

Preventing and Dealing with Retaliation Against Whistleblowers

Brita Bjørkelo & Stig Berge Matthiesen

In 2001, Sherron Watkins, an employee in the American gas and energy company Enron, notified her chief executive officer Kenneth Lay about a perceived accounting scandal. Watkins did so hoping Lay would act. He did not, and was later arrested due to his involvement in the wrongdoing acts (cf. Swartz & Watkins, 2003). The following collapse of Enron led to a multitude of workers losing their jobs and pensions and thousands of stock owners losing their investments. The Enron collapse also caused trembling throughout the corporate business world in the US, perhaps strong enough to pave the way for the Sarbanes Oxley Act (SOX) of 2002 (cf. Schmidt, 2005; Dworkin, 2007). SOX consist of two models to aid whistleblowing, the anti-retaliation model and the structural model. The first concerns protection against retaliation while the second concerns the requirement of a 'standardised channel to report organizational misconduct internally within the corporation' (Moberly, 2006, p. 1107).

The proactive behaviour of Watkins and others like Cooper and Rowley has been labelled 'Whistleblowing'. Proactivity at work concerns forward looking and self-initiating behaviour without being asked to do so and solving potential problems before they occur (Crant, 2000; Morrison & Phelps, 1999). The act of whistleblowing has the potential to alert and stop harmful activities that often harm a third party and has been defined as 'the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action' (Near & Miceli, 1985, p. 5). Sometimes, the act of reporting wrongdoing at work is met by retaliation, victimisation and even workplace bullying. This was the case of the consultant urologist Ramon Niekrash. He was removed from duty and later won compensation after he was bullied for reporting how cutbacks impacted patient treatment at Queen Elisabeth Hospital in South London (The Telegraph, 3-10-2009).³⁸

In this chapter we will first outline the background for our research before we explain the term of retaliation and describe some types of such behaviour. Then, we will describe some of the most common symptoms reported after exposure to retaliation and workplace bullying, before we delineate the link between whistleblowing, retaliation, workplace bullying and health. Subsequently, we will portray different ways in which we can prevent and deal with

³⁸ For example, see <http://www.telegraph.co.uk/health/healthnews/7144383/Whistleblower-who-criticised-NHS-cost-cutting-wins-damages.html>.

retaliation against whistleblowers. Throughout the chapter, we will also sketch out future directions for studies and practice.

1. Background

The national background for our research is Northern Europe, Scandinavia and Norway. Norway is a rather small country population-wise with some 4 937 000 inhabitants as of April 2011 (<http://www.ssb.no/english/>) and is highly homogenous, with some 11 percent of the population being refugees, work immigrants or family members of present inhabitants. The employment rate is high, trade unions are strong, working life is well regulated, internal systems of control are well established and gender equality is a strongly integrated part of the society.³⁹

Our way into the field started from workplace bullying research (see e.g., Matthiesen, 2004). Since 1996 Einarsen had described how the victimisation after whistleblowing that was described by whistleblowing researchers (for instance Lennane, 1993) had similarities with the negative acts of workplace bullying. Later, the second author was appointed as an expert witness in a trial where an employee accused his employer of exposure to bullying. The employee had previously reported wrongdoing in the form of serious negligence and violations to prison service regulations. The reprisals started after the report had been made. The wrongdoers were mainly colleagues and his nearest manager remained passive. In order to change the current situation for the prisoners, the employee also reported the wrongdoing to top management. Afterwards, he was socially frozen out of his job (i.e., silence treatment, see e.g., Williams et al., 2005 and Eisenberger et al., 2003 for an introduction to the term and its effects), he developed health problems and later became a recipient of disability benefit. At that point in time, it was obvious that knowledge about whistleblowing was lacking and that this needed improvement.

Another inspiration to the development of research on whistleblowing at work for us was the first International Whistleblowing Conference in 2002 at Indiana University in the US that was hosted by, among others, Professors Dworkin and Near.⁴⁰ Then, in relation to the revision of the Norwegian Work Environment Act in 2005, several Norwegian research projects were launched. From 2008 and onwards the first articles on whistleblowing were published internationally by Norwegians (Malmedal et al., 2009a, 2009b; Bjørkelo et al., 2008, 2010, 2011a; Skivenes & Trygstad, 2010; Lewis & Trygstad, 2009; Gottschalk, 2011, Gottschalk & Holgersson, 2011). Thus, compared to North America and the US where

³⁹ See e.g.: http://www.ssb.no/arbeid_en/ and http://www.ssb.no/english/subjects/07/02/10/arborg_en/.

⁴⁰ See e.g.: <http://newsinfo.iu.edu/news/page/normal/310.html>.

systematic research has been conducted for some 30 years, research on whistleblowing at work in Norway has had some seven years of research. In the workplace bullying field, the International Conference on Workplace Bullying and Harassment has been arranged for many years. While the 4th conference (Einarsen & Nielsen, 2004) had very few papers on the link between bullying and whistleblowing, the 7th conference in 2010 provided a whole symposium to the topic. The next and 8th conference will uphold this tradition and has announced that whistleblowing is one of the conferences' pronounced topics.⁴¹

The first application of the term whistleblowing to describe actions such as performed by the prison employee presented earlier from a Norwegian setting is in a 1995 article by Katherine van Wormer, an American Social Work Professor. van Wormer (1995) worked in a private Norwegian treatment centre on alcoholism in Norway between 1988 and 1990 and reported her concerns about issues relating to the treatment and administration to her nearest manager (i.e., internal reporting). She also wrote about the need for external reporting. Although van Wormer's experiences were published in an international journal, the term whistleblowing had not yet developed in Norwegian language. But in 2000, massive media exposure was directed at a medical doctor who in 1998 had reported one of his colleagues first to his employer and later to the police about the use of euthanasia in a Norwegian hospital. This was one of the first Norwegian cases that applied the term whistleblowing to describe the behaviour of reporting perceived misconduct to someone who was able to stop it. After the year 2000, a range of cases that reached the Norwegian media and concerned how employees had reported on perceived wrongdoing by their employer were described as whistleblowing.

Simultaneously, the Norwegian Work Environment Act from 1977 was as previously mentioned revised. The Act's new sections on whistleblowing (§2-4, 2-5, and 3-6) became active in 2007 (Directorate of Labour Inspection, 2007) and were developed from every individual's right to freedom of speech, which is a part of the Norwegian constitution. The new sections described the limitations of this right that exist when an individual is employed by a private or public organisation. According to the new sections, an employee has the right to notify his or her employer about 'censurable conditions' or wrongdoing at work if they follow appropriate procedures. An employee is also to be protected against retaliation or punishment after whistleblowing and is entitled to seek compensation if it happens. If so, it is the employer that is required to prove that retaliation has not occurred. The employer must also facilitate whistleblowing by developing procedures. One year after the new law had been put in place, almost 40 percent were acquainted with the new whistleblowing sections,

⁴¹ See e.g.: http://bullying2012.com/abstract_submission/.

seven percent knew them well and almost 20 percent knew that whistleblowing procedures had been developed at work (Matthiesen et al., 2008). Two to three years after this, some 44 percent of employees without a formal job position as a manager or a representative were *partly* aware of the new sections on whistleblowing, seven percent of the same group said that they knew the whistleblowing paragraphs very well, but still, less than 40 percent knew that their own workplace had written whistleblowing routines in place (Trygstad, 2010). In 2009, a study that discussed the Norwegian whistleblowing legislation found that there is a vagueness in relation to what is considered to be a wrongdoing by law and as to what is to be perceived as an 'appropriate procedure' for whistleblowing reports (Lewis & Trygstad, 2009, p. 382).

Two other central Norwegian research environments in the field of whistleblowing within Norway that are relevant for the background of our studies are the Work Research Institute (WRI, <http://www.afi.no/index.asp?iLang=1>) and FAFO (<http://fafo.no/indexenglish.htm>). At WRI, the Hetle study was conducted. This study was initiated in 2004 and investigated which challenges nurses in public sector experienced when reporting 'criticisable aspects of workplace praxis, or trying to do so'. The study consisted of a qualitative screening, qualitative interviews across workplaces, a case description of mechanisms for silence in organisations, discussions on workplace safety, silence and the law, as well as a description of the international research literature. The screening consisted of a representative survey of nurses with some 600 participants. The main findings showed that four out of five nurses had had the need to report wrongdoing, reporting was effective, but internal criticism was punished. It should be noted that this study did not apply a definition of whistleblowing and that nurses have a legal duty to report dangers to patient safety as a part of their professional role.

At FAFO, one of several studies was conducted by Skivenes and Trygstad in 2004 and aimed at investigating the conditions for communication in eight municipalities among employees in child welfare and protection, education and health care. The results showed that whistleblowing was frequent; reporting was effective and that whistleblowing was followed by more positive than negative consequences, even though the impact of the negative consequences could be severe. The data from this study founded the basis of the first book on whistleblowing in Norwegian (Skivenes & Trygstad, 2006b). The data from this report and others (Skivenes & Trygstad, 2005a, 2005b, 2006a; Trygstad & Skivenes, 2007; Trygstad, 2010) have also founded the basis of articles in Norwegian (Trygstad & Skivenes, 2008) and English (Skivenes & Trygstad, 2010) for northern European and international journals. Skivenes and Trygstad argued that the high reporting rate could be a result of that it was perceived as ordinary organisational behaviour within Norwegian organisations. To

distinguish normal reporting from whistleblowing they introduced a classification of weak and strong whistleblowing where weak whistleblowing means to report to your nearest manager and strong refers to cases where the employee continues to report as a result of no improvement.

In sum, the national results from a Norwegian setting have been that whistleblowing can be linked to positive, negative and mixed reactions from managers and colleagues (Skivenes & Trygstad, 2010; Bjørkelo et al., 2011a). Few employees that have reported wrongdoing and are employed report that they are exposed to retaliation and bullying, but still they are more exposed to bullying than other employees (Bjørkelo et al., 2011a). The nature and severity of negative reactions are experienced as more severe than positive reactions (Matthiesen et al., 2008). As an example, even though *few* employed whistleblowers report negative reactions, the *impact* of these reactions is perceived as more severe than the perceived *impact* of the positive reactions when participants are asked to grade their reactions on a scale from one to ten. We also know that consequences on health and work participation can be severe (Bjørkelo et al., 2008; Matthiesen et al., 2008). It is further found that workplace climate matters for whether an employee reports wrongdoing and for what response he or she receives as well as for the effect of the whistleblowing (cf. Trygstad, 2010). A good communication climate is described by Trygstad as the possibility to report about worries to ones manager or colleague without being punished for it. The importance of psychosocial work environment has also been shown in relation to workplace bullying (see e.g., Hauge, 2010 and Skogstad et al., 2011).

2. Retaliation

Negative consequences after whistleblowing, suffered by some whistleblowers, are labelled retaliation (Near & Miceli, 1986, Parmerlee et al., 1982). According to Rehg and colleagues (2008) retaliation is 'taking an undesirable action against a whistleblower – in direct response to the whistle-blowing - who reported wrongdoing internally or externally, outside the organization' (p. 222). Retaliation can also be defined as 'taking adverse action against an employee for opposing an unlawful employment practice or participating in any investigation, proceeding, or hearing related to such a practice' (Cortina & Magley, 2003, p. 248). Adverse action is not easy to operationalise, but it is assumed that it is the employee exposed to the actions or others observing them that are the perceivers or judges of these.

Retaliation types

Retaliation can be informal and unofficial (De Maria & Jan, 1997, Cortina and Magley, 2003) such as ostracism (Faulkner, 1998; Williams et al., 2005; Hedin & Månsson, In press), being treated as 'persona non grata' (Tucker, 1995) as a 'leper' (Peters & Branch, 1972) or being

confronted with verbal threats (Solano & Kleiner, 2003). Formal and official types of retaliation or workplace reprisals (De Maria & Jan, 1997; Cortina & Magley, 2003) may include such as plain notice, selective downsizing and unfavourable job evaluations (Baucus & Dworkin, 1994; Glazer, 1983; Lennane, 1993; Lubalin & Matheson, 1999; Lubalin et al., 1995). The ultimate retaliation act may be understood as expulsion from work (Baucus & Dworkin, 1994). Exposure to retaliation has been expressed by one employee in the following manner: 'I used to go over to the canteen at lunch time for a meal, and they wouldn't come and sit with me – not that they disapproved of what I had done, but they didn't want other people to see. They might nod their head, but they wouldn't sit ... none of them would hold a conversation, they would always find an excuse. You felt very much as an outsider' (Beardshaw, 1981, p. 37). According to Lhuilier (2008), such experiences can be described as being out of the circle of social turn-taking, individuals are treated as 'no-one', they have no group identity, they have no social room or control and feel that others act as if they should be happy they even have a job to go to.

There are several ways to describe a potential retaliation process. One of them is presented here. Figure 1 illustrates two important aspects about whistleblowing. In some instances the whistleblowing is in vain, that is, the wrongdoing is not terminated, as in the Enron case previously mentioned. The reprisals, in the form of harassment or sanctions are of shorter duration.

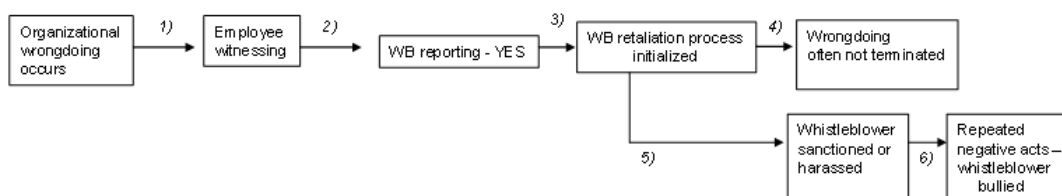


Figure 1. An illustration of a possible retaliation process (elaborated with permission from a previous version published by Matthiesen et al., 2011, p. 306).

Exposure to persistent and repeated negative acts can be defined as workplace bullying, which is harassing, offending, socially excluding someone or negatively affecting someone's work tasks (see e.g., Einarsen et al., 2011, p. 22). The negative acts occur repeatedly and regularly (e.g. weekly), over a period of time (e.g. about six months) and is an escalating process where the person exposed ends up in an inferior position (Glasø et al., 2011).

According to Miceli and colleagues (2008), for most whistleblowers exposed to retaliation, there seems to be a pattern of repeated incidences of reprisals often from different sources. The severity of retaliation can therefore also be assessed on the basis of how *many* types of

reprisals the whistleblowers have experienced or been threatened with (see e.g., Near & Miceli, 1986). In a study by Cortina and Magley (2003), 30 percent of the whistleblowers experienced social retaliation (i.e. informal, antisocial behaviour) whereas 36 percent experienced both social and work-related retaliation (i.e. formal, adverse actions documented in employment records). We can further assess the severity of retaliatory acts based on the reported types of wrongdoing that were reported. Occupational wrongdoing concerns activities that are personal in that they not necessarily are supported by the organisation and may be performed for personal gain, while organisational wrongdoing denotes situations where the entire corporation or institution is enmeshed in fraud or treatment practice that is supported and even encouraged (cf. Miethe, 1999; Miethe & Rothschild, 1994). The risk of retaliation and workplace bullying is assumed to be greater when an employee has reported organisational wrongdoing that may include reporting members of the top management and corporate crime.

One way to describe and understand the link between whistleblowing, retaliation and workplace bullying is power theory. According to power theory a whistleblower's attempt to influence and terminate wrongdoing can be seen as a power struggle where the dominant coalition either may accept or turn this initiative down by terminating the wrongdoing or balancing the power struggle by retaliating against the whistleblower (Near et al., 1993). According to Brodsky (1976), 'harassment became a way of dealing with a deviant who was on the side of the angels rather than on the side of the devil. A film called *Serpico* dealt with the same theme. In it, the "honest cop" was interfering with a system that permitted crime' (pp. 33-34). Exposure to retaliation and workplace bullying can also influence the perception of the person who reported wrongdoing at work in the form of a stigma (see e.g., Goffman, 1963/1990 and Jones, 1984 for an introduction to the term). In the next section we will turn to the most typical symptoms reported by employees after exposure to retaliation, workplace bullying and stigma.

3. Symptoms

Research on workplace bullying has emphasised the theoretical perspective of stress concerning deterioration in health (Zapf & Gross, 2001). According to Zapf and Gross, even if stress might be an inevitable variable in working life in general, the consequences of workplace bullying can be devastating in the long run. Further, Zapf, Knorz and Kulla (1996) consider workplace bullying as an extreme form of social stressor. Others claim workplace bullying is more crippling and devastating than all other work-related stressors combined (cf. Wilson, 1991; Adams, 1992). Several studies have documented how whistleblowing can be followed by consequences for physical health (Soeken & Soeken, 1987), psychological

health (Rothschild & Miethe, 1999), symptoms analogue to post traumatic stress (PTSD) such as extreme vigilance and re-experiencing (Bjørkelo et al., 2008), the whistleblowers significant others (Glazer & Glazer, 1989; Lennane, 1993) and for colleagues and others involved in the whistleblowing process (McDonald & Ahern, 2002; Jackson et al., 2010a; Peters et al., 2011).

The term victimisation can refer to retaliatory and workplace bullying behaviours (primary victimisation) as well as to deteriorating consequences on the person in question's health (secondary victimisation, Björkqvist et al., 1994; Lennane, 1993; Leymann, 1992; Mikkelsen, 2001). Lack of social support, being fired, or the judicial experience if not supported in a trial are examples of other secondary victimisations, which may further aggravate symptoms after workplace bullying (Mikkelsen, 2001) and whistleblowing (Bjørkelo et al., 2008).

Regarding psychological health consequences, a survey study of 84 self-selected whistleblowers found the most negative effect to be on emotional state, social activities and psychical health (Soeken & Soeken, 1987). Both whistleblowers as well as their spouses reported increased levels of anxiety as well as symptoms of depression. In another study, severe depression or anxiety (84 %) was found to be the most common mental health consequence related to whistleblowing (Rothschild & Miethe, 1999). Anxiety is generally described as a condition characterised by worry of everyday events and problems and tension of some duration that the person finds hard to control (cf. Andrews & Slade, 2002). Depression is described by low mood, as well as lack of energy and interests (cf. Olsen et al., 2003). In a single case mixed methods research study, severe health consequences were found even a decade after the retaliation process had taken place (Bjørkelo et al., 2008). As most previous studies on health consequences after whistleblowing have been descriptive (one measurement point) and conducted among selected samples of whistleblowers, these findings need to be investigated among more random samples of whistleblowers. Future longitudinal studies should therefore also investigate to what extent mental health problems reported at one point in time persist, deteriorate or improve over time, as well as investigate the link between health and later employment status.

In relation to trauma symptoms, studies have shown that whistleblowers exposed to retaliation and bullying at work report symptoms equivalent to a diagnosis of PTSD (Bjørkelo et al., 2008; Rothschild, 2008; Peters et al., 2011). Exposure to retaliation and workplace bullying does however not fulfill the formal criteria to set a formal PTSD diagnosis (see e.g., Mikkelsen & Einarsen, 2002, 2004; Bonafons et al., 2009). The A criteria requires that the person in question has experienced, witnessed or been confronted with an incident that has involved death, severe damage or threats of harm in addition to potential threats about harm directed at own or others physical integrity (cf. American Psychiatric Association, 2000). The

classic symptoms are such as hyper vigilance, re-experiencing, intrusive memories, avoidance, flashbacks and dreams or nightmares of the traumatic event. Still, employees that have reported wrongdoing at work report similar symptoms. One whistleblower described it in this way: 'I lost ground control and I experienced a form of dissonance ... a kind of reality rupture. (...) I have become hypersensitive about being and feeling unwanted, when I feel unwanted I can't be there' (Bjørkelo et al., 2008, p. 28). As a result of these similarities in symptoms, researchers and clinicians have made an effort to get the revision of the Diagnostic and Statistical Manual of Mental Disorders (DSM see e.g. ⁴² and ⁴³) to include workplace trauma such as retaliation and workplace bullying into the A1 criteria. In the judicial system it has usually only been possible to seek compensation for involvement in a catastrophic event and not for conditions that have been labeled as slow burn stress (see e.g., Barrett, 2010). In the following, we will describe what is known about the link between whistleblowing, retaliation, workplace bullying and health.

4. The link the between whistleblowing, retaliation, workplace bullying and health

Studies conducted among selected samples of whistleblowers have shown that retaliation rates are high, while studies applying more randomly selected samples of employees have found that retaliation rates are low (see e.g., Near & Miceli, 1996). This gap can be a result of the fact that whistleblowers, still employed where they reported wrongdoing, have been exposed to less severe forms of retaliation than unemployed whistleblowers, due to a potential association between workplace bullying, health and subsequent job exit (Bjørkelo, 2010).

In sum, studies have documented that (1) whistleblowing and bullying are related phenomena (Bjørkelo et al., 2008, 2011a) and that whistleblowing is a risk factor for later exposure to bullying (Bjørkelo et al., 2009). The latter study examined the role of whistleblowing in relation to bullying behaviours with two measurement points in two different samples, controlling for reports of the opposite phenomenon of interest at time one. The results showed that whistleblowers had twice as high risk (odds ratios of 2.33 and 2.22 in two separate logistic regression analyses in two longitudinal samples) of being exposed to workplace bullying behaviours than other employees. As the analyses were conducted in two individual longitudinal samples, this indicates that the effect holds across samples.

⁴² <http://www.dsm5.org/proposedrevision/pages/proposedrevision.aspx?rid=165>

⁴³ http://www.iawbh.org/therapeutic_practitioners

Until now, we have mostly investigated the link between whistleblowing, retaliation and workplace bullying among employed whistleblowers. In order to understand more about the mixed results on retaliation, we also need to investigate negative consequences after whistleblowing (e.g. retaliation and workplace bullying) among previous employees that have reported wrongdoing and now are outside working life. One suggestion for future research is therefore to investigate the link between health and employment status over time. Now we will turn to the issue of how to prevent and deal with retaliation against whistleblowers.

5. Preventing and dealing with retaliation against whistleblowers

A basic concern in clinical psychology is the distinction between various types of intervention strategies (see e.g., Korchin, 1976), such as primary, secondary and tertiary intervention (cf. Durlak & Wells, 1998). *Primary intervention* involves measures to target normal populations in order to preclude problems from developing in the first place. So what is then particular about prevention and dealing with retaliation in relation to whistleblowing?

In the specific case of whistleblowing, one type of primary prevention can be legal regulation in the form of perceiving whistleblowing as a preventive tool against corruption. Primary intervention can also take the form of public opinion. Cases with massive media coverage can change the view on how business and treatment in hospitals are to be run. It can also be seen as a type of primary prevention when the organisation is proactive and handles 'can be problems' before they evolve any further. The onset of severe problems such as unethical behaviour at work or corporate crime can potentially be prevented by effective organisational socialisation in terms of education practices and use of role models, and for instance if management views whistleblowing as a type a risk management (see e.g., Vandekerckhove & Tsahuridu, 2010; Lewis, 2011; Francis & Armstrong, 2003). For an introduction into whistleblowing as a type of risk management, see also the chapter by Tsahuridu in this book. Further, the climate for communication is of significance (Trygstad, 2010), along with managers and colleagues that act on the wrongdoing and support the employees who report them (i.e., psychosocial work environment and social support, see e.g., Hedin and Månsson, In press). One last type of primary prevention in relation to whistleblowing can include raising organisational awareness, and the perception of whistleblowing as a tool in organisational development (see e.g., Schein, 2009). In the following, we will present one example of how an intervention program for reducing school bullying (see e.g., Olweus, 1994, p. 1186, and Olweus, 2003, p. 72) can be applied to prevent and deal with retaliation against whistleblowers at work.

<p><i>General prerequisites</i></p> <p>++ General awareness and top management involvement regarding whistleblowing as a type of risk management and anti-retaliation policies.</p>
<p><i>Measures at the organisational level</i></p> <p>++ Applying questionnaire surveys.</p> <p>++ Whistleblowing as a type of risk management awareness day.</p> <p>++ Routines for detection of wrongdoing and retaliatory acts against whistleblowers.</p> <p>+ Coordination groups in charge of the implementation process of effective whistleblowing procedures.</p> <p>+ Manager and staff representative meetings and discussion groups regarding how to detect and handle reported wrongdoing and to protect whistleblowers from retaliation and workplace bullying.</p>
<p><i>Measures at the unit level</i></p> <p>++ Whistleblowing and anti-retaliation policies that include clear examples of types of wrongdoing and retaliatory acts.</p> <p>++ Customary meetings with managers, staff, human resources, and personnel officers about psychosocial factors, including whistleblowing as a type of risk management and how to prevent and deal with retaliation and workplace bullying against whistleblowers.</p>
<p><i>Measures at the individual level</i></p> <p>++ Serious talks with (1) employees perceived and identified as performing wrongdoing, (2) employees perceived and identified as performing retaliatory acts against whistleblowers, as well as with (3) colleagues and potential silent observers and witnesses. These talks should include information about expected behaviour (whistleblowing as a type of risk management and anti-retaliation policies) and include information about laws that regulate the freedom of speech in organisations as well as protection against retaliation after whistleblowing.</p> <p>+ Individual intervention plans, which include step-by-step suggestions on how to help employees who report wrongdoing at work.</p> <p>+ Meetings and discussion groups with manager and staff representatives that use vignettes and scenarios about whistleblowing as a type of risk management and the application of anti-retaliation policies in practice.</p> <p>++ Core components; + Highly desirable components</p>

Table 1. Intervention program strategies in a workplace setting (elaborated with permission from a previous version published by Matthiesen and Bjørkelo, 2011, p. 171).

According to Hassink and colleagues (2007), European whistleblowing policies usually include the scope of the policy, the expectations about types of wrongdoing that should be reported, information about complaint recipients, formalities relating to the whistleblowing process, issues of confidentiality, information regarding protection from retaliation and details on how the investigation of the wrongdoing will take place. See the chapter by Moberly for more information regarding policies in the US.

Secondary prevention concerns measures for individuals with subclinical-level problems. In relation to whistleblowing, subclinical-level psychological (e.g., depression, anxiety, post traumatic analogue symptoms and sleep problems), physical (e.g., muscular problems), financial (e.g., in need of disability benefit), and social (e.g., withdrawal from friends and family) health problems need to be addressed in different ways depending on the severity and combination of the symptoms. When it comes to the organisation itself, secondary intervention can be exemplified by measures to improve the effectiveness of whistleblower procedures that have been found not to be optimal when dealing with actual cases.

The aim of *tertiary intervention* is to reduce the duration and impact of established disorders. In relation to whistleblowing, this can imply different measures at different levels of intervention. At the individual level, this can include individual psychotherapy (Bjørkelo et al., 2011b). In individual psychotherapy, potential themes that may emerge are for instance secondary victimisation as a result of not being heard and the perception of blameworthiness for one's current situation (cf. Leymann & Gustafsson, 1996; Leymann, 1996; Mikkelsen & Eriksen-Jensen, 2007). Whistleblowers can also feel betrayed by their workplace in the form of lack of support in that colleagues or the trade union have stopped supporting them (cf. Strandmark and Hallberg, 2007). Other relevant themes can be such as having lost one's faith in the basic values in society or 'common narratives' such as 'law and justice can be relied upon', 'it makes sense to stand up and do the right thing' and that 'someone, somewhere who is in charge knows, cares, and will do the right thing' (Alford, 1999, p. 271). Janoff-Bulman (1989, 1992) describes how such basic assumptions and perceptions of the world as benevolent and meaningful can be 'shattered' when an individual is confronted with traumatic experiences (cf. Mikkelsen & Einarsen, 2002).

One other issue that may come up is the development of a master identity as a 'whistleblower' (cf. Bjørkelo et al., 2008; Rothschild & Miethe, 1999). A master identity can include re-telling one's whistleblowing experience 10 to 20 years after the incidents took place (Alford, 2000). From trauma and workplace bullying literature it is known that some persons can 're-connect with themselves again' and even label their past experience as something they would not have been without (see e.g., Tedeschi & Calhoun, 1995, 2004; Zoellner & Maercker, 2006; Matthiesen et al., 2011; Tehrani, 2011). In a study by Hallberg and Strandmark (2006), some of the participants described how exposure to bullying at work had resulted in positive experiences for themselves personally in that they had become more humble and attentive towards other people. In a seven staged model of the whistleblowing process by Soeken (1986), the last stage (i.e. resolution) concerns becoming oneself again after having reported wrongdoing and been exposed to retaliation. One suggestion for future studies is to investigate the usefulness of the concept of post traumatic growth further in the

description of the rehabilitation process that seems to take place among whistleblowers who reach the stage of resolution.

As argued elsewhere (Bjørkelo et al., 2011b), there are also potential limitations in regards to solely individual psychotherapy as tertiary intervention in relation to whistleblowing. One of these can be that a purely individual focus neglects the other involved parties in the process. Several studies have shown that both colleagues, friends and family can be involved (see e.g., Peters et al., 2011; Jackson et al., 2010a, 2010b; McDonald & Ahern, 2002; Bjørkelo et al., 2008). A potential solution to this can be to evaluate more including forms of therapy, such as psycho education which provides information about assumed causes, symptoms, the process, potential treatments and recommendations as to how a family member may help in a situation like this (cf. Leff, 1994 for the concept of psycho education). To neglect the workplace when the wrongdoing is pervasive, persistent and involves top management is also a potential limitation of solely individual psychotherapy as tertiary intervention in relation to whistleblowing.

A potential hindrance to including members from the organisation in tertiary intervention can, however, be a planned or actual trial. It may not always be possible to go to therapy during an ongoing trial as this participation demands all possible attention. Solely individually based psychotherapy sessions in relation to a whistleblowing case can also potentially lack awareness of the interaction between organisations, society and individual treatment (see e.g., Madsen, 2010 for a discussion of the potential limitations of what has been labelled as the therapeutic society). Another challenge is that organisations are doing business in both global *and* local destinations. Therefore, whistleblowing is based on that employees are willing to display a sort of 'global conscience'.

At the group level, tertiary intervention can include group therapy. This has previously been found effective for employees that have been exposed to bullying at work (Bechtoldt & Schmitt, 2010; Schwickerath, 2001; Schwickerath et al., 2006; Schwickerath and Zapf, 2011). Other group level tertiary intervention measures can be to attend support groups for whistleblowers (see e.g., the Norwegian association www.varslerunionen.no, or the whistleblower union in English). At an organisational level, tertiary intervention can imply peer support and counselling as previously described by Tehrani (2001, 2003, 2004, 2011) in relation to workplace bullying, while at a societal level, it can for instance include vocational rehabilitation. Legal cases where organisations have been ordered to compensate the whistleblower for not having dealt with the wrongdoing and for not having protected the employee against retaliation, can also act as a form of tertiary intervention for the employee in question. If possible, such a process can further include that the organisation in question gradually re-integrates the employee into his or her previous job

position. Some legislation also provides a right to transfer (see e.g., Lewis & Uys, 2007). However, in many cases, the return to one's previous job may for many reasons not be possible in practice.

6. Conclusion

In 1863 Florence Nightingale wrote that 'It may seem a strange principle to enunciate as the very first requirement in a hospital that it should do the sick no harm' (p.iii). To paraphrase this, it may seem strange to emphasise that employees who report wrongdoing should not be punished, and draw all our attention towards how to prevent and deal with retaliation against whistleblowers. Most whistleblowers that are employed after they reported wrongdoing at work are not punished, but those who are and are exposed to retaliation and workplace bullying may suffer with symptoms in the form of depression, sleep problems, anxiety and PTSD analogue symptoms (Bjørkelo, 2010).

In this chapter we have shown how whistleblowing has the potential to alert and stop detrimental activities that often harm a third party. We first outlined the background for our research before we explained the term retaliation and described some types of such behaviour. We then presented some of the most typical symptoms reported by employees that have reported wrongdoing at work and been exposed to retaliation and workplace bullying afterwards, before we delineated the link between whistleblowing, retaliation, workplace bullying and health. Studies have shown that there is a link between whistleblowing, retaliation and workplace bullying. Future studies should also investigate the link between health and later employment status. In the subsequent section we portrayed different ways in which to prevent and deal with retaliation against whistleblowers in practice. In individual, group or societal tertiary interventions, therapists and practitioners are encouraged to listen. Through listening, they can gain insight into how one can understand and be of help to employees that attempt or have tried to improve the situation for a third party without excluding the impact of the organisation or society in question.

References

- Adams, A. (1992). *Bullying at work: How to confront and overcome it*. Virago.
- Alford, C. F. (1999). Whistle-blowers: How much we can learn from them depends on how much we can give up. *The American Behavioral Scientist*, 43, 264-277.
- Alford, C. F. (2000). Whistleblower narratives: Stuck in static time. *Narrative*, 8, 279-293.
- American Psychiatric Association (2000). *Diagnostic and statistical manual of mental disorders: DSM-IV-TR*. American Psychiatric Association.

- Andrews, G. & Slade, T. (2002). The classification of anxiety disorders in ICD-10 DSM-IV: A concordance analysis. *Psychopathology*, 35, 100-106.
- Barrett, B. (2010). When does harassment warrant redress? *Industrial Law Journal*, 39, 194-201.
- Baucus, M. S. & Dworkin, T. M. (1994). Wrongful firing in violation of public policy: Who gets fired and why. *Employee Responsibilities and Rights Journal*, 7, 191-296.
- Beardshaw, V. (1981). *Conscientious objectors at work*. Social Audit Limited.
- Bechtoldt, M. N. & Schmitt, K. D. (2010). 'It's not my fault, it's theirs': Explanatory style of bullying targets with unipolar depression and its susceptibility to short-term therapeutical modification. *Journal of Occupational and Organizational Psychology*, 83, 395-417.
- Bjørkelo, B. (2010). *Whistleblowing at work: Antecedents and consequences*, PhD. University of Bergen.
- Bjørkelo, B., Einarsen, S., Nielsen, M. B. & Matthiesen, S. B. (2011a). Silence is golden? Characteristics and experiences of self-reported whistleblowers. *European Journal of Work and Organizational Psychology*, 20, 206-238.
- Bjørkelo, B., Magerøy, N. & Magerøy, K. (2011b). Veien videre: Psykoterapi for arbeidstakere med mobbeerfaringer [Moving forward: Psychotherapy for employees with bullying experiences]. *Tidsskrift for norsk psykologforening [Journal of the Norwegian Psychological Association]*, 48, 759-765.
- Bjørkelo, B., Matthiesen, S. B. & Einarsen, S. (2010). Predicting proactive behaviour at work. Exploring the role of personality as an antecedent of whistleblowing behaviour. *Journal of Occupational and Organizational Psychology*, 83, 371-394.
- Bjørkelo, B., Matthiesen, S. B., Einarsen, S. & Eén, V. S. (2009). The role of whistleblowing in relation to bullying behaviours - a predecessor or successor? *14th European Congress of Work and Organizational Psychology. Santiago de Compostela, Spain. May 13-16*.
- Bjørkelo, B., Ryberg, W., Matthiesen, S. B. & Einarsen, S. (2008). "When you talk and talk and nobody listens": A mixed method case study of whistleblowing and its consequences, *International Journal of Organisational Behaviour*, 13, 18-40.
- Björkqvist, K., Österman, K. & Hjelt-Bäck, M. (1994). Aggression among university employees, *Aggressive Behavior*, 20, 173-184.
- Bonafons, C., Jehel, L. & Corroller-Béquet, A. (2009). Specificity of the links between workplace harassment and PTSD: Primary results using court decisions, a pilot study in France. *International archives of occupational and environmental health*, 82, 663-668.

- Brodsky, C. M. (1976). *The harassed worker*. Lexington Books.
- Cortina, L. M. & Magley, V. J. (2003). Raising voice, risking retaliation: Events following interpersonal mistreatment in the workplace. *Journal of Occupational Health Psychology*, 8, 247-265.
- Crant, J. M. (2000). Proactive behavior in organizations. *Journal of Management*, 26, 435-462.
- De Maria, W. & Jan, C. (1997). Eating its own: The whistleblower's organization in vendetta mode. *Australian Journal of Social Issues*, 32, 37-59.
- Directoratel Of Labour Inspection (2007). *Act relating to working environment, working hours and employment protection, etc. (Work Environment Act)*, Trondheim.
- Durlak, J. A. & Wells, A. M. (1998). Evaluation of indicated preventive intervention (secondary prevention) mental health programs for children and adolescents. *American Journal of Community Psychology*, 26, 775-802.
- Dworkin, T. M. (2007). Sox and whistleblowing. *Michigan Law Review*, 105, 1757-1780.
- Einarsen, S. (1996). *Bullying and harassment at work: Epidemiological and psychosocial aspects*, PhD. University of Bergen.
- Einarsen, S., Hoel, H., Zapf, D. & Cooper, C. L. (2011). *Bullying and harassment in the workplace: Developments in theory, research and practice*. Taylor & Francis.
- Einarsen, S. & Nielsen, M. B. (2004). The Fourth International Conference on Bullying and Harassment in the Workplace. Proceedings. University of Bergen.
- Eisenberger, N. I., Lieberman, M. D. & Williams, K. D. (2003). Does rejection hurt? An fMRI study of social exclusion. *Science*, 302, 290-292.
- Faulkner, S. L. (1998). *After the whistle is blown: The aversive impact of ostracism*. PhD. University of Toledo.
- Francis, R. & Armstrong, A. (2003). Ethics as a risk management strategy: The Australian experience. *Journal of Business Ethics*, 45, 375-385.
- Glasø, L., Vie, T. L. & Hoel, H. (2011). Bullying in the workplace. In Burke, R. J. & Cooper, C. L. (eds.) *Risky business: Psychological, physical and financial costs of high risk behavior in organizations*. Gower.
- Glazer, M. (1983). Ten whistleblowers and how they fared. *The Hastings Center Report*, December 1983, 33-41.

- Glazer, M. & Glazer, P. M. (1989). *The whistleblowers. Exposing corruption in government and industry*. Basic Books.
- Goffman, E. (1963/1990). *Stigma*, Prentice-Hall Penguin.
- Gottschalk, P. (2011). Prevention of white-collar crime: The role of accounting. *Journal of Forensic & Investigative Accounting*, 3.
- Gottschalk, P. & Holgersson, S. (2011). Whistle-blowing in the police. *Police Practice and Research* 12, 397-409. doi: 10.1080/15614263.2010.536723.
- Hallberg, L. R. M. & Strandmark, M. K. (2006). Health consequences of workplace bullying: Experiences from the perspective of employees in the public service sector. *International Journal of Qualitative Studies on Health and Well Being*, 1, 109-119.
- Hassink, H., De Vries, M. & Bollen, L. (2007). A content analysis of whistleblowing policies of leading European companies. *Journal of Business Ethics*, 75, 25-44.
- Hauge, L. J. (2010). *Environmental antecedents of workplace bullying: A multi-design approach*, PhD. University of Bergen.
- Hedin, U.-C. & Månsson, S.-A. (In press). Whistleblowing processes in Swedish public organizations: Complaints and consequences. *European Journal of Social Work*. doi: 10.1080/13691457.2010.543890.
- Jackson, D., Peters, K., Andrew, S., Edenborough, M., Halcomb E., Luck, L., Salamonson, Y., Weaver, R. & Wilkes, L. (2010a). Trial and retribution: A qualitative study of whistleblowing and workplace relationships in nursing. *Contemporary nurse: A journal for the Australian nursing profession*, 36, 34-44.
- Jackson, D., Peters, K., Andrew, S., Edenborough, M., Halcomb E., Luck, L., Salamonson, Y., Weaver, R. & Wilkes, L. (2010b). Understanding whistleblowing: Qualitative insights from nurse whistleblowers. *Journal of Advanced Nursing*, 66.
- Janoff-Bulman, R. (1989). Assumptive worlds and the stress of traumatic events: Applications of the schema construct. *Social Cognition*, 4, 113-136.
- Janoff-Bulman, R. (1992). *Shattered assumptions. Towards a new psychology of trauma*. The Free Press.
- Jones, E. E. (1984). *Social stigma: The psychology of marked relationships*. Freeman.
- Korchin, S. J. (1976). *Modern clinical psychology: Principles of intervention in the clinic and community*. Basic Books.

- Leff, J. (1994). Working with the families of schizophrenic patients. *British Journal of Psychiatry*, 164, 71-76.
- Lennane, J. (1993). Whistleblowing - a health issue. *British Medical Journal*, 307, 667-670.
- Lewis, D. (2011). Whistleblowing in a changing legal climate: Is it time to revisit our approach to trust and loyalty at the workplace? *Business Ethics: A European Review*, 20, 71-87.
- Lewis, D. & Trygstad, S. (2009). Protecting whistleblowers in Norway and the UK: A case of mix and match? *International Journal of Law and Management*, 51, 374-388.
- Lewis, D. & Uys, T. (2007). Protecting whistleblowers at work. A comparison of the impact of British and South African legislation. *Managerial Law*, 49, 76-92.
- Leymann, H. (1992). *Från mobbning till utslagning i arbetslivet [From bullying to expulsion in work life]*, Stockholm, Publica.
- Leymann, H. (1996). The content and development of mobbing at work. *European Journal of Work and Organizational Psychology*, 5, 165-184.
- Leymann, H. & Gustafsson, A. (1996). Mobbing at work and the development of post-traumatic stress disorders. *European Journal of Work and Organizational Psychology*, 5, 251-275.
- Lhuillier, D. (2008). Processus d'exclusion dans le monde du travail: Inflation imaginaire et carence symbolique. In Soares, A., Jeannau, N., Plante, G. & Hannah, G. (eds.) *Book of abstracts. 6th International Conference on Workplace Bullying. 4th - 6th June 2008*. École des sciences de la gestion Université du Québec à Montréal, Montréal, Canada: ESG, UQAM, Institut Santé et société.
- Lubalin, J. S., Ardini, M.-A. E. & Matheson, J. L. (1995). Consequences of whistleblowing for the whistleblower in misconduct in science cases. Final report. Research Triangle Institute.
- Lubalin, J. S. & Matheson, J. L. (1999). The fallout: What happens to whistleblowers and those accused but exonerated of scientific misconduct? *Science and Engineering Ethics*, 5, 229-250.
- Madsen, O. J. 2010. *Den terapeutiske kultur [The therapeutic culture]*. Oslo Universitetsforlaget.
- Malmedal, W., Hammervold, R. & Saveman, B.-I. (2009a). To report or not report? Attitudes held by Norwegian nursing home staff on reporting inadequate care carried out by colleagues. *Scandinavian Journal of Public Health*, 37, 744-750.

Malmedal, W., Ingebrigsten, O. & Saveman, B.-I. (2009b). Inadequate care in Norwegian nursing homes - as reported by nursing staff. *Scandinavian Journal of Caring Sciences*, 23, 231-242.

Matthiesen, S. B. 2004. When whistleblowing leads to bullying at work. *Occupational Health Psychologist*, 1, 3.

Matthiesen, S. B. & Bjørkelo, B. (2011). Workplace bullying - A toxic part of organizational life. In Burke, R. J., Clarke, S. & Cooper, C. L. (eds.) *Occupational health and safety*. Gower.

Matthiesen, S. B., Bjørkelo, B. & Burke, R. J. (2011). Workplace bullying as the dark side of whistleblowing. In: Einarsen, S., Hoel, H., Zapf, D. & Cooper, C. L. (eds.) *Bullying and harassment in the workplace: Developments in theory, research, and practice*. 2 ed. Taylor & Francis.

Matthiesen, S. B., Bjørkelo, B. & Nielsen, M. B. (2008). *Klanderverdig atferd og varsling i norsk arbeidsliv [Wrongdoing and whistleblowing in Norwegian working life]*. Universitetet i Bergen.

Matthiesen, S. B. & Einarsen, S. (2004). Psychiatric distress and symptoms of PTSD among victims of bullying at work. *British Journal of Guidance and Counselling*, 32, 335-356.

McDonald, S. & Ahern, K. (2002). Physical and emotional effects of whistleblowing. *Journal of Psychosocial Nursing & Mental Health Services*, 40, 14-27.

Miceli, M. P., Near, J. P. & Dworkin, T. M. (2008). *Whistle-blowing in organizations*. Routledge.

Miethe, T. D. (1999). *Whistleblowing at work. Tough choices in exposing fraud, waste, and abuse on the job*. Westview Press.

Miethe, T. D. & Rothschild, J. (1994). Whistleblowing and the control of organizational misconduct. *Sociological Inquiry*, 64, 322-347.

Mikkelsen, E. G. (2001). Mobning i arbeidslivet: Hvorfor og for hvem er den så belastende? [Workplace bullying: Why and for whom is bullying such a strain]. *Nordisk Psykologi*, 53, 109-131.

Mikkelsen, E. G. & Einarsen, S. (2002). Basic assumptions and symptoms of post-traumatic stress among victims of bullying at work. *European Journal of Work and Organizational Psychology*, 11, 87-111.

Mikkelsen, E. G. & Eriksen-Jensen, I. L. 2007. Håndtering af mobning - er det mobning, og hvem skal tage sig af det? In Mikkelsen, E. G., Kullberg, K. & Eriksen-Jensen, I. L. (eds.) *Mobning på arbejdspladsen [Workplace bullying - causes and solutions]*. FADL's forlag.

- Moberly, R. E. (2006). Sarbanes-Oxley's structural model to encourage corporate whistleblowers. *Brigham Young University Law Review*, 5, 1107-1181.
- Morrison, E. W. & Phelps, C. C. 1999. Taking charge at work: Extrarole efforts to initiate workplace change. *Academy of Management Journal*, 42, 403-419.
- Near, J. P., Dworkin, T. M. & Miceli, M. P. (1993). Explaining the whistle-blowing process: Suggestions from power theory and justice theory. *Organization Science*, 4, 393-411.
- Near, J. P. & Miceli, M. P. (1985). Organizational dissidence: The case of whistle-blowing. *Journal of Business Ethics*, 4, 1-16.
- Near, J. P. & Miceli, M. P. (1986). Retaliation against whistle-blowers: Predictors and effects. *Journal of Applied Psychology*, 71, 137-145.
- Near, J. P. & Miceli, M. P. (1996). Whistle-blowing: Myth and reality. *Journal of Management*, 22, 507-526.
- Nightingale, F. (1863). *Notes on hospitals*. Longman, Green, Longman, Roberts, and Green.
- Olsen, L. R., Jensen, D. V., Noerholm, V., Martiny, K. & Bech, P. (2003). The internal and external validity of the Major Depression Inventory in measuring severity of depressive states. *Psychological Medicine*, 33, 351-356.
- Olweus, D. (1994). Annotation: Bullying at school: Basic facts and effects of a school-based intervention program. *Journal of Child Psychology and Psychiatry*, 35, 1171-1190.
- Olweus, D. (2003). Bully/victim problems in school: Basic facts and an effective intervention programme. In: Einarsen, S., Hoel, H., Zapf, D. & Cooper, C. L. (eds.) *Bullying and emotional abuse in the workplace. International perspectives in research and practice*. Taylor & Francis.
- Parmerlee, M. A., Near, J. P. & Jensen, T. C. (1982). Correlates of whistle-blowers perceptions of organizational retaliation. *Administrative Science Quarterly*, 27, 17-34.
- Peters, C. & Branch, T. (1972). *Blowing the whistle: Dissent in the public interest*. Praeger publishers.
- Peters, K., Luck, L., Hutchinson, M., Wilkes, L., Andrew, S. & Jacson, D. (2011). The emotional sequelae of whistleblowing: Findings from a qualitative study. *Journal of Clinical Nursing*, 20, 2907-2914.
- Rehg, M. T., Miceli, M. P., Near, J. P. & Van Scotter, J. R. (2008). Antecedents and outcomes of retaliation against whistleblowers: Gender differences and power relations. *Organization Science*, 19, 221-240.

Rothschild, J. (2008). Freedom of speech denied, dignity assaulted: What the whistleblowers experience in the US. *Current Sociology*, 56, 884-903.

Rothschild, J. & Miethe, T. D. (1999). Whistle-blower disclosures and management retaliation. The battle to control information about organization corruption. *Work & Occupations*, 26, 107-128.

Schein, E. H. (2009). *The corporate culture survival guide*. Jossey-Bass.

Schmidt, M. (2005). "Whistle blowing" regulation and accounting standards enforcement in Germany and Europe - An economic perspective. *International Review of Law and Economics*, 25, 143-168.

Schwickerath, J. (2001). Mobbing am Arbeitsplatz. Aktuelle Konzepte zu Theorie, Diagnostik und Verhaltenstherapie [Mobbing in the workplace. Current concepts of theory, diagnosis and behavioral therapy]. *Psychotherapeut*, 46, 199-213.

Schwickerath, J., Riedel, H. & Kneip, V. (2006). Le harcèlement moral sur le lieu de travail: Fondements et thérapie cognitivo-comportementale des maladies psychosomatiques liées au harcèlement moral dans le milieu hospitalier [Bullying in the workplace: Principles and cognitive-behavioral therapy of psychosomatic disorders in relation to bullying in an inpatient setting]. *Journal de thérapie comportementale et cognitive*, 16, 108-112.

Schwickerath, J. & Zapf, D. (2011). Inpatient treatment of bullying victims. In: Einarsen, S., Hoel, H., Zapf, D. & Cooper, C. L. (eds.) *Workplace bullying: Development in theory, research and practice*. 2 ed. Taylor & Francis.

Skivenes, M. & Trygstad, S. C. (2005a). *Når arbeidstakere ytrer seg kritisk: En pilotstudie av et utvalg medarbeideres erfaringer med å varsle i utdannings- og pleie- og omsorgssektoren* [When employees speak up: A pilot study of a sample of employees' experiences with whistleblowing in the education, nursing- and care professions]. Fafo.

Skivenes, M. & Trygstad, S. C. (2005b). *Varsling i norsk arbeidsliv: Hva betyr det og hva vet vi* [Whistleblowing in Norwegian working life: what does it mean and what do we know?][In Norwegian]. Fafo.

Skivenes, M. & Trygstad, S. C. (2006a). *Roller, kommunikasjon og ytringsklima* [Roles, communication and climate for freedom of speech]. Fafo.

Skivenes, M. & Trygstad, S. C. (2006b). *Varslere: En bok om arbeidstakere som sier ifra!* [Whistleblowers: A book about employees that voice their concerns]. Gyldendal akademisk.

Skivenes, M. & Trygstad, S. (2010). When whistle-blowing works: The Norwegian case. *Human Relations*, 63, 1071-1097.

Skogstad, A., Torsheim, T., Einarsen, S. & Hauge, L. J. (2011). Testing the work environment hypothesis of bullying on a group level of analysis. Psychosocial factors as precursors of observed workplace bullying. *Applied Psychology: An International Review*, 60, 475-496.

Soeken, D. R. (1986). J' Accuse. *Psychology Today*, 20, 44-46.

Soeken, K. L. & Soeken, D. R. (1987). A survey of whistleblowers: Their stressors and coping strategies. *Whistleblowing Protection Act of 1987*. Supt. of Docs., Congressional sales office, U.S. G.P.O.

Solano, F. & Kleiner, B. H. (2003). Understanding and preventing workplace retaliation. *Management Research News*, 26, 206-211.

Strandmark, M. K. & Hallberg, L. R.-M. (2007). Being rejected and expelled from the workplace: Experiences of bullying in the public service sector. *Qualitative Research in Psychology*, 4, 1-14.

Swartz, M. & Watkins, S. (2003). *Power failure: The inside story of the collapse of ENRON*. Doubleday.

Tedeschi, R. G. & Calhoun, L. G. (1995). *Trauma & transformation: Growing in the aftermath of suffering*. Sage.

Tedeschi, R. G. & Calhoun, L. G. (2004). Target article: Posttraumatic growth: Conceptual foundations and empirical evidence. *Psychological Inquiry*, 15, 1-18.

Tehrani, N. (2001). *Building a culture of respect managing bullying at work*. Taylor & Francis.

Tehrani, N. (2003). Counselling and rehabilitating employees involved with bullying. In: Einarsen, S., Hoel, H., Zapf, D. & Cooper, C. L. (eds.) *Bullying and emotional abuse in the workplace. International perspectives in research and practice*. Taylor & Francis.

Tehrani, N. (2004). *Workplace trauma: Concepts, assessment and interventions*, Hove, Brunner-Routledge.

Tehrani, N. (2011). *Managing trauma in the workplace: Supporting workers and organisations*, London, Routledge.

Trygstad, S. C. (2010). *Med rett til å varsle: - men hjelper det, og er det lurt? [With licence to blow the whistle: But does it help and is it wise?]*. Fafo.

Trygstad, S. C. & Skivenes, M. (2007). *Kommunale lederes håndtering av alvorlige kritikkverdige forhold [Municipality managers' dealings with serious wrongdoing at work]*. Fafo.

- Trygstad, S. C. & Skivenes, M. (2008). Kommunikasjonsbetingelser og varsling i en endret offentlig sektor [Conditions for communication and whistleblowing in an altered public sector]. *Tidsskriftet Politik*, 11, 82-93.
- Tucker, D. (1995). Whistleblowing without tears: The exposure of Brisbane's King George square car park fraud. *Australian Journal of Public Administration*, 54, 475-482.
- Van Wormer, K. (1995). Whistleblowing against the company: A case of ethical violations at a Norwegian treatment centre. *The international journal of drug policy*, 6, 8-15.
- Vandekerckhove, W. & Tsahuridu, E.E. (2010). Risky rescues and the duty to blow the whistle. *Journal of Business Ethics*, 97, 365-380.
- Williams, K., Forgas, J. P. & Hippel, W. V. (2005). *The social outcast: Ostracism, social exclusion, rejection, and bullying*. Psychology Press.
- Wilson, C. B. (1991). US businesses suffer from workplace trauma. *Personnel Journal*, 70, 47-50.
- Zapf, D. & Gross, C. (2001). Conflict escalation and coping with workplace bullying: A replication and extension. *European Journal of Work and Organizational Psychology*, 10, 497-522.
- Zapf, D., Knorz, C. & Kulla, M. (1996). On the relationship between mobbing factors, and job content, the social work environment and health outcomes. *European Journal of Work and Organizational Psychology*, 5, 215-237.
- Zoellner, T. & Maercker, A. (2006). Posttraumatic growth in clinical psychology - A critical review and introduction of a two component model. *Clinical Psychology Review*, 26, 626-653.