

# WHISTLEBLOWING & INTEGRITY: a new perspective

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In the opinion of the organisers of the Global Forum, “the support and protection of whistleblowers and aggrieved private parties merits special attention” in the UN Convention Against Corruption. This Paper explains why whistleblowing is important and how legal frameworks can address this issue.

**Whistleblowing** - [a] Bringing an activity to a sharp conclusion as if by the blast of a whistle (*Oxford English Dictionary*); [b] Raising a concern about malpractice within an organisation or through an independent structure associated with it (*UK Committee on Standards in Public Life*); [c] Giving information (usually to the authorities) about illegal or underhand practices (*Chambers Dictionary*); [d] Exposing to the press a malpractice or cover-up in a business or government office (*US, Brewers Dictionary*); [e] (*origins*) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.

## 1 Introduction

1.1 Whistleblowing is relevant to all organisations and all people, not just those few who are corrupt or criminal. This is because every business and every public body faces the risk of things going wrong or of unknowingly harbouring a corrupt individual. Where such a risk arises, usually the first people to realise or suspect the wrongdoing will be those who work in or with the organisation. Yet these people, who are best placed to sound the alarm or blow the whistle, also have most to lose if they do.

1.2 Unless culture, practice and the law indicate that it is safe and accepted for them to raise a genuine concern about corruption or illegality, workers will assume that they risk victimisation, losing their job or damaging their career. Firms and companies aware that a bribe has been solicited will fear not only that they will lose the contract if they do not pay, but that if they blow the whistle their future economic interests will be damaged and their people will be harassed.

1.3 In considering this issue, it may be helpful to bear in mind the approach taken to a criminal who decides to testify in criminal proceedings against his or her former accomplices or colleagues. The authorities in all nation states value such collaborators and will often offer them protection and rewards. This is explained by their role in providing the necessary evidence that helps the police and authorities to secure convictions. However, where a responsible worker or a law-abiding firm blows the whistle on corruption the best they can hope for seems to be isolation and disapproval. The effect (albeit unintentional) is that someone who informs on corruption which he has participated in will receive more protection and help from the authorities than an innocent colleague or competitor who blows the whistle on it.

1.4 In the context of bribery this situation has particular relevance. Unless people are enabled and encouraged to blow the whistle when a bribe is solicited from them, it is not clear how far the fight against corruption can succeed. Without information from firms about the solicitation of bribes or from workers about corrupt colleagues, the authorities will have to rely on evidence from either the bribe payer or the bribe recipient. As these two people will have effectively conspired against the public good, it may be rather optimistic to rely on one of them to ‘see the light’ and to provide the evidence which will allow the law to be enforced.

1.5 The consequence of this culture is that it discourages the great majority of normal, decent people from raising concerns about serious wrongdoing. It also encourages unscrupulous people to use the information for their own advantage and at a time of their own choosing. In this way this culture actually increases the risk of abuse. Malicious workers and aggrieved competitors do already make damaging disclosures. Put simply, they are able to exploit the absence of clear signals about how to blow the whistle properly. Because there is neither a safe procedure nor an accepted way to blow the whistle, they may also maintain that they are justified in communicating false information to the authorities or the media anonymously. With nothing more than the anonymous but interesting allegations to go on, the authorities may start investigations and the media are likely to report damaging rumours.

## 2 The dilemma

2.1 In practical terms, if someone is concerned about corruption or serious wrongdoing in or by an organisation, they have three options. These are

- To stay silent.
- To blow the whistle internally or with the responsible person.
- To blow the whistle outside to the authorities or the media.

### Silence

2.2 Silence is the option of least risk both for the individual worker and for a responsible firm which comes across corruption. It will be attractive for many reasons. The whistleblower will realise that his or her facts could be mistaken or that there may be an innocent explanation. Where colleagues or competitors are also aware of the suspect conduct but stay silent, the whistleblower will wonder why he or she should speak out. In organisations where labour relations are adversarial and in cultures where corruption is common, the whistleblower is likely to assume that he or she will be expected to prove that the corrupt practice is occurring, rather than see those in authority investigate and deal with the matter. Even though he or she has no control over it, the whistleblower may feel responsibility for any action that may be taken against the wrongdoer. Finally, unless the whistleblower believes there is a good chance that something will be done to address the wrongdoing, it is almost inevitable that he or she will stay silent.

2.3 Even if he or she thinks the alarm should be sounded, the whistleblower will want to consider his or her private interests before taking action. Without reassurance to the contrary, the whistleblower will fear reprisals – be it harassment or dismissal. The whistleblower may also suspect (rightly or wrongly) that the corruption involves, implicates or is condoned by more senior people in or outside the organisation, in which case he or she will fear the matter will be covered up. Even where these obstacles are overcome or reduced, the whistleblower will fear that he or she will be labelled as disloyal by the generality of colleagues whose respect and trust the whistleblower may want or need in future.

2.4 The results of this culture of silence are that:

- responsible employers are denied the opportunity to protect their interests;
- unscrupulous competitors, managers or workers are given reason to believe that 'anything goes';
- society focuses more on compensation and punishment than on prevention and deterrence.

## Blowing the whistle internally

2.5 Addressing the effects of this culture in the public sector, the UK Committee on Standards in Public Life commented:

*“Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation. We observed in our first report that it was far better for systems to be put in place which encouraged staff to raise worries within the organisation, yet allowed recourse to the parent department where necessary. An effective internal system for the raising of concerns should include:*

- A clear statement that malpractice is taken seriously in the organisation and an indication of the sorts of matters regarded as malpractice;
- Respect for the confidentiality of staff raising concerns if they wish, and an opportunity to raise concerns outside the line management structure;
- Penalties for making false and malicious allegations;
- An indication of the proper way in which concerns may be raised outside the organisation if necessary.”<sup>1</sup>

2.6 In formulating these recommendations, the Committee took account of good practice in the private sector where there has been considerable experience (particularly in the finance industry and in food retail) of providing fail-safe reporting channels to senior management. These initiatives started in more competitive markets where there was little doubt that the early reporting of suspected wrongdoing was in the organisation’s self-interest. The following analogy may be drawn here. Competitive sectors were also the first to gather information from their consumers about how a product or service operates in use. This practice has now been adopted through much of the public sector.

2.7 However the approach many organisations now take to information from workers is similar to the attitude taken toward consumers thirty years ago (that they were troublesome, untrustworthy complainants). This is a mistake since not only is information from the workforce readily accessible and free to collect, but it enables the organisation to put a potential problem right before it causes any real damage to it, its reputation or its stakeholders. The self-interest of the organisation in whistleblowing is now being recognised and recently a few large firms have begun to use outside advice lines to encourage and reassure staff to raise concerns about wrongdoing. These developments have been given added impetus – particularly in the USA - by legal requirements to demonstrate due diligence, where safety, competition, finance and certain criminal laws have been breached.

2.8 Organisations are now beginning to realise the importance of providing an alternative to (but not a substitute for) line management, since without it their managers will have a monopolistic control over the information which goes to those higher up. As with any monopoly, one weak link – be it a corrupt, lazy, sick or incompetent person – will break the communication chain and stop those in charge receiving information which could be critical to the organisation.

## Blowing the whistle outside

2.9 If, however, it is not safe and accepted for people to blow the whistle internally, then we need to turn to the options which exist for those people who consider some action is warranted when they come across corruption. Without a safe internal route, the only option is for them to disclose the matter outside - be it to the authorities or more widely. This is an increasingly important matter since the opportunities for such wider disclosure particularly to the media and public interest groups are likely to be increased with new technology. A relevant example to

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<sup>1</sup> UK Committee on Standards in Public Life, *Second Report*, May 1996, page 22.

consider in the context of any anti-corruption measure is where a worker or an audit firm discovers, or reasonably believes, that account books or entries may conceal bribes. If they feel unwilling or unable to blow the whistle internally, the only options they will have are to blow the whistle outside, or to stay silent.

2.10 Such outside disclosures raise ethical and legal issues of confidentiality and business secrecy. They also influence the balance of relationships between business, the state and the media. An outside disclosure will involve at the least some regulatory intervention and inconvenience and, at worst, unjustified adverse publicity. This will cause unnecessary damage and disruption to a responsible organisation which would have dealt with the matter properly had it been aware of it. As shown above, a culture where – in the absence of safe alternatives – it can be argued that media disclosures are a legitimate first port of call is an open invitation to an aggrieved or malicious person to cause damage, rather than raise the issue responsibly.

2.11 In most legal systems, there is no protection for a worker who makes an outside disclosure – even if it is in good faith, justified and reasonable. Accordingly, such disclosures are often made anonymously. This raises a number of issues. Anonymity will be the cloak preferred by a malicious person. It also makes the concern difficult to investigate and even impossible to remedy. Finally, in any event, anonymity is no guarantee that the source of the information will not be deduced. Where the person is identified, the fact that they acted anonymously will often be seen as a sign of bad faith, jeopardising their position. In the worst cases such people forfeit their career. Their plight then attracts media attention, which can only discourage others from sounding the alarm.

2.12 The near certainty that an outside disclosure will lead to serious reprisals means that often the matter is not raised until the worker is leaving the organisation or the firm has lost the contract. By then the problem may be much worse (indeed the disaster may have happened), the evidence will be old, and the motives of the whistleblower may allow the wrongdoer to distract attention from the corruption. In some cases this delay may also allow the information to be used to damage or even blackmail the organisation.

### **3 The CONSEQUENCES of the current culture**

3.1 The implications of the current culture of silence can be far-reaching:

- The failure of officials in the European Commission to respond to the internal whistleblowing of an auditor caused him to disclose his concerns of financial misconduct to the European Parliament. This led to the resignation of the College of Commissioners, a crisis in confidence in the European Union and to the suspension of the whistleblower and – he maintains – lasting damage to his career;
- The Bingham Inquiry into the corruption at the Bank of Credit and Commerce International found that there was an autocratic environment where neither workers nor firms were willing to voice concerns. This led to new rules in the UK on the duties of auditors and other firms to report suspected irregularities;
- The victims of HIV contaminated blood products in France complained that the ministers and officials had known of the problem but had said nothing and done nothing. This led to criminal prosecutions against ministers and the resulting public scepticism about attitudes to safety influenced the position the French Government took on the dispute about UK beef imports;
- Two years before Robert Maxwell stole almost \$1 billion pension funds, he sacked a union official who had challenged what he was doing with the pension money at a Scottish newspaper. Maxwell, a powerful businessman, was able to ensure that the man could not get another job in the industry so destroying his career;

- The major leak at the nuclear power station near Tokyo was able to happen because no-one questioned poor safety practices based on an unauthorised manual drawn up by a key contractor<sup>2</sup>.

3.2 Time and again similar messages come out of official inquiries into major scandals and disasters. They reveal that people who worked in or with the organisation had seen the problem but had either been too scared to sound the alarm or had raised the matter in the wrong way or with the wrong person. Quite apart from the tragic human costs and enormous financial damage caused in these cases, they undermine public confidence not only in the organisation concerned but also in business and governments more generally. These wider implications are serious. In a changing competitive world, the very success of business, public bodies and new technologies rely on public confidence in their openness and probity.

3.3 Whenever there is a scandal or major disaster that could have been averted, there is pressure for new regulatory controls. Although these are aimed at the reckless, they often impose burdens on responsible organisations in the sector, thereby damaging competition. Each disaster also calls into question the mechanisms by which law and society oversee the conduct of private and public bodies. And each successive scandal renews mistrust and scepticism about the role and work of governments and business. The resignation of the European Commission in March 1999 is a case in point. The Committee of Independent Experts remarked that the facts demonstrated “the value of officials whose conscience persuades them of the need to expose wrongdoings encountered in the course of their duties. They also show how the reaction of superiors failed to live up to legitimate expectations”<sup>3</sup>.

## 4.0 The aims of a whistleblowing culture

4.1 The primary aim of a whistleblowing culture is that concerns about corruption and wrongdoing should be properly raised and addressed in the workplace or with the person responsible. Crucially, it sees the whistleblower as a witness, not as a complainant. Where communication channels in organisations are designed for grievances and complaints, that is how they are used by the workforce. In the context of concerns about abuse, it is important to bear in mind that malicious and aggrieved people do already make damaging disclosures when there is not any recognised whistleblowing scheme. Recognising this a whistleblowing culture should be concerned with the silent majority who think it is not in their interests to blow the whistle on corruption or serious wrongdoing. Drawing on the theory of efficient markets (that competitive forces begin to operate once one quarter of consumers will consider switching suppliers), a whistleblowing scheme will help organisations and societies deter corruption and wrongdoing where a significant minority of those who now stay silent can be encouraged to see internal whistleblowing as a viable, safe and accepted option.

4.2 The main beneficiaries of a culture which disapproves of, and penalises, people who blow the whistle in good faith are those few corrupt firms and individuals. Knowing that the alarm will not be sounded, they are confident that their wrongdoing (especially if it is corruption or bribery) will go undetected and unpunished. (In any case, when the successful investigation and prosecution of criminal activity outside of the workplace depends overwhelmingly on the information the police receive, it is not clear why the communication of information about wrongdoing in organisations is generally assumed to be undesirable.) Quite apart from people with a predisposed criminal intent, the current culture adversely affects the conduct of the great majority of people. For them the strongest deterrent is the fear of being caught and the shame and embarrassment that goes with it. Where a culture of secrecy and silence exists, otherwise reasonable people may be tempted to engage in malpractice because they believe they will not

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<sup>2</sup> Asia Week 19/11/99 – commented that Japanese culture deprecates whistleblowing yet seems to condone the resignation or even suicide of top executives when unchecked wrongdoing leads to major disaster.

<sup>3</sup> The Committee of Independent Experts, *Second Report*, para 7.6.9.

be caught. Equally if such a culture exists in a society, then otherwise responsible organisations may feel they will be at a competitive disadvantage if they do not also pay bribes or engage in illegal practices.

## 5.0 The essentials of a whistleblowing culture

5.1 A whistleblowing culture cannot succeed without a strong and clear signal from the very top of the organisation that it is against corruption and is resolved to go about its business lawfully. Such a culture will provide assurances against reprisals for whistleblowing on wrongdoing. These will apply even where the whistleblower is mistaken, provided he or she acted honestly and reasonably. In terms of disclosures, such a culture will direct the worker toward seeking impartial advice (be it from unions, lawyers, professional bodies or a designated ethics service) and/or to blowing the whistle internally or with the person responsible. This will help ensure that even if the whistleblower is mistaken, no unwarranted damage is done to the organisation or to individuals within it. Critically it provides a safe and viable alternative to silence.

5.2 To be effective, such a system will also provide that where there is good evidence to support the concern, whistleblowing to a designated authority will be protected. This will greatly encourage the organisation to reassure the whistleblower that the matter can safely be raised internally. One recent example demonstrates the value of such a provision. When an international bank 'road-tested' a new global corporate compliance culture ethic, employees in all cultures said that they did not believe the assurances that they would be protected. The bank then introduced new whistleblowing mechanisms and declared they would rather concerns were raised with regulators than left unreported.

5.3 Such a clear provision will also encourage managers to be receptive to concerns about corruption and to deal with them properly. As importantly it will reassure those in charge that managers will address the matter properly. It will give a clear indication to the authorities that the organisation is seeking to operate responsibly and this will influence the conduct of any investigation that may prove necessary (whether prompted by a whistleblower or not). It will also enable the authorities to readily distinguish reputable organisations from reckless ones. The practical consequences of this provision will be that an organisation with a whistleblowing culture will be able to demonstrate that it is fit to regulate itself. Furthermore, it will itself be well placed to notify the authorities of any proven wrongdoing a whistleblower has raised with it.

5.4 If such a culture is to maintain the confidence of the wider community, any scheme must also address the particular circumstances in which a wider disclosure may be justified. Essentially this should be an option of last resort and, where reasonable, would include a disclosure to the media. An example of such circumstances would be a flagrant cover-up or the failure by the authorities to deal effectively with a serious issue such as the sexual abuse of children in a care home or the payment of bribes to a senior official or politician. One way forward is to introduce a carefully weighted four-step structure:

1. Impartial advice;
2. Internal whistleblowing;
3. Whistleblowing to authorised independent agencies;
4. Wider whistleblowing (where appropriate to the police, victims, shareholders, politicians or the media).

Such a structure should also influence the actions of a malicious person as he or she will for the first time have reason not to go direct to the media. Where he or she does, society will have good reason to expect the media to look into his or her motives and *bona fides*.

## 6 Winds of change

6.1 For all the above reasons there is growing acceptance of the case for a new approach to whistleblowing. With the changing nature of employment, globalisation and the increased flow of information, there is also a recognition that the traditional approach of trust and confidentiality in the workplace cannot be relied upon to operate as it did through much of the 20<sup>th</sup> century. While trust and confidence is of critical importance in any community or organisation, to be effective it cannot be blind or unquestioning. Whistleblowing cultures which emphasise internal reporting are a means by which the abuse of trust and confidence can be checked and by which asymmetrical accountabilities of those within the workplace can be understood and developed. If the organisation is prepared to promote and implement such a culture, any risk of it being hijacked by petty vendettas will be minimised, if not removed.

6.2 This approach sees whistleblowing as a means to deter wrongdoing, promote transparency and good governance, underpin self-regulation and maintain public confidence. It is the approach which has been put on a legislative footing in the UK and in South Africa in recent years.<sup>4</sup> These laws differ somewhat from the protection offered in the USA, which has had whistleblowing legislation for over a century offering substantial rewards to employees. While other provisions in the USA are rooted in the concepts of freedom of expression, and those in Australia and New Zealand are concerned with ethics in the public sector, these recent developments in the UK and South Africa address the issue of accountability across all sectors.

6.3 Essentially the new approach sees whistleblowing as a means to deliver good management, to maintain public confidence and to promote organisational accountability. They help everyone identify who is responsible for what and to whom. While this has secured strong support from business, unions and professional interests, it would be misleading to suggest that the underlying principles are anything new. Based on ethical provisions recognised by many religions, the principles were adopted and developed into a balanced and practical approach in jurisprudence. Such judge made laws recognise both the public interest in maintaining confidences (esp. business secrets) and the particular circumstances where whistleblowing disclosures outside can be justified. Like race and sex discrimination laws, the pre-eminent aim of these UK initiatives has been to declare a change in culture. The resulting legislation was commended by one of the most senior UK judges for “so skilfully achieving the essential but delicate balance between the public interest and the interest of employers.”<sup>5</sup> It seeks to embed a system where, in the words of Independent Experts called in by the European Union, “the duty of loyalty and discretion should not become an empty concept, but neither must it be used to install a conspiracy of silence.”<sup>6</sup> This UK approach has also been commended by both management and labour interests at the OECD, who have recommended that it is fed into the forthcoming revisions to the Anti-Bribery Convention.<sup>7</sup>

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<sup>4</sup> The Public Interest Disclosure Act 1998 provides protection against reprisals for good faith whistleblowing on wrongdoing. It directs the worker toward seeking confidential advice and to blowing the whistle internally or with the person responsible. Provided there is good evidence to support the concern, it also protects (a) whistleblowing to designated authorities and (b) wider whistleblowing where both the circumstances justify it [cover up, victimisation or failure to address the matter] and the particular disclosure is reasonable [having regard to recipient of the disclosure, seriousness, risk, obligations of confidence and the employer’s whistleblowing culture]. The Protected Disclosures Act 2000 creates a similar regime in South Africa. The UK legislation and notes on cases can be found at [www.pcaw.co.uk](http://www.pcaw.co.uk)

<sup>5</sup> Lord Nolan, who had also chaired the Committee on Standards in Public Life.

<sup>6</sup> See note 9 supra, para 7.6.10. The European Commission’s proposals were published in Feb 2000.

<sup>7</sup> See OECD Labour/Management Programme – PAC/AFF/LMP(2000)1. This Paper is a revised version of the discussion paper set out in that report.