Inquiry into whistleblowing protections within the Australian Government public sector

Submission by Kathy Ahern, RN, BA *W.Aust.*, GDipEd *E.Cowan*, GDipNurs *E.Cowan*, MAppSc *Curtin*, PhD *W.Aust.*

Summary

People have human characteristics that tempt them to protect their reputations by covering up their misdeeds. Self preservation also exists at the organisational level so that when a whistleblowing complaint is made, actions to deny the wrongdoing include reprisals against the whistleblower that are embedded in legitimate workplace procedures. This paper argues that cultural change within an organisation which values pro-ethical behaviours is possible, but will not occur without an external body with the mandate and expertise to investigate allegations of workplace misconduct.

Specific recommendations include

1. The establishment of an independent (external to the organisation) body to deal with whistleblower allegations and protection; and to oversee the workings of any internal (within the organisation) audit committees. Any whistleblower can make this external body their first point of contact.
2. Explicit rules should be developed so that if a whistleblower submits a complaint to an internal audit committee, the members of that committee will follow strict guidelines. If these guidelines and timeframes are not met, the matter will be automatically transferred to the external body.
3. Procedures for dealing with misconduct allegations must detail exactly how an investigation is to be conducted; and include the proviso that whistleblower allegations are made 'in good faith'. Further, there should be disciplinary action taken against people who make knowingly false reports.
4. Internal staffing matters must be included in whistleblower protection legislation since these are common vehicles for retribution in the workplace.
5. Managers who do not deal with misconduct allegations adequately are to be considered complicit in the misconduct and subject to penalty.
6. Publication of the results of alleged misconduct investigations should be mandatory as the increased transparency will provide an incentive for organisations to take whistleblowing allegations seriously.

Whistleblowing protections within the Australian Government public sector

As social researcher I have come to the conclusion that human beings have impressive strengths, and equally human frailties. I believe that it is our human frailties that have led to the need for whistleblowers and for whistleblower legislation. The term whistleblowing derives from sport, where the umpire blows a whistle to stop an illegal action such as a high tackle; an intervention which openly acknowledges the need for arbitrators to facilitate a fair match. In sports, whistleblowing is an integral part of the game. This paper discusses the frailties of human beings in the workplace in relation to whistleblowing according to the terms of reference of this inquiry.

In the research literature, human frailties as they pertain to whistleblowing exist in two main areas. The first is that people cannot be experts in all areas. The second is that people will act in ways to benefit themselves (Grover & Hui, 1994). For employees this means that some people will participate in workplace misconduct. Cabral-Cardeso (2004) gives the example of a wrongdoer who goes so far as to deliver a pre-emptive strike in the investigation of his unethical conduct by claiming that there was a conspiracy against him and asking for disciplinary measures to be taken against the whistleblower!

Managers are also human. By definition, whistleblowing means that alleged workplace misconduct occurred during their watch. For some managers, to investigate (expose) this misconduct could be seen as a reflection of their own managerial deficits which allowed the problem to happen in the first place (Hassink, deVries, & Bollen, 2007). Thus managers can have a strong personal incentive to avoid the misconduct allegations becoming public (Ting, 2008).

Self preservation also exists at the organisational level. Cabral-Cardeso (2004) describes a case study of plagiarism at a university in which the processes to keep the misconduct private included minimisation of the issue, cronyism, legalism, delaying tactics and intimidation. In my own research of Western Australian nurses who blew the whistle on misconduct (McDonald & Ahern, 2000), a similar profile of activities was identified. Reprisals included having the whistleblower being officially reprimanded, demoted, being punitively transferred and being suspended. Any one of these, or the even the threat of this type of reprisal, could be conveniently viewed by an organisation as internal staffing matter.

A current PhD student of mine, Donna MGrath is investigating workplace bullying. Her thesis reports that bullying behaviours can be presented under the guise of workplace rules. These behaviours are embedded into legitimate workplace procedures and include deliberately blocking opportunities for promotion or training and removing responsibilities in areas of skill and expertise. Further, rules may be rigidly applied for some, while for others rules may not apply. Other examples of bullying perpetrated by managers/supervisors include intentionally giving misleading instructions; excluding the target from secretly conducted meetings or cc email lists; intentionally not passing on important emails; and setting unreasonable deadlines (McGrath, 2008). Any number of these covert bullying behaviours will act to discredit the target, which will then have an impact on performance reviews and career advancement. In this way, retribution for whistleblowers is often disguised within managerial processes (McDonald & Ahern, 2000).

Given the extent to which retribution can be hidden within managerial processes (Ting, 2008), I consider that it is essential that internal staffing matters are included in the protection of whistleblowers. This position reflects that described by DaCosta (2008) who reports that the US supreme court construed adverse reactions to "encompass any action – including actions not affecting the compensation, terms, condition or privileges of employment – that might well dissuade a reasonable employee from making or supporting a charge of discrimination" (p. 953). The rationale for this is that perpetrators of retaliation tend to be the employee's supervisor, who is privy to information about the employee's work and personal circumstances. "This gives retaliation-minded employers the unique advantage of being able to identify and exploit each worker's particular vulnerabilities, thereby causing harm that might be inconsequential to the average employee but that the employer knows will be material to *this* employee" (pp 969-970). As a result, other employees may witness this retribution and be deterred from reporting workplace misconduct. The US Supreme Court decided that whistleblower law should place the *utmost importance on thwarting deterrence* of employees to blow the whistle. (DaCosta, 2008; emphasis added).

Thus, with regards to term 2bii, about grievances over internal staffing matters being addressed through separate mechanisms, I strongly feel that internal staffing matters **should** be included in whistleblower protection legislation.

The numerous ways in which retribution can be perpetrated described in the research literature provides strong evidence that internal (within the organisation) investigation and protection of whistleblowers cannot be left solely in the hands of the managers in an organisation. In addition to this, the insidious nature of the retribution suggests that high level investigative skills and procedures are necessary (Earle & Madek, 2007). Most managers are not called upon to develop these skills in the daily course of events, so it is unlikely that, even if they wanted to, they would have the expertise to conduct a fair and thorough investigation of misconduct allegations.

Cabral-Cardeso (2004) describes a case study in which the outcome of an internal investigation of student plagiarism resulted in a university committee report that blamed the whistleblower and the individual whose work had been plagiarised, but *not* the student who plagiarised the work or the examiners who passed the work knowing that it had been plagiarised. Although this outcome was arguably partly the result of self interest on behalf of university managers, it also demonstrates a lack of knowledge and procedures within the university about how to investigate whistleblower allegations.

My research (Ahern & McDonald, 2002) has identified that employees and managers often experience conflict between their various roles, such as loyalty to the organisation, a code of conduct and clients. Grover and Hui (1994) found that under conditions in which it is impossible to serve two conflicting roles, people are more likely to lie, especially when there is reward for lying. In the context of whistleblowing, this would suggest that many mangers would choose to protect their employing organization over supporting the whistleblower. This self interest has been amply demonstrated in the research literature. In academia, Cabral-Cardeso (2004) concludes that self regulation tends to be taken by collective self-interest and pack

loyalty in which a concern for ethics becomes a cynical justification of behaviour strictly for damage control.

This leads to the conclusion that an independent, external body is required that 1) does not have a vested interest in the organisation and 2) whose members have the skills and experiences to thoroughly investigate whistleblower allegations and alleged workplace harassment of whistleblowers.

However, the research literature also provides evidence that having an external ethics body does not *by itself* lead to increased understanding of how ethical conduct can be encouraged in employees and managers. This problem has been addressed in several countries. In the UK, the Financial Services Authority has a Code of Corporate Governance which requires that an internal audit committee within the organisation "review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties.... The audit committee's objective should be to ensure that arrangements are in place for the proportionate and independent investigate of such matters and for appropriate follow-up action" (Hassink, deVries, & Bollen, 2007 p 27). Similar requirements have been adopted by the Netherlands, Germany, Belgium, Switzerland, France and Sweden (Hassink et al., 2007). In the US, the Sarbanes-Oxley Act seeks to stem misconduct through self-monitoring by encouraging whistleblowers to report to internal corporate monitors, thereby reducing public-oversight costs (DaCosta, 2008).

As a means to ensure compliance, the British Financial Services Authority's Code of Corporate Governance requires all companies listed on the London Stock Exchange to 'report on how they have applied the principles of the code, and either to confirm that they have compiled with the code's provisions or, where they have not, to provide an explanation (Hassink et al., 2007). Earle and Madek (2007) recommend that disclosure be included in annual reports. This would provide an incentive for organisations to resolve whistleblower claims and correct irregularities in a timely manner. A major benefit of this requirement is that internal organisational committee members would have substantive knowledge of the area in which the complaint is made. Earle and Madek (2007) give the example of the arcane and complex activities of high level executives in finance whose irregularities may be hard to track by people who do not possess specialist financial understanding.

The long term purpose of having an internal (within the organisation) whistleblowing audit body would be to encourage the development of ethical attitudes and increase the management skill base with regards to allegations of misconduct. The difficulty, however, is how to facilitate adoption of personal moral philosophies in employees and managers. As Cabral-Cardeso (2004) states, codes are successfully implemented only when they become part of the organisational culture. Blind implementation of ethics codes would not improve the ethical climate of organisations (Fernando, Dharmage, & Almeida, 2008). Hassink et al. (2007) found that managers who have introduced internal reporting procedures perceive them as contributing to their image as both an ethical and efficient organisation, which might help resolve their conflicting loyalties experienced when misconduct is reported (Ahern & McDonald, 2002).

The literature provides several concrete recommendations for organisational whistleblower policies. Christensen (2008) concludes that the law regarding ethical decision making must be as explicit as possible. This includes a rule that employees will be protected, with a clear statement guaranteeing punishment of retaliation; and that investigation or serious treatment of a report is guaranteed, including cooperation of managers and other employees with investigation procedures (Hassink et al., 2007). There needs to be a requirement to keep a log of the investigation and a specified time frame for feedback to the employee. The time frame of eight weeks has been adopted by several European countries (Hassink et al., 2007).

Conclusion

Human beings need clear boundaries of acceptable behaviour in sport and in the workplace. Research has indicated that with regards to whistleblowing, individuals and organisations have strong incentives to cover up evidence of misconduct. In order to change this culture, procedures which facilitate a valuing of whistleblowing are required. Ideally this would be via an internal audit committee where managers can learn high level investigative and decision-making skills. However, the literature and my own research clearly indicate that this has not worked in the past. Therefore, an independent body of highly skilled and experienced members must also be established to investigate whistleblower allegations. This external body could oversee every whistleblowing complaint handled internally and take over management of the complaint if the internal committee is unable to satisfactorily deal with the issue within a specified time frame.

Recommendations

- An independent body needs to be established, although this does not preclude also having an internal whistleblowing audit committee which gives people the opportunity to put their own house in order.
- If the primary contact person is involved in the violation to be reported; or the person has not responded to the report within the period specified in the policy or has suggested a different response period which is unreasonably long; or the employee reasonably fears retaliation against his action; or a previously submitted report about the same violation has not had the effect of removing the violation, the whistleblower should directly contact the external ethics body (Hassink et al., 2007).
- Internal staffing matters should be included in whistleblower protection legislation since these are common vehicles for retribution in the workplace (McDonald & Ahern, 2000).
- In order to promote moral behaviours, whistleblowing and support of whistleblowers needs to be actively encouraged. Facilitating support of whistleblowers needs to be included in workplace evaluations, promotion criteria and workplace sanctions. Thus, managers who do not deal (by internal investigation or referral to the external agency) with misconduct allegations adequately are to be considered complicit in the misconduct.
- A clear set of procedures needs to be developed which spells out exactly how an allegation of misconduct is to be conducted. This requires that

whistleblowing reports are 'in good faith', based on 'reasonable grounds/beliefs' or are 'genuine/honest/legitimate'. The complaint may turn out to be unfounded after due investigation, but if it satisfies these conditions the employee should not be punished for reporting it. In addition, disciplinary action against knowingly false report and reports with malicious intent is also required.

- Publication of the results of alleged misconduct investigations (minimally, the number of times whistleblowing protocols were implemented) provide a picture of the organisation's corporate governance (Hassink et al., 2007) and should be adopted. This increased transparency will provide evidence of the organisation as a place where criminal and unethical acts do not go unreported.

References

Ahern, K., & McDonald, S. (2002). The beliefs of nurses who where involved in a whistleblowing event. *Journal of Advanced Nursing, 38*(3), 303-309.

Cabral-Cardeso, C. (2004). Ethical misconduct in the business school: A case of plagiarism turned bitter. *Journal of Business Ethics, 49*, 75-2004.

Christensen, S. (2008). The role of law in models of ethical behaviour. *Journal of Business Ethics, 77*(451-461).

DaCosta, C. (2008). Stitching together the Patchwork: Burlington Northern's lessons for state whistleblower law. *Georgetown Law Journal, 96*(3), 951-984.

Earle, B., & Madek, G. (2007). The mirage of whistleblower protection under Sarbanes-Oxley: A proposal for Change. *American Business Law Journal, 44*(1), 1-55.

Fernando, M., Dharmage, S., & Almeida, S. (2008). Ethical ideologies of senior Australian managers: An empirical study. *Journal of Business Ethics, 82*, 145-155.

Grover, S., & Hui, C. (1994). The influence of role conflict and self interest on lying in organisations. *Journal of Business Ethics, 13*, 295-303.

Hassink, H., deVries, M., & Bollen, L. (2007). A content analysis of whistleblowing policies of leading European Companies. *Journal of Business Ethics, 75*, 25-44.

McDonald, S., & Ahern, K. (2000). The professional consequences of whistleblowing by nurses. *journal of Professional Nursing, 16*(6), 313-321.

McGrath, D. (2008). Workplace bullying. Unpublished manuscript. The University of Queensland.

Ting, M. (2008). Whistleblowing. *The American Political Science Review, 102*(2), 249-267.