

**SELECTED PAPERS FROM  
THE INTERNATIONAL  
WHISTLEBLOWING RESEARCH  
NETWORK CONFERENCE**

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**edited by**

**David Lewis & Wim Vandekerckhove**



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edited by David Lewis & Wim Vandekerckhove

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# 1. Introduction

David Lewis, Middlesex University

Wim Vandekerckhove, University of Greenwich

## 1.1 THE INTERNATIONAL WHISTLEBLOWING RESEARCH NETWORK

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 (IWRN) 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, October 2017, there are over 200 members of the network. The current convener of the network is David Lewis who can be contacted via [d.b.lewis@mdx.ac.uk](mailto:d.b.lewis@mdx.ac.uk).

Following the IWRN conferences in 2011, 2013 and 2015 two Ebooks 'Whistleblowing and Democratic Values' and 'Developments in whistleblowing research 2015' and a special issue of the E-Journal of International and Comparative Labour Studies were produced. Thus this Ebook, which uses material presented at the June 2017 IWRN conference held in Oslo, maintains the network's tradition of disseminating papers relevant to research in the field.

## 1.2 CHAPTER SUMMARIES

In this Ebook the chapters are sequenced as follows. The first two chapters focus on various aspects of the Norwegian experience of whistleblowing, and the third chapter examines the gap in protection afforded to UN whistleblowers. The following two chapters look at the importance of culture both generally and in particular sectors, namely health and social care. The final chapter explores how trade unions might use their voice to engage in the whistleblowing process.

In her chapter entitled *Norwegian whistleblowing research: A case of Nordic exceptionalism?* Brita Bjørkelo discusses some experiences from Norwegian whistleblowing research in the past twenty years and how this seems to be both similar and different from other countries' results. The so-called 'Norwegian uniqueness' is discussed in the context of the notion of exceptionalism. She concludes that, although some Norwegian results may be exceptional, others are more diverse and in a way similar to findings from other countries. Thus the description 'same but different' may be appropriate.

In the chapter entitled *Legal provisions and democracy: Freedom of expression and whistleblowing in Norwegian workplaces*, Sissel Trygstad, Anne Mette Ødegård and Elin Svarstad observe that the right to speak out can be morally justified on the basis of two different but interrelated arguments: democracy and efficiency. From a comparative perspective, Norway offers one of the strongest protections for freedom of expression in Europe. This freedom is regulated by the Constitution as well as the Working Environment Act and applies to workers in both public and private sectors. Their chapter discusses how these laws operate in practice and explains how recent amendments seem not to have resulted in the changes intended by the legislators.

In *The UN whistleblowing protection gap: implications for governance, human rights and risk management* Caroline Hunt - Matthes and Peter Anthony Gallo profile the challenges confronting the UN Ethics mechanisms charged with whistleblower protection in the period 2006-2016. They consider the evidence of the failure and tainted independence of these mechanisms and assert that they have resulted in declining numbers of UN staff claiming protection under the whistleblowing arrangements. Unsurprisingly, they conclude that this situation creates unnecessary risk for the UN.

Using the title *Enhancing whistleblower protection: 'It's all about the culture'*, Stelios Andreadakis argues that emphasis needs to be given to corporate culture so that existing cultures of silence coupled with dismissal and retaliation practices are replaced by a new culture based on honesty, integrity and transparency. He asserts that only by changing the mind-set in the boardrooms of modern corporations will whistleblowing achieve its purpose as an effective accountability mechanism. Drawing inspiration from the UK Bribery Act 2010, he makes practical recommendations for this change of corporate culture to be initiated and for companies to be actively involved in this process.

In her chapter entitled *Denial and paradox: conundrums of whistleblowing and the need for a new style of leadership in health and social care*, Angie Ash examines two conceptual conundrums – paradox and denial – found consistently in international whistleblowing research and outlines a model of ethical leadership to counter these. She develops a model of leadership in antithesis to Ludwig and Longenecker's concept of the 'Bathsheba Syndrome' i.e where organisational leaders enjoy power and privilege that firewall them from exigencies and compromises subordinates routinely make, and which may result in dangerous organisational practices becoming normalised. Characteristics of an 'Anti-Bathsheba' model of leadership are proposed as the means by which paradox and denial in whistleblowing can be countered.

Finally, Arron Phillips addresses the question *How might Trade unions use their voice to engage in the whistleblowing process?* He asserts that, although there are some contextual differences, the voice mechanisms in the UK, Norway and The Netherlands are comparable. He concludes by suggesting how trade unions might use these mechanisms. At an individual level they can support whistleblowers with individual voice options. At regulator level they can work with organisations to improve understanding and conditions for whistleblowers and at public level they can use their voice to inform the wider community about the whistleblower's particular concern or treatment.

### 1.3 CONTRIBUTORS

**Stelios Andreadakis** joined the School of Law at Leicester University in July 2013 and took up his current post as a Senior Lecturer in Corporate and Financial Law at Brunel University in 2017. His research interests are in the areas of Corporate Law and EU Law. Stelios' current work focuses on the role of whistleblowers in modern corporate governance and he is conducting empirical research in the US, Japan and Europe.

**Angie Ash** runs a health and social care research consultancy. Angie is a registered social worker who has worked with adults and children at risk of abuse and in charity sector management. Since 1994, Angie has carried out research in health and social care for central and local government and NGOs, and has held research fellowships at the University of Bristol and Swansea University. Angie has been involved in many investigations into failures of health and social care, and has published widely on the abuse and mistreatment of adults and children at risk.

**Brita Bjørkelo** teaches on the Leadership and Management programmes at the Norwegian Police University College. She is involved in several research projects on whistleblowing and is also involved in investigations on ethical grey area police cases and ethical dilemmas among Senior Investigative Officers. Brita participates in projects on diversity in police education and organization and gender representation in top positions in academia. She also manages a project on Teacher Education, Ethics and Social Media.

**Peter Gallo** is a qualified attorney admitted to practice law in three countries. Prior to joining the UN, he spent 19 years in Asia as an investigator in the private sector and was recognised as an expert on money laundering. In 2011, he joined the United Nations as an investigator in the Office of Internal Oversight Services (OIOS), Investigations Division in New York. He left the UN after allowing his contract to expire in 2015 and later became an outspoken critic of the prejudice and corruption in OIOS, its ineffectiveness and its treatment of whistleblowers.

**Caroline Hunt-Matthes** is a human rights lawyer and investigator by training and an Adjunct Professor in Labour Relations, Media Law, Corporate Governance, Corporate Social Responsibility and Managing Ethics and Diversity at Grenoble Business School, France and Webster University, Geneva. She served as a peacekeeper with the first UN Transitional Administration in the Former Yugoslavia and the pioneering UN human rights field mission to Rwanda in 1994. Her experience as a UN whistleblower inspired her to conduct research in this field.

**Anne Mette Ødegård** is a political scientist from the University of Oslo (1999) and a business graduate from BI Norwegian Business School (1993). Before she started as a researcher at Fafo in 2004, she worked as a journalist for more than 15 years.

**Anne Mette** has been engaged in several projects concerning the working environment and the consequences of the EU-enlargement for the Norwegian labour market. Another research interest is labour market regulations, both on European and national level. The last four years she has also done research on whistleblowing at the workplace.

**Arron Phillips** is a doctoral candidate at the University of Greenwich. His research involves a comparative study of trade unions and their role in the whistleblowing process. He has undertaken teaching in the areas of Business Ethics and Organisational Behaviour. Since completing his undergraduate degree in Law and a Master's degree in Employment Law he has taken an active interest in researching various aspects of whistleblowing.

**Elin Svarstad** has an MSc in Business and Economics and has been working at Fafo since 2016. Her main fields of research are the Nordic working life model, industrial relations and wage formation. She has participated in several projects related to whistleblowing and freedom of speech.

**Sissel C. Trygstad** has a doctorate in Politics and became Director of Research at Fafo in 2015. She has worked there since 2004 and her research interests include part-time working, leadership and work organization as well as whistleblowing. She has attracted funding from many sources over the years and has published extensively in leading academic and practitioner journals.

## 2. Norwegian whistleblowing research: a case of Nordic exceptionalism?

Brita Bjørkelo

### ABSTRACT

Since the 1990s descriptions about wrongdoing at work in Norwegian working life have been portrayed in scientific articles (van Wormer, 1990, 1995). This has drawn attention to the phenomenon whistleblowing itself as well as acted as calls for change within the areas where wrongdoing has been reported. Provisions relating to Norwegian private and public employees right to notify their employer regarding wrongdoing have been active since 2007 (Lewis & Trygstad, 2009), and in November 2016 an expert group was appointed to address and evaluate the current state of whistleblowing legislation and the application of these (Eriksen, 2017). Studies have pointed to the uniqueness of Norwegian results in regard to more whistleblowing and less retaliation than found in other nations (Bjørkelo et al, 2011; Skivenes & Trygstad, 2010, 2017). This chapter discusses some of the experiences from Norwegian whistleblowing research in the past twenty years and how this seems to be similar and different from other nations' results. The 'Norwegian uniqueness' is discussed in the context of the notion of exceptionalism. In sum, although some Norwegian results may be exceptional, others are more diverse, and in a way more similar to findings from other nations. Thus the description 'same but different' may be appropriate.

### 2.1 WHISTLEBLOWING IN NORWAY

In 1995, Katherine van Wormer published what may have been the first scientific article that applied the term whistleblowing on wrongdoing from a Norwegian context. Van Wormer had previously worked in a private Norwegian treatment centre on alcoholism in Norway and the wrongdoing concerned the treatment itself as well as issues relating to leadership and administration (van Wormer, 1995). Van Wormer also emphasised a need for regulation. At the time of van Wormer's article being published in an international journal, the term whistleblowing had not yet developed in Norwegian language. However, since then the term has been applied in the media coverage of cases that have become publicly known and in scientific articles. Most Norwegian whistleblowing cases have begun as internal reports to the employees' line manager (Bjørkelo et al, 2011), as is common for whistleblowing cases in general (Miceli et al, 2008).

When the Norwegian Work Environment Act (WEA) 1977 was revised, new sections on whistleblowing were added, and these became active in 2007 (Lewis & Trygstad, 2009). The whistleblowing sections were developed from every individual's right to freedom of speech which



is a part of the Norwegian constitution (§ 100).<sup>1</sup> The WEA thus describes the limitations of this right that exist when an individual is employed by a Norwegian private or public organisation. Despite these rights, some Norwegian legal experts argue that the provisions are limiting, as they blur the link to the constitutional right to freedom of speech.

## 2.2 NORWAY AS UNIQUE

As described by van Wormer in the 1990s, lack of regulation could hinder development of secure, legal and ethical treatment conditions for patients in Norwegian private drug treatment facilities. Even though statutory provisions 'required employees to report wrongdoings in the organizations since 1956, when the provision of safety representatives was incorporated in the Norwegian Environment Act' (Skivenes & Trygstad, 2017), the WEA from 2007 required employers to have procedures for reporting wrongdoing at Norwegian workplaces. Studies published after the implementation of the WEA, with data collected before and after the implementation, have found that the frequency of observing wrongdoing varies (see e.g. Skivenes & Trygstad, 2010: 1075; Trygstad & Ødegård, 2016: 33), the frequency of intending (or attitude towards reporting) varies (see e.g. Malmedal et al, 2009: 746-748; Skivenes & Trygstad, 2013), the same adheres to actual reporting (see e.g. Bjørkelo et al, 2011; Skivenes & Trygstad, 2015), and most quantitative studies show that whistleblowers are not retaliated against and are effective (see e.g. Bjørkelo, 2010; Matthiesen et al, 2008; Skivenes & Trygstad, 2017; Trygstad and Ødegård, 2016).

Norwegian findings, for example that there are many whistleblowers and that they are less likely to experience retaliation, may be interpreted as relating to the Norwegian working life model and the strength of institutional arrangements (see e.g. Skivenes & Trygstad, 2017). The notion of exceptionalism is associated with the work by e.g. Pratt (2008), Lappi-Seppälä (2007) and Savelsberg (1994) and 'Nordic exceptionalism' has been used to describe the treatment of prison inmates in the Nordic countries as humane and welfare-oriented compared to elsewhere (see e.g. Helgesen, 2015). In Pratt's (2008) work, the description of Norwegian exceptionalism is for instance based on factors such as: egalitarianism, next to no immigration, religious homogeneity, inclusiveness and solidarity, and a focus on what citizens are allowed to do as opposed to the penalties for illegal actions. Further, exceptionalism is associated with the welfare model which according to Pratt (2008) most likely will ensure that 'there would be no stigma attached to being a welfare beneficiary; nor would anybody be excluded from the assistance it provided' (p. 127).

## 2.3 NORWAY AS DIVERSE

At the same time, employees that report wrongdoing at work report more bullying at work than other employees and worst-case scenarios are similar to descriptions and findings from other parts of the world (Bjørkelo, 2013; Bjørkelo et al, 2011; Bjørkelo et al, 2015). Preliminary findings from a

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<sup>1</sup> <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>

longitudinal study with three measurement points (2005, 2007 and 2010) show that whistleblowers at one point in time report significantly higher levels, that is, more exposure to systematic negative behaviors than other employees at two later points in chronologic time (Bjørkelo et al, 2015). However, the preliminary results also show that new whistleblowing may be predicted by previous exposure to bullying at work (Bjørkelo et al, 2015). This may imply that there are two different groups and processes going on.

This particular study defined whistleblowing in a way that excludes reporting about wrongdoing that relates to him/herself, such as e.g., self-experienced sexual harassment or bullying, which opens up for diverse interpretations. It may be that in some cases, an employee observes or learns about wrongdoing in the form of bullying/harassment of other employees. In this respect s/he goes from being an observer or bystander to a whistleblower, and is then only later him/herself exposed to workplace bullying (Bjørkelo, 2017). Another situation may be that an employee that him/herself is exposed to workplace bullying blows the whistle on another workplace wrongdoing that harms someone else, and that this employee again becomes the recipient of re-exposure to bullying, as a result of the whistleblowing (Bjørkelo, 2017). It may thus be the case that pre- and post-exposure to workplace bullying may relate to different causes and consequences in relation to whistleblowing.

All while most self-reported quantitative results on the consequences after whistleblowing show that most employees not retaliated again and are effective. Qualitative results describe the impact of job loss, the stigma of association of even being *seen* as a friend or an associate of a current or previous employee that has reported about wrongdoing at work has been described as for instance in the following manner:

I realised I was kind of treated as if I was contagious or radioactive (...) People stiffened and some were lip talkers. Some were scared (...) I guess somebody had told them, that if you hang around him, he will report you, and you will get in trouble! (...) It is very unpleasant. Because you do not know what people have heard (...) and you cannot pick people randomly and say: listen! I will tell you what this is really about. (Bjørkelo et al, 2008: 28).

Some ten years after the law was implemented, few employees seem to have success in the legal system (Eriksen & Bjørkelo, 2014). One of the core issues seems to be the difficulty of gaining understanding for the link between the reported wrongdoing and the later negative reactions (Arntzen de Besche, 2013). In addition, a national representative study found that since 2010, fewer Norwegian employees seem to achieve changes based on their whistleblowing, more seem to receive negative reactions, fewer are willing to report wrongdoing again, and more argue that they stay silent due to fear of negative reactions (Trygstad & Ødegård, 2016).

## **2.4 ISSUES OF INTEREST**

An issue of interest is how retaliation rates are different depending on the sample applied, which is a shared empirical challenge across nations. According to Miceli and Near: 'Nowhere is this problem

better illustrated than in current research on retaliation, where research results based on non-random samples suggest that a large majority of whistle-blowers suffer retaliation, whereas research findings based on random samples indicate just the opposite' (Miceli & Near, 2007). Thus, retaliation rates based on national representative studies are often low (Bjørkelo et al, 2011; Skivenes & Trygstad, 2010) while retaliation rates based on severe and often external whistleblowing cases are often high and potentially as severe as including symptoms associated with post-traumatic stress (Bjørkelo et al, 2008).

A study of Norwegian citizens attempted to link these portraits together (see e.g. Matthiesen et al, 2008). The study applied a random and representative sample of 7000 Norwegian citizens in the age span of 20-67 years and the criterion for inclusion was to have been a former or current employee with some level of tenure (see also Matthiesen, 2016). Preliminary findings suggest that employees that had reported wrongdoing and were still employed experienced similar negative consequences but to a lesser extent, than whistleblowers outside working life (Bjørkelo et al, Under progress). Dworkin and Baucus (1998) found similar trends when investigating the experiences of internal and external whistleblowers respectively.

Several Norwegian whistleblowing cases based in the public sector domain (e.g., police, nursing, bureaucracy) have had an impact on public discourse regarding public sector leadership, allocation of economic means and evaluations of how this may impact actual professional work. In Norway, one of the most publicly known cases have been the reporting of an alleged suicide of a young child (see e.g. Johannessen, 2015; Schaefer, 2015). After a long process, and many internal and external efforts to draw attention to the perceived wrongdoing, the mother's previous cohabitant was sentenced to 18 years detention with a minimum term of ten years for the murder of the eight year old girl Monika.<sup>2</sup>

The duty to report is something that is shared by many occupations and is regulated in different parts of the Norwegian legislation. In professions such as health care, the awareness and role of safety culture has increasingly been acknowledged and seems to be applied in practice to some extent. Thus, even though legally divided, these two actions, duty reporting and whistleblowing, are not completely different as phenomena. Several of the Norwegian most publicly known whistleblowing cases concerned public or private sector corruption, health care and/or cases of human rights and were voiced by professional workers employed in the police, schools, health care, as well as lawyers, auditors, and financial directors. These employees reported due to their role and prescribed duty and still seem to describe similar reactions as described among external whistleblowers elsewhere.

## **2.5 NORWEGIAN UNIQUENESS SEEN THROUGH THE LENSES OF EXCEPTIONALISM**

At the core of exceptionalism lie the institutionalised social democratic values (Pratt, 2008). Another corner stone is the emphasis of private (and public) companies not working only 'to profit their

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<sup>2</sup> <http://norwaytoday.info/news/18-years-detention-monika-case-2/>

members' but also 'to fulfil the ends of society' (Pratt, 2008: 129). Whistleblowing is behaviour and practice that tests these values in a society. Having regulations in place is one thing. How a society handles whistleblowing cases in practice is another (see e.g. Senekal & Uys, 2013). This is not to underscore that 'institutional arrangements really matter' (p. 325) in that 'having a procedure and following it lead to better outcomes for both employers and whistleblowers' (Lewis et al, 2015). It is therefore of utmost importance to study successful whistleblowing, whether this is due to exceptionalism or not. Studies into why whistleblowing has had an effect may aid organizations in stopping wrongdoing at work, help observers to evaluate the likelihood of their own potential effectiveness as well as encourage valid whistleblowing (Van Scotter et al, 2005).

Norwegian findings may be due to a form of exceptionalism and a result of highly egalitarian cultural values and social structures. Due to institutionalised structures in the welfare state, this may bring understanding and explanations as to high reporting rates and low retaliation rates. Norway has a law that includes both private and public employees, it has strong unions, a well-founded and structured labour market model and many formal whistleblowers (Skivenes & Trygstad, 2017). Still, in relation to results concerning individual and institutional power, studies has shown that even though procedures are in place (36 %) or being prepared (5 %), many have none (31 %) or may be unaware of the provisions (27 %, Skivenes & Trygstad, 2017). Further, a minority (17 %) report to have applied them in practice. Middle managers s more than others seem to stay silent out of fear of reprisals, female employees are more likely to be retaliated against and even though to a greater extent bigger institutions have procedures, they report less effective whistleblowing (Skivenes & Trygstad, 2017). Thus, a range of studies show that there is a lot of formal whistleblowing in Norway in that being a manager or union representative is related to reporting wrongdoing at work (Bjørkelo et al, 2011). It may thus seem that most whistleblowing goes through formal channels owing to a strong working life model and institutional arrangements. In other words, there seems to be less whistleblowing from Norwegian employees without any formal or non-duty of reporting other roles. In one of the studies that excluded reporting though established channels or about wrongdoing directed at him/herself, the reporting rate was 12 % (Bjørkelo et al, 2011).

## **2.6 A CASE OF SAME BUT DIFFERENT?**

Empirical Norwegian results on whistleblowing portray a form of uniqueness as well as they add some diversity among them. In a study that compared whistleblowing results from the US, Australia and Norway, the authors stated that

Despite differences [...] across the studies [...] a) a large group of employees observed wrongdoing in each of the organisations studied, although the rate of observation varied dramatically; b) a large group of the employees who observed wrongdoing reported it internally or externally, but it was often below 50%; c) a large group of employees who blew the whistle also perceived that they suffered reprisal as a direct result for doing so; again, however, this was always less than 50% of the whistle-blowers (Miceli & Near, 2013: 443).

Exceptionalism in terms of welfare state, e.g., the role of formalisation of democratic rights may very well play a part in the interpretation of Norwegian results (Skivenes and Trygstad, 2017), especially when compared to, for instance India, (see e.g. D’Cruz & Bjørkelo, 2016).

If there is agreement across nations, it is most likely on issues such as the need for laws, regulations, ethical guidelines and whistleblowing procedures, along with the recognition that these, in themselves, not predict actual practice even though they may be of vital help (see e.g. Lewis et al, 2015; Senekal & Uys, 2013). Thus even though regulations across the world expand; reporting through established procedures may also be associated with negative consequences. In one of the most publicly known Norwegian whistleblowing cases, the starting point for the employee that reported was being asked to sign the internal ethical guidelines that were being introduced in the Norwegian part of an international company he worked for at the time.<sup>3</sup>

According to previous Norwegian studies it seems that it is easier to agree upon wrongdoing in the form of corruption ('numbers') more than experiences (see e.g. Bjørkelo et al, 2011; Skivenes & Trygstad, 2013). Applying exceptionalism as a theoretical framework for understanding and explaining Norwegian whistleblowing results; it may be assumed that there are more reports about, for instance, questionable financial investments and that these reports are more acted on in Norway than elsewhere. Still, some of the most officially known cases in Norway concerned numbers and the interpretation of the law in regulating the alleged types of wrongdoing. In one of these, the Terra case, Ingvar Linde, a municipality accountant reported about the alleged illegality of investments made by a Norwegian municipality. After a long process, including notifying the highest levels of political leadership, eight 'municipalities lost €137.5M, after having invested in complex financial products that plunged when the financial crisis set in' (Gårseth-Nesbakk & Kjærland, 2016). The societal consequences of the investments were dramatic.<sup>4</sup> In another cases, Siemens Business Services (SBS) were acquitted for intentional major fraud of 60 mill NOK and repaid 75 mill NOK to the Norwegian Armed Forces (Johnsen, 2011). The verdict was not appealed by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Johnsen, 2011).

Johnstone has described 'Denmark's apparent success at controlling corruption' as 'both real and more complex than it may appear' (Johnston, 2013). An analysis of a number of Norwegian role-prescribed whistleblowing and audit cases reported that 'it seems as though these individuals were heard only after contacting the press' and points to the importance of the media as 'societal watchdogs' in Norway (Warhuus, 2011). Analyses of Norwegian corruption cases, the discourse and interplay between the media and the cases themselves, have found the cases to be linked both to allegations of corruption and also to 'wider social and political tensions' as well as illuminating ideological, social and cultural norms (Breit, 2011).

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<sup>3</sup> See e.g., <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/portrait-of-a-whistleblower.html>

<sup>4</sup> See e.g., <https://www.theguardian.com/business/2008/jun/30/subprimecrisis.creditcrunch>

## **2.7 CLOSING IN AND SUMMING UP**

Van Wormer's work from Norway raised national debate about and eventually potentially led to regulation in the Norwegian social work profession. It may very well be that the effect the report had was related to having reported the wrongdoing in a welfare state and the fact that she was supported by institutional rights, in that the professional Norwegian union for social work supported her. Van Wormer, who also was an external whistleblower, was exposed to retaliation. Even though her efforts in the beginning were related to supporting other members of the staff, she eventually went public about the perceived wrongdoing. The negative consequences followed in the form of, for instance, denied monetary support for herself and her family to return to the US, which had previously been agreed.

Summing up the Norwegian findings, most quantitative studies show that whistleblowers are not retaliated against and are effective, the frequency of observing wrongdoing varies, the frequency of intending (or attitude towards reporting) varies, and the same adheres to actual reporting. There are also many formal whistleblowers, and as a result, much potential role-prescribed whistleblowing. Health care workers and other public employees are and may be prescribed to report wrongdoing as a part of their professional role. In the first Norwegian studies, data were primarily based on employees from such sectors, for instance nurses (see e.g. Hetle, 2004; Skivenes & Trygstad, 2005). Studies that have applied definitions where role-prescribed and self-reporting about wrongdoing directed at oneself has been excluded as whistleblowing, have found lower levels of reporting along with associations with workplace bullying and lower job satisfaction (Bjørkelo et al, 2011). Further, few Norwegian employees have won in a court of law, and when some have won, they may simultaneously have been responsible for costs and become losers in financial terms. As one publicly known Norwegian whistleblower described it, you may be a hero but that does not necessarily provide you with a job with a stable income. Thus, although there may be some form of Norwegian exceptionalism, there may also be a case of same but different.

## **2.8 THE WAY FORWARD: WHISTLEBLOWING SEEN THROUGH THE LENSES OF NORDIC EXCEPTIONALISM**

According to Bjørkelo and Madsen (2013), the call for more strategy documents and guidelines, as parts of the neo-liberal ideology and New Public Management (NPM), may facilitate as well as hinder whistleblowing. Others have discussed how whistleblowing may be seen as a form of subversive action, both benign and malign (Olsson, 2016). Despite being framed within the Nordic working life model, organizational critique in the form of whistleblowing is a phenomenon that not necessarily has had an easy way into the tripartite cooperation (Trygstad, 2017). In further research, exceptionalism as an explanatory factor for whistleblowing may thus be expanded to investigate how and whether institutionalised possibilities of welfare states in the Nordic region in fact do provide other rates and conditions for whistleblowing than elsewhere. Investigations may include going into existing as well as initiating more comparative Scandinavian and Nordic whistleblowing

research. This includes examining related phenomena such as the work on critique (see e.g. Plessis, 2015; Sørensen, 2015; Willig, 2016), work on different forms of loyalty (see e.g. Ahlstrand et al, 2017; Arvidson & Axelsson, 2014; Börnfelt et al, 2014) as well as work on whistleblowing (see e.g. Gottschalk & Holgersson, 2011; Hedin & Månsson, 2008, 2012; Hedin et al, 2008; Kjöllner, 2016; Wieslander, 2016). Johnstone has described 'Denmark's apparent success at controlling corruption' as 'both real and more complex than it may appear' (Johnston, 2013) and du Plessis (2014) describes Danish research on whistleblowing and whistleblowing procedures as scarce (see e.g. Bjørkelo & Høgh, 2013; Sienknecht, 2010).

Further, a Finnish thesis emphasised that an 'auditor's reporting duties to authorities should be limited to exceptions' and discourage general reporting rules (Reiman, 2017). Another way to investigate the assumption of exceptionalism as a way to explain and understand whistleblowing in a Scandinavian and Nordic context is through role-prescribed whistleblowing. High reporting levels may be due to most reporting being channeled through institutional roles, in the form of formal leaders and employee representatives. In these ways, exceptionalism may provide a lens to both extend further comparative investigations as well as provide alternative ways to interpret Norwegian whistleblowing results.

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### 3. Legal provisions and democracy: freedom of expression and whistleblowing in Norwegian workplaces.

Sissel C. Trygstad, Anne Mette Ødegård & Elin Svarstad

#### **ABSTRACT**

The right to speak out can be morally justified on the basis of two different but interrelated arguments: democracy and efficiency. From a comparative perspective, Norway offers one of the strongest protections for freedom of expression in Europe. This freedom is regulated by the Constitution as well as the Working Environment Act and applies to workers in both public and private sectors. This chapter discusses the practice of these laws at the workplace, and explains how recent amendments seem to have failed to bring about the changes intended by the legislators.

#### **3.1 INTRODUCTION**

Freedom of expression is a key element in democratic working life. Put simply, it is fundamentally a matter of the possibilities to take part in public debates related to one's field of interests, to voice criticism and submit notification about concerns. From an employer's point of view, there are several reasons for why 'free speech' should be appreciated. It is of great importance to acquire knowledge about waste, poor quality of services and products and corruption. Employees who speak out might provide fruitful information to employers about good and bad practices in the production process. It might also be argued that 'free speech' is closely linked to a good working environment in general (Kalleberg, 1983; Skivenes & Trygstad, 2007). From the employees' and the trade unions' side, freedom of expression is a precondition for participation and co-decision at the workplace, which is a cornerstone in the Norwegian working life model. Patman is concerned with how participation promotes educational, intellectual and emotional development, and the workplace is seen as a key arena for training in politics and democracy (Patman, 1970, cited in Trygstad 2017).

Employees' freedom of expression has been strengthened during the last two decades and is regulated in the Norwegian Constitution and in the Norwegian Working Environment Act (WEA). In 2004, amendments in Section 100 stated that it is attempts to limit employee's freedom of expression that needs to be justified, not the other way around. Three years later, the Working Environment Act (WEA) introduced new provisions to promote whistleblowing and protect employees who blow the whistle. In the Norwegian Constitution, there is no clear line between voicing opinions and whistleblowing. In 2017 there were further amendments to the WEA on this topic: mandatory procedures (routines) for whistleblowing and protection also for sub-contracted

or temporary workers. The arguments for these provisions were linked to democracy in general and freedom of expression in particular.

In this chapter we elaborate the effects that the amendments in the Constitution (2004) and the Working Environment Act (2004) may have had when it comes to the perceived opportunities for employees to participate in public debates, voice criticism in public and to blow the whistle. The legal changes got a lot of publicity, and issues related to retaliation for using voice whistleblowing is hot news in Norway. In this chapter we ask:

- To what extent is it unproblematic for employees to raise opinions outside the workplace?
- Have the changes in the WEA made it easier and safer to blow the whistle for Norwegian employees?

In the next section (section 3.2) we present the legal changes and how these changes were received by different actors. In section 3.3 we comment on the methodology in use, before we present our findings in section 3.4. We discuss and conclude in section 3.5.

## **3.2 THE LEGAL CHANGES**

The changes in the Constitution and in the WEA did not represent something entirely new; it is fairer to say that they strengthened the already existing rules and practices embedded in Norwegian working life. The statutory provisions introduced in 2007 can be traced back to 1956, when the provision on safety representatives was incorporated into the Norwegian Environment Act (Skivenes & Trygstad, 2015). These representatives have a special responsibility to report harmful conditions at the workplace and, in very dangerous situations are entitled to stop production. The existing provisions (also before 2007) in the Working Environment Act were and still are highly protective through such wording as ‘to secure a working environment that provides a basis for healthy and meaningful working situation that affords full safety from harmful physical and mental influences, and that has a standard of welfare at all times consistent with the level of technological and social development of society’ (WEA 2005, Section 1-1 A). As we will see later, the changes in the Working Environment Act were highly controversial.

### **3.2.1 CHANGES IN THE CONSTITUTION**

The general freedom of expression is protected by Section 100 in the Constitution and by Article 10 of the European Convention on Human Rights (ECHR). In principle, employees enjoy the same freedom of expression as everybody else (Elvestad, 2011: 31). In the Norwegian Constitution, there is no clear line between voicing opinions and whistleblowing. According to the changes in 2004, grounds must be provided for restricting employees freedom of expression. Moreover, the government White Paper (St. meld. nr. 26 (2003–2004): 14) states that employees are likely to have a special motivation to participate in public discourse because they might possess specialized

knowledge about the debated subjects. Furthermore, it is emphasized that freedom of expression is essential in light of the society's need for information and open discourse. However, there are some limitations. Obviously, statements must not violate the employee's statutory duty of confidentiality and as an employee you cannot speak on behalf of the employer. Further, managers are subject to stricter obligations of loyalty than non –managerial staff.. The same goes for employees in the public sector with positions close to the political sphere. Finally, statements must not violate employers' legitimate interests in a significant way (Somb, case 2014/379).

After the adoption of the amendments, the Parliamentary Ombudsman ascertained that Section 100 of the Constitution provides stronger protection than the ECHR, and that the right of employees to free expression now accords with a direct interpretation of the Constitution. While the purpose of the new Section 100 was to strengthen the right of employees to free expression, the provisions on notification were introduced to protect employees against accusations of disloyalty (Trygstad, 2017).

### **3.2.2 CHANGES IN THE WEA – THE RIGHT TO NOTIFY**

The background for giving the right to notify on a statutory basis lies in the recognition that challenging people in power within an organization involves the risk of retaliation (Bakken & Dalby, 2007; Bjørkelo, 2010; Brown et al., 2008; Skivenes & Trygstad, 2010). Employers and employees may have varying and contradictory interests, which can affect how notifications of censurable conditions are handled. This is the main reason for incorporating the provisions on notification in the WEA in 2007.

The precondition for whistleblowing is that something censurable has occurred. This is commonly defined as acts or conditions that are illegitimate, immoral and/or illegal (cf. the definition given by Near & Miceli et al., 1985). The question remains, however, how the criteria of illegitimacy, immorality or illegality should be understood and interpreted. This might vary between countries, branches and workplaces. The preparatory works for the provisions on notification in the WEA states that censurable conditions include violations of relevant legislation or breaches of ethical codes of conduct. It is therefore specified that 'by censurable conditions are meant not only criminal (i.e. punishable) acts, but also contraventions of other legally defined prescriptions or prohibitions' (Ot. prp. nr. 84 (2005–2006): 37, Lewis & Trygstad, 2009). Breaches of ethical codes of conduct refer to codes that have been issued by the enterprise in questions or norms generally accepted in the society ((Ot. prp. nr. 84 (2005–2006): 17).

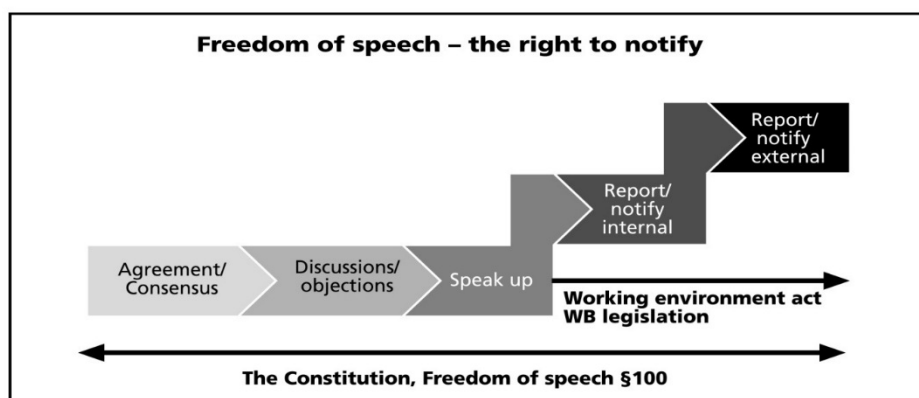
According to the WEA, an employee has 'a right to notify concerning censurable conditions at the undertaking', which covers both internal and external whistleblowing.<sup>5</sup> Norway has, together with Ireland, Sweden and the UK, what Vandekerckhove (2010) labels a three-tiered system of

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<sup>5</sup> It has been argued that whistleblowing as a concept should be limited to external whistleblowing (Haglunds, 2009), but as stated by Miceli et al. (2008), internal and external whistleblowing are rather to be seen as two sides of the same coin. Empirical findings show that employees report misconduct internally, most often to their immediate supervisor, before reporting the issue outside the organization (ibid., Trygstad et al., 2014).

whistleblowing legislation, which involves I) reporting inside the organization, II) reporting to supervisory authorities, and in some cases III) reporting to the public, e.g. media. Section 2 A-1 (2) of WEA provides that the employee must ‘follow an appropriate procedure when notifying’, but regardless of this, the worker will have a right to notify when there is a duty to notify, or in accordance with the routines for notification at the workplace. Further, reporting of wrongdoing to for example, union representatives, health and safety inspectors or supervisory authorities such as the Norwegian Labour Inspectorate, is always regarded as appropriate. In most cases, it will also be considered appropriate to report the wrongdoing to the immediate supervisor or a manager, and sometimes also externally to the media. This applies i) if the incident constitutes a danger to life or health, ii) if there is a danger of destruction of evidence, iii) if one fears sanctions by reporting the incident, or iv) if one has tried to report the incident internally without any success (ref). When reporting in a proper way, the whistleblowers are protected from retaliation and unfair treatment. Section 2 A–1(3) of WEA 2005 places the burden on the employer to prove that the notification was not in accordance with this section. Section 2 A-2 prohibits retaliation against whistleblowers. If there is reason to believe that retaliation has occurred, it is assumed to have taken place unless the employer ‘establishes otherwise’. Irrespective of the fault of the employer, compensation is available if the court considers it reasonable. In relation to facilitating notification, employers are obliged to develop routines for internal notification if there are five or more employed in the company (legislation changed in June 2017).

After the legal changes in 2004 and 2007, it is possible to argue that Norwegian employees have a double protection. Freedom of expression gives them wide scope to express views outside the organization. In addition, the Working Environment Act is meant to protect them from sanctions when blowing the whistle on more serious matters (censurable conditions/wrongdoing) at the workplace. In figure 1 we illustrate the double protection Norwegian employees have (Trygstad & Ødegård, 2014: 219).



### 3.2.3 CONTROVERSIAL CHANGES

Fasterling (2014) points to the necessity of linking whistleblowing protection to other institutional features of a country, not only employees' freedom of expression but also employment protection legislation and other relevant institutional arrangements. Norway stands out from liberalist countries such as the United States and the United Kingdom, but also Denmark when it comes to a strong protection for the individual employee (Nesheim, 2017; OECD, 2010). Further, the Norwegian (as well as the Nordic) working life model is characterized by an inclusive employment regime with rather high and stable union density and wide coverage by collective agreements. Co-operation between employers and employees is a key element in the Norwegian model, at industry as well as at company level. Additionally, according to laws and agreements, Norwegian employees have different channels for voice (Hagen & Trygstad, 2009). The legislative changes in the Constitution and the WEA could therefore be seen as a further expansion of democracy at work. According to leading scholars of institutional theory, legal changes that strengthen pre-existing rules and practices are commonly seen as easier to accomplish (Mahoney & Thelen, 2010; Pierson, 2004; Scott, 1995). Surprisingly, this does not seem to be the story here. The changes, especially in the Working Environment Act were controversial. While important trade unions in the public sector strongly argued for the need for whistleblowing legislation, all the organizations on the employer side were against it (Trygstad, 2017). They saw no need to introduce a statutory right to disclose, and referred to the democratic tradition that characterizes Norwegian working life.

This controversy and its consequences might be a question of power. Seen from the employers' organizations' point of view, the changes were at odds with two key principles: the managerial prerogative and the duty of loyalty (Trygstad, 2017). In terms of the legal aspects, it was pointed out that whistleblowers were already protected through existing legislation. The employers' organizations feared that a statutory right to disclose would act as 'encouragement to persons who fail to act in accordance with the requirements for loyalty, but pursue their own objectives through such acts.' (Trygstad, 2017:186). This standpoint was opposed by those who claimed that the proposed provisions on disclosure did not go far enough. These included the Parliamentary Ombudsman and professional associations, such as the Norwegian Nurses Organization and the Union of Education Norway. It seems that the legal changes disturbed the power balance between labour and capital (Trygstad, 2017).

### 3.3 METHODOLOGY AND DEFINITIONS

A number of large-scale studies on freedom of expression and whistleblowing have been conducted in Norway during the 2000s. In this chapter, we use data from five different whistleblowing surveys covering the entire Norwegian labour market (Bjørkelo, 2010; Fritt Ord Foundation, 2013; Matthiesen et al., 2008; Trygstad, 2010, Trygstad & Ødegård, 2016). In two of them, (Fritt Ord Foundation, 2013 and Trygstad & Ødegård, 2016) questions concerning freedom of expression are



included. The surveys were conducted after the 2004 legislative changes in the Constitution and the WEA in 2007. All surveys have data that illustrate the whistleblowing processes (see below).

In addition, we use data from a survey among Norwegian trade union representatives during autumn 2014 (hereafter the TU survey). In the TU survey, trade union representatives were asked if they knew about the whistleblowing legislation and how they evaluated the effect of the new sections in WEA 2005. The same questions were asked in Skivenes & Trygstad (2010) and in Trygstad & Ødegård (2016). This makes it possible to compare data over time.

In this chapter, we will mostly be referring to our latest study from 2016, which covers employees across sectors and industry. The response rate was 51 per cent, and the sample consisted of 3155 people who answered the questions in a web-based survey during the spring of 2016. 29 percent was from the public sector, 68 percent from the private sector and 3 percent were students. The sample was representative regarding sector, gender, education and working hours. There is, however, an over-representation of employees in the age group 55-66 years, at the expense of younger people. In order to compensate for this bias, we have weighted our descriptive analyses but not our regression and, correlation analyses or when we test for significance.

### **3.3.1 MEASURES IN USE**

To measure the employees experienced freedom of expression we use an index constructed out of six different variables. The Cronbach's Alpha is 0.84. The variables have five values, where 1=totally disagree and 5=totally agree.

1. My opportunities to publicly refer to seriously unfair workplace conditions are limited by my superior
2. The top management does not appreciate that employees participate in public debates
3. I do not feel free answer questions and requests from the press about working conditions
4. My employment contract limits my opportunities to comment on my workplace
5. At my workplace, employees are sanctioned by senior managers when they speak publicly
6. Top management limits my opportunities to express my opinion publicly by referring to the enterprise's reputation.

We also ask if the employees have procedures that regulate who can voice their opinion publicly and respond to requests from the media.

When speaking about the whistleblowing process, we refer to whistleblowing activity, whistleblowing efficiency and whistleblowing sanctions.

Whistleblowing activity refers to those who have observed serious wrongdoing at the workplace in the last 12 months and have reported the misconduct to someone with power to take action. 16 per cent (442 employees) have witnessed, observed or uncovered incidents of wrongdoing during

the last 12 months that ought to be stopped. Those who had observed wrongdoing in the preceding 12 months were asked whether they reported the wrongdoing to anyone inside or outside the organization. We used the most common definition of whistleblowing: «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). Whistleblowing was coded as (0) if an employee experienced wrongdoing and did not report it, and it was coded as (1) if the employee reported it to anyone with power to effect action.

Whistleblowing efficiency refers to whether or not it helps to blow the whistle, while whistleblowing sanctions refer to retaliation against whistleblowers. We asked the employees whether their report of wrongdoing had led to rectification of the wrongdoing. The response alternatives were: (1) The situation was resolved, (2) A clear improvement occurred, (3) A certain improvement occurred, (4) No significant changes occurred, (5) A certain deterioration occurred, and (6) A clear deterioration occurred, (7) Too early to say. In regression analysis, the last group is excluded.

Reaction: The respondents were asked if they had experienced some sort of reaction to their whistleblowing. The alternatives included (1) unambiguously positive feedback (2) no reactions, (3) mixed reactions that include both positive and negative feedback, and (4) unambiguously negative reactions. In the regression analysis, we have excluded those who reported (2), and merged joint together (3) and (4). In our logistic analysis, unambiguously positive feedback is coded (0), mixed and unambiguously negative feedback is coded (1).

We also asked respondents whether the workplace has formal whistleblowing procedures. Those who had were coded (1) and those who had not were coded (2). In the surveys conducted in 2010, 2013 and 2016 similar definitions are used when mapping the whistleblowing process. Research shows that the definitions used for wrongdoing (censurable conditions) and whistleblowing have a major impact on the findings (cf. Skivenes & Trygstad, 2012).

### **3.4 FINDINGS**

In this section, we report findings related to employees' perceived freedom of expression and their whistleblowing activity. In addition, we will present the trade union representatives' views and experiences of the new provisions in the Working Environment Act introduced in 2007. We start with our first research question: To what extent is it unproblematic for employees to raise opinions outside the workplace?

#### **3.4.1 FREEDOM OF EXPRESSION**

Making a public statement to journalists or in communications to editors is not a common occurrence for most employees, even if the parameters for employees' freedom of expression are broad. Most workers are highly loyal to their company. When asking employees to assess their right

to voice concerns externally, we have emphasized that this does not include statements that violate the statutory duty of confidentiality. In figure 2, we see how Norwegian employees assess different aspects of freedom of expression.

Almost six out of ten fully or partly agree that they do not feel free to answer questions from the press about issues related to their workplace, and almost four out of ten agree that senior management limits their opportunities to speak in public out of concern for the workplace reputation. Further, one third recall having signed an agreement with their employer which restrict their opportunity to mention the company in public. Almost the same share (one in three) agrees that the management does not appreciate employees' participation in public debates. Moreover, 31 per cent of employees believe that their opportunity to publicly voice concerns about serious wrongdoing is restricted by superiors. There are however a smaller number (19 percent) that states that employees are sanctioned when they speak out in public. The same statements were assessed by employees in 2013. The overall conclusion is a rather stable picture. In 2016, as in 2013, we find a significant difference in how public and private employees assess the statements. Employees in the public sector assess the statements in figure 2 more negatively than those in the private sector. The same is true when we control for size of the enterprise, the respondents' education and length of service. Also other factors might make a difference, such as gender and educational level (table 1).

Table 1 Indicators that affect the employee's assessment of their freedom of expression (externally).

Indicators	B	T-value
Constant	3,73	22,1***
Women	,22	5,81***
Higher education	-,12	-5,52***
Number of employees at the workplace	,05	4,85***
Reorganisation process	-,19	-4,9***
Public sector	,1	2,5**
N=2403, Adjusted R2=. 1		

\*\*sign.p<.05; \*\*\*sign.p<.01

The model has limited explanatory power. Gender, education and reorganization affect the assessment of the external climate for using voice. Women assess the external climate less favourably than men. An explanation may be related to how women's expressions in public are received. Research has pointed out that while men receive comments on their opinions, women often receive negative feedback related to gender and how they look (Hagen, 2015). This may affect female assessment. The fact that highly educated people consider their freedom of expression as

being better than those with low education, can be related to the professions' position and that the highly educated are more centrally placed in the work organization. Consequently, they also have more power than those with low education. In addition, our analysis indicates that those who have been through reorganization over the last two years consider their opportunities to voice their opinion to the public to be worse than the rest. In previous surveys we have similar findings (Trygstad et al, 2006). It seems like the management's tolerance for criticism is weakened when the business has been through reorganization. We don't know if this is a transient or more lasting phenomenon. But the fact that critical voices are weakened during change processes can also cause workers to fail to speak out about decisions, processes and effects that should have been changed.

### **3.4.2 PROCEDURES THAT VIOLATE THE CONSTITUTION?**

We also asked if the employees work in enterprises with procedures that regulate freedom of expression. 48 percent of the respondents work in enterprises with such routines, and 56 percent have routines that regulate who can talk to journalists. There are no differences between public and private sector employees. We do, however, find an interesting correlation between those who have routines and the assessment of their freedom of expression (see figure 3). We use an index constructed out of six different variables (see section 3.3) as a measure of employee's assessment of their external freedom of expression. A low score indicates good opportunities for voice and vice versa.

The analyses indicate that the respondents who have procedures which regulate expression assess their external opportunities for expression significantly worse than those without. One obvious explanation may be that the routines are formulated in a way that restricts instead of opening up the employees' freedom of expression at company level. It is worth mentioning that the Parliamentary Ombudsman on several occasions during the last few years has affirmed that public-sector enterprises, including municipal ones, have imposed restrictions that violate Section 100 of the Constitution with regard to the employees' freedom of expression. Many of these restrictions are found in different forms such as those mentioned above.

Figure 2. Norwegian employees' assessment of their right to speak publicly. Those who fully or partly agree. N=2885.

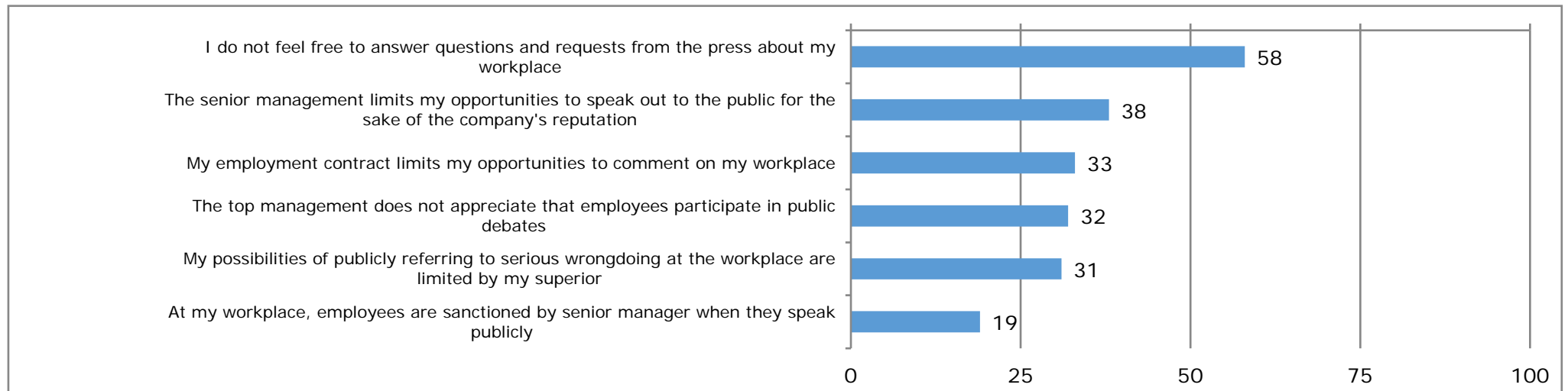
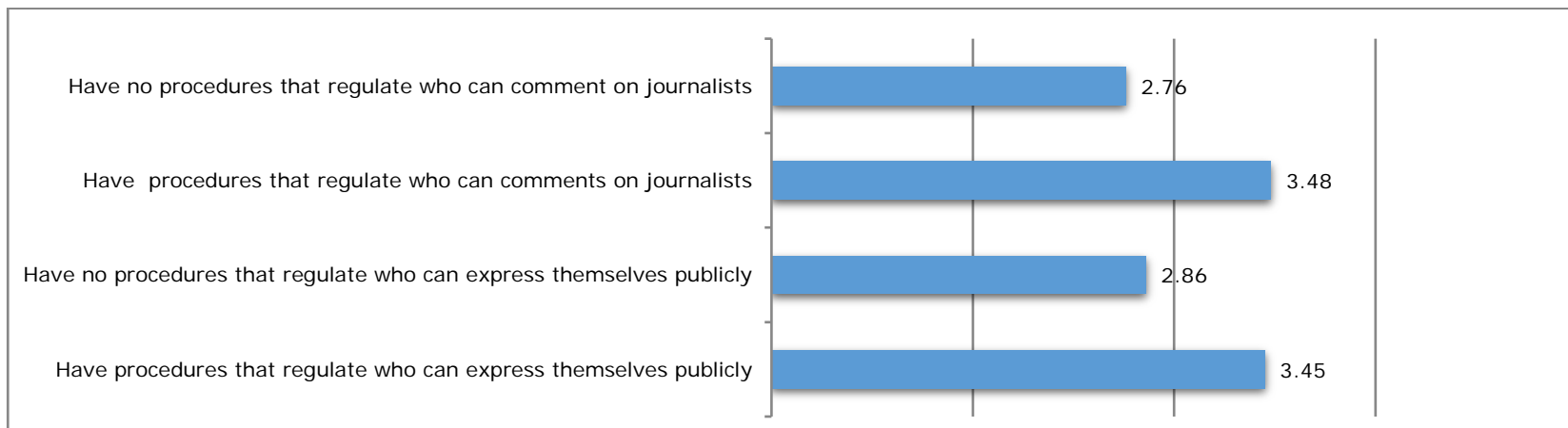


Figure 3. Freedom of expression and the presence of procedures. Differences in means. One-way Anova. N=3087



### 3.4.3 THE WHISTLEBLOWING PROCESS

In this section, we focus on our second research question: have the changes in WEA made it easier and safer to blow the whistle for Norwegian employees? Altogether 16 per cent of those who responded to our latest study (2016) had witnessed or experienced wrongdoing/censurable conditions at the workplace during the preceding year. 53 per cent reported it. This proportion of whistle blowing activity is in line with results from other studies (see table 2). Whistleblowing efficiency refers to whether the whistleblowing partly or completely solved the problem. In this last survey from 2016, 36 per cent of the respondents believe that whistleblowing has an effect. This is a lower proportion than we have previously found. Further, in 2016 one in four is met with reprisals. We have never before measured such a high proportion in the Norwegian labour market.

Table 2 summarizes the main points in the surveys that have encompassed the entire labour market, across sectors and industries concerning the whistleblowing process. All these have included mapping and analyses of self-reported whistleblowing and the consequences of this activity. Thus, the basis of the analysis is the reporting by employees of their experience of censurable conditions in the workplace.

Table 2. Findings from studies in the Norwegian labour market

	Matthiesen et al. 2008 N=1604	Trygstad 2010 N=6000	Bjørkelo et al. 2010 N=2539	Freedom of expression 2013 N=1169	Trygstad & Ødegård 2016 N=3160
Whistleblowing activity	55%	53%	12%	64%	53%
Whistleblowing effectiveness	51%	50%	59%	52%	36%
Proportion of whistleblowers exposed to reprisals	18%	13%	7%	15%	25%
Proportion that would blow the whistle again	81%	82%	-	84%	71%
Proportion of those who have whistleblowing procedures at work	19 %	42 %		55 %	51 %

Note: Whistleblowing activity: The proportion of employees that have witnessed censurable conditions (wrongdoing) during the last 12 months and then ‘blew the whistle’. Whistleblowing effectiveness: Refers to the question did it help to blow the whistle? Was the wrongdoing terminated or reduced?

Table 2 shows some variations in whistleblowing activity (those who have observed serious wrongdoing in the last 12 months and have reported the misconduct to someone with power to take action) but also a relatively high degree of stability around such factors as the effectiveness of disclosure and the use of sanctions.

In the surveys conducted by Matthiesen et al in 2008, Trygstad in 2010 and Trygstad & Ødegård in 2016, the level of whistleblowing activity is nearly identical. This stability indicates that there has been no major increase in whistleblowing activity over this time span. The most prevalent reprehensible issues in 2016 include 'destructive leadership that is detrimental to the working environment', 'violations of ethical guidelines' and 'conditions that may pose a risk to life and health'. It is, however, a rather high proportion that do not blow the whistle. When asked why, the most common reason is fear for reprisals (Trygstad & Ødegård, 2016).

As regards whistleblowing efficiency (whether it helps to blow the whistle), the results are relatively similar over a period of a little more than five years. We, however, see a severe decline from 2013 to 2016 when 36 per cent of respondents believe that whistleblowing is effective. In the report 'Status for freedom of expression in Norway' (2014), a total of 54 per cent of the respondents stated that whistleblowing has an effect. In other words, when it comes to efficiency, we see a rather significant reduction from 2013 to 2016.

In terms of the proportion of employees who have faced retaliation after their disclosures, the share varies from 7 percent (the lowest) to 25 percent (the highest). There is a significant increase from 2013 to 2016 in the proportion of employees who respond that they faced reprisals (sanctions) as a consequence of having blown the whistle on censurable conditions. What is meant by retaliation and sanctions may be unclear, since there are numerous virtually invisible ways to strike back at the whistleblower, such as deferred promotion and giving him/her fewer/other job tasks. In this study, the most common negative reaction included rebukes and reprimands from a superior.

It is also a significantly reduced proportion who report their willingness to blow the whistle again if they should find themselves in a similar position. Previous studies have shown that witnessing reprehensible conditions is a strain on those involved, and it also has a demoralizing and demotivating effect (Miceli et al, 2012). On the other hand, the same studies show that if wrongdoing is rectified, the negative consequences are minimized. In our latest study, four out of ten believe that their whistleblowing had no effect. In addition to the consequences described above, it is reasonable to assume that this may have a chilling effect on the willingness to blow the whistle.

Finally, table 2 indicates that there has been an increase in employees who have whistleblowing procedures in their workplace during the period. In 2013 and 2016 around half of them reported that they have such routines.

The findings from 2016 underscore the reasons for concern over developments in Norwegian working life when it comes to whistleblowing. Furthermore, this study (2016) shows that 43 per cent of those who are the main recipients of whistleblowing reports, i.e. managers, safety delegates and trade union officials, failed to investigate whether the employee who submitted the report to them was exposed to reprisals either during or after the whistleblowing process.

### 3.4.4 WHAT MATTERS?

In several international studies the effect of demographic variables such as gender, length of service, education, etc. on the whistleblowing process have been tested. The results indicate that they do not have a great impact either on who blows the whistle or the outcome (Miceli et al., 2008; Skivenes & Trygstad 2010, 2015). Skivenes and Trygstad (2015) find that institutional arrangements at the workplace make a difference. The presence of trade union representatives at the company level and whistleblowing procedures increase the probability of success when reporting wrongdoing (Trygstad, 2017:188). The explanation given is that while trade union representatives can function as a safety net, whistleblowing procedures seem to contribute to predictability in whistleblowing processes (Skivenes & Trygstad, 2015). However, even in enterprises where these institutional arrangements are present, whistleblowing can be risky. Whistleblowers can harm powerful people, challenge the power structures and provide the public with information that may be regarded as damaging for the organization. In the 2016 survey these variables seem to contribute positively to whistleblowing efficiency and heighten the risk of retaliation.<sup>6</sup>

Table 3. What may influence efficiency and increase the risk of retaliation? Regression analyses.

	Efficiency	Sanction
<b>If one has been through a reorganization process</b>	***	**
<b>The position of the responsible person</b>	***	***
<b>Presence of WB procedures</b>	***	***

\*\*sign.p<.05; \*\*\*sign.p<.01

We find that gender, education, time in office, size of the company or sector have no significant impact in the analyses. The analysis does, however, give us three rather clear findings. Firstly, there seems to be a better environment for whistleblowing for employees who work in firms that haven't been subject to reorganization processes in the last two years. Those who have been through such process, report lower efficiency and a higher risk of retaliation when they blow the whistle. One explanation may be that the tolerance for critique and reports of misconduct is easily interpreted as noise that hinders the process of change.

<sup>6</sup> See [http://www.fafu.no/images/pub/2016/20595\\_Vedlegg2.pdf](http://www.fafu.no/images/pub/2016/20595_Vedlegg2.pdf) for the analysis.



Secondly, the analyses confirm previous findings (see Skivenes & Trygstad, 2010, 2015). If the person responsible for the misconduct is a manager, whistleblowing-efficiency is lower and the risk for retaliation is higher. In other words, it is less 'risky' to blow the whistle when the person responsible for the wrongdoing is a colleague and not a superior and the chances of succeeding seem to increase.

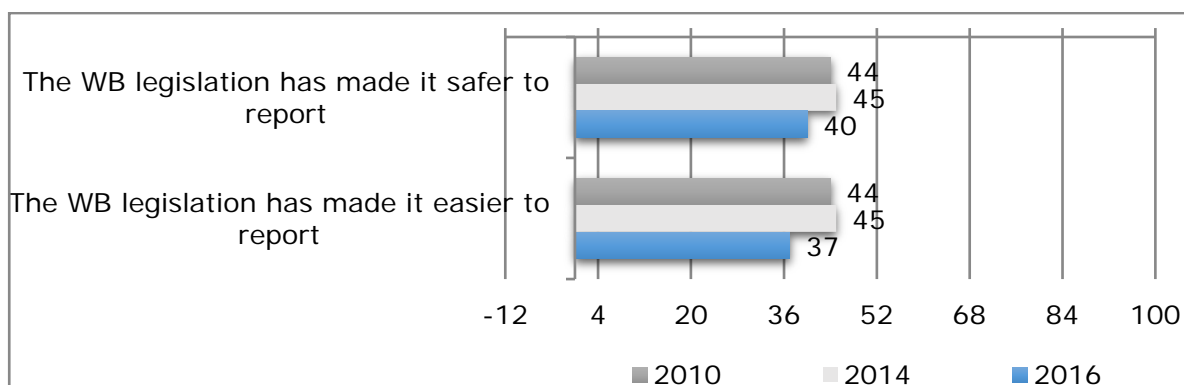
Thirdly, it is interesting to note that while procedures for information and media contact seems to reduce the employees' assessment of their right to speak in public, whistleblowing procedures have a more positive impact, at least on the internal process. The analyses in table 3 confirms previous findings (Trygstad, 2015), that whistleblowing procedures have a positive impact upon the whistleblowing process. One obvious reason, as pointed out by Lewis and Vandekerckhove (2011) and Olsen (2014), is that it makes the whistleblowing process less arbitrary. In 2017 it became mandatory for enterprises with five or more employees to establish such routines in the enterprise.

So far, our findings do not indicate that the whistleblowing process has become easier or safer after the changes in the WEA. We turn now to a group given an important role in the whistleblowing legislation: employees representatives.

### **3.4 5 THE ROLES AND VIEWS OF TRADE UNION-REPRESENTATIVES AND SAFETY DELEGATES**

Trade union representatives and safety delegates at the workplace are given a central place in the whistleblowing legislation and can play different roles in the whistleblowing process. In general, they are normally advocates of an open culture in order to safeguard co-decision and a healthy working environment. When something is wrong, they might firstly act as a whistleblower themselves, and secondly, they might be recipients of reports from whistleblowers at the workplace. Remember that to notify to a trade union representative or a safety delegate is always permissible under the Working Environment Act. Thirdly, trade union representatives or a safety delegate can play an important role when it comes to protecting whistleblowers from retaliation. As mentioned earlier, many of the national trade unions in Norway advocated the new legislation on freedom of expression and protection of whistleblowers. This position, together with their different roles, makes it interesting to see how the trade union-representatives together with safety delegates at the workplaces consider the effect of the new legislation in the Working Environment Act. In 2010, 2014 and 2016 we asked if they believe the whistleblowing legislation has made it safer and easier to blow the whistle. In figure 3, we have listed the proportion that answered 'Totally agree' and 'Partly agree'.

Figure 3: The impact of the changes in the Working Environment Act seen from the trade union-representatives' point of view.



(Percent, N=1062/990/270) (Source: Trygstad, 2010; TU survey, 2014).

The proportions of trade union representatives and safety delegates that agree or partly agree with the statements 'The WB legislation has made it safer to notify' and 'The WB-legislation has made it easier to notify' are almost identical; 44 percent both in 2010 and 2014. However, we do see signs of a slight decrease in 2016. This development leads us to the conclusion that the new provisions have had a moderate effect, seen from a whistleblowing recipient's point of view. It is fair to relate these findings to the fact that the 'black box' still has to be opened. The law cannot make up for a culture hostile to critique and the reporting of wrongdoing. It is, however, important to note that we do not know how the situation would have been without this legislation.

### 3.5 DISCUSSION

During the 2000s important changes were made in the regulatory framework related to Norwegian employees' opportunity to use voice at work. Comparatively speaking, after the amendments, Norway has one of the strongest protections for freedom of expression in Europe. In this section we discuss what kind of effects the amendments in the Constitution (2004) and in the Working Environment Act (2007) may have had when it comes to the perceived opportunities to voice criticism in public and to blow the whistle at the workplace. Our findings underscore the reasons for concerns over the development.

Openness and transparency are preconditions for detecting and dealing with gross errors, wastefulness and abuse. For employers, it is also crucial that employees participate in professionally related discussions of priorities and issues related to health, safety and the environment. For employees, it is important to enjoy co-determination in the workplace. However, the employer's ability to handle criticism and unpleasant information is a precondition for this to happen.

The legislator's intention by changing the Constitution and the WEA was to strengthen employee's freedom of expression and to promote a democratic working life even further (Egge, 2008; Elvander 2011). As pointed out previously, the changes did not represent something entirely new, but

followed the path of workplace democracy. One could therefore assume that the changes would lead to a process towards layering. Layering describes a process of sedimentation that takes place when new elements are added to old ones (Mahoney & Thelen, 2009; Streeck & Thelen, 2005; Thelen, 2004). As part of a layering process, one could expect that the legislative changes, in combination with massive public attention to freedom of expression in general and whistleblowing in particular, would make it easier and safer to participate in the public debate and if necessary to voice criticism and blow the whistle about illegal and unethical actions and incidents at the workplace. But, as shown, the results from different surveys after 2007 do not support such a hypothesis, and it is surprising that a legal framework that promotes reporting of concerns about corruption, waste, theft and harassment was and still is so controversial among the employers.

### **3.5.1 DISTURBING FINDINGS**

The majority of the observed wrongdoing cases are related to the working environment in general and management in particular. In conjunction with trade union representatives and safety delegates, management has a particular responsibility for ensuring a fully acceptable working environment, pursuant to the Norwegian Working Environment Act. We have also seen that fear of reprisals is a key reason for failing to blow the whistle. Overall, this indicates that a significant proportion of employees find it difficult to voice criticism and report wrongdoing. Further, in the 2016-survey we found that the whistleblowing effectiveness was lower, the share of whistleblowers exposed to sanctions higher and the proportion that would blow the whistle again lower than in the studies from 2008 to 2013. We have also seen that employees who have been through organizational changes assess their opportunity to express themselves in public less favourably than others, they succeed less and experience a higher risk of retaliation if they blow the whistle. The same goes for those who report incidents for which a superior is responsible. How can we explain these negative findings from 2016?

As previously observed, when new elements supplement old ones, a possible outcome is a reinforcement of the original purpose. One can, however, end up in a situation of tension inside already established institutions, such as the existing framework of workplace democracy (Engelstad, 2015; Trygstad, 2017). Actors with power can use different strategies to hinder a layering process, in our case widening the scope of workplace democracy. As mentioned in section 2, employees' participation and influence are not the only elements embedded in the Norwegian model of labour relations. Managerial prerogative and the duty of loyalty are just as important. The resistance that the legal changes seem to have provoked may be considered as a response to what the employers and their organizations saw as challenges to the power balance. As stated earlier, the employers' organizations were not in favour of a statutory right for whistleblowers in the first place. It was argued that whistleblowers already enjoyed a legal protection through the Working Environment Act. In addition, they feared that these provisions could be misused.

We will, however, argue that the employers' reactions might have been influenced by leading concepts of management. One question is whether models and principles that emphasize the managerial prerogative have increased demands for loyalty and made it particularly difficult to develop a climate for free speech, critical voices and whistleblowing. Managerial prerogative and loyalty, together with committed employees, have for decades been seen as central concepts of management. Although different, these concepts (e.g. TQM, HRM, NPM, Lean) have some common features. They are all developed in labour market models quite different from the so-called Nordic model. Researchers have argued that these concepts challenge the cooperative relationship and the ideas of workplace democracy, characterized by extensive participation and co-determination, as we know them in Nordic countries (Busck et al, 2010; Finnestrand, 2015; Hagen & Trygstad, 2009; Tønnesen 2007). Individual participation is emphasized and justified on the grounds of efficiency. In such a context, voice and criticism may be interpreted as noise and as damaging to a streamlined production. Implementation of procedures that regulate employees' contact with journalists and what they can say in public illustrate such a development. Our studies show that those who have such procedures at the workplace assess their opportunities to express themselves publicly as less than those without. In the sector, the Government Ombudsman has several times pointed to the fact that public sector employees' possibility for using voice is illegally restricted and that public sector employers therefore violate the Constitution.

At the workplace, it will be essential to discuss measures that can promote a culture in which criticism and whistleblowing is handled constructively and with tolerance of critical viewpoints. This makes demands not only of the recipients of criticism and whistleblowing, but also of the messengers. It is conditioned by provision of information and a willingness to discuss difficult cases.

### **3.5.2 CONCLUDING REMARKS**

As previously noted, freedom of expression is a key element in a democratic working life. The purpose of the Working Environment Act is to secure a meaningful, healthy working environment free from harmful physical and mental influences. A healthy working environment also entails that employees have the opportunity to express themselves in a critical way about conditions in the workplace. The freedom of expression and the WEA provisions intended to protect whistleblowers provide a legal framework for encouraging workers come forward with their views. However, in order to foster critical viewpoints from employees, the working environment and organizational climate are also important aspects. In the preparatory papers for the WEA it is stated that a climate where the employees have real opportunities to speak out about wrongdoing is an essential feature of a good working environment and a healthy business culture (Ot.prp. nr. 84. 2005-2006). The changes made to the WEA in 2007 were based on the recognition that challenging people in power within an organization involves the risk of retaliation (Bakken & Dalby, 2007; Bjørkelo, 2010; Brown et al, 2008; Skivenes & Trygstad, 2010). An essential feature of a healthy working environment is that employees are not afraid to be subjected to reprisals from employers or from other colleagues. Our findings do not indicate that the whistleblowing process has become easier or safer after the

changes in the WEA. We find that fear of reprisals is a key reason for failing to blow the whistle. Further, our results show that one in four employees encounters management displeasure when voicing critical views of workplace issues. It seems that the organizational climate and the business culture are important features to why this is the case. As previously pointed out, the management has a particular responsibility to ensure a fully acceptable working environment. It goes without saying that how management handles these issues is a crucial part of a healthy work environment. To succeed, it is important to create a culture where participating in discourse is considered valuable. Achieving this requires information and communication, as well as training and a lot of targeted effort.

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## 4. The UN whistleblowing protection gap: implications for governance, human rights and risk management

Caroline Hunt-Matthes and Peter Anthony Gallo

### ABSTRACT

UN staff members are duty bound to report misconduct in accordance with the rules drawn from the 1946 Charter of the United Nations. Since the UN Ethics Office was established under the 'whistleblower protection' policy (ST/SGB/2005/21), it has summarily rejected an extraordinary 96 per cent of protection applications in its decade of operation from 2006 - 2016.

Transparency is a prerequisite for accountability. The reality of UN whistleblower protection failure became clear when a United Nations legal precedent in 2011 (Hunt-Matthes 2011/UNDT/063) opened UN Ethics Office decisions to independent legal scrutiny which revealed grave errors by the UN Ethics Office in the implementation of that policy.

The 2011 case [precedent] encouraged more UN staff to come forward to request judicial review of the UN Ethics Office decisions. Every case between 2011-2014 reviewed by the UN Tribunal determined that the Ethics Office had exercised their discretion in error and failed to protect whistleblowers, or were proactive in shooting the messenger for doing his/her job. In 2014, however, a controversial UN Appeals Tribunal (UNAT) judgement determined that the UN Ethics Office decisions could no longer be challenged. This judgement (Wasserstrom 2014/UNAT/457) bears the hallmark of what Montesquieu referred to as 'tyranny perpetuated under the shield of law and in the name of justice' (de Montesquieu, 1748). This decision has arguably fostered, and not deterred, a retaliation culture. Moreover, it inhibits organizational learning and transparency, and it discourages staff from reporting wrongdoing.

The new whistleblower policy introduced in January 2017 (ST/SGB/2017/2) by the 9th UN Secretary General does little towards acknowledging the shortcomings of the preceding policy and will be implemented using the same mechanisms that have failed UN staff over the past decade.

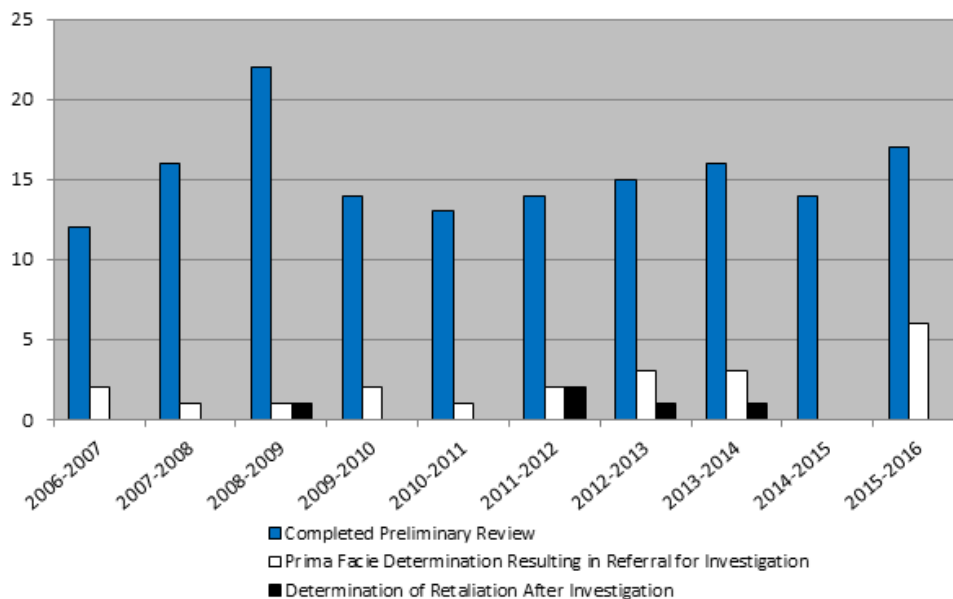
This chapter profiles the challenges confronting UN Ethics mechanisms charged with whistleblower protection in, the last decade (2006-2016) and considers the evidence for its tainted independence which have resulted in declining numbers of UN staff claiming protection under the policy. This has, in turn, created unnecessary risk for the organisation.<sup>7</sup>

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<sup>7</sup> The mandate of the UN Ethics Office also includes dispensing confidential ethics advice; ethics awareness and education, managing a financial disclosure programme and promotion of coherence and common ethics standards across the UN family. This paper does not address these aspects of the mandate.



Figure 1. UN ETHICS OFFICE Protection against retaliation statistics 2006-2016



	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016
Completed preliminary review	12	16	22	14	13	14	15	16	14	17
Prima facie determination resulting in referral for investigation	2	1	1	2	1	2	3	3	0	6
Determination of retaliation after investigation	0	0	1	0	0	2	1	1	0	Pending

Source UN Ethics Office Report to General Assembly 2016

#### **4.1 UN IMPLEMENTATION OF WHISTLEBLOWER PROTECTION: A DECADE OF FAILURE (2006-2016)**

The UN staff regulations and rules create a mandatory reporting obligation, and also prohibit retaliation against staff who comply with that obligation.

Rule 1.2(c) of the UN Staff Rules is unequivocal in stating:

Staff members have the duty to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

UN staff are required to meet the highest standards of 'efficiency, competence, and integrity,' (Article 101(3) Charter of the United Nations) where the concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. (UN Staff Rules 1.2)

The European Union's first ever Anti-Corruption Report (2014) noted that

[...] whistleblowing faces difficulties given the general reluctance to report such acts within one's own organisation, and fear of retaliation. To remedy this, effective protection mechanisms must give confidence to potential whistleblowers.

A growing evidence base, however, indicates that potential UN whistleblowers do not trust the protection mechanisms, despite it being incumbent upon them to report wrongdoing. (Internal UN staff surveys between 2012 and 2017 and the UN Joint Inspection Unit 2011)

This chapter will confine its analysis to the evidence of the effectiveness of the implementation of the UN 'whistleblower protection' policy (ST/SGB/2005/21) solely in relation to the function of protection against retaliation which has a direct bearing on the detection of corruption in the United Nations.

The UN Ethics Office maintains that 96 per cent of those requesting protection did not meet the criteria of the policy. However, in 100 per cent of cases where the UNDT subsequently independently reviewed the Ethics Office's rationale for refusal to protect those applicants, the judges found the UN Ethics Office determination was flawed. To date the UN Ethics office has remained silent on the issue of its responsibility for those errors.

The mistreatment of whistleblowers who fulfilled their duty to report misconduct is a grim chapter in the arbitrary use of power in the United Nations.

#### **4.1.1 A CENTRAL TENET OF GOOD GOVERNANCE - A SAFE ENVIRONMENT TO REPORT WRONGDOING**

An important UN internal study entitled 'Ethics in the United Nations System'<sup>8</sup> by the UN Joint Inspection Unit<sup>9</sup> found that the Ethics Office was perceived to lack independence and was therefore not a safe mechanism for the proper protection of staff who report misconduct (Wynes & Zahran, 2010).

In this report the UN Joint Inspection Unit found in their system-wide assessment of the ethics function that:

[...] there was a strongly held perception throughout the United Nations System of a pervasive culture of secrecy in the decision-making processes of the organizations and little, or no accountability. Against this background, there was little staff buy-in to the ethics function, which was viewed merely as a management device that did nothing to address the underlying problems. [...] Without staff confidence and staff involvement, however, the ethics function will struggle to make an impact. It is of paramount importance, therefore, that the ethics function operates independently of management.

These structural issues are further exacerbated by lack of redress available to UN staff through the internal justice system. Statistics on UNAT judgements indicate a growing perception of an inherent bias in the UN Appeals Tribunal against the staff member returning judgements in favour of the staff in 12 per cent of cases (Gallo, 2017).

#### **4.1.2 THE CRUX OF THE ISSUE IS UN GOVERNANCE**

The reluctance by UN management to sanction wrongdoers at the senior level is the crux of the issue. Research indicates that shortcomings in accountability will inevitably taint the reputation of a whole organization, even when the majority of staff members are hardworking, law-abiding and dedicated (Felps et al, 2006). The ramifications of reputational damage are most serious for the world body.

The UN's unique legal status means in practice that UN staff, in the conduct of their official duties, are subject to no national laws, only the internal system at the UN itself (Ahluwalia, 1964; Bekker, 1994). Functional immunity was envisaged to enable the performance of the UN mandate and to prevent political prosecutions not as a shield against accountability. Yet within that system, in too many cases, no action is taken to hold any senior official accountable for wrongdoing. This contempt for its own law sends a message that accountability does not apply to senior UN officials.

According to the Government Accountability Project (GAP) in Washington DC 2016:

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<sup>8</sup> Ethics in the UN system- Report of the Joint Inspection Unit JIU/REP/2010/3 para 44.

<sup>9</sup> The Joint Inspection Unit is an independent oversight body of the United Nations System

The principle flaw in this arrangement is readily apparent: if senior managers are subject only to an internal system of justice, their authority may allow them to manipulate that system. In such cases, they can engage in corruption, or ignore it when they see it, without incurring the consequences typically resulting from illegality (Edwards, 2016)

#### **4.1.3 THE UN: GUARDIAN OF UNIVERSAL HUMAN RIGHTS**

The dissonance between representing that whistleblowers are protected, and the reality that they are not, challenges the moral authority and credibility of the United Nations. As the de facto guardian of universal human rights, this situation undermines the rights of its own staff members.

In 2015, then Deputy Secretary-General, Jan Eliasson, confirmed in writing that

freedom of opinion, as enshrined in the Universal Declaration of Human Rights, is subject to reasonable restrictions, including the requirement to act in accordance with the United Nations Staff Regulations and Staff Rules (Eliasson, 2015).

This position is not consistent with Article 19 of the International Covenant on Civil and Political Rights or the position of its own UN special rapporteurs. Alfred de Zayas, UN Independent expert on the promotion of a democratic and equitable international order 2017 has called for:

Governments worldwide to put an end to multiple campaigns of defamation, mobbing and even prosecution of whistleblowers like Julian Assange, Edward Snowden, the Luxleakers [...]

To hold United Nations staff members to a different human rights standard arguably erodes the moral authority of the organization.

#### **4.2 FACTORS TAINTING THE INDEPENDENCE OF THE UN ETHICS OFFICE**

Several factors have influenced staff perceptions of the independence of the Ethics Office. According to The Government Accountability Project (GAP), requests for protection had dwindled across the secretariat world wide by 2016, a plausible indication of the lack of confidence (Edwards, 2016).

##### **4.2.1 THE UN ETHICS OFFICE BEGAN ITS OPERATIONS WITHOUT PROPER RESOURCES IN JANUARY 2006**

Retaliation in the UN usually meets the statutory definitions of ‘harassment’ and ‘abuse of authority’, both of which constitute misconduct in their own right under ST/SGB/2008/5.<sup>10</sup> The

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<sup>10</sup> Under that Bulletin however, these complaints are not investigated under normative OIOS procedures but by an ad hoc ‘fact finding panel’ comprising at least two individuals from the same department, office, or mission as the complainant, and who have

investigation of misconduct is the responsibility the Investigations Division of the UN Office of Internal Oversight Services (OIOS/ID) created in 1994.

The UN Ethics Office was created by pressure from the General Assembly, led by United States, as part of the larger UN reform agenda to strengthen whistleblower protection. The whistleblower protection policy (ST/SGB/2005/21) was introduced and the UN Ethics Office established in January 2006, but this was done in haste without a proper budget allocation. Thus handicapped in its operations from the outset, the office was not fully staffed for almost 18 months. This arguably contributed to poor decision-making.

#### **4.2.2 DELEGATION OF THE CENTRALISED FUNCTION OF THE UN ETHICS OFFICE**

In 2007, the 8th United Nations Secretary-General, Ban Ki Moon, diluted coherence, independence and impartiality of the ethics function by authorizing the UN Funds and Programs to set up their own Ethics Offices.

Factors such as the appointment of an independent Ethics Office Chief of sufficient integrity with proper terms of reference, as well as independent reporting lines to the legislative body of each organization, would be key indicators of independence. Yet, the 2007 delegation of the Ethics function, moved from system in which one umbrella UN Ethics Office oversaw reports of retaliation to one that allowed each fund and program of the UN to have its own Ethics Office, thereby putting the day-to-day management of the whistleblower protection into the very hands of the management of those bodies (See Appendix).

The Chart in the Appendix illustrates the characteristics of the new Ethics Offices using criteria developed by the UN Joint Inspection Unit in 2010. According to GAP, many of these policies were found to be inconsistent, flawed by arbitrary loopholes and, on the whole, less comprehensive than the original UN policy established in 2005 (GAP, 2016). Moreover, the Head of the UN Ethics Office, originally an Under-Secretary-General's post, was subsequently downgraded to a Director post, diminishing its authority within the UN hierarchy.

#### **4.2.3 EVIDENCE OF POLITICAL INFLUENCE TAINTING THE ETHICS AND INVESTIGATION FUNCTION**

The General Assembly created an independent Office for Internal Oversight Services (OIOS) in 1994 and the evidence of its initial success under the leadership of USG Karl Theodor Pashke is documented in OIOS reports to the General Assembly.

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attended a short training course. The independence of that process is questionable. Programme Managers may have a vested interest in ensuring that complaints against their managers are not upheld. This inherent conflict of interest could paradoxically contribute to retaliation being carried out within the parameters of the UN Staff Regulations and Rules.

OIOS has, however, more recently been subject to political interference during the evolution of its operations when the interests of the powerful were threatened. In 2010, the outgoing USG/OIOS was heavily critical of interference from Secretary-General in her 2010 end of assignment report:

I would like to ensure that my successor, the incoming USG/OIOS, will not have to spend three years defending the OIOS mandate and the operational independence of the Office against the Secretary-General himself; be it investigations or any of the other disciplines of the Office, audit or evaluations [...] There is no transparency, there is lack of accountability. Rather than supporting the internal oversight which is the sign of strong leadership and good governance, you have strived to undermine its position and to control it. I do not see any signs of reform in the Organization [...] Management at that [U.N.] Secretariat has never protected OIOS and ID [the Investigations Division] in particular from the political pressures exerted by member states when their interests are threatened (Alhenius, 2010).

One example referred to by the USG Alhenius was the motive by the organisation for keeping the key post of UN Investigations Director vacant for two and a half years. As the UN Joint Inspection Unit pointed out in its report on the Investigation Function in the United Nations System:

[...] investigators may be negatively influenced or even manipulated in performing their duties by individuals who may become their direct supervisors or play a role in their career advancement in the future (JIU, 2011).

#### **4.2.4 JUDICIAL REVIEW OF UN ETHICS OFFICE DECISIONS REVEALS ERRORS IN 100% OF CASES**

The gravity of the failure in implementation of UN accountability at the level of its Ethics Office are well documented in a number of UN judgments between 2011 and 2014.

The UN Dispute Tribunal (UNDT) took jurisdiction to review Ethics Office decisions for the first time in 2011 (Hunt-Matthes UNDT/2011/063). Central to Judge Boolel's rationale for his decision was that the Ethics Office decisions affect employment rights:

[...] the Ethics Office, unlike the Office of the Ombudsman, has the requisite authority to make binding determinations affecting the rights of a party and should therefore not be allowed to operate in a legal vacuum [...]

This legal precedent allowed other UN staff to request judicial review of UN Ethics Office decisions. Remarkably, in every case reviewed by the UNDT between 2011 and 2014, the Tribunal found the Ethics Office had failed to protect UN staffers. Moreover, case reports, discussed below record how the Ethics Director has simply ignored an Order from the Tribunal to protect a whistleblower from retaliation.

*Hunt-Matthes (2004-Present): Longest retaliation case in UN history on unilateral failure of internal whistleblower channels*

In January 2006, after reporting several 'protected activities', Ms. Hunt-Matthes, a Senior Investigation Officer, became the first UN staff member to apply to the UN Ethics Office for protection against retaliation, providing evidence of obstruction and overt interference from senior officials in the conduct and outcome of investigations at the United Nations High Commissioner for Refugees (UNHCR) Inspector Generals Office (IGO). Her disclosures included:

October 2003: obstruction to her rape investigation by a UNHCR Country Representative committed by another UNHCR staff member;

December 2003: the decision of the IGO to hire a staff member who was himself subject to an IGO investigation, and the failure of her supervisors to take corrective action against a wrongly fired staff member as a result of an erroneous investigation by her supervisor;

January 2004, the refusal by her supervisors to follow registration procedures in the subsequently founded case of the sexual harassment by the UNHCR High Commissioner- (the supervisor of the Inspector General);

July 2004: irregularities at the UNHCR Indonesia Office including the unlawful detention of refugees by senior UNHCR staff, leading to the death of a refugee while in detention, and a report of sexual exploitation of a refugee by a UNHCR staff member.

The hallmark of this case is that investigations at each stage of due process for a whistleblower using internal channels were suppressed. This is a proactive strategy on the part of some employers (Martin, 1996). Witness testimony in the case highlighted political interference of the UNHCR investigation function to manipulate the process to get particular outcomes.

As a result, she was separated from service on 27 August 2004 based on a flawed negative performance appraisal created by her supervisors post hoc. Her request for protection was denied by the UN Ethics Office, who used the impugned performance evaluation to justify its refusal to protect. The UNDT found the performance appraisal, constituted one of the 'acts of retaliation against her' for being a whistleblower. Her UNHCR supervisors and the legal department were referred to the Secretary General for accountability. No action was taken. The UNDT judge in 2013 noted:

There can be no doubt that [Hunt-Matthes'] uncompromising stance on the application of ethical and procedural standards to investigations caused discomfort at the highest levels.

The UN appealed both UNDT judgements i.e. the substantive retaliation case (Hunt-Matthes 2013/UNDT/085) and the UN Ethics Office failure to protect case (Hunt-Matthes 2013/UNDT/084) to the United Nations Appeal Tribunal (UNAT) which subsequently vacated both the UNDT judgments, after denying the request for an oral hearing.

In Hunt-Matthes UNAT 444/2014, the judges argued that the retaliation occurred before the UN Ethics Office was created in January 2006 and was therefore not receivable, in effect erasing UN Ethics Office negligence from the record. The UNAT ignored the fact that the original report was filed with OIOS, the responsible office for retaliation complaints in 2005 and that OIOS recommended the transfer of the request to the UN Ethics Office in April 2006. These errors on the face of the record can be in part attributed to the refusal by UNAT of the request for an oral hearing in a complex case, against which there is no right of appeal. The substantive retaliation case UNAT 443/2014 was referred back to the UNDT for a retrial based on a witness technicality. In October 2017, the matter was still pending a retrial de novo 13 years after the initial separation in 2004.

*Wasserstrom 2007: UNAT closes door to independent judicial review*

James Wasserstrom, an American anti-corruption veteran serving in the United Nations Mission in Kosovo (UNMIK), suffered egregious retaliation after reporting a multi-million dollar corruption scheme involving UN officials and local companies in Kosovo in 2007. He sought protection by the UN Ethics Office against retaliation under ST/SGB/2005/21 until, on appeal in 2014 (seven years after the retaliation), the UN Appeals Tribunal ruled in Wasserstrom 2014/UNAT/457 that a UN staff member had no enforceable right to protection, and the UN Dispute Tribunal therefore had no jurisdiction to hear a challenge to any decision made by the Ethics Office.

The UNAT relied on Article 2(1) of the UNDT statute, which limits the jurisdiction of the Tribunal to hear a challenge to only an 'administrative decision' that is alleged to breach the terms of the staff member's employment. By a majority decision, the UNAT held that ST/SGB/2005/21 section 5.7 only authorized the Ethics Office to make a recommendation to the Secretary-General. Recommendations are not 'administrative decisions' and even if the form of the retaliation has a serious detrimental effect on the staff member's employment, decisions made by the Ethics Office are not deemed to be subject to judicial review. This reversed the decision opened the door to judicial review in Hunt-Matthes UNDT/2011/63.

The status quo as of 2014 is that the Ethics Office may recommend that the staff member be protected from retaliation. However, the Secretary-General is under no obligation to accept that recommendation. Whistleblower protection in the UN is therefore not an enforceable legal right because the staff member has no legal means by which to compel the Organisation to protect them, no matter what the findings of the retaliation report might be.

*Nguyen-Kropp & Postica (2015): custodians of the investigation function retaliate*

The UN Ethics Office found a prima facie case of retaliation against two OIOS investigators. The Acting Director, OIOS/ID had downgraded their respective 2010 performance evaluations when they raised legitimate concerns about his tampering with evidence. As the case involved an OIOS staff member, the UN Ethics Office convened an external panel for a full investigation. The applicants were denied the right to challenge the appointment of members of the panel or their terms of reference, despite concerns that the panel members were not independent. This Investigation



Panel found no evidence of retaliation, though that claim was subsequently contradicted by the UN Dispute Tribunal following a hearing in Nguyen-Kropp & Postica (2013/UNDT/176).

Following the publication of the Nguyen-Kropp & Postica (2013/UNDT/176) judgement in late December 2013 in which OIOS/ID was criticised for initiating an investigation with a retaliatory motive, the Investigations Director requested that the persons responsible at least be placed on administrative leave. No action was ever taken against any of the retaliators identified.

#### *Artjon Shkurtaaj (2007): UN Ethics Office jurisdiction rejected*

Artjon Shkurtaaj, an Albanian Chief Operations Officer of the UN Development Programme (UNDP) in North Korea, was fired in 2007 after he reported counterfeit US dollars in the UNDP office safe in Pyongyang and their unauthorized use. Senior management at UNDP unilaterally withdrew Shkurtaaj's appointment, and his short-term contract was allowed to expire. He requested protection from retaliation from the UN Ethics Office, and in August 2007 the Ethics Office found a prima facie case of retaliation. The UNDT later concurred with this finding.

In response, UNDP Administrator Kemal Dervis claimed that the UNDP was not subject to either the jurisdiction of the Ethics Office or the UN anti-retaliation policy, and would therefore create its own policy and Ethics Office:

Instead of following the procedures established in his new whistleblower policy, however, Dervis convened an ad hoc External Independent Investigative Review Panel' to review the Shkurtaaj case. Dervis self-selected the panel without consultation and proper terms of reference and included a member of a UNDP advisory board (Warah, 2016).

Shkurtaaj challenged that decision in the UNDT and was successful. The UNAT upheld the Ethics Office's decision to award compensation to him, albeit reduced on appeal. No disciplinary action was taken against anyone involved in the corruption that he reported. This case however catalyzed the delegation of authority of the Ethics Office function to individual UN funds and programmes in 2007.

#### *Rahman: Ethics Office recommendations*

Kalilur Rahman challenged the failure to select him for a D-2 post and the decision to return him to a retaliatory work environment at the United Nations Conference on Trade and Development (UNCTAD). Retaliation was established but the Secretary-General failed to protect him, forcing Rahman to appeal to UNDT for its enforcement which was dismissed without a hearing.

Rahman appealed to the UNAT over the failure of the institution to restore him to the professional and financial standing he had prior to making protected disclosures. UNAT dismissed both appeals and affirmed the UNDT's judgement. (UNAT/2014/453) However, the judges stated that Rahman, as a victim of retaliation, was entitled to be informed of the disciplinary measures imposed on the persons responsible for the retaliation.

### *Nartey: the UN Ethics Office ignore UNDT order*

Felix Nartey served as a procurement Officer on secondment from the United Nations Office in Nairobi as a UN peacekeeper. In this case (UNDT/NBI/2014/051 ), the UNDT had ordered the UN Ethics Office to protect the applicant from retaliation following his witness testimony against management in a court case. The Ethics Office refused to comply. Judgment No. UNDT/2014/051 concluded that 'UNON management abused its authority in [...] denying [Mr. Nartey] the grant of a lien on his post to serve as a peacekeeper. The UNDT found that UNON's general practice of denying liens to professional staff going on mission was 'contrary to the spirit and intent of the Secretary-General as expressed in ST/AI/404'. Judgment No. UNDT/2014/051 was vacated by UNAT, and the referrals of the Director of the Ethics Office and the Director of DAS of UNON to the Secretary-General for accountability were vacated. The flouting of UN court orders by the UN Ethics Office without proper justification does not reinforce culture of accountability.

### *Kompass 2014: A retaliatory Investigation*

In 2014, Anders Kompass of Sweden was Director of the Field Operations Division in the Office of the High Commissioner for Human Rights (OHCHR) in Geneva. In that capacity, he received an OHCHR report from the Multi-dimensional Integrated stabilization Mission in the Central African Republic (MINUSCA) mission detailing the ongoing sexual abuse of children by French troops. These troops were not under UN command but French command and the UN had no jurisdiction over them because they were not deployed as military UN peacekeepers but as an independent French force.

Kompass, whose role involved cooperation with member states, passed the information to the French Government. This action was interpreted by his supervisors as leaking confidential information. The Director of the Ethics Office referred the case to OIOS/ID, to have Kompass investigated for 'misconduct.' The OIOS Investigation Director recused himself from the investigation on the basis that he perceived it to be a politically motivated witch-hunt (Inner City Press, 2015).

The ensuing press publicity forced the UN to appoint an external panel to review the case. Their report highlighted the influence of UN Chief of Staff Malcorra on Ethics Director Joan Dubinsky and the OIOS Chiefs, and found that USG/OIOS Lapointe had acted improperly and abused her authority.<sup>11</sup>

These cases have done little to inspire confidence in future UN whistleblowers in deciding to exercise their duty to blow the whistle (Rocha & Kleiner, 2005). Moreover, the use of power and legal resources by the United Nations in litigating these cases raises serious questions (Kipnis, 1981).

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<sup>11</sup> Ms. Dubinsky retired from the UN very shortly thereafter, but not before Ms. Malcorra extended her contract just long enough to give her a significantly increased pension.

The United States Congress, however, took important steps to address UN accountability failure in relation to whistleblowers in 2014.

#### *Rielly-errors in UN ethics reports - A review of its own errors*

One of the last cases to be reviewed by the UN Ethics Office prior to abolition of the policy was the case of Emma Rielly in July 2016. Ms. Reilly was an employee of the Office of High Commissioner for Human Rights who reported protected activities in relation to her supervisor including the acceptance of gifts from a government and the compromising of the identity of Chinese dissidents to the Chinese Government.

The UN Ethics Office stated in its decision which took 85 days to deliver, that no prima facie case of retaliation existed on the basis that in their opinion Ms. Rielly had endured no retaliation. The decision contained numerous errors of fact and law that the UN Ethics Office agreed to review it again- a decision was still pending in October 2017. Under the new policy, Ms Rielly will have no right of judicial review unless the Ethics Office find a prima facie case of retaliation (Gallo, 2017).

These cases illustrate that external independent scrutiny of Ethics Office decisions are an imperative.

### **4.3 US CONGRESSIONAL CERTIFICATION INITIATIVES**

Section 7048 of The US Appropriations Act 2014 requires that UN agencies funded by the US comply with international best practices for the protection of whistleblowers.

The US State Department was required to certify that each of these bodies complied with these standards, failing which 15% of the US contribution to that body would be withheld. Within six months of legislation being passed, the Hunt-Matthes and Wasserstrom judgements illustrated that whistleblower protection implementation was flawed, though the budget contribution was not withheld. This certification process is a positive measure to enforce UN accountability and the diligent exercise of the certification process will be critical in enforcing UN accountability in future.

### **4.4 INCREASING EVIDENCE OF PERCEPTION OF BIAS IN THE UN APPEALS TRIBUNAL**

The UNDT, with its independent judges, represents a marked improvement over the discredited justice system it replaced. Yet the trend in United Nations Appeal Tribunal judgements continues to concern UN staff given the perceived bias against them. Moreover, there is an automatic right of appeal to the UNAT and its judgements are final.

Table 1. Statistics from UN Justice System Annual Reports to the General Assembly (Gallo, 2017)

UNAT JUDGEMENTS	2016	2015	2014
FOR UN	63	90	73
FOR UN STAFF	15	16	16

In January 2017, ST/SGB/2005/21 was replaced by ST/SGB/2017/2, but implementation of the new policy remains assigned to the same Ethics Office that failed to implement the 2005 policy. In addition, the new policy does not address why staff lack confidence in it. This is the governance equivalent of doing the same thing over and expecting different results. It is futile and shortsighted at best.

In 2017, incoming Secretary-General Antonio Guterres aware of staff concerns stated:

The United Nations must focus on delivery rather than process; and on people rather than bureaucracy. I am committed to building a culture of accountability, strong performance management and effective protection for whistleblowers.

This is not dissimilar to the assurances offered by his predecessor Ban Ki Moon in 2007, who said:

We must build a staff that is truly mobile, multi-functional and accountable, [...] And we must hold all UN employees to the highest standards of integrity and ethical behaviour.

#### **4.5 HURDLES FOR FUTURE WHISTLEBLOWERS UNDER THE NEW POLICY ST/SGB/2017/2**

The new whistleblower policy, ST/SGB/2017/2 introduced in January 2017, purports to strengthen whistleblower protection for UN staff members. How discretion is exercised in its implementation is the core issue to determine its effectiveness.

The criteria for granting whistleblower protection remain unchanged: the staff member must have suffered retaliation after a ‘protected activity,’ which is either (a) reporting misconduct, or (b) having co-operated with an investigation or audit.

The definition of retaliation has been amended to mean

any direct or indirect detrimental action that adversely affects the employment or working conditions of an individual, where such action has been recommended, threatened or taken for the purpose of punishing, intimidating or injuring an individual [Emphasis added] because that individual engaged in [a ‘protected activity’].

This allows the Ethics Office to excuse retaliation on the grounds that management was able to provide an alternative motive for the actions taken. These are typically disingenuous performance issues and restructuring initiatives designed to abolish the post of the whistleblower.

This new policy retains the same burden of proof, with the onus remaining on the Organisation to demonstrate by 'clear and convincing evidence' that they would have taken the same action even without the protected activity.

The ability to probe a case beyond a superficial justification requires a high degree of expertise to secure circumstantial evidence in addition to the political will to do so. In 2013, witness evidence given under oath by Susan John, former Ethics Officer in Hunt v Matthes UNDT/2013/085 stated that an untrained and unpaid intern was delegated the responsibility of making the decision on behalf of the UN Ethics Office in relation to fraudulent documentation produced by the Inspector General's Office. The judgement of the Under Secretary General for Ethics in delegating a case of such complexity<sup>12</sup> to discern burden of proof to an intern is questionable.

Moreover, the new policy retains the requirement (section 2.1) that in order to be a 'protected act' the misconduct complaint must contain 'information or evidence to support a reasonable belief that misconduct has occurred.' This allows the Ethics Office to make a completely subjective assessment as to the adequacy of the grounds for the misconduct complaint, and therefore dismiss the application. Such decisions are still excluded from judicial review.

Between 2006-2016, 96 per cent of applications for protection were summarily rejected without further investigation at the 'preliminary review' stage. The staff member cannot challenge the preliminary review decision. Moreover, ST/SGB/2017/2 Section 8.4 allows the Ethics Office to dismiss an application for protection against retaliation after an OIOS investigation found there was retaliation. That section authorizes the Ethics Office to then conduct a further 'independent review' assessing the motives for the retaliation, and thus dismiss the application at that stage – again without staff member having the right to challenge it.

Access to necessary evidence such as management communications or other documents without an Order from the Tribunal is problematic for staff. Prima facie evidence of its existence is required. Even when such an order is granted, there is a history of the UN Administration failing to disclose documents, again leaving the staff member with no admissible evidence. For example, the confidential UNHCR Lack Hill and Langford Report of 2007 commissioned by the UNHCR High Commissioner and independently verified irregularities in the UNCHR IGO reported by the whistleblower was unknown to the applicant for a decade.

Much has been made of the shortened time limits under ST/SGB/2017/2 for the Ethics Office to exercise its discretion. ST/SGB/2005/21 had required a decision to be made within 45 days from receiving the complaint of retaliation. This has now been 'shortened' to 30 days - but within 30 days of receiving all information requested. That is a retrograde step. It allows for the procedure to be delayed almost indefinitely. The UN Ethics Office request for more documents effectively resets the

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12 UNAT judges failed to grasp the correct facts in Hunt-Matthes UNAT/2014/444.

30-day clock at each juncture. There is no penalty or sanction for running beyond this time period, and the staff member has no right to challenge the Ethics Office failure to act in the specified time period.

The new policy, ST/SGB/2017/2 purports to extend the coverage of the whistleblower protection policy to non-staff members and confirms that it is misconduct for a UN staff member to retaliate against an outside party. This presents unique implementation challenges as the UN has no legal jurisdiction over third parties.

This is illustrated by two cases involving experienced American police officers serving in UN peacekeeping missions but hired by private companies. Both Kathy Bolkovac hired by Dyn Corp USA and Tamatha Fischer hired by PAE under contract with the US State Department reported serious sexual impropriety by UN personnel in accordance with applicable UN internal channels and were not protected from brutal retaliation. Additionally, Fischer experienced post-employment retaliation, received no relief and was subsequently blacklisted. Bolkovac received relief from a UK tribunal in 2002 where Dyn Corps was registered<sup>13</sup> (Bolkovac, 2011; Walden, 2014). How protection would apply under the new policy is yet to be tested.

Under the new policy, Section 9 provides for the 'review' of the Ethics Office decision by the Alternate Chair of the UN Ethics Panel, but the argument that that is somehow 'independent' is fallacious. The Alternate Chair of the UN Ethics Panel will by definition always be a professional colleague of the Ethics Director. Any professional relationship they have could create a conflict of interests that prevents them from reviewing the decision of someone they know and work with. Furthermore, decisions of the Ethics Panel cannot be reviewed by the UNDT. The lack of access to judicial review is the most serious flaw in the system.

That an administrative decision is contestable under ST/SGB/2017/2 section 10.1 only partially closes the loophole that allowed for the dismissal of the application in the Wasserstrom case. Only decisions by the Administration are contestable, following a recommendation from the Ethics Office. Decisions of the Administration are those instances where retaliation is actually established by the Ethics Office, (less than 4% of all applications between 2006-2016). Even then, the decision can only be challenged if it has 'direct legal consequences' affecting the staff member's employment. As such, it will only be of any real value if the applicant is still employed by the UN at the time such a decision is made.

According to the August 2017 report to the General Assembly: Activities of the Office of Internal Oversight Services for the period 1 July 2016-30 June 2017, the Ethics Office referred 5 cases for investigation under the new policy of which one case of retaliation was substantiated. More research is required as to how discretion was exercised by the Ethics Office.

In summary, ST/SGB/2017/2 appears to preserve the Ethics Office ability to dismiss applications for protection as staff members still have no right to an independent legal challenge of the decision. In

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<sup>13</sup> Dyn Corps, UK a subsidiary of Dyn Corps International has since moved its registration to the middle east where employment law standards favour the employer.

short, this new policy preserves the organization's tactics for dismissing applications for protection (Lewis & Vandekerckhove, 2011). More research will determine the validity of the hypothesis.

#### **4.6 CONCLUSION: A CULTURE OF SILENCE AND INCREASE IN CORRUPTION**

Evidence to date has shown that poor implementation of ST/SGB/2005/21 has created a decade long whistleblower protection gap which has paradoxically served to protect unethical and retaliatory managers more than staff members reporting in good faith (Rothschild & Miethe, 1999).

To submit the new policy to implementation by the same mechanisms and to expect a different result is shortsighted and does not address UN staff lack of confidence in the implementation mechanism. Evidence garnered from internal staff surveys (UN 2017, UNHCR 2011, UNHCR 2017, UNICEF 2017) and ongoing external research (Hunt-Matthes 2017) indicates that instead of empowering staff to speak up it may have inadvertently created a 'culture of silence' in the face of UN corruption (Knoll & Dick, 2013).

At the launch of ST/SGB/2017/2, the Secretary-General announced the establishment of an 'Internal Working Group' to monitor progress under this new policy, but failed to look outside the UN system for solutions to the lack of independence of its whistleblower protection mechanisms.

There is, for example, no independent dispute resolution entity, either internally or across the whole UN system.

To be effective, any whistleblower protection mechanism must involve mandatory enforcement of its findings. There must be penalties for retaliation, and any act of reprisal for, or interference with, a whistleblower's disclosure should be sanctioned without delay as misconduct. Perpetrators of retaliation should be subject to employment/professional sanctions and civil penalties.

Until then, as the UN JIU Inspectors predicted seven years ago:

'Without staff confidence and staff involvement, however, the ethics function will struggle to make an impact. It is of paramount importance, therefore, that the ethics function operates independently of management' (Wynes & Zahran, 2010: para 44).

This protection gap has created a significant management risk within the UN (Ponemon, 1994). Whistleblowers constitute the prime source of critical information when it comes to identifying fraud and abuse 43% of all fraud is flagged by whistleblowers (KPMG, 2016). When an organization decides 'to shoot the messenger,' employee morale is detrimentally affected, with grave consequences for tackling corruption.

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APPENDIX

Independence of the UN Ethics function by agency, date of establishment of function and indicators of independence - Source JIU report 2010

Organization	Terms of appointment of head of ethics office	Reporting to executive head	Reporting to legislative bodies	Informal access to legislative bodies
United Nations	Appointment is not time-limited.	Reports directly to Secretary-General (SG). Annual report to SG cannot be changed by SG.	SG reports annually to General Assembly on the activities of the Ethics Office.	No
UNDP	Policy: one four-year contract, non-renewable; ineligible for subsequent employment in UNDP. Practice: one-year contract renewable up to four years.	Reports directly to Administrator. Annual report to Administrator cleared by United Nations Ethics Committee (UNEC) which makes recommendations as appropriate. Administrator cannot change annual report.	Ethics Office reports annually to Executive Board. Recommendations of UNEC sent to the Administrator.	No
UNFPA	Policy: one five-year contract, non-renewable; ineligible for subsequent employment in UNFPA. Practice: subject to current recruitment rules.	Reports directly to Executive Director (ED). Annual report to ED cleared by UNEC which makes recommendations as appropriate. ED cannot make changes to annual report.	ED annual report to Executive Board on oversight activities includes paragraph on ethics and recommendations made by UNEC.	No
UNICEF	Policy: one five-year contract, non-renewable; ineligible for subsequent employment in UNICEF. Practice: two-year contract renewable up to five years.	Reports directly to the Executive Director. Annual report to ED cleared by UNEC which makes recommendations as appropriate. ED cannot make changes to annual report.	ED annual report to Executive Board includes key elements of Ethics Office report and any recommendations made by UNEC.	No
UNHCR	Appointment is not time-limited.	Reports directly to High Commissioner (HC). Annual report to HC cleared by UNEC which makes recommendations as appropriate. HC cannot make changes to annual report.	Ethics Office provides courtesy copy of annual report to the chair of Executive Committee and this report is on website. Ethics Office reports to Executive Committee/ Standing Committee on periodic/ad hoc basis.	No
WFP	Appointment is not time-limited.	Reports directly to Executive Director. Annual report to ED cleared by UNEC which makes recommendations as appropriate. ED can make changes to annual report.	ED forwards summary of the report to Executive Board and includes recommendations of UNEC.	No

ILO	No separate head of ethics office. Appointment is not time-limited.	Reports directly to Director-General in capacity as Ethics Officer. Presents a periodic report to DG.	No reporting by DG to Governing Body on the activities of the Ethics Officer.	No
FAO	Appointment is not time-limited.	Reports directly to Director-General in capacity as Ethics Officer.	No information	No
UNESCO	Policy: appointment of limited duration, with maximum duration of four years. Practice: one year initially with a maximum tenure of	Reports directly to Director-General.	No such policy	No
UPU	No separate head of ethics office. Appointment is not time-limited.	Reports directly to Director General of the International Bureau in capacity as Ethics Officer.	No information	No
ITU	Appointment is not time-limited.	Ethics Officer reports directly to Secretary General.	Through the SG Office, EO updates Council working groups, Council and Plenipotentiary Conference about ethics function.	No
WMO	No separate head of ethics office. Appointment is not time-limited.	Reports to Secretary-General in capacity as Ethics Officer a.i. Reports on discharge of the ethics function through annual accountability report to SG which cannot be changed by SG.	EO a.i. provides periodic information about the ethics function in progress reports to the WMO Audit Committee, and through the SG to Executive Council/Congress.	No
IMO	Appointment is not time-limited.			No
WIPO ( June 2012)	Appointment is not time-limited.	Reports directly to Director-General in capacity as Ethics Officer. Presents a periodic	No	No
UNIDO	Appointment is not time limited	EO reports directly to the DG	No information	No
IOM	Appointment is not time limited	EO reports directly to the DG		No

## 5. Enhancing whistleblower protection: 'it's all about the culture'

Stelios Andreadakis

### ABSTRACT

This chapter argues that, since law and policies do not provide a fully adequate answer to the problem of whistleblower protection, we need to reinforce these rules and policies and make them more focused on corporate culture. More specifically, whistleblower policies can contribute towards the creation of a culture of openness and honesty, as whistleblowing can be not only an instrument of good governance but also a manifestation of a more open culture

### 5.1 INTRODUCTION

In April 2017, Barclays' chief executive, Jes Staley, was put under investigation by the Financial Conduct Authority and the Bank of England for breaking their rules in relation to the treatment of whistleblowers. Jes Stanley apologised for attempting to uncover an informant's identity and John McFarlane, Barclays' Chairman, admitted that that he is personally disappointed that this situation does not fit with the bank's culture and the integrity of its controls. This was another setback for Barclays after the reputational damage it suffered following its involvement in the Libor rigging scandal.

It is not the aim of this chapter to evaluate the ethical stance of Barclays or the conduct of its executives. However, this story brought to the surface again the issue of whistleblower protection, not so much in relation to the existence of whistleblowing procedures and policies in a company, but mainly about their integrity, independence and effectiveness in protecting whistleblowers from being victimised or retaliated against because they have disclosed concerns. Although in the case of Jes Staley and Barclays there was no harassment or blacklisting, because the whistleblower was not identified, it is the most recent one in a long list of cases involving attempts to silence, victimise or retaliate employees, who tried to follow the whistleblowing procedures. Michael Woodford, Cynthia Cooper, Sherron Watkins and Gary Walker are just a few of the whistleblowers who were brave enough to step up and, instead of protection, they received contempt, prosecution and harassment.

It is worth mentioning that in many countries around the world there is a legislative framework that has been introduced to offer protection to whistleblowers and more and more companies seem to respond positively by introducing whistleblower channels and procedures, especially where such requirement is included in the Listing Rules of a country's stock exchange. At the same time, it needs to be examined whether these rules and initiatives are sufficient in actually safeguarding whistleblowers or encouraging employees to step up and blow the whistle. Although Serbia, Ireland

and New Zealand have some enlightened statutory provisions, it cannot be argued that there is uniformity and consistency among these legal frameworks in terms of the type of protection offered, the oversight and enforcement mechanisms, and the implementation of internal procedures. As a result, there is a growing number of cases of retaliation, discrimination, and insufficient protection of whistleblowers, while we are far from the establishment of a set of minimum standards that would apply internationally. If potential whistleblowers do not feel that they will be adequately protected, they are not likely to blow the whistle, for fear of having the same treatment as the above -mentioned whistleblowers.

This chapter argues that, since law and policies do not provide a fully adequate answer to the problem of whistleblower protection, we need to reinforce these rules and policies and make them more focused on corporate culture. More specifically, whistleblower policies can contribute towards the creation of a culture of openness and honesty, as whistleblowing can be not only an instrument of good governance but also a manifestation of a more open culture (Committee on Standards in Public Life, 2005). Although improvements can and should be made to the existing regulatory framework, this framework needs to be benefitted from a culture that actively encourages the challenge of inappropriate behaviour at all levels. Embedding the right culture as well as the right processes is the key to achieving efficient whistleblower protection.

## **5.2 WHISTLEBLOWERS AND THE REALITY CHECK**

Workers, including directors and members of the management team, feature at the heart of whistleblowing regulation, as they are usually the first to identify or to know when something is wrong within their company. Their access to information and their inside knowledge of their company renders them an extremely valuable asset not only for fraud and mismanagement reporting purposes, but also as an early warning and accountability mechanism (Berry, 2004; Miceli & Near, 1992). At the same time, the key for successfully tackling the problem of corporate mismanagement and corruption is the establishment of strong bonds and sufficient communication channels between employees and management. Encouragement and protection are the two main pillars upon which an efficient legal framework should be based. Without clear arrangements which offer employees safe ways to raise a concern, it is difficult for a company to effectively manage the risks it faces. Unless employees have confidence in the arrangements, they are likely to stay silent where there is an issue that can negatively affect the company, its stakeholders or the wider public interest. Needless to say, such silence denies the company the opportunity to deal with a potentially serious problem before it causes real damage. The costs of such a missed opportunity can be great: fines, compensation, regulatory investigation, reputational damage, lost jobs, lost profits and even lost lives. (Brown et.al, 2014; Vandekerckhove, 2016).

Since the 1970s, when the term was initially used by activist Ralph Nader as an alternative to derogatory terms, such as informant or snitch, numerous attempts have been made to provide a comprehensive definition of whistleblowing without great success. For the purposes of our

discussion, a whistleblower is 'a concerned citizen, totally or predominantly motivated by notions of public interest, who initiates of his or her own free will, an open disclosure about a significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of the wrongdoing' (Australian Senate Select Committee, 1994). In essence, effectively encouraging employees to disclose any wrongdoing is a critical step for discovering fraud and corporate misconduct. Due to the complexity of uncovering a financial misconduct, inside information by low or mid-level employees of a company would be of valuable assistance. Indeed, employees have an information advantage over external gatekeepers because they have more far-reaching knowledge regarding the inner workings of a large corporation. Their position as 'insiders' in the company could be instrumental in solving the inherent information problems of external gatekeepers (Brickey, 2003).

As a result, whistleblowers are considered an effective source of feedback on managerial malpractices, which can bypass difficulties to communication that often exist in large companies and effectively provide essential information to persons that have the power to act (Callahan & Dworkin, 1992). Most of the time, blowing the whistle allows external monitors to request and get access to information about alleged misconduct and subsequently to involve the authorities (Call et al, 2014). Although whistleblowing can be an effective system of internal monitoring and reporting based on employee-watchdogs, there are limitations. An employee's right to freedom of speech and disclosure of information can be seen as part of their right to self-development and autonomy, but they should be careful not to breach their employer's right to enjoy the trust and confidence of their employees (Barendt, 2007).

There is always a balancing act to be performed and, provided that there are considerations that make the disclosure necessary, such as the protection of public interest, these considerations tip the balance in favour of protecting whistleblowers. Of course, it can also be argued that fraud or internal irregularities are not directly related to the protection of public interest, but the impact of corporate scandals is rather far-reaching and affects different groups of citizens and the public as a whole, as history has shown in the cases of Enron, WorldCom, Parmalat and Lehman Brothers. It cannot be denied that there is public interest in effective management and the accountability of public affairs and private business (Markopolos, 2010). Whistleblowing goes far beyond the narrow boundaries of corruption, criminal activity and violations of the law or administrative regulations and can include information about abuse of authority, risks to health and safety, risk to the environment and cover up of waste of public funds or similar cases of gross mismanagement. Therefore, protection should be afforded to whistleblowers because their conduct contributes towards the protection of their colleagues as well as the public, the improvement of legislation and the proper functioning of a democratic society. The achievement of such goals presupposes a strong commitment to the encouragement and the protection of the legitimate interests of those who have courageously been willing to come forward with their concerns (Kohn et al, 2004).

The design of a robust and efficient system of whistleblower regulation has been a real challenge for national legislators and there is lack of uniformity as to the methods employed, the choice of prevention techniques, motivation tools and enforcement mechanisms internationally. The three



main areas which most of the legislative initiatives have in common and are arguably essential in the quest for an optimal model of regulation, are whistleblower protection from retaliation practices or unfair dismissal, encouragement of potential whistleblowers and finally the filtering and evaluation of whistleblower allegations.

Starting with the third area, it is an onerous task for the authorities to be able to identify credible whistleblowers and distinguish them from opportunistic ones. It cannot be expected that all individuals are responsible and non-opportunistic, but baseless or unsubstantiated reports can unfairly damage the reputation of innocent parties. It is important that emphasis is put on punishing frivolous and vexatious reporting, otherwise credible whistleblowers are likely to slip through the cracks, particularly given the limited resources available. Just as whistleblowers' actions may be complex, variably motivated, ambiguous and contested, so too can be the responses of those in authority (within and outside a company) when confronted with new information and there is a pressing demand for action.

Despite the difficulties in filtering and evaluating whistleblower credibility, the value of whistleblowing as a crime detection and accountability mechanism cannot be underestimated. According to the 2016 ACFE Global Fraud Study in 94.5% of the cases examined the perpetrator took some efforts to conceal the fraud (ACFE, 2016). Whistleblowers have enabled regulators in the US to successfully obtain additional judgments of more than \$22 billion more than would have been obtained without their assistance, while the total amount of penalties imposed within the period from 1978 to 2016 exceeds \$85 billion (Call et al, 2014; SEC, 2016). In addition, tips were found to be the most common detection method by a wide margin, accounting for 39.1% of cases (43,3% in 2014), as opposed to outside monitors (ACFE, 2016). Being part of the company and having easier access to insider information is a determining factor for the exposure of cases of misconduct, as there is a 15% higher likelihood that corporate financial misconduct comes to light when employees are the ones who blow the whistle (Dyck et al, 2010).

Externals, such as auditors, regulators or institutional investors, closely monitor the company's performance and behaviour, but the growing complexity of modern corporations in combination with the limited and restricted access of publicly available information can make it difficult for stakeholders to identify financial misconduct (Hobson et al, 2012). On the other hand, employees have easier access to insider or sensitive information, but they lack the ability to enforce appropriate reporting behaviour or to directly levy penalties against their company. Most of the time, blowing the whistle allows external parties to request and get access to information about an alleged misconduct and to involve the authorities (Zingales, 2004). For the SEC, the whistleblower program is one of 'the most powerful weapons in [its]...enforcement arsenal', as it helps 'identify possible fraud and other violations much earlier than might otherwise have been possible' (Karpof et. al, 2008). Therefore, in countries, such as the US, there is a long tradition of promoting whistleblower activity as an accountability mechanism complimentary to the operation of external monitors on financial reporting activities. The False Claims Act in 1863 stipulated that individuals not affiliated with the government who initiate or file actions against federal contractors claiming fraud against the government, will be rewarded with a percentage between 10% and 30% of any award or

settlement amount. Similar incentives can also be found in the more recent Dodd-Frank Act 2010 for whistleblowers who voluntarily provided original information to the SEC that led to the successful enforcement of an action resulting in monetary sanctions exceeding \$1 million (15 U.S.C. § 78u-6(b)).<sup>14</sup>

This is related to the second important element of whistleblower regulation: the encouragement and motivation of potential whistleblowers. Workers often possess private information about wrongdoing in their company and who may be responsible for these (Yu, 2008). Encouraging them to bring to attention this valuable information would be the most efficient and cost-effective way for companies to stop, mitigate the effect or prevent wrongdoing. As such, internal whistleblowing could be seen as a blessing in disguise for companies and society as a whole, because it brings to the surface corporate misconduct that can harm corporate and social welfare, but companies get the opportunity to deal with them without the involvement of the authorities and the negative publicity (Labaton Sucharow, 2012, 2013).

It is worth noting here that encouraging and rewarding whistleblowers is as challenging as ensuring their protection under any circumstances. There is an ongoing debate in the US and in Europe about the proper incentives and, as will be discussed in the next section, the use of financial rewards. Some whistleblowers have indicated that moral preferences, rather than financial incentives, drive their decision to report (Miceli et al, 2008). Moral motivation is an important determinant of whether an employee blows the whistle or remains silent and thus knowing more about the factors that moderate this relationship can help companies to design a better incentive strategy to achieve their goal of encouraging internal reporting. At the same time, it has also been shown that personal morality could influence whistleblowing decisions less when employers offer financial incentives to employees for blowing the whistle. Irrespective of their motivation, according to a 2011 survey, 99.5% of self-identified whistleblowers said they blew the whistle because they thought it was the 'right thing to do' (Bowles & Polania-Reyes, 2012).

Although whistleblowers perceive their actions as legitimate and necessary either from an ethical or a corporate governance perspective, they need to feel safe from any retaliation practices. 74% of employees, who felt that they could question the decisions of management without fear of retaliation, went ahead and raised their concerns, but only 51% of those, who feared retaliation, reported (Ethics Resource Center, 2012).

The term 'retaliation' should be widely construed and cover any action related to public humiliation, harassment, discrimination, threat, demotion, reprisal, punishment, retribution, blacklisting, suspension, and dismissal. In the UK, the Public Interest Disclosure Act 1998 (s. 47B) makes explicit reference to the right of a worker not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that the worker has made a protected disclosure. If, for example, an employee is dismissed in connection with their protected disclosure,

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<sup>14</sup> It is worth noting that the Sarbanes-Oxley Act 2002 (SoX)'s provisions were aimed at encouraging corporate whistleblowers but not through financial incentives. SoX reflects an attempt to offer enhanced protection to whistleblowers from employer retaliation after they disclose wrongdoing and to provide employees with a standardized channel to report organizational misconduct internally. See Moberly (2006)

such dismissal is automatically unfair. Companies should be prepared to show zero tolerance of retaliatory practices of any kind against whistleblowers and such practices should grounds for disciplinary action. No whistleblower legislation should allow exceptions, because lack of full support to whistleblowers would mean covering up and fostering misconduct and wrongdoing. The overarching aim of companies and legislators should be to promote a culture where honest disclosures are respected, valued, and even rewarded (Frey & Jegen, 2001).

A further problem in relation to the phenomenon of retaliation against whistleblowers is the difficulty of proving that they were actually retaliated against as their companies could claim that the measures in question, including dismissal, blocked career progression or disciplinary were taken due to performance-related reasons and not in retaliation for whistleblowing. In the UK, there are different burdens of proof on the plaintiff depending on whether or not they seek to bring a claim for unfair dismissal or because they have suffered a detriment. At the same time, this diversity in relation to the burdens of proof work against a whistleblower, because it creates confusion, makes the law less accessible to whistleblowers, and of course more expensive and time consuming (Blueprint for Free Speech, 2016).

Surveys in the US and Australia in the 1990s returned disappointing results as to the companies' attitude towards whistleblowers, as in the US almost 90% of these employees ultimately lost their jobs or were demoted, while there were lawsuits initiated against 27% of them (McMillan, 1990). In Australia, 20% were dismissed and 14% were demoted; 14% were transferred (to another town, not just within the department); 43% were pressured to resign; and 9% had their position abolished. Such high percentages serve as evidence of a certain pattern of behaviour through which companies were sending a clear message to potential whistleblowers that the response will be crushing in intensity (Lennane, 2012). It is positive that recommendations have been included in international good practice documents<sup>15</sup> to reverse the burden of proof. However, it remains to be seen whether these recommendations will be translated to legislative provisions and to what extent they will bring a positive change. This is another area where law should aim at changing the existing culture, because, even when the whistleblower employee remains in the company, the variety of informal retaliation tactics is remarkable, including isolation, removal of normal work, inspections, repeated threats of disciplinary action and referral for psychiatric assessment/treatment (Bjørkelo, 2013; McDonald & Ahern, 2002). One consequence of publicizing stories about retaliation might be that less corporate executives or employees would be tempted to become whistleblowers. Even those employees, who are ethically driven and thus feel that they have no choice but to step up and speak, may still think about it twice

As has become apparent, whistleblowers are not adequately protected and the perception that the existing legislative framework is effective is far from accurate. What is clear and needs to be underlined is that there are a few pieces missing to complete the jigsaw of whistleblower regulation

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<sup>15</sup> See, among others, OECD, 'Committing to Effective Whistleblower Protection', OECD Publishing, Paris, 2016, G20 Anti-Corruption Action Plan, 'Protection of Whistleblowers - Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation', 2012, Council of Europe, Committee on Legal Affairs and Human Rights, 'The protection of 'whistle-blowers'', Doc. 12006, 2009 and Council of Europe, Parliamentary Assembly, 'Protection of 'whistle-blowers'' Resolution 1729, 2010.

and these pieces are not concerned with the letter but with the spirit of the law. We need to nurture a culture of ethics, not just a culture of compliance. Embedding a culture of continuous improvement in ensuring transparency, accountability and openness, instead of a culture of silence, in combination with a set of robust processes, can be the key to unlock the riddle of efficient whistleblower protection and minimise retaliation, fear and oppression.

### **5.3 CAN CULTURE BE THE ANSWER?**

Creating the right organisational environment where voices can be aired and effective action can be taken will remain a daunting task, as long as whistleblowing is not seen as an integral part of the wider organisational setting, but as something somehow separate and different, a 'bolt on' addition (Mannion & Davies, 2015). Whistleblowing is undeniably a means for maintaining integrity, protecting interests, influencing justice, and righting wrongs without necessarily the fear of public embarrassment, government scrutiny, fines, and litigation. However, more effort is required for whistleblowing to become a default accountability mechanism for all companies and achieve its purpose. This process has to start from within the companies. 'Regulators are not able, and should not try, to determine the culture of firms. They cannot write a regulatory rule that settles culture. Rather, it is the product of many things, which regulators can influence, but much more directly which firms themselves can shape' (Bailey, 2016). Regulators can point towards the right direction and require companies to nurture an appropriate culture. Integrity is evidenced by the ethical behaviour of all corporate stakeholders, including employees, managers and regulatory authorities. The legislation will indicate what is the moral and ethical path that companies should be following and then companies will have to show their commitment by creating an ethical culture. Such culture is a macro level of ethical consideration having developed from the micro level of personal integrity and ethical behaviour (Predmore et al, 2018).

There is much written about the importance of setting 'the tone from the top' (Laasch & Conaway, 2015; Schwartz et al, 2005). It is the responsibility of management to inspire their employees using a collection of shared values and a common mindset based on integrity, fairness and 'doing the right thing'. It is not simple to set an example and promote ethical conduct, because it rests upon the willingness of people throughout the organisation to adopt and adhere to that tone from the top. Operating in an 'ethical culture' is far from a mere box-ticking exercise; it requires commitment and emphasis to the effective implementation (Awrey et al, 2013; Kaptein, 2009). Having the right organisational rules and controls in place is necessary, but they alone are insufficient, unless they are embodied within a vibrant ethical culture and a community of trust. Sometimes rules may not connect with the company's culture or align with its operations, they may intimidate rather than inspire employees or they may be detached from business reality. In this case, they do not meaningfully convey a 'tone at the top', unless those at the top of the organization show leadership on this issue and ensure that the message that it is accepted and acceptable to raise a whistleblowing concern is promoted regularly (BSI Code of Practice, 2008).

Rules do not exist in a vacuum and the environment where the rules operate is as important as the rules themselves. There will always be a gap between the 'letter' of the law and the norms of society in any legislation which aims to change or regulate human behaviour (Ashton, 2015). Companies should step in at this point and build a bridge that would allow employees to cross the Rubicon and blow the whistle, if they come across potential illegality or significant risks to their companies. A recent empirical project in the UK showed that some 83% of respondents blow the whistle at least once but mostly internally compared to 15% raising their concerns externally. This is encouraging, as it shows that the government has managed to convey to the business community the message about the significance of relying on internal reporting. However, the next findings support the assumption that the real problem is not the rules, but within the companies themselves. 75% of the respondents maintained that nothing was done about the wrongdoing, with 65% receiving no response from management, while the most likely response was demotion and dismissals (PCAW & University of Greenwich, 2014).

The focus should be on the culture and not solely on the rules for one additional reason. Research on whistleblowing in many jurisdictions consistently shows that one of the main reasons for not reporting concerns is that whistleblowers do not believe that it will make a difference. In fact, American surveys of federal employees repeatedly found that the fear of retaliation is only the second reason why some half a million employees choose not to blow the whistle. The primary reason is that they do 'not think that anything would be done to correct the activity' (Devine, 2004; Lewis et al, 2017). According to the Association of Certified Fraud Examiners (ACFE), this perception does not reflect reality, because tips were the source of information for more than 40% of reported instances of occupational fraud. The SEC confirms this approach, stating that 'even if a whistleblower's tip does not cause an investigation to be opened, it may still help lead to a successful enforcement action if the whistleblower provides additional information that substantially contributes to an ongoing or active investigation' (Association of Certified Fraud Examiners, 2012).

In the Francis Report (Freedom to Speak Up, 2015), the term 'culture' appears 294 times. Apparently, culture has become a buzzword and this is positive, because this is what all the attempts and initiatives should focus on: how to shape a company's culture and how to combine law and culture in a sustainable way. The answer is not easy, because culture is really deep-rooted. Cultural values are often so internalised that they are unspoken; they are communicated pervasively and absorbed by osmosis rather than by bold statements of organisational ethics and values. The initiative for the shaping (or the changing) of a company's culture comes from the top but for the changes to take effect they must occur throughout the company. To effectively change the culture, it is not enough to communicate values verbally, but ensure that everybody within the company 'lives' them; in other words, everybody demonstrates their commitment to a particular set of values and behaviours and equally expects others to follow suit (Miller, 2017).

Changing the mind-set is a really difficult undertaking and it takes time and strong will. Instead of reproducing the same general recommendations that led to the creation of ineffective paper policies, which allow companies to do just the minimum amount required in order to comply with the law, this chapter puts forward a more practical solution for both US and UK. A suggestion that

aims at using legislation together with corporate culture with view to achieve stronger protection to whistleblowers.

#### 5.4 AN EXAMPLE TO FOLLOW?

A provision based on section 7 of the UK Bribery Act 2010 should be added in the existing set of rules. Section 7 of the Bribery Act 2010 introduces a new offence by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage.<sup>16</sup> The available defence for a company, should an offence be committed, is to prove that it has adequate procedures in place to prevent bribery. Section 7 basically shifts the burden of proof away from the authorities towards the core of the problem, the companies themselves.

The example of the Bribery Act was chosen for a variety of reasons. First of all, it was recently introduced in the UK to update and enhance UK law on bribery, a burning issue with international implications that is closely related to corruption, the same as whistleblowing. Secondly, the 2010 Act represents an example of national law inspired by international initiatives and standards, more specifically the 1997 OECD anti-bribery Convention. Thirdly, it has received positive comments and it is regarded as being among the strictest legislation internationally, not only in terms of penalties, but notably because it introduces a new strict liability offence for companies which are failing to prevent bribery.

A similar approach, if adopted in the context of whistleblower protection, would effectively kill two birds with one stone. On the one hand, companies will not be able to hide behind their commitment to fight corruption and encourage internal whistleblowing; they would have to provide apt evidence, not empty promises, that they have strong, up-to-date and effective policies and systems. On the other hand, the whistleblowers themselves will eventually stop being side-lined or seen as liabilities, but they will have to be integral parts of their companies' anti-corruption and whistleblower protection strategy.

The rationale behind the introduction of a section 7-type rule is not to unduly burden companies with another box-ticking exercise, but to target individuals who treat whistleblowers as 'snitches, troublemakers and backstabbers' (Campbell, 2013). It also fits well with the existing legislative framework and, more specifically, section 47B (1D) of the Employment Rights Act 1996, which allows an employer to avoid vicarious liability if it took reasonably practicable steps to prevent workers retaliating against whistleblowers. This requirement goes beyond mere compliance with the law. Companies will be expected to send a strong message to their employees and stakeholders that the

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<sup>16</sup> Failure of commercial organisations to prevent bribery

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

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct

company is built on ethical foundations and is truly committed to promote a culture of openness, with whistleblowing protection being one of the key components.

It will be the responsibility of the senior management and the board of directors, i.e. the typical offenders in most whistleblowing cases, to ensure that all internal and external actors are aware of and familiar with the relevant policy and commitment to establishing a new culture, and the consequences of breaching the policy. In this way, companies of all sizes will have the opportunity to design and implement a 'zero tolerance' policy against mistreatment of whistleblowers throughout their operations over and above inadequate box-ticking systems not supported by a suitable corporate culture and values deeply embedded in the company (Whipp, 1989). The question of adequacy of internal procedures will ultimately depend on the facts of each case, as consideration needs to be given to a number of relevant factors, such as the company's previous conduct and the seriousness of mistreatment.

In addition, emphasis must be given to the effective implementation of these policies. Companies may believe they have been effectively implementing their policies, but it is easy to be over-confident about this. Therefore, it is of paramount importance to ensure that the board, management, agents, employees and stakeholders understand the requirements of the policy and that there are adequate internal controls to monitor its implementation. A robust 'checks and balances' system involves a two-tier arrangement: a) proper documentation and filing of the concerns raised, their handling and the outcomes and b) periodic reports to senior management and possibly the board on the issues raised, the actions taken and the promptness with which inquiries were dealt (Transparency International, 2010).

Finally, effective training should be implemented providing details of how to raise concerns, the available channels and procedures, how people will be protected and how they will be kept informed of the outcome of the process. At the same time, training should be given to senior management on how to deal with disclosures effectively, how to operate whistleblower 'hotlines' and other channels and how to communicate the whistleblower policy as part of the company's culture. Communication through posters, newsletters, periodic training sessions, staff orientation, ethics and compliance communications, refresher speeches from senior management, staff surveys and awareness tests is of key importance. Gradually, people will develop a sense of trust to the company's senior management and a feeling of confidence in the integrity, independence and effectiveness of the company's whistleblowing procedures.

The main objective of adding such a requirement to the existing legislation is not to penalise and harm the reputation of well-established and successful corporations that experience an isolated incident involving allegations for mistreatment of a whistleblower. A full defence will be provided, recognising the fact that no regulatory regime will be capable of eradicating certain behaviours at all times. Additionally, a defence should also be available so that companies are encouraged to set up the right mechanisms for supporting internal whistleblowing and protecting whistleblowers against any illegal or unethical action. Good whistleblowing arrangements send a clear message that if employees have a concern, the company encourages them to raise it through the available channels and procedures. The message should be that it is safe and acceptable to raise a concern

and that disclosures will be heard, assessed and dealt with appropriately. Openness is the safest strategy and employee confidence in the integrity of the arrangements underpin and demonstrate a company's commitment to strengthening its organisational ethos (O'Brien, 2010). The onus rests primarily on the shoulders of directors and managers, who need to show leadership and pave the way for the creation of an environment where employees feel safe to raise concerns, where there is greater accountability of managers and leaders (when necessary) and where disciplinary action is taken against individuals, who are found to have mistreated employees who have raised concerns or have blown the whistle.

Employees can be reluctant to speak up and raise concerns for fear of being discriminated against, disbelieved, bullied, seen as disloyal or disrespectful, and for fear that blowing the whistle will negatively affect their career progression or their future in the company. Such mentality can only be removed when there are proper protection mechanisms in place as well as examples that these mechanisms are in fact working properly. For instance, in the UK and US health sector there have been several initiatives to encourage whistleblowing ('Stop the Line', 'If in doubt speak out' or 'Don't walk by'). These attempts have significantly contributed in raising awareness, but they must be supplemented by additional initiatives with view to normalising the raising of concerns.

Normalisation cannot be achieved by process and procedure alone. Process and procedure need to sit within a culture that inspires confidence that raising concerns will be dealt with in an appropriate way. If whistleblowers have suddenly been subject to critical appraisals and poor performance processes, a negative perception of whistleblowers as 'troublemakers' is reinforced, setting back attempts to change the culture, while at the same time other employees are deterred from coming forward with concerns for fear they too will end up being performance managed.

Changing the mind-set is a one-way street for achieving effective whistleblower protection. Research undertaken by the Financial Conduct Authority (FCA) showed that the introduction of financial incentives for whistleblowers would be unlikely to increase the number of quality disclosures made (Financial Conduct Authority and Prudential Regulation Authority, 2014). The general feeling is that we need to aim for better protection for all whistleblowers rather than financial rewards for a few. The introduction of an additional duty to companies to actively promote whistleblowing and to be able to provide evidence if required is the key for this ethical transformation to take place. Section 7 of the Bribery Act 2010 can be used as an example and it can serve as the missing link in the process of normalisation of whistleblowing and adequate safeguarding of whistleblowers' rights.

## **5.5 CONCLUDING REMARKS**

Although whistleblower protection has attracted considerable attention and there is increasing activity involving the development of whistleblowing policies and regulation at both government and corporate level, the existing framework that is in place internationally does not offer sufficient assurances to potential whistleblowers. The question with which this chapter deals is how we can



ensure that all potential whistleblowers will not be discouraged and will blow the whistle on improper activities without the fear of being ignored or retaliated.

The answer lies in the culture of ethics within a company and industry in general. Such culture should determine or at least influence 'what employees perceive to be the public interest or a matter of conscience ahead of the interests of their employing business or institution' (Lofgren, 1993). Employees should not be left on their own fraught with conflicting values, responsibilities, and loyalties. They should be allowed to make an informed decision without any pressure or coercion from their employers and colleagues. This informed decision should be in line with the business culture and the set of values that each company has developed and maintains (Westman, 1991).

It is of paramount importance that all employees are not only informed about their company's position on whistleblowing or on reporting, but also about the fact that they have a commitment to report any wrongdoing they may come across. The basis of their commitment is not merely their personal perspective on ethics, but primarily their company's perspective. This approach does not reject altruism and selflessness, which can act as strong incentives for a number of individuals, however a further reinforcement of the need to do what is right should be provided. If an ethical corporate culture has been established and is deeply embedded in the company, then there is not much need for monetary rewards or extra incentives; 'virtue may be its own reward' (Callahan & Dworkin, 1992).

Law and corporate culture should be promoted as the most efficient means to provide adequate protection to whistleblowers. The law prescribes the procedures to be followed and the safeguards in place and companies, along with their management teams, should show that they are really committed to applying the law and increasing their employees' sense of organizational justice. Section 7 of the Bribery Act offers an alternative perspective and can be used as a roadmap for legislators and authorities around the world to strengthen the existing set of rules and stimulate the much-awaited change of culture in relation to transparency, accountability and whistleblowing. Such a solution aims at shifting the burden away from the employees, who wish to help their company, so that there are no examples where we shot the messenger, overlooking the message that is being delivered. At the same time, companies participate actively in this culture shift taking reasonable steps to ensure that their staff are informed about the whistleblowing policy, concerns can be raised and action will be taken, where necessary, by the corporate managers, and there are no instances of whistleblowers being harassed, marginalised or dismissed. Finally, it becomes clear that the government and the authorities do not aim at penalising and harming the reputation of companies; quite the contrary, companies are given the opportunity to redeem themselves by endorsing accountability instead of a culture of introversion and silence.

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## 6. Denial and paradox: conundrums of whistleblowing and the need for a new style of leadership in health and social care

Angie Ash

### ABSTRACT

The contradictions of whistleblowing are as follows. First, ignore both the messenger and the message. When they don't give up, go after the messenger – hard – and trash their professional reputation. Next, after devastating, life-ending failures of care, spend millions of public money on statutory inquiries which, years later, conclude that both messenger and the message had been pretty much nailed the problem all along.

This chapter considers these paradoxes. It argues the need for a different style of leadership in health and social care in the UK; leadership which, emphatically and unequivocally, includes political as well as organisational leadership, national policy-making and the statutory regulation of these services.

### 6.1 INTRODUCTION: BIG 'EM UP. KNOCK 'EM DOWN

People who report wrongdoing in the workplace – whistleblowers – may find themselves targets of investigation, harassment, intimidation, persecution, and sometimes prosecution. At the same time, breathless claims may be made about the heroism of whistleblowers. David Cameron, then UK Prime Minister, said in the House of Commons<sup>17</sup> '[...] we should support whistleblowers and what they do to help improve the provision of public services'. Yet the personal opprobrium and damage to reputation and career sometimes heaped on a whistleblower suggests that anyone speaking out would be ill-advised to expect appreciative accolades from anyone in or outside government. A prime minister's fine words sit uneasily alongside the collateral, lifelong damage to lives, livelihoods, relationships, careers and health of those who have spoken out.

That UK Prime Minister had barely reached his age of majority when Stephen Bolsin became a consultant anaesthetist at the Bristol Royal Infirmary (BRI; a hospital in England) in 1988. As soon as he took up post, Bolsin was struck by data on the very high mortality rates for children undergoing heart surgery there. He raised his concerns many times with senior hospital consultants, the Department of Health in England and with the General Medical Council (GMC: the UK regulator of medical practitioners). No action was taken. Bolsin took his concerns to the media. This galvanised the GMC into action. Professionally marginalised, Dr Bolsin found himself unemployable in the UK: he took up medicine in Australia. Thirteen years after Bolsin first raised his concerns, a public inquiry chaired by Ian Kennedy concluded that between 30 and 35 children had died unnecessarily, and that

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<sup>17</sup> In answer to an oral question. *Hansard*, 24 April 2013, column 882.

one-third of children undergoing heart surgery at this Bristol hospital prior to 1995 had had less than adequate care. The Kennedy inquiry found Dr Bolsin had been right to persist in raising his concerns. Kennedy recommended a new culture of openness in the UK's national health service (NHS), and a non-punitive system for reporting serious incidents (Hammond & Bousfield, 2011; Kennedy Inquiry, 2001).

Twelve years after the Kennedy Inquiry published, another public inquiry, this time chaired by Robert Francis, considered failures of care in Mid Staffordshire NHS Foundation Trust in England. Francis reached the very same conclusion as Kennedy: that there was a need for a culture of openness in the NHS (Francis Report, 2013). A few months after Francis reported, Dr Stephen Bolsin was awarded the Royal College of Anaesthetists' Medal in recognition of his work to promote safety in anaesthesia (PCAW, 2013).

Such are the contradictions of whistleblowing. First, ignore both the messenger and the message. When they don't give up, go after the messenger – hard – and trash their professional reputation. Next, after devastating, life-ending failures of care, spend millions of public money on statutory inquiries which, years later, conclude that both messenger and the message had been pretty much nailed the problem all along.

This chapter considers these paradoxes. It argues the need for a different style of leadership in health and social care in the UK; leadership which, emphatically and unequivocally, includes political as well as organisational leadership, national policy-making and the statutory regulation of these services. What follows in is five parts. The next section discusses, firstly, whistleblowing in context, purposely situating findings from other scholarship about who whistleblows (and who does not) in their situational, organisational culture and climate. Secondly, some of the paradoxes that pervade organisational responses – often of denial – to the whistleblower are considered, and the uneasy 'silence' that can settle on workplaces where wrongdoing is known about, but ceases to be spoken about. The thread running through these discussions is that of leadership and the organisational culture which, it is argued, can make or break the likelihood of an employee speaking out about wrongdoing. Thirdly, the concept of 'systemic attention deficit disorder' or 'SADD', is proposed, to describe an organisational culture and leadership that fails to pay attention to signs of potential organisational disaster. The penultimate section offers critique of the 'romance of the leader' as heroic saviour / cost slayer of organisational and political discourse. The characteristics of this cult of leadership and its dangers are identified, developing the concept of the 'Bathsheba Syndrome' originally put forward by Ludwig and Longenecker (1993). Finally, the antidote to Bathsheba syndrome leadership is mapped out. Such 'Anti-Bathsheba' leadership models ethical practice, thinks critically, listens carefully to whistleblowers, and puts right any wrongdoing, rather than punishing the person reporting it.

## 6.2 WHISTLEBLOWING IN CONTEXT

Whistleblowing may be understood as an act of loyalty (or 'self loyalty': Arvidson & Axelsson, 2017). It is a commitment to doing right, to doing no more harm. It is prosocial behaviour. Little distinguishes whistleblowers from non-whistleblowers: you can hardly tell a whistleblower from their non-whistleblowing counterpart on any of the usual measures that differentiate employee characteristics. Whistleblowers may hold the same attitudes about their workplace, about their job and about their managers as those who remained silent. Almost anybody in Brown's (2008) large-scale survey of public interest whistleblowing in Australian public sector agencies could be expected to speak up and not – as retribution attacks by an organisation on a whistleblower would have us believe – only those who were bitter, bore a grudge or were passed over for promotion. And almost any employee may stay silent in the face of wrongdoing. Just one characteristic set those who spoke out apart from others: their high level of 'organisational citizenship behaviour'. That is, they cared about the organisation and took their role as part of it very seriously (Brown, 2008).

'Prosocial' behaviours (behaviour motivated by altruism as well as self-interest and intended to benefit the public or social good), when reinforced and informally normalised in the workplace, are more likely to increase whistleblowing activity. Younger and short-tenured employees may be less influenced by this prosocial control, suggesting that this is learned and reinforced over time in the workplace. When they care about what they do and want to benefit the public or social good, employees are more likely to raise concerns about practice. This prosocial behaviour needs an environment in which it is cultivated and valued: an organisation that is prosocial, that displays citizenship behaviour in what it does, and how it does it (Stansbury & Victor, 2008). Personal and situational characteristics interact, but it is contextual variables – the organisation, its culture and leadership, relationships of power and authority, peer group pressures – that explain a propensity to whistleblow more than individual factors (Near & Miceli, 1996). If managers routinely raise concerns – displaying prosocial organisational citizenship behaviour – the likelihood of a new employee conforming to this workplace norm increases (Greenberger et al, 1987). Thus whistleblowing becomes more likely in organisations that actively support whistleblowing in word and deed – where managers walk the talk to tackle wrongdoing and concerns (rather than the person raising them).

Organisations that are perceived to be more fair and ethical by employees are likely to receive more whistleblowing reports (Miceli & Near, 2005). Employees considering whether to report wrongdoing are influenced by their perception of their employer's whistleblowing policies: supervisor support for whistleblowing, and workers' perception of informal policies that support external whistleblowing, have been found to be significant predictors of external whistleblowing (Sims & Keenan, 1998). An employee is more likely to make a disclosure if they believe their manager will back them up; confidence their concerns will be listened to makes it more likely employees will voice their concerns (Brown, 2008). These line managers are themselves influenced by the organisational culture and milieu they work in: '... organisation leaders create an environment of



support and encouragement for their employees to speak up and blow the whistle on illegal, unethical, or illegitimate activities' (Sims & Keenan, 1998: 420).

Thus the wider context counts when it comes to the likelihood an employee will raise concerns. If the wrongdoing is sufficiently serious, if it is observed and if the employee thinks that by reporting the wrongdoing they can stop it, without suffering personal detriment and harm, they are more likely to do so. Employee protection, the right and support to raise concerns, and a workplace culture where it is the organisational norm to raise concerns, significantly influence the likelihood of reporting. Reporting concerns and getting something done about them, are very hard where poor, corrupt or illegal practice is tacitly tolerated (by inaction, or by turning the 'blind eye'), or where whistleblowing procedures feel like an obstacle course designed to fell anyone foolish enough to use them. The main reasons for not reporting wrongdoing is the belief that nothing will be done, or that the person reporting will suffer reprisal. In other words, that the messenger will be shot while the message goes unheeded. Speaking truth to power can be a tough call.

### **6.3 PARADOX, DENIAL AND SILENCE**

To be used and useful, people need to be aware of, understand and have confidence in their employer's whistleblowing procedures, as well as in the people who manage it. It asks a lot of the employee fulfilling their side of the employment contract if they find they have to negotiate their employer's whistleblowing procedures with all the care of someone picking up a hand grenade. When employers regard their whistleblowing policy merely as a box to be ticked to meet compliance, regulatory and legal requirements, discouragement or punishment of dissent is perceived as the organisational *actualité*, whatever the policy says.

Vandekerckhove (2011) set out five paradoxes in the management of whistleblowing. The first is a truism – whistleblowing policies work best in organisations that don't really need them. That is to say, places where early corrective action is taken about emerging problems. Second, anonymous reporting channels for whistleblowers don't always help. Managers may, for example, regard anonymous reports as less credible and allocate fewer resources to investigating and rectifying reported wrongdoing. Third, rectifying the problem the whistleblower raises may, paradoxically, create other problems for the organisation's managers. The stakes are higher if the whistleblowing matter threatens the organisation; if it does, whistleblowing is less likely to be effective (Near & Miceli, 1995). Fourth, loose talk about the right to blow the whistle, disguises the reality that this is an implied or disguised duty. When wrongdoing comes to light, those who knew but did not report it are blamed and held accountable, even if they feared reprisal had they raised the concern. In this way, a right becomes a liability. Fifth is the paradoxical response to whistleblowing and to the employee raising concerns: detriment, reprisal and wrongdoing perpetrated against the employee. These paradoxes lie in perfect counter-point: the whistleblower is damned if they do, and damned if they don't.

### **6.3.1 SILENCE AND DENIAL**

Between 2005 and 2009, parts of the Mid Staffordshire NHS Trust in England delivered shockingly poor healthcare. Many working in that NHS Trust had raised concerns, only to find themselves ignored, marginalised, ostracised or scapegoated by their managers and some colleagues. Most simply gave up trying to get anything changed (Francis Report, 2013). One who made a protected disclosure under the UK's whistleblowing legislation was Nurse Donnelly. She said she had been asked to fabricate patient nursing notes to conceal the number of patients whose length of stay in the Accident and Emergency department of Stafford Hospital was breaching the four-hour waiting time target. Before making her protected disclosure, Nurse Donnelly sought advice from her Royal College of Nursing representative. The advice, which Nurse Donnelly ignored, was that she should 'keep her head down' as there was little that could be done (Francis Report, 2013: 109).

When employees coordinate work across an organisation they speak to others about the workplace, its culture and management. These conversations may well conclude that professional survival means keeping quiet about wrongdoing: fear of retaliation is an effective silencer. Just having a whistleblowing policy is unlikely to be enough to get people to speak out about wrongdoing: the organisational culture and the experience of those working in it are more powerful determinants (Keenan, 1990). When an employee conforms to the unspoken organisational 'rule' about not speaking out, they buy into organisational silence. They are acting precisely in line with an organisational culture that has the accessories, but not the action, of speaking out.

'Silence' is non-action or inaction about wrongdoing. Fear of being sanctioned, sidelined or labelled a 'trouble-maker' (so often code for 'not-a-team-player'), can keep people quiet and shut down debate about what's wrong and what to do about that. Managers may lack skills in giving feedback to their superiors or subordinates about shortfalls in practice, quality or safety. Managers may obliquely discourage communication about organisational performance up the leadership chain. They may do nothing, or dismiss the employee's concerns. 'Deaf ear syndrome' (Peirce et al, 1998) discourages employees' direct and open expression of discontent. The primary organisational message – whatever its public statements – becomes cost control, target-hitting, and a deadening emphasis on consensus by any means necessary.

### **6.4 CONTAMINATED CULTURES**

Contexts to this organisational silence are where its origins, forms and meaning are to be found. They are crucial for understanding the meaning and significance of not speaking out (Pinder & Harlos, 2001). These contexts embrace power relations, hierarchy, dominance and authority. Cultures of injustice may develop, where conflict is suppressed, where job relations are valued over human relations, and where competitive individualism dominates workplace behaviour.

The culture of an organisation and its leadership can, therefore, make or break the likelihood of whistleblowing (Ash, 2016). The norms, values, beliefs and behaviours of organisational culture are

in dynamic, fluid, social construction. People act in line with these organisational norms, conventions and expectations (Warren, 2003). A homogeneous health or social care workforce or workplace, staffed by people who share similar beliefs and values, delivering consistency and sameness despite the diversity of human need presented to it every day, gradually ceases to honour the value of difference, and remains deaf and blind to points of view critical to the 'business as usual' of the organisation. Bland homogeneity stifles diversity, debate and constructive dissent, and props up a workplace culture where speaking out against the norm is imperilled, by covert threats of social marginalisation by colleagues or sanction by employers. Organisations where the silence about wrongdoing is (another paradox) deafening, share common topography: little or no tolerance of dissent; a strong strategic emphasis on cost control; and leadership by people with a background in economics or finance. The longer senior managers stay in leadership positions in the same organisation, the more alike each other top managers are likely to be (in terms of gender, race, wealth, age, core values, difference from main workforce), and the stronger and more embedded organisational cultural norms, practices and beliefs surrounding silence and shutting up become (Morrison & Milliken, 2000).

#### **6.4.1 CULTIVATING DISASTER**

'Disasters' in health and social care are often long in the making. Macrae observed that 'disasters are essentially organised events', which followed systematic and prolonged neglect of warning signs and signals of danger, creating 'deep pockets of organisational ignorance, organisational silence and organisational blindness' (Macrae, 2014a: 441). When problems and risk signs are not acted on, or when they are misunderstood, then safeguards and defences against those risks are compromised, assuming they were in place at the start.

Macrae's (2014b) study of 'close calls' in aircraft safety, offers an illuminating crossover into health and social care. Rather than the shockingly expensive, inexorably delayed, post hoc public inquiries in health and social care when things have gone wrong (and had done for some considerable time), airline flight safety investigators interrogate flight data, whether mundane or extreme, at all times. This expertise demands creative thinking, and capacities to be suspicious, curious and endlessly probing. In flight safety, like health or social care, early warning signs can be humdrum and easy to miss. Poor hygiene and rough ways of speaking to people using health or social care services are signs of slippage which, left unchecked, can spiral into major, life-threatening incidents, such as patient death from hospital-acquired infections. Disasters develop through sustained and systemic failures of practice and attention (Macrae, 2014a). They don't spontaneously combust as bizarre or unfathomable events.

This slow incubation provides the opportunity in healthcare to take action before disaster occurs – but only if attention and resources are mobilised (Macrae, 2014a). This requires, firstly, a hunger – the overwhelming drive – to pick up problems and early warnings throughout the organisation (not just at the service-delivery end); secondly, effective monitoring systems to pick these up; and, thirdly

and critically, the will and capacity to put right, with intelligence and commitment, systemic problems that underlie disasters.

In health and social care, nurses, doctors, social workers and managers on the ground are more likely than not to know where the problems and risks are in relation to patient safety and care quality. The 2013 Francis Report on Mid Staffordshire NHS Foundation Trust recounted many of the fears of doctors who knew of problems of care but kept quiet, because they believed that to raise these would mean career suicide; or, they feared they would be viewed as complicit in what was going on.

Complaints and patient safety reports were not dealt with properly in parts of the Mid Staffordshire NHS Foundation Trust; and were not regarded as providing data of concern for anyone alert to what was going on. Whistleblowers were discouraged, and people raising concerns were blamed, bullied or marginalised. One of the inquiry's recommendations was that reporting and information collection needed overhaul (Francis Report, 2013). Except the Mid Staffordshire NHS Foundation Trust was overloaded with information, as Kennedy had found a decade before at the BRI. In the three months between January and March 2007, the Mid Staffordshire NHS Foundation Trust had a patient safety incident about staffing levels every day (Macrae, 2014a). Staff were not keeping quiet: they were raising these reports. But when data aren't interrogated competently and with a detached curiosity, when snippets of information are used to construct a façade of excellence, rather than to inform intelligent, thoughtful leadership and management, they become little more than costly, useless ornamentation. When daily patient safety incidents are received but passed over, when the messenger is blamed for the message, a problem exists. It is systemic, and it is one for a leadership that has paid insufficient attention to what is actually going on in their organisation.

#### **6.4.2 SYSTEMIC ATTENTION DEFICIT DISORDER – SADD**

This system-wide problem might be called systemic attention deficit disorder, or SADD. Improving the capture, analysis and presentation of information on safety and quality cannot be anything other than important (Macrae, 2014a). So is being clear that leadership, governance and regulatory infrastructures have a mandate to interpret and use information, and not just receive it for assessment of potential reputational damage to the organisational window-dressing before moving on to the next thing.

Health and social care staff are used to working in organisations and with systems that are far from an ideal type of compassionate care. Time is always squeezed, equipment may be out-dated; budgets are cut as demand exceeds capacity. Muddling through and getting by can become survival strategies to deliver the service. Imprint this onto the proliferation of governance structures in health and social care, surround it with the political turbulence that too often marks free-at-the-point of delivery national health care in England then, as what happened in Mid Staffordshire NHS Foundation Trust illustrated, such conditions incubate disasters. If risks and warnings signs are not attended to and recognised for what they are, rot sets in.

Mid Staffordshire NHS Foundation Trust used information to support its bid to achieve foundation trust status. It constructed what materialised as a false narrative of safety and quality that discounted the counter-factuals presented by those raising concerns. To monitor and ensure quality and safety, the systems, processes and people who operate and work in them, have to pay attention, with intention, for data that question and challenge expedient suppositions and convenient wisdoms. Assumptions and beliefs about safety and quality of health and social care have to be explicit – and continually challenged – within those organisations and by their regulators. Early warning signs from staff, disconfirming data and information need interrogation. Paying attention and acknowledging ignorance are friends, not foes, of the governance and regulator structures (Macrae, 2014a).

Getting wise and tackling SADD means looking for early warning signs of things going wrong in health and social care systems. It means creating leadership and organisational cultures that expect (and value) employees speaking out about poor care. It is not an elevated esoteric practice alien to the existing capacity of health and social care systems. It doesn't cost money. One of the understandable complaints of those criticised in the inevitable inquiries and rapid-fire re-inspections that follow disasters in health and social care, is that people knew what was going on, and that they tried to get it put right. But this intelligence was painted over with fancy graphs and enticing graphics to convince others of the health of the organisation, when embedded information told an entirely different story. Warning signs don't appear in pretty red boxes with 'Danger!' stencilled appealingly down one side. Warning signs have to be constructed as danger signs; they have to be related to pre-existing concerns about potential failure and future harm. Expecting problems, looking out for failure, help produce what Macrae (2014a) called the 'right kind of fear' – fear motivated by the pursuit of quality and safety, not the paralysing dread of the sound of messengers being shot. It takes a particular style of leadership that imprints on an organisation a relentless quest to detect and extinguish SADD.

## **6.5 THE ROMANCE OF THE LEADER**

What happens to a whistleblower after they raise their concerns shines a direct spotlight on the leadership and culture the organisation. The calibre of an organisation's leadership makes a difference to its culture, but that is not to set up a leader up as 'saviour'. The cult of 'romancing the leader' describes how leaders are singled out and get headline billing in organisation studies and leadership development programmes (Ash, 2016; Meindl et al, 1985). If things go wrong in a health or social care organisation, the predictable political response is to search for The New Leader – the one who will transform failure into achievement, slash costs, and all within the first year. This is a narrative of the heroic figure of myth or fairy tale; the noble slayer of those dragons of corruption.

Leaders are pivotal influences, for better or for worse, on the organisational culture and people who work in it. Leaders influence others to achieve a purpose. Leadership style, character and integrity shape how the organisation goes about its business, and how employees experience their work (Schaubroeck et al, 2012). Leaders do this whether or not they are aware of it, by modelling

behaviour, by being observed, imitated or identified with by others (Brown et al, 2005). The behaviour of an employee's boss is amongst the strongest influences on their own behaviour, more so than the employee's own moral frameworks, or the behaviour of their peers (Schminke et al, 2002). Leaders and their leadership teams allocate resources and rewards, signalling where organisational priorities and interests lie. What leaders give their attention to – in real time, not in 140-character-soundbites – is observed by those around them. It shapes the climate and culture of the organisation and its response to whistleblowers.

### **6.5.1 RIGHT LEADERSHIP**

Right leadership influences an organisation's culture to do the right thing rather than just do things right. Ethical leadership has been defined by Brown et al (2005: 120) as 'the demonstration of normatively appropriate conduct through personal actions and interpersonal relationships, and the promotion of such conduct to followers through two-way communication reinforcement, and decision-making'. That 'normatively appropriate conduct' happens in a context: normatively appropriate conduct in global finance may be different than that in health and social care, or so we might wish.

The more complex the organisation, sector or entity, the more challenging it is to develop and sustain ethical leadership to (Eisenbeiß & Giessner, 2012). Complexity includes the knowledge needed to understand the organisational environment and the availability of resources. On this basis, the UK NHS and social care operate in ultra-complicated environments. Their humanitarian mandate, delivered in an often-hostile political climate of privatisation purporting to pursue 'excellence' (on an ever reducing real-time resource base), and relentless pharmaceutical industry profit-making, sets up a cognitive disconnect (Ash, 2013; Festinger, 1962). The dissonance of working for the public and social good, in a context of inhumane or destructive behaviour in the political sphere, can result in stress, distress and failure. But if ethical leadership, in a political and policy context that manifests an ethic of care, acts to deliver the humane goals of the organisation, then such negative behaviour stands less chance of gaining traction in health and social care services (Ash, 2015).

### **6.5.2 RIGHT LEADERSHIP IN AN ETHICAL CLIMATE**

What a leader pays attention to creates and reinforces organisational culture more so than, say, the periodic eruptions that are regulatory inspections of health or social care (Dean, 2014). The 'ethical climate' of day-to-day organisational life – formal and informal behavioural ways of working, authority structures, reward systems, codes of conduct and policies that underpin activity in an organisation – set the scene for what behaviour and action are expected of employees (Ash, 2014). If employees perceive an organisational climate as benevolent, their commitment to it is greater (Cullen et al, 2003). Organisations with ethics codes that are the warp and weft of organisational

life, which include demonstrable leadership support and reward systems for ethical behaviour such as public organisational accolades, possess effective deterrents to unethical conduct. A workplace climate focused to the exclusion of all else on self-interest is most strongly associated with acts of unethical behaviour (Kish-Gephart et al, 2010; Treviño et al, 1998). In workplaces with no ethical pulse, employees are more likely to adapt to that milieu and those tacit expectations. Employees and leaders-in-the-making with a stronger ethical drive to the way they work, will leave. These are not positive conditions for expecting, still less encouraging, staff to speak out about poor treatment and care.

## **6.6 'BATHSHEBA LEADERSHIP' AND ITS ANTIDOTE**

Developing a health and social care system (that includes politicians and political classes, policy makers and regulators) ingrained with an ethic of care calls for – both at its simplest and at its most challenging – a change of emphasis from a leader as The Great Person, to a leader as reflective human being committed to right action. If leadership is to model ethical behaviour and action, then core leadership competencies are the demonstrable capacity to think critically and pay attention to information from employees who speak up about wrongdoing, and the leadership ability to take responsibility for dealing with the problem, rather than buck-passing, blaming others or embarking on a cover-up.

Leaders of the 'Great Person' command-and-control school of leadership, paid wildly more than most people they employ whilst shielded from the everyday working life of the people they lead, are unlikely ever to experience the needs of the people who use the service. They easily fall prey to what Ludwig and Longenecker (1993) called the 'Bathsheba Syndrome'. The story of Bathsheba and King David is found in a number of biblical traditions. By these accounts, David was described as having risen rapidly from humble origins to become king of Israel. David was successful, powerful, wealthy and influential. But in that very success lay the seeds of his own disgrace. When his generals were at battle, instead of leading them, David remained in his palace. From there, he caught sight of a woman bathing – Bathsheba, who was the wife of one his generals. David embarked upon an affair with Bathsheba; she became pregnant with his child. David's many attempts to conceal his adultery and paternity of Bathsheba's baby led to an elaborate cover-up of his own wrongdoing, and his arranging the death of Bathsheba's husband in battle. From being Golden Boy who had all the trappings of Great Leader, David descended into deceit, adultery, corruption and self-preservation, come what may. 'Bathsheba Syndrome' describes the dynamics of that descent: where rapid success and public acclaim quickly degenerate into hubris and corruption.

The Great Person leader suffering from Bathsheba Syndrome simply will not get it. The perks and privileges they enjoy (whether as politicians, permanent secretaries, chief executives, directors or other elevated positions within the system that is publically-funded health and social care), where their calls are returned, their emails firewalled, where they command and enjoy resources and (lifelong) benefits that are beyond the comprehension of people they are paid to serve, where they hold the (false) belief that they can control events, circumstances and people, insulate them from

the exigencies, trade-offs and compromises others routinely find themselves making to deliver the service the Bathsheba Syndrome leader leads, and about which the whistleblower raises concerns.

### **6.6.1 ANTI-BATHSHEBA?**

Health and social care systems urgently need to expunge the creation of any more leaders of the Bathsheba tendency. Instead, the imperative must be to cultivate what we might call 'Anti-Bathsheba' leadership. Anti-Bathsheba leaders, whether they occupy the political, policy-making, regulatory or organisational wings of health and social care systems, are those who make sure they are surrounded by critical friends in their leadership team: people who are curious, who question and use reason, who ask hard questions of hard data, and do so from outside the comfort of conventional wisdom and the herd mentality. Anti-Bathsheba finds out, and pays close attention to, what employees say; they do not shoot, or arrange for others to shoot, the messenger when they are told. Anti-Bathsheba is the leader who regards saying 'I don't know' as a hallmark of thoughtful leadership, not ineptitude. Anti-Bathsheba is the antithesis of The Great Person school of leadership and its hierarchical organisational cultures that view criticism as disloyalty. In social work, for example, Anti-Bathsheba would be concerned that UK social work professionals are, by and large, uncritical, that is, unquestioning, of the organisational cultures and structures they practise in (Preston-Shoot, 2010). Anti-Bathsheba would understand how such passive docility corrodes critical, questioning social work practice.

Anti-Bathsheba would resist putting themselves and others under prolonged and protracted stress and pressure, knowing that stress disinhibits: when people are exhausted, overworked, hungry or sleep-deprived, right action and right decision-making take the hit. Long working hours deplete ego and cognitive controls on behaviour (Brown & Mitchell, 2010). Anti-Bathsheba is not afraid to call out those whose ethical behaviour falls short. They lead organisations where people (inside or outside it) have confidence that unethical behaviour will come to light, and be sanctioned when it does.

Anti-Bathsheba would recognise, as research has consistently done, that whistleblowers are not vengeful, deranged troublemakers, and instead would understand whistleblowing as a prosocial act. Rather than increasing the 21 ways to skin a whistleblower (Bousfield, 2011), Anti-Bathsheba would lead from the front to stop reprisals, threats or vexatious complaints to a regulator about the whistleblower (three of those 21 ways), and instead would regard whistleblowing as providing a constructive internal warning light. Anti-Bathsheba would look first to understand the alleged wrongdoing, and then to doing something about the wrongdoing rather than the whistleblower. These are leaders who understand that while compliant yes-men and yes-women are superficially easier to manage (they always follow the crowd), it's the extraverts with low agreeableness, whose first priority is to their profession and people it serves, rather than the bureaucracy that surrounds (or stifles) it, are the ones to cultivate in any leadership team and workforce (de Graaf, 2010). Anti-Bathsheba knows that it is fear of retaliation, and of the consequences of being seen to grass up colleagues, that keeps people quiet.



## 6.6.2 ANTI-BATHSHEBA AND LEARNING THOSE LESSONS

Learning, whether from failure or success, is a process. Learning is a practice that needs practice. Deep learning is the corrective to an escalation of commitment to harmful action, where the intensity of doing the same wrong things over and over again increases after each failure (Sleesman et al, 2012). The Anti-Bathsheba leader knows that 'learning' isn't a fire shield to be worn only when a vicious political firestorm rages and mendacious media are out for blood. Anti-Bathsheba pays attention to small deviations from what is expected, whether to the good or the bad, and shapes an organisational culture where people develop the skill, and get the practice, of learning.

Barriers to learning are embedded into the way an organisation goes about its work. There is a strong personal and social aversion to being seen to fail, or of acknowledging failure. Being seen as successful has huge social cachet for leaders of the old-school Bathsheba Syndrome persuasion. Managers have an incentive to distance themselves from failure. Organisational procedures and policies, and senior management, can discourage people from trying things out and failing, especially when those organisations work in highly politicised environments of health and social care that are in perpetual public and, particularly, political gaze. Shared learning is a risky business; primitive emotions (fight, flight) emerge and many old school Bathsheba Syndrome leaders aren't able to handle these. People feel negatively when exposing own failures, and may lack the competencies so to do that are detachment, dispassionate interest, separation of the self from the failure. Carrying out any effective examination of failure requires patience, tolerance of mess, uncertainty, and of not knowing. This doesn't fit at all with political demands for action yesterday, someone-to-blame, slick answers to superficial questions. It's much more alluring to stay with the comfort of self-confirming beliefs (Cannon & Edmondson, 2005).

If the drive is for learning only from 'success', then failure will surely follow (Baumard & Starbuck, 2005). Anti-Bathsheba would reframe failure as 'learning', or 'practice', and regard it as an inevitable, everyday, to-be-expected part of complex, skilled and demanding human services work. Anti-Bathsheba would trade trite tropes like 'zero tolerance' and robotic, risk-averse, box-ticking, for critical thinking about what is done and why, and asking good questions, probing, interrogating and constantly seeking to understand and improve. Anti-Bathsheba wants and expects whistleblowers. When they step forward with concerns, Anti-Bathsheba listens very carefully.

Health and social care services and organisations, and their political and operational leaders, policy-makers and regulators, should encourage the information that a whistleblower brings. Their focus should be on the alleged wrongdoing and how to deal with that, instead of on the person reporting it. Cultivating, nurturing and leading organisational cultures where people speak out about poor practice before it gets normalised, is the counterbalance to harm and the slippery slope that leads to disasters. This is the culture of Anti-Bathsheba leadership in health and social care, where whistleblowing is recognised, not as a threat, but as means of ensuring the best possible health and social care is provided to people who need it.

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## 7. How might trade unions use their voice to engage in the whistleblowing process?

Arron P.D. Phillips

### ABSTRACT

Little is known about whistleblowing in the voice literature and the whistleblowing literature has not yet expansively explored the role of trade unions and how they might use voice as a mechanism to support whistleblowers. This chapter seeks to develop the literature that does exist by considering six different voice groups that trade unions could use. It then considers how trade unions might use these voice options to support whistleblowers make safe and effective disclosures.

### 7.1 INTRODUCTION

Trade unions and voice go hand in hand. Trade unions speak on behalf of their members, as the collective voice is often more effective than an individual voice. Voice mechanisms often provide avenues for a representative of a group to speak, rather than allowing each individual member to do so. Whistleblowers will use their individual voice to raise concerns that may impact or affect a wider group of people within their workplace or wider society. Many whistleblowers face some repercussions for doing so; however, the concern may not be dealt with. If the collective voice is potentially more effective, it may be that a trade union's voice would have better outcomes not only for the whistleblower but also the concern raised. However, little is known about whistleblowing in the voice literature and the whistleblowing literature has not yet expansively explored the role of trade unions and how they might use voice as a mechanism to support whistleblowers. This chapter seeks to develop the literature that does exist by considering six different voice groups that trade unions could use. It then considers how trade unions might use these voice options to support whistleblowers make safe and effective disclosures. This chapter will use the standard research definition of whistleblowing by Near and Miceli (1985:4), namely 'the disclosure by organisation members (former or current) of illegal, immoral illegitimate practices under the control of their employers, to persons or organisations that may be able to affect action'.

### 7.2 VOICE LITERATURE

The concept of voice as it is understood today started in the early seventies with Hirshman's work on consumer voice (1970). This was extended into the workplace by Freeman and Medoff, who considered employee voice of importance and defined it as 'providing workers as a group with a means of communicating with management' (1985:8). The collective nature of this definition led

them to conclude that voice was served by unions on behalf of their members. In fact, unions have been using their collective voice since the late 1800's.<sup>18</sup> This collective power was a primary motive for joining a union. However, more recently, members have a wider set of reasons to join, such as individual representation, and legal and financial services. Having said this, union membership in the West has declined considerably (Visser, 2006). There are a few exceptions, such as the Scandinavian countries that adhere to the Ghent model. Supported by the state, this system provides for unemployment funds and some other forms of benefits to be given by the trade unions (Kjellberg & Lyhne Ibsen, 2016). To be entitled to access the unemployment fund, membership of the union is required, hence the higher unionisation rates in countries that implement such a system. A notable exception to union decline, Norway does not subscribe to the Ghent model but retains high membership rates. Trade unions, therefore, need to find new avenues to engage and show their members and society more broadly that they have value. One such way may be using their voice to support whistleblowers.

Recently, voice has become more individual and about promoting dialogue that is constructive (Barry & Wilkinson, 2015: 2; Van Dyne & LePine, 1998: 109). This has led to a division of the organisational behaviour, employee relations, and human resources management voice literature. The employee relations and human resources management literature has focused on in-role behaviours and using direct and indirect channels. These indirect channels are where trade unions are considered but whistleblowing is not looked at within this literature. Van Dyne and Lepine (1998) do not see whistleblowing as something that is done within one's role and thus it is considered as extra-role behaviour. Whistleblowing has, therefore, been left to organisational behaviour employee voice literature for discussion. This literature has been structured into two groups, namely prosocial voice and justice voice. Van Dyne et al (1995: 247) suggested four types of extra role behaviour, two of which were whistleblowing and prosocial. Whilst recognising similarities between prosocial and whistleblowing, they favoured a rigid definition where prosocial was helping an individual person. The concept of prosocial has since been widened (Morrison, 2011). Therefore, whistleblowing has been viewed as justice-related under the organisational behaviour voice literature. This classification of whistleblowing in the voice literature is contrary to what is known of whistleblowing, namely that, in the majority of cases, it is an internal process which starts with using ordinary direct and indirect voice channels (PCAW & University of Greenwich, 2013) and that it predominantly is done within a prosocial motive (Dozier & Miceli, 1985; Miceli & Near, 1985). If trade unions exist to provide an indirect voice within internal organisation voice mechanisms and whistleblowers seek to raise concerns using internal voice channels in the first instance, it is logical to suggest that trade unions could potentially have a role to play in the whistleblowing process.

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<sup>18</sup> For a critical review of the development of voice and trade union voice up to 1970's see Kaufmann 2014.

### 7.3 WHISTLEBLOWING AND TRADE UNIONS LITERATURE

The literature on what role trade unions have in the whistleblowing process is sparse. Much of the whistleblowing literature has focussed on the whistleblower or legislation. This has sought to explore and understand the process whistleblowers go through and the repercussions of making a disclosure, with legislation being developed based on the information. However, it has been noted that this has come at the cost of ensuring that whistleblowing is effective (Near & Miceli, 1995). Effectiveness can be considered as 'managerial responsiveness to the primary concerns about alleged wrongdoing aired by the whistleblower about wrongdoing; and managerial ability or willingness to refrain from, or protect the whistleblower against, retaliation or reprisals for having aired those concerns' Vandekerckhove et al (2014:306). Trade unions can have a place within the organisation and thus are in a position to assist whistleblowers to not only make a safe disclosure but also make sure the disclosure is effective. In Norway, whistleblowing has been regarded as successful. This has, to an extent, been put down to the high unionisation rate and the institutionalised nature of trade unions in the national system (Skivenes & Trygstad, 2010). However, more recently, this success has been questioned (Skivenes & Trygstad, 2013, 2017). Research suggests that elsewhere whistleblowers do not see trade unions as a suitable place to make the first disclosure. Vandekerckhove (PCAW & University of Greenwich, 2013) found, in an analysis of 1000 cases logged via the charity's advice line, that in only 2% of the 849 cases where a disclosure was made, the union was contacted in the first instance. This increased to a maximum of 5% as the whistleblower made the disclosure on subsequent occasions. Furthermore, in an Australian study of public sector whistleblowers, only 1.8% of the 97% internal disclosures engaged the trade union (Donkin et al, 2008: 90). However, a study of the NHS in the UK for the Freedom to Speak Up Review found that trade unions were the fourth likeliest group to be approached for internal advice by Primary Care Workers or second for NHS trust Staff (Lewis et al, 2015). When the same groups were asked about making external disclosure, trade unions were the second most likely for NHS trust staff and third most likely recipient for primary care workers behind professional bodies and regulators. One reason that could be attributed to this lack of whistleblowers engaging with trade unions is that trade unions are reluctant to provide resources to an employment dispute in which the outcome is not foreseeable. This was highlighted by Vandekerckhove and Rummyantseva (2014) who were given this as a reason during an interview with a person who had experience as a union representative.

It has previously been suggested that trade unions could take on a role of supporting whistleblowing (Lewis & Vandekerckhove, 2016). They speculate how trade unions could engage in the whistleblowing process. The article takes a UK perspective using Vandekerckhove's (2010) three tier model of whistleblowing regulation and Kaine's (2014) four levels of union voice. The three tier model suggests a staged process for whistleblowers to raise a concern, whereby the disclosure is made internally on the first occasion. This means that it is not externalised and the organisation has an opportunity to deal with the concern raised. The second tier is to a regulator, so the disclosure of information is made outside the organisation but remains restricted. Regulators will have

oversight of the organisation and often, but not always, will have the power to require the organisation to take action. The third tier is to make a disclosure to the public. Kaine's four levels of union voice are individual, workplace, industry, national and supra-national. She provides some examples of methods, such as collective bargaining at workplace industry level and political affiliation at the national level. In their article, Lewis and Vandekerckhove (2016) align these two against each other (see Fig 1), recognising that the three-tier model is rather more rigid with fixed boundaries, whereas Kaine's union voice is multi-scaled as she herself points out.

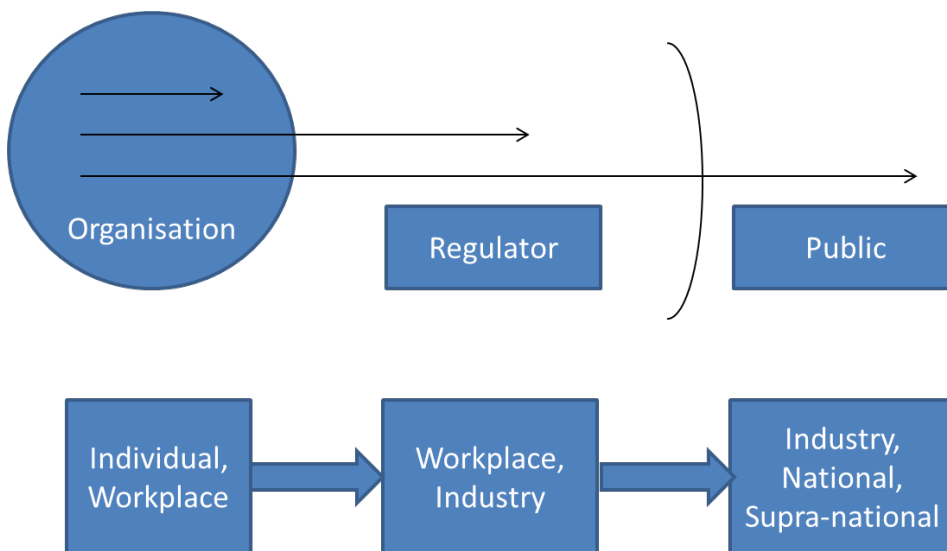


Fig 1. Lewis and Vandekerckhove 2015

Lewis and Vandekerckhove (2016) then go on to identify ways that trade unions in the UK could engage at the three levels and explore the issues around them. The article, however, does not consider the many voice channels that already exist (other than individual representation). These voice channels already being in existence mean trade unions may already be integrated or at the very least familiar with them requiring less of trade unions in terms of impetus to engage. It is suggested that these voice channels can be classified into six groups namely; individual voice; collective bargaining; works councils; joint consultation committees; non-union voice; public voice. The benefit of creating these six groups as opposed to looking at the many individual voice channels is that they have boundaries and can be aligned with Lewis and Vandekerckhove (2016) model. Secondly, these groups then become transferable to other countries that might have different voice mechanisms or unions engage differently.

#### 7.4 THE SIX GROUPS OF VOICE

Individual voice is any occasion where an individual is caused to use their own voice. In general, this will be an employee/worker invoking a designated procedure. In most contexts this will be a



grievance procedure; however, it could be other policies, for example, a bullying or a whistleblowing policy. In some cases, it will be an individual using their voice in their own defence in disciplinary procedures instigated by an employer. However, research suggests that whistleblowers do not recognise themselves as a whistleblower until they are told that is what they are (Rothschild & Mieth, 1999). Therefore it is possible that whistleblowers will use grievance procedure to raise their concern (Lewis & Vandekerckhove, 2015). Furthermore, a whistleblower may use a grievance procedure to disclose retaliation by a manager or peer which results from them making a disclosure.

Collective bargaining is about negotiating to achieve better working conditions. Collective bargaining is predominantly undertaken by trade unions and or national trade union federations. As a voice mechanism, it seeks to reach a consensus about minimum standards and or policies (Doellgast & Benassi, 2014). These will involve reaching agreement on pay, hours and holiday as a minimum but may go further to cover other terms and conditions around physical working environment and discipline.

Works councils within an organisation are institutionalised representative bodies. However, these are usually established independently of or against the wishes of management (Nienhuser, 2014). The overarching aims of work councils are to represent the employees of the organisation to its management (Rogers & Streeck, 1995: 5) although the specific purpose can vary between countries. Works councils vary in power and rights. Some countries such as the UK only have a right to information, whereas countries such as Germany and the Netherlands have a right to co-determination and consultation. Norway has a mid-position along with countries like France and Luxembourg who only have consultation rights. Whether a trade union has a presence on a works council can depend on the country - for example, in Sweden the trade unions act as the works council (Nienhuser, 2014: 252).

Joint Consultation Committees, whilst similar to works councils, can be distinguished on two grounds. First, they are created by management and secondly the purpose of them is the exchanging of views on matters that fall outside of collective bargaining (Pyman, 2014). Furthermore, they have an indirect influence on organisational decision-making (Morishima, 1992). Whilst Joint consultation committees are a creature of management they are in some cases supported by law or practice, such as in Germany where they are embedded into the national system (Brewster et al, 2007). Brewster et al (2007) suggest that many joint consultative committees have significant union membership and Pyman (2014) suggests this is due to the fact unions were the dominant mechanism prior to the creation of joint consultative committees. In both works councils and joint consultation committees union involvement is not guaranteed. However, it has been found that where unions are not part of these voice mechanisms there is a positive benefit for employee voice and workplace outcomes where the voice mechanism and the union are mutually supportive (Brewster et al, 2007; Marchington, 1994).

Non-union voice mechanisms have increased as trade union membership has decreased (Bryson et al, 2013). Non-union employee representation usually occurs in organisations where there is no trade union, although in some instances it can occur where there is a trade union but that trade union is not entitled or invited to participate in the representation structure. To be a non-union

employee representation mechanism, Gollan (in Dobbins & Dundon, 2014: 343) highlights five core features. Firstly, it must be restricted to individuals employed by and within the organisation. This then limits the role of external organisations such as trade unions. Secondly, he highlights that there is likely to be no or very limited links to trade unions or other external representative units. Thirdly, it is the firm or organisation that provides resources for the forum to exist. Fourthly, the representative body is essentially indirectly providing representative functions rather than more direct mechanisms of involvement. Finally, he says that the structures represent all employees at the workplace level. Dobbins and Dundon (2014) highlight that these non-union employee representation models generally occur in different forms of committees, such as grievance committees, joint health and safety and well-being committees or equal opportunity dialogue forums. It can also encompass works councils and joint consultative committees where there is no union presence or influence. Bryson et al (2013) highlight that these indirect forms of non-union voice representation are in decline, whilst more direct channels such as team briefings and problem-solving groups are on the increase. Dobbins and Dundon (2014) highlight that this literature suggests that there are two reasons an employer might engage in non-union employee representation. The first is union avoidance i.e. it is a primary objective to avoid an external union involving itself in the affairs of the organisation. Gall (2004) suggests that non-union voice mechanisms are often the result of an organisation trying to express to its workers that there is no need for union recognition within the workplace. Secondly, the alternative is to go beyond union avoidance thus the arrangements are set to complement union structures rather than replacing them. Bryson (2004) found that direct voice mechanisms and non-union representation together had better managerial responsiveness than union voice. However, Bryson (2000) suggested that where unions existed direct voice was more effective.

Public voice is where an individual or group do not use internal voice mechanisms but instead choose to go outside the organisation. This can be both at a local or national level. It can be considered to be public where the mechanism used does not seek to limit who receives the information. The information will be available to the public at large.

## **7.5 MAPPING AGAINST THE MODEL**

Having identified the key elements of these six groups we are now able to identify how they might map against the Lewis and Vandekerckhove (2015) model (see Fig 2). At the first tier, the requirement was that it was internal within the organisation, individual voice remains within the organisation. Works councils and Joint consultation committees are within the organisation and thus can be considered at the organisational level. As mentioned by Kaine (2014) some voice is multi-scaled a good example of that is collective bargaining as in some instances it is done at the organisational level. However, in some places, it is done externally to the organisation such as nationally or industry wide. When collective bargaining is conducted it is not public and is kept within a limited group of people. For example, in Norway collective bargaining starts nationally between the trade union federations and business federations, therefore, collective bargaining also

fits within the regulator level. At the third tier, we have quite clearly public voice. However, we can also place non-union voice here in the context of trade unions. As one of the main requirements was that it had to be staff, trade unions could not be involved and cannot be considered as part of the organisation. Any involvement by the trade union is going to be in an external public capacity.

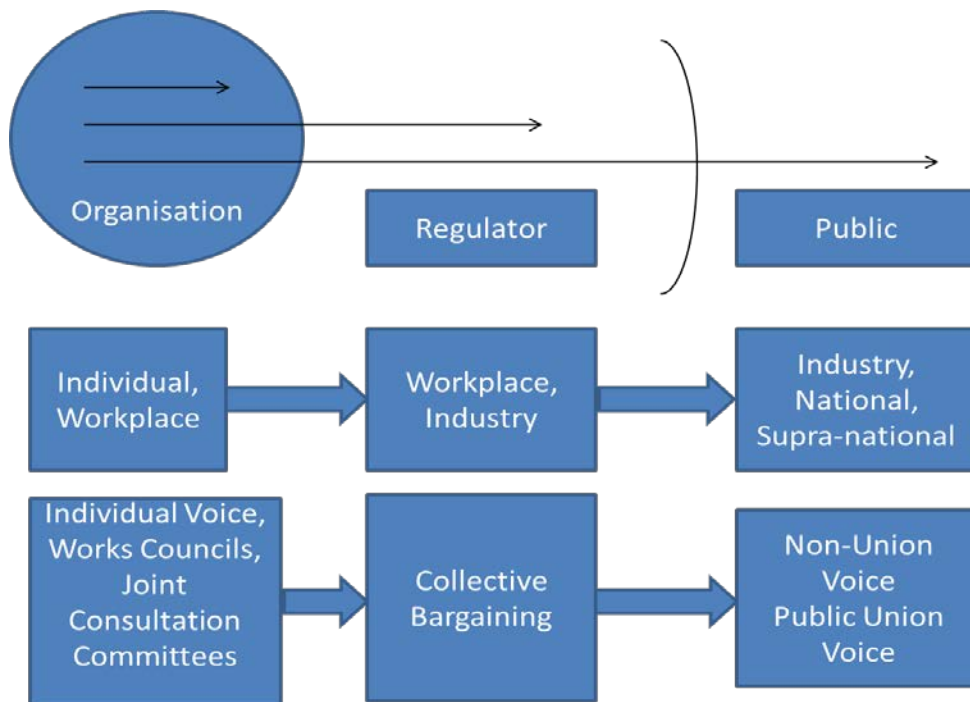


Fig 2, Lewis and Vandekerckhove 2015 adapted by Phillips

## 7.6 POTENTIAL AVENUES FOR TRADE UNION INVOLVEMENT

Having identified these different voice groups it is now possible to suggest ways that trade unions might use these channels to support whistleblowing and whistleblowers more proactively. By distinguishing whistleblowing from the whistleblower, trade unions can contribute to creating an environment where disclosures are dealt with effectively as well making sure whistleblowers are protected from any negative treatment.

Individual voice provides trade unions with the greatest potential to provide a safe environment for whistleblowers to make disclosures. Trade unions can provide advice to their members who wish to raise a concern. The union can then help the individual formulate the disclosure in such a way that the disclosure is seen by the organisation as a concern rather than a complaint by a disgruntled employee. The union can where they have the right to, either through collective bargaining agreement or legal right<sup>19</sup>, represent the member in any meetings regarding the concern. By representing the member the union can ensure that the organisation focus on the concern raised, rather than on the motives of the whistleblower. Unions will also be familiar with the organisation's

<sup>19</sup> For example in the UK s10 of the employment rights act 1996 permits an individual to have a trade union official, lay representative of the union or a work colleague represent them in grievance or disciplinary proceedings.

policies and can make sure that during the process the organisation follows the procedure in place. Further, by holding organisations to account in this way, the union may build trust with their membership and may see more members coming forward to raise concerns. Another benefit of representing individuals is that trade unions will become aware of issues which may affect more of their members and when this occurs they will be able to turn it into a collective issue. Making a collective issue of a concern raised enables the whistleblower to take a step back and creates an additional level of protection for the whistleblower. A collective issue raised by the union is also likely to have a greater likelihood of being effectively looked into and resolved.

Having said this, unions should be cognisant of the fact that whistleblowers will be raising a concern generally with a prosocial motive and will want to see the concern rectified. As Lewis and Vandekerckhove (2015) point out, the remedy a whistleblower may expect may not be in the wider union membership's interest, and thus unions will need to be careful to approach this potential situation with caution. Should a union not deal with it carefully the whistleblower may lose trust in the union and believe that the union is colluding with the organisation. This creates the potential of a whistleblower making a disclosure to a regulator or the public unnecessarily. A further issue unions may face is that a concern is raised by one member which implicates another union member. In general, this should not be a problem for unions as they are well versed in representing their members and on occasions have to deal with one union member raising a grievance against another. However, when this occurs unions should be careful that they do not appear to be picking sides or favouring the alleged wrongdoer over the whistleblower. For example by having a lay representative support the whistleblower whilst a full-time union official supports the alleged wrongdoer. This has the potential for the whistleblower to lose trust in the union.

Collective bargaining provides trade unions with an ideal opportunity to work with an organisation to make sure that whistleblowing is seen as important. Through collectively bargaining, trade unions can ensure the policy and procedure both protect the whistleblower and provide mechanisms for investigating any concern raised. Lewis (2006) found that where trade unions were engaged in the formulation and supported whistleblowing policies these policies were likely to be more influential. Trade unions that have a good relationship with the organisation may also try to encourage the organisation to include the union as a suitable internal recipient. As an internal recipient, it provides whistleblowers with an additional location to make the disclosure. It also potentially provides a safer route as the organisation may not be aware of who has made the disclosure to the union. A potential benefit to the union is that non-unionised individuals may seek to use the union as a receiver of a disclosure. If the whistleblower has a positive experience with the union they may then take up membership. Thus, a potential by product of good collective bargaining might be increased membership. However, unions must be seen as independent of the organisation. Should a whistleblower lack faith in the organisation and then also feel that the union is too close to the organisation they may avoid using a well-drafted procedure and find an alternative route to raise their concern with all the potential dangers that entails.

How trade unions engage on work councils will to a significant degree depend on which country they are in and the power of the works council. As identified above, works councils will fall into

three categories: information, consultation, and co-determination. As works councils are set up potentially against the organisation's wishes, it may be that the employer will only provide the minimum rights as necessary to comply with its obligations. It, therefore, requires unions on works councils to be assertive. Where a works council is only entitled to information trade unions can have two roles. Firstly, where the organisation has a whistleblowing procedure, trade unions can seek information on how it is used in practice, what concerns are raised, and how the organisation has dealt with them. Through asking these questions trade unions can identify potential issues of wider importance to their membership and hold the organisation to account for its implementation of its whistleblowing arrangements. Secondly, where no procedure exists trade unions can apply pressure to create one by asking for information about issues raised that might fall under such a procedure and highlight the benefits of having whistleblowing arrangements.

Where a works council has consultation rights they can undertake all the aspects of unions that are on information only works councils. They can, however, go further and push for a policy and provide input into what a policy might contain. Where a works council has co-determination rights a trade union can put forward the idea of having a whistleblowing procedure where one is not in existence. Where a procedure exists unions can engage in reviewing its effectiveness and push for changes where needed and hold the organisation to account.

Joint consultation committees are as mentioned previously a creation of the organisation. Trade unions that are part of these committees can engage in highlighting the need for a whistleblowing policy and an effective procedure. By promoting the view that whistleblowing can benefit the organisation, trade unions can help organisations realise the need for an effective whistleblowing procedure. Where a whistleblowing procedure exists trade unions can use the committee to express their view on the effectiveness of it. This will cover both the protection of the whistleblower and how the organisation deals with the wrongdoing.

There may be occasions where trade unions are recognised by the organisation for certain things but are not part of the work council or joint consultation committee. Where this occurs trade unions should make sure that they are supportive of these voice channels as it will provide better workplace outcomes for its members and will have a positive impact on employee voice (Brewster et al,2007; Marchington, 1994). Trade unions could also encourage their members to run for election to these voice mechanisms. Whilst they will not be recognised as union officials, the union will be able to provide support and advice to these members to improve the member's engagement. Those members can potentially undertake the suggestions above as if the union was part of these voice mechanisms. The individual could feed this information back to the union, which could, raise a collective issue or use other means to get the matter dealt with by the organisation.

Non-union voice by its very nature means that the union has little to no scope to engage. However, individuals within the organisation might be union members. Where this is the case the union can encourage them to put themselves forward as part of the voice mechanisms. Trade unions can then support that member through training courses to help them develop their skills. These individuals will then be well placed to ask the questions that a union might pose if they had recognition. Individuals may then be able to pass significant information back to the union which it can then use

in other ways. One example is if the individual highlights a concern that has been raised internally but has been ignored. The union could contact the organisation and have a conversation about it. It might also apply pressure by alerting the organisation to the public voice options.

Public voice provides trade unions with a large audience to which they can share information. This gives trade unions an opportunity to apply a strong amount of pressure on an organisation. Trade unions are external to the organisation that their membership is part of. Therefore, apart from any conditions in a recognition agreement, trade unions owe the organisation little in the way of trust or confidentiality. If a trade union is ignored by the organisation it has the ability to make any concern public either locally or nationally. Trade unions will have links with media outlets and thus are able to refer whistleblowers to appropriate reporters and help them present their story in a way that is credible. Trade unions could also make the disclosure to the media on the whistleblower's behalf.

A further opportunity for trade unions in using their public voice is suggested by Lewis and Vandekerckhove (2015). They suggest that unions could use their voice to lobby for legislative changes. They highlight that unions could pool their expertise to do this. By pooling their expertise they could provide real insight into whistleblowing experiences across sectors in both the public and private sectors. Trade unions could use this to make sure that any policy or legislative changes are effective. Trade unions will have different philosophies and will approach situations with different perspectives and objectives. To take into account these differences it may be that national trade union federations could play an important role in national lobbying. At international level, the ETUC may be a good alternative to individual unions or national federations as they can draw on these wider philosophies and make sure national and social systems are considered. In countries where trade unions are heavily engaged in the social systems such as the Netherlands, this will be easier than those such as the United Kingdom where unions continue to suffer curtailment of their power.

## **7.7 CONCLUSION**

Whistleblowers who speak out will often use internal voice channels in the hope that their concern will be heard and rectified. However, many people do not speak out for fear of retaliation. Trade unions are organisations with the purpose of securing good employment terms for their members. In performing this function, they have a unique position within society, as they are given rights within and influence over the organisation. Trade unions, therefore, have the potential to support whistleblowers both in terms of making a safe and an effective disclosure. Trade unions being in this internal position have the ability to support the whistleblower from the very first stages of raising a concern. This is significantly earlier than others, such as solicitors or regulators, who will often become involved further down the line when the disclosure has been made and the whistleblower has not felt that the concern has been dealt with or has experienced repercussions.

Little is known to date about how trade unions engage in this process. What we do know does not paint a good picture in terms of the trust whistleblowers have in them. Lewis and Vandekerckhove

(2015) started to identify ways, in which trade unions could engage in supporting whistleblowers. This chapter has sought to develop that by focusing on voice mechanisms that can be identified potentially in different countries and employment contexts. These six voice groups suggest different ways trade unions could engage in making whistleblowing safer and more effective. It is recognised that many of the suggestions are speculative. However, as unions are used to engaging and negotiating with organisations, and assisting, advising and training their members what is suggested here is not outside of the ordinary work of trade unions.

In a time when whistleblowing is becoming more frequent and whistleblowing arrangements are being recognised as an essential part of good organisational corporate governance, trade unions should see whistleblowing as providing a new opportunity for them to engage with both workers and wider society. If trade unions engage in a responsive manner, can build trust with whistleblowers and become an important actor in the whistleblowing process, they might achieve growth both in terms of responsibility and membership. By supporting whistleblowers and using various voice mechanisms, trade unions could find that they have a more expansive function within society too.

Many of the potential ways identified above that trade unions could engage with do not require much in terms of resources. Trade unions already participate in them, and the most resource-dependent one of individual representation is a function trade unions already engage with significantly. What it does require, though, is for trade unions to see whistleblowing as an employment issue and make a concerted effort to actively engage in supporting whistleblowing and whistleblowers.

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