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Disadvantages and Advantages of Financial Incentives Arrangements in Whistleblower Legislation across Different Jurisdictions, including the Bounty Systems Used in the United States of America

Abstract

This submission examines the disadvantages and advantages of Financial Incentives Arrangements in Whistleblower Legislation across different jurisdictions, including the Bounty Systems as used in the United States of America. This has been done by examining published literature on those who oppose and propose the idea of whether financial incentive should be included as an integral part of the whistleblowing framework or not. Upon examination of both views, it becomes clear that financial incentives should be considered as a part of whistleblowing protection framework, but not as a sole strategy. Several empirical studies and data are presented to support the argument.

In term of effectiveness, there is no empirical evidence to indicate that the US 'qui tam' system increases either the quantity or the quality of whistleblowing disclosures (Bank of England Prudential Regulation Authority 2014). Moreover, the US model does not appear to be better in protecting whistleblowers, than large payments to a tiny minority (Bank of England Prudential Regulation Authority 2014). This is consistent with the findings of the Department for Business, Innovation and Skills, the UK Government (BIS) Call for Evidence, and with the proposals for action by businesses and regulators that BIS have now published, which reject the idea of financial incentives as an integral part of the whistleblowing framework. Similarly, an empirical study conducted in Africa indicates that a financial reward did not motivate an individual to blow the whistle (Ayagre & Aidoo-Buameh 2014). However, the authors doubt that financial incentive was not interesting because its value did not do enough to attract people, and there were other possible factors that overcome its benefits (Ayagre & Aidoo-Buameh 2014).

1. Advantages of Including Monetary Incentives into Whistleblowing Protection Schemes

Many argue that a financial incentive scheme for whistleblowers did not breach moral codes or present a dilemma or conflict of interest, and are effective in attracting individuals to disclose misconduct.

In order to ensure the quality and quantity of disclosure and to prevent false claims, policy makers can impose of a regulation "relieving whistleblowers from civil and criminal liability for defamation or breach of confidentiality and statutory secrecy provisions, for example only affording protection if the disclosure is made through a prescribed channel"(OECD 2012, pp. 13-4) .

According to the "Universal Dignity Theory of Whistleblowing" (UDTW) proposed by Hoffman and McNulty (2011, p. 51), the fundamental principle is that "whistleblowing is both permissible and a duty to the extent that doing so constitutes the most effective means of supporting the dignity of all relevant stakeholders". The principle of UDTW leads to the following conditions for ethical whistleblowing: first, compelling evidence of nontrivial illegal or unethical actions by an organization or its employees that are considered to violate the dignity of one or more of its stakeholders; and second, a lack of knowledge within an organization of wrongdoing or failure by the organization to take corrective actions (Hoffman & McNulty 2011).

However, it would also be unreasonable to expect an individual to disclose misconduct in his or her organization if one had credible grounds for believing that by reporting wrongdoing one would be putting themselves or their loved ones at risk of

retaliation (Hoffman & McNulty 2011;Dussuyer et al 2016). As Hoffman and McNulty (2011) also noted, while their ethical whistleblowing theory is grounded in conditions in the United States, the theory is intended to be applicable to other countries and cultures. In line with their arguments, our current study in the Indonesian Directorate General of Taxes (DGT) in 2016 indicate that the majority of respondents (more than 50%) valued financial reward as one of determinants to encourage employees to report bribery. By investigating the amount of financial reward at least it becomes a *prima facie* case for examining how much (amount) money is considered as being sufficient as a core feature to develop the existing regulations.

For the first step, Indonesia's DGT may consider the adoption of three features for their reward scheme, such as 10% of asset seizure, 10 times of Take Home Pay or Rp100 millions (US$7,504.69) depending on which one is higher. The advantage of placing such a scheme more specifically in the regulations and policies is that the scheme represents a powerful enforcement mechanism in whistleblowing laws and shows the seriousness of DGT to promote genuine support to whistleblowers against fraudulent practices.

The finding above shows that although Indonesians are collectivist and high-power distance cultural dimensions (Hofstede & Hofstede 2005), such dimensions do not really prevent people's motives to seek financial rewards, which can be characteristic of individualistic and low-power distance people such as found in Australia and the U.S. Having said that, we may conclude that if a financial scheme still works in collectivist and high-power distance cultural dimensions (i.e. Indonesia), it should work better in individualistic and low-power distance like Australia.

In addition, as literature would suggest, humans often have other motives (intrinsic or extrinsic) beyond mere self-sacrifice, when they do a good deed (whistleblow) for the broader community (Dozier & Miceli 1985). For instance, in the context of whistleblowing, individuals may be motivated to disclose wrongdoing given the opportunity to obtain financial and other personal benefits (Bowden 2014). This concept, also called prosocial behavior, has been developed as pro-organizational behavior (POB) in an organizational context (Brief & Motowidlo 1986). POB is defined as behavior that is "(a) performed by a member of an organization; (b) directed toward an individual, group, or organization with whom he or she interacts while carrying out his or her organizational role; and (c) performed with the intention of promoting the welfare of the individual, group or organization toward which it is directed" (Brief & Motowidlo 1986, p. 711).

The main difference between prosocial behavior and altruism is that the latter requires purely unselfish motives by actors when performing a particular behavior (Dozier & Miceli 1985). Borrowing this idea, in the context of whistleblowing theory, many prominent scholars have considered whistleblowing as POB (Brown 2008; Miceli & Near 2013). Thus, we believe that if an organization is keen to encourage their employees to report misconduct, they need to facilitate working in an ethical environment, supportive culture and values, as well as devise appropriate regulations, policies, procedures and other intrinsic and extrinsic ingredients. The reasons are very clear. Since whistleblowing has an embedded risk of retaliation, asking one to sacrifice their career and in some cases potentially their very life, without providing adequate protection from adverse consequences and providing stimulus that could encourage them to speak up, is unreasonable. Equally, enforcing others to sacrifice themselves is no sacrifice at all when the one giving direction does not bear any adverse costs (Bouville 2008). In fact, as Bouville (2008) noted, offering and giving rewards to potential or existing whistleblowers does not breach morality. People are not expected to be saints who act with pure motives, and so the rejection of rewards is incompatible with the basic assumptions of morality (Bouville 2008). In addition, the argument that whistleblowers' motives being driven by monetary reward is a greedy action is fundamentally flawed because:

1. It would be very difficult to know individuals' hidden agenda;
2. An individual often has many and complicated motives, not just a single one. It would be hard to detect a "greedy" motive and distinguish it from other motives.

There will be no conflict of interest in a court because robust whistleblowing that can be followed up if it is based on adequate evidence not from rumours, hearsays or gossip. In addition, the court could question the reliability of the evidence because the witness may be considered as a liar who stood to gain financially, thus undermining the prosecution's case (Bank of England Prudential Regulation Authority 2014). Moreover, from a cost and benefit perspective, the potential to disclose and stop wrongdoing has seen financial rewards become more prevalent. Consistent with this line, some scholars (Bowden 2014; Brink, Lowe & Victoravich 2013; Dworkin & Near 1997; Miceli & Near 1985) suggest that adequate financial incentives should be included as extrinsic motivational factors to encourage employees to report misbehavior. However, it should be borne in mind that the definition of "adequate" may varies across the globe due to differences of humans' cost of living and expectations in each area.

In addition, in term of effectiveness, empirical data shows that America's Whistleblower Reward Law, the False Claims Act, has had outstanding achievement in exposing misconduct. According to Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the United States of Justice Department's Civil Division, the institution obtained more than $4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government in fiscal year 2016 ending Sept. 30, 2016 (Department of Justice 2016). This is the third highest annual recovery in False Claims Act history, bringing the fiscal year average to nearly $4 billion since fiscal year 2009, and the total recovery during that period to $31.3 billion (Department of Justice 2016). Proven effectiveness of the financial incentives system for whistleblowers, mostly based on US False Claims Act, 31 USC (FCA) has attracted a few researchers to make financial reward worthy of consideration for a global model (Faunce et al. 2014).

Conclusion

As we outline, there are both proponents for and against offering monetary advantage in whistleblowing schemes. Conclusively, a review of literature suggests that financial incentives are important and should be included as an integral part of the whistleblowing framework, but alone it would not be adequate. So, the further question should not focus anymore on the issue of whether financial important is important or not, but policy makers and scholars should investigate how much money can be considered as adequate. This can culturally be a signal that the disclosure of misconduct is valued by the organization. As well, incentives need to be one part of a wider approach that includes a suite of considerations such as an ethical environment, supportive culture and values, as well as appropriate regulations (that protect against retaliation, for example), policies, procedures and other intrinsic and extrinsic attributes.

Financial incentives (and the appropriateness of the amount of such rewards) aside, we cannot ignore that in reality whistleblowers are the parties who suffer the most. Since whistleblowing has an embedded risk of retaliation, it is unreasonable to ask one to sacrifice their career and in some cases potentially their very life, without providing adequate protection from adverse consequences, as well as provide a stimulus to encourage them to speak up.

Based on our law review, the Victorian Government may adapt several protections from the Government of Indonesia Act Number 13 Year 2006 concerning the Protection of Witnesses and Victims. To illustrate:

An example from Indonesia of when to guarantee witness and whistleblowers protection, was enacted on August 11, 2006 Act No. 13 of 2006 concerning the Protection of Witnesses and Victims. The law is derived from Indonesia's commitment to fight against corruption as the country has ratified its commitment to the United Nations Convention Against Corruption on 18 April 2006 (Hendradi 2011). The Government of Indonesia seriously considers corruption cases, drugs abuse cases, terrorism, and other offences as extra-ordinary crimes, that need to be treated differently compared to common criminal behaviours, since those may cause Witnesses and Victims to be placed in a difficult position which may seriously endanger their lives.

As explained in the Explanatory Note on *Witness and Victims Protection Law* 2006), the success of a court proceeding depends heavily on evidence revealed or found. In addition, the Explanatory Note explaining the importance of protecting witness and victims can be summarized as follows (see *Witness and Victims Protection Law* 2006, p. 34):

"In an Indonesian court proceeding, especially one related to Witnesses, there are many cases which become unresolved due to lack of Witnesses who can support law enforcers' tasks. Hence, the existence of Witnesses and Victims is a very determining element in a court proceeding. The existence of Witnesses and Victims in a court proceeding has not received the attention of communities and law enforcers. Many cases became unresolved nor unsettled because of Witnesses and Victims being reluctant to present their testimony to law enforcement officers because they received threats from certain parties.

In an effort to encourage community participation in resolving offences, it is necessary to create a favorable climate by providing legal protection and security to anyone who has the knowledge of or discovers anything which can be useful in helping to resolve an offence and who reports it to law enforcement officers. People who report as aforementioned are entitled to sufficient legal protection and security upon what they report, so that they do not feel their rights and life threatened or intimidated. With such reassurance of legal protection and security, a situation is created which enables members of a community to report without feeling any fear or offence that they know of to law enforcement officers. People shall not be anxious or feel their life is threatened by a certain party."

The foundation for protecting the rights witnesses and victims in the crime proceeding, which is inline the article 32 and 33 of United Nations Convention Against Corruption, requires the obligation for every state party to provide effective protection for witness, experts, victims and reporting persons from potential reprisal or coercion including from his or her family or any person close to them (Hendradi 2011).

Particularly, as pursuant to article number 1, the Law Number 13 Year 2006, defines any person who can obtain the protection and any assistance, as follows:

1. Witnesses means people who can provide information for the purpose of investigation, litigation, prosecution, and examination in court proceeding on an offence, which they hear, see, and/or experience themselves.
2. Victims mean people who have suffered from physical and mental harm, and/or economic loss due to a violation of criminal laws.
3. Families means people who are blood-related to Witnesses and/or Victims in a direct line upward or downward and sideward up to the third degree of generations, or due to marriage, and/or dependents of Witnesses and/or Victims.

Moreover, in Article 2 and 8, this Law provides protection for Witnesses and Victims in all stages of court proceedings in court jurisdiction since the investigation stage starts and ends in accordance with the provisions stipulated in this law.

Furthermore, the law stipulates that witness and victim are entitled to:

1. the right to obtain protection of their personal, family and property safety, against any threat which is related to the testimony which they will give, are giving, or have given;

2. the right to participate in selecting and determining the form of protection and security assistance;
3. the right to give information without any pressure;
4. the right to obtain a translator;
5. the right to be free from any misleading questions;
6. the right to be informed about the development of court proceedings;
7. the right to be informed about court's verdict;
8. the right to be informed about the release of the offender;
9. the right to obtain a new identity;
10. the right to obtain relocation;
11. the right to obtain reimbursement for transport expenses as necessary;
12. the right to obtain legal advice; and/or
13. the right to obtain living expenses temporarily until the protection is terminated.

In addition, for serious human rights violations, victims are also eligible to obtain 1) medical services and 2) psycho-social rehabilitation services.
In term of "sufficient legal protection and security upon what the person(s) report, *Witness and Victims Protection Law* 2006, p. 8) defines that "Protection means any form of action to fulfill the rights and assistance to provide a sense of safety to Witnesses and or/Victims, which are the obligations of Witnesses and Victims Protection Agency or other agencies as stipulated in this Law".
The explanation of article 10 number 1 regulates that "witnesses, victims and people who report an offence should not be prosecuted on criminal or civil codes on the report or testimony which they will give, are giving, or have given" (*Witness and Victims Protection Law* 2006, p. 21). However, the law excludes justice collaborator(s) and individuals, who provide information without a good intention, such as giving false information, false oath, and ill-intended agreement, from being Witnesses and Victims who have rights to be protected by the Law. Similarly, those who are also offenders in the same case cannot be freed from any legal charges if proven legally and convincingly guilty; though, their testimony can be used by the judge as a consideration to lessen the sentence.
Inside, the Act, (The (*Witness and Victims Protection Law* 2006), (LPSK)) also implemented establishment of an independent agency based in the Indonesian Capital City that is responsible for dealing with the granting of protection against the witnesses and victims (Hendradi 2011), . The Act also mandates LPSK to establish branch(es) at local areas when it is necessary.
For opponents who argue that several individuals would misuse financial incentives, we can challenge their arguments with the view that the court or management' decision should be based on evidence, not based on hearsay or rumours. It is reasonable to assume that most unreasonable reports would not be followed up by the authorities if those are not based on strong evidence. In addition, Victorian people or institutions' reputations are protected also by Defamation Act 2005 Act No. 75/2005. Any individual or institution who considers damage to their reputation has or is likely to happen, as a result of material published, may sue the publisher/s of the material. This regulation may detract any individuals whose intention is to make a false reporting.

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