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Whistleblowing Needs a Mother

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1. Introduction

The arguments behind the assertion that whistleblowing needs a mother are essentially institutional – that blowing the whistle on wrongdoing is an increasingly common phenomenon in many countries, across all disciplines and occupations, with many different practices and legislative requirements under development. This multiplicity of practices and requirements places increasing demands on the teaching and training efforts in each of those occupations, as well as on managing the ethical practices in the organisations that employ those disciplines. This article documents the many research studies that tell us that blowing the whistle on wrongdoing is effective in bringing illegitimate activity into the open, but then explores additional issues that are raised in the process. It undertakes this exploration through an examination of components of the systems operating in three countries – the US, Britain and Australia. These are systems which, in core aspects, are very different in concept and in practice. The paper identifies a number of research problems that need to be answered, and asks how are they best examined. Probably the most urgent is that, although whistleblowing is proven to be effective in identifying wrongdoing, the various legal and administrative systems used by different countries around the world raise questions on their relative effectiveness. The overriding questions are, as noted, institutional. Who does the research that will answer these questions? Who then documents the base information for the many teachers of ethics in all disciplines

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across our universities and colleges? Or ethics officers in the work force? Or for whistleblowers themselves?

2. Whistleblowing is Multi-Disciplinary in Application

Possibly the most powerful argument to support the assertion that whistleblowing needs a mother – academic or administrative - is that the examples of wrongdoing and the questions they raise are drawn from many disciplines. There have been notable business examples, but corruption in government is an equally pervasive issue. The health professions, however, have possibly seen even greater whistleblowing activity. Stephen Bolsin at the Bristol Royal Infirmary or Toni Hoffman at Bundaberg Hospital in Queensland are only two of many examples.

Engineering has Maria Garzino, of the U.S. Army Corps of Engineers (USACE). Garzino is credited with revealing the inadequate state of New Orleans floodwater pumps installed by the USACE in the aftermath of Hurricane Katrina. Her disclosures, which were fought for years by both the Department of Defense and the USACE, show how New Orleans residents remain in great danger if flooding occurs again. A mechanical and civil engineer, Garzino received the 2009 Public Servant Award from the Office of Special Counsel in recognition of her achievement. Other engineering examples, such as the Challenger disaster, or the Ford Pinto case, are often taught in general ethics classes.

Law enforcement has its share. Frank Serpico in the US was an early example of a police officer who blew the whistle on wrongdoing by fellow officers. Debby Locke was yet another in Australia. Pharmacists can also expose wrongdoing–they are particularly well positioned to discover and report Medicaid fraud – and have brought about a number of highly successful qui tam actions under the US False Claims Act. Even dentistry has its share. A Maine (US) dentist was fined $72,000 after two employees - dental hygienists - raised concerns over perceived lapses in the infection prevention processes. After they raised concerns with the dentist but were ignored, one of the hygienists filed a complaint with the Occupational Safety and Health Administration[1].

[1] Occupational Safety and Health Administration, (OSHA) Feb 08, 2013, *http://ohsonline.com/articles/2013/02/08/osha-fines-dentist-for-punishing-whistleblowers.aspx* (accessed February 12, 2013).

The many sub-disciplines of business – marketing, finance, personnel management, etc. are also locations where wrongdoing has taken place. The overriding questions for ordinary employees contemplating exposing a wrong in their organisations or disciplines is how best to find out how to blow the whistle, and how to do it without endangering themselves. These employees need a readily available source for information or advice. They are unlikely to have read the books on whistleblowing written by legal or management researchers. It is also unlikely that their professional texts or even the ethics publications in their own disciplines will carry much information on whistleblowing. They need assistance.

Some of them will write up their experiences, or even undertake research into whistleblowing in their discipline. One question that we need to face, then, is how do we structure a nation's whistleblowing practices so that we learn across the disciplines?

One argument for an academic and professional mother to whistleblowing then is that the failures and successes of the best available whistleblowing practices need to be examined, and if necessary, communicated across to other disciplines. The teaching of whistleblowing policies and systems in the work practice classes or ethics classes in the various disciplines of our colleges and universities is again another area in which we need to ensure that there is learning across the disciplines.

Four disciplines stand out in answering the question about who does this research and how are the findings broadcast. Two in particular – law and management, and two to a lesser extent – psychology and moral philosophy, are the major contributors, with law perhaps being outstanding. Law, however, is an unlikely home for much of the research on administrative and institutional issues – arguably the overriding set of questions facing whistleblowing. Whistleblowers also face major personal decisions where law is perhaps not the best research home. Business and public sector management, often in the behavioural sciences, also would be major contributors in efforts to strengthen current practices.

Of the dozen contributors to the edited findings of the International Whistleblowing Research Network's 2010 conference, six were lawyers, three management specialists and two were psychologists[2]. One was a philosopher.

In concluding this section, therefore, I should note that the argument so far, is that the existing contributors need to ensure that their lessons are

[2] D. Lewis and W. Vandekerckhove (eds.), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, London, 2011.

transferred across disciplines. Later I shall argue that they also need to work across the many systems under development in different countries and ensure that this aspect of cross learning takes place. I shall also argue that the new and revised institutional approaches under development also demand cross learning.

3. Learning across Countries and Systems

An underlying contention of this paper is that whistleblowing is effective in exposing ethical transgressions in organisations. Several major research studies, world-wide, have confirmed that blowing the whistle on illegal or unethical action is the most effective way to expose wrongdoing .Brown 3, Price Waterhouse Coopers[4], Dyck, Morse and Zingales[5], KPMG[6], Durant[7] are among those who have documented the ability of whistleblowers to expose wrongdoing. This research is extensive and convincing. The benefits from encouraging whistleblowing are such that governments world-wide, as well as stock markets, industry associations, and professional bodies, are now advocating in-house whistleblowing systems.

It can readily be argued that whistleblowing legislation and associated administrative practices have three objectives: (i) to encourage employees to speak out against wrongdoing; (ii) to protect the whistleblower from retribution and (iii) to stop the wrongdoing – by investigating and taking appropriate action[8]. This paper contends that the dominant objective of the three is to stop wrongdoing – and that this objective is the essential measure of effectiveness. The other two are necessary if the primary

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[3] A. J. Brown (ed.), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, ANU E Press, Canberra, 2008.

[4] Price Waterhouse Coopers, *Global Economic Survey on Economic Crime*, http://www.pwc.com/en_GX/gx/economic-crime-survey/pdf/global-economic-crime-survey-2009.pdf 2009, 9 (accessed February 4, 2013).

[5] A. Dyck, M. Morse, L. Zingales, *Who Blows the Whistle on Corporate Fraud?,* National Bureau of Economic Research, 2007, www.nber.org/papers/w12882 *(*accessed April 6, 2013).

[6] KPMG, *Fraud Survey.* http://www.kpmg.com.au/Portals/0/FraudSurvey%2006%20WP(web).pdf , 2006 (accessed November 4, 2010).

[7] A. Durant, *Fraud Preventions: The Latest Techniques*, Paper presented at the ACFE 15th Annual Fraud Conference, Las Vegas, USA, 2004.

[8] Brown (2008) *op cit.*

objective is to be achieved. Current research shows that whistleblowers will come forward, if they are confident that their allegations will be investigated and actioned, and that they will not be harmed[9]. If the administrative system behind them is not effective, then the investigating and stopping of wrongdoing will not occur.

Another issue to note is that there is limited learning across countries. Most whistleblowing researchers undertake and write up their research, for the most part, within the confines of their own disciplines and on the practices within their own country. There are, as will be documented in the following paragraphs, systems in some countries that provide lessons for other countries, both of success and of failure. The argument that whistleblowing needs a mother – overlying institutional systems that ensure the effectiveness of current practices is maximised – also demands that we examine whistleblowing practices in an international context – that we learn across countries as well as across disciplines.

This exploration of both effective and ineffective systems and procedures in the three countries – the US, the UK and Australia – provides further support to the argument that we need to institutionalise the practice of learning across systems and countries. Other countries are drawn on, in a minor way, as appears appropriate, but these countries provide a wide ranging sample. In any case, as Vandekerckhove tells us in an examination of European whistleblowing systems, there is not really that much whistleblower protection in Europe. He describes the results of his search over 27 countries, as very meagre[10].

4. Does Whistleblowing Stop Wrong Doing?

The following paragraphs examine some of the issues that might be raised by a cross -country, cross-discipline, examination of whistleblowing practices. I start first with the United States and the Sarbanes Oxley Act (SOX- the Corporate and Auditing Accountability, Responsibility, and Transparency Act, 2002). Developed in response to the financial meltdowns in the early part of the last decade, SOX was in part copied in a number of other countries, including Australia (but not the UK). Early predictions were that it would be effective. Not long after SOX was first introduced, Robert Vaughn described it as "the most important

[9] Brown (2008) *op cit.*

[10] W. Vandekerckhove, *European Whistleblowing Policies: Tiers or Tears?* in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure*, Edward Elgar, Cheltenham, 2010, 15-35.

whistleblower protection law in the world"[11]. A mid-term evaluation of its effectiveness identified a few weaknesses but in general stated, with the proviso that it was too early to decide, that in the long run SOX will have a positive impact on the performance of publicly traded companies and the willingness of the public to invest in such companies[12]. That review was more concerned with SOX's regulations on financial management, however, than its whistleblowing provisions. Others concurred: "SOX is likely to have the biggest impact on business"[13].

Moberly tells us that its whistleblowing provisions have not been effective. The reason would appear not to be the act itself but its administration[14]. He states:

> Sarbanes-Oxley's greatest lesson derives from its two most prominent failings. First, over the last the decade, the Act simply did not protect whistleblowers who suffered retaliation. Second, despite the massive increase in legal protection available to them, whistleblowers did not play a significant role in uncovering the financial crisis that led to the Great Recession at the end of the decade.

Dworkin, another well-known whistleblower researcher, explains the rationale for the Sarbanes-Oxley Act 2002 then sets out evidence of its failure[15]. She also suggests in relation to the False Claims Act that "even this most successful whistleblowing law has significant problems". Dworkin concludes that there is only an illusion of protection, that whistleblowers need help to look after themselves.

In a more general sense, Moberley suggests that the failure of Sarbanes Oxley may be a failure in managing the investigative process. It is certainly true that the Securities and Exchange Commission has been criticized for its failure to detect the 2008 financial crisis[16]. The National Commission

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[11] R. G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers Administrative Law Review,* vol. 57, n.1, 3, 2005.

[12] C. A. Rofe, *Efficacy of the Sarbanes-Oxley Act in Curbing Corporate Fraud, Rivier College Online Academic Journal,* http://www.rivier.edu/journal/roaj-2005-fall/j11-rolf.pdf, 2005.

[13] M. Miceli, J. Near and T. Dworkin, *Whistle-Blowing in Organizations,* New York, Routledge, 2008, 154.

[14] R. Moberly, *Sarbanes-Oxley's Whistleblower Provisions –Ten Years Later*, Electronic copy available at: http://ssrn.com/abstract=206406, 2012.

[15] T. Dworkin, *US Whistleblowing: A Decade of Progress?* In D. Lewis, (ed.), *A Global Approach to Public Interest Disclosure: What Can We Learn From Existing Whistleblowing Legislation and Research,* Edward Elgar, Cheltenham, 2010, 36-55.

[16] T. Stabile, *SEC Must Drive a Harder Bargain, Financial Times*, (April 3, 2011), 2011, 12.

on the Causes of the Financial and Economic Crisis in the United States also blames the crisis primarily on regulatory failure[17].
Such a failure bears out this writer's own personal experience – of the four cases with which he is closely familiar, not one has been satisfactorily resolved – the reasons being solely in the management of the complaint.
Moberley[18] further asserts that:

> Two primary factors contributed to the difficulties whistleblowers had winning cases: administrative recalcitrance and adjudicative hamstringing.
> In 2009 and 2010, these conclusions received some support from two Government Accountability Office (GAO) independent audits of OSHA's whistleblower program. These audits found that OSHA lacked resources to investigate whistleblower claims adequately and that OSHA's investigators often lacked training to investigate complex cases.

He had anticipated these findings in an earlier review of 700 separate decisions from the Department of Labor's whistleblowing group[19].
A small project on whistleblowing in the National Institute of Health (NIH) bears further testimony. The researchers interviewed 135 NIH Investigators who had examined research wrongdoing. They explored a variety of investigator responses, including reporting to the parent institution, peer shaming, one-on-one discussions with the wrongdoer. They formed the conclusion that at least in research organisations, considerable mismanagement of the investigations into the reported wrongdoing had taken place[20].
The US failure was the principal reason behind the introduction of the Dodd Frank Act (The Dodd–Frank Wall Street Reform and Consumer Protection Act 2010). In this act, the US has incorporated elements of the original False Claims Act, by introducing a form of whistleblowing management which pays whistleblowers a percentage of the savings.
The above acts are for the private sector. The US has also recently amended its national public sector Whistleblower Protection Act 1989 by passing the Whistleblower Protection Enhancement Act in November 2012, after a 13 year program by activists to upgrade the original

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[17] National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* Public Affairs, New York, http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf, 2011.
[18] Moberley, 2012 *op cit.,* 28.
[19] R. Moberly, *Unfulfilled Expectations: an Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win***,** in *William and Mary Law Review,* vol. 49, n. 1, 2007, 65-153.
[20] J. Sieber, *Witness to Research Wrongdoing,* in *Journal of Empirical Research on Human Research Ethics,* vol 7, n. 5, 2012, 3-14.

legislation. It is too early to assess the efficacy of the new legislation. The activists' attitudes to the earlier program suggest that they did not hold the earlier systems in high regard.

> The Whistleblower Protection Enhancement Act (WPEA) is a landmark good government law that overhauls the defunct Whistleblower Protection Act and provides millions of federal workers with the rights they need to report government corruption and wrongdoing safely (GAP, Government Accountability Project, 2013).

The above paragraphs reach tentatively towards the conclusion that some US whistleblowing programs may not be particularly effective. This finding is supported to some extent by findings from Australia and the UK. Australia now has both federal and state whistleblowing legislation but this is applicable only to the public sector[21]. The country does have private sector whistleblower protection provisions in the Corporations Act, but as will be noted, they are not effective.

A search through the annual reports of state Ombudsman offices in Australia to determine the incidence of reporting wrongdoing and the subsequent outcomes of those reports provides some indicative information about effectiveness. Most states are only starting to provide information that facilitates an assessment of the Australian legislation. Although our search went back for six years for some states, we were only able to determine the outcomes for three states and then only for the most recent year. These findings showed the reporting of many more disclosures than were investigated. In NSW in 2013, for instance, 48 disclosures were made, 28 qualified for protection and 5 were investigated. No action other than minor administrative improvement was taken on any of those investigated. In the state of Victoria the same figures were 117, 59 and 38. The Northern Territory gave figures of 70, 38, and 9. No state gave complete figures for earlier years.

These figures show that a noticeable percentage of reports are not accepted as protected disclosures and that, of those that are accepted; only a small percentage has resulted in action. This may be due to administrative shortcomings as noted by Moberley. An alternate reason could be that a high percentage of complaints were not whistleblowing exposures in the sense that they were considered to be in the public interest.

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[21] The Federal Public Interest Disclosure Act 2013 is expected to come into operation in early 2014.

Australian state legislation, applicable only to employees of state government instrumentalities, stipulates heavy fines or prison terms for those who retaliate against whistleblowers. Brown however, notes that there have been few prosecutions for retaliation in any state. He further draws the conclusion that the causes of weaknesses are administrative in origin:

> That analysis (of Australian whistleblowing legislation) indicated that while there is a high level of reporting, at the organizational level there are significant shortcomings in the way in which the legislation and its principles are being interpreted and disclosers being supported[22].

Thomas Faunce and Stephen Bolsin (the whistleblower at the Bristol Royal Infirmary) examined "whistleblowing's uncertain role in Australia"[23]. Their work concentrated on the health sector. They examined whistleblowing practices that had been used to correct administrative and professional issues in three hospitals. In one of the enquiries (Camden hospitals in NSW), the Independent Commission against Corruption produced a report into claims made by the nurse whistleblowers. It found that not one of the 39 allegations was substantiated[24]. This finding, together with the earlier observations on the small percentage of exposures that were acted on, leaves a very uncertain impression about the efficacy of the administrative processes for dealing with whistleblower complaints.

Returning to the US, the results of a study by the Ethics Resource Centre (ERC) lend further weight to the impression that whistleblowing systems are evidencing uncertain administrative effectiveness. The study by the ERC was on whistleblower hotlines. It is available on their website, June 2013, under the title of Procedural Justice.

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[22] A. J. Brown, *Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, D. Lewis and W. Vandekerckhove, (eds.), *Whistleblowing and Democratic Values,* International Whistleblowing Research Network, London, 2011, 70.

[23] T. Faunce and S. Bolsin, *Three Australian Whistleblowing Sagas: Lessons for Internal and External Regulation,* in *Medical Journal of Australia,* vol. 181, n. 1, 2004, 44-47.

[24] M. Duffy, *A Whistleblower's Unhealthy Mess*, Sydey Morning Herald, December 23, 2005.

The study found that of 619 complainants only 21% were fully substantiated:

> 38 percent of the reports were "unsubstantiated." They did not stand up under initial scrutiny [by ethics officials] and were effectively dismissed without further action;
> 12 percent were partly substantiated at the initial stage;
> 29 percent were referred by ethics officials to the human relations or legal department for additional inquiry. In three quarters of these cases (75 percent) the objective outcome was unfavourable to the complainant;
> And that 21 percent were fully substantiated.

This study, incidentally, included grievance complaints as well as wrongdoing complaints.

5. The Whistleblower with a Grievance

Australia has highlighted a related issue in the whistleblowing debate, a problem that may be the cause behind the ERC results, and perhaps the Moberly findings – that of uncertainty over the extent of wrongdoing in the whistleblower's complaint. Some who come before whistleblower support groups are, without doubt, people who are seriously concerned with the treatment they have received from a supervisor or from their employer generally. They will complain about their concerns, often in a whistleblowing context. This writer estimates that between 5 and 10 % of people who have approached him about a whistleblowing concern are in fact, people with a personal grievance that is not due to a wrongdoing.
Others pose a more serious problem. We are all aware of difficult people in the workplace. The many books on this topic are evidence that there is some substance behind the belief that at least some of our fellow workers suffer from personality disorders[25]. In the inquiry into the need to strengthen the whistleblowing provisions of the Corporations Act, one respondent noted, with some support, "that people with a grudge against their company, or against their supervisor, could raise false allegations, such as bullying or displaying favoritism"[26].

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[25] L. Faraday-Brash, *Vulture Cultures*, Australian Academic Press, Brisbane, 2012; R. Cava, *Dealing with Difficult People,* Firefly Books, New York, 2004; A. Bernstein, *Emotional Vampires,* McGraw Hill, New York, 2001.
[26] P. Bowden, *Whistleblowing,* in P. Bowden (ed.), *Applied Ethics,* Tilde University Press, Melbourne, 2013.

The other side of this concern, however, is the allegations of the practice of government agencies of discrediting contentious employees, including whistleblowers, by using compliant psychologist assessments[27]. Crikey.com, the activist group behind this assertion, is reasonably convincing. The author has also come across instances where a psychological assessment has been the result of having blown the whistle. The Seage article reveals that seminars on psychiatric issues were presented to legal and HR managers of the Australian Tax Office (ATO). This article quotes a number of supporting references, including one by the chairman of the Australian Justice Tribunal, which says as long as the practice of paying expert witnesses for psychiatric reports on contentious staff remains in force, government agencies like the ATO "will continue to foster miscarriages of justice that destroy innocent lives".

The obvious response of a genuine whistleblower, who may indeed be harried by superiors, is to gather evidence that the wrongdoing is factual, and highly supportable. Such a requirement makes it all the more necessary that all sides have a common understanding of wrongdoing, and that the mechanisms for verification are well established. A personal grievance, such as being bullied, may be factual, or it may be only in the eyes of the person complaining. If consistent by one supervisor, and across a number of people who are willing to expose it, it is clearly a wrongdoing, and in need of investigation.

6. Compensating Whistleblowers as a Deterrent

The underlying concept behind the United Kingdom's Public Interest Disclosures Act, 1998, is that the agency that inflicts retaliation should compensate the whistleblower who suffers the retaliation. An exploration of the case studies published by Public Concern at Work (PCaW) –a major whistleblower advice agency in that country – supports this conclusion. Proponents of the UK act would argue that such compensation deters organisations from taking detrimental action against whistleblowers. Nevertheless, if reducing illegitimate or unethical behaviour and correcting the wrong is accepted as a primary objective of the whistleblowing system, this objective appears to be ignored or at least downplayed in the UK. A number of cases are documented where

[27] C. Seage, *The Tax Office, "Hired Assassins" and How to Gag Dissent,* http://www.crikey.com.au/2013/02/05/, 2013 (accessed July 25, 2013).

wrongdoing was not proven, nor corrected, yet the "whistleblower" has been compensated. Public Concern at Work notes in its Whistleblowing beyond the Law, Biennial Review (2011):

> In the first 10 years of the Act, there were approximately 9,000 claims. Of these, only 3,000 odd had resulted in written judgments, all of which were sent to us by the ET (Employment Tribunal). Of these, only 532 judgments contained sufficient information to identify the public concern that gave rise to the claim[28].

PCaW had advocated that the documentation for the Employment Tribunal claim (the ET1 claim form) be sent to the appropriate regulator, so that it can take action to correct the wrongdoing. To quote the same PCaW 2011 review "At present over 75% of PIDA claims are settled before a hearing. One result of this is that we are unable to tell from the Tribunal judgments exactly what happened to give rise to the claims"[29]. The National Association of Schoolmasters, Union of Women Teachers in its submission to the 2011 inquiry by the Department of Business, Innovation and Skills (DBIS) on this issue, claimed that the wrongdoing was currently being "hushed up". Parliament did decide that, provided the whistleblower agreed (by ticking a box), details of the whistleblower's accusation of wrongdoing on the ET1 claim form could be sent by an employment tribunal to the appropriate regulator.

It is this writer's belief, however, that sending the whistleblower's complaint via the ET1 claim form to a regulator will be insufficient for that regulator to decide whether it should investigate the wrongdoing. Any regulator will at least need to interview the whistleblower, as well as the company (which will likely deny the claim), and investigate the accusation before reaching a conclusion. There are perhaps 40 regulators in the UK, most of which have little experience in investigating whistleblower's claims and taking corrective action.

The United States also uses a form for submissions by public sector whistleblowers - the Office of Special Counsel OSC Form 12. It is a separate form enabling the whistleblower to provide details of the wrongdoing .The whistleblower lists which of five wrongs he/she is reporting – a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority, or substantial and specific danger to public health or safety He/she also responds to

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[28] Public Concern at Work, *Whisteblowing Beyond the Law, Biennial Review* http://www.pcaw.org.uk/files/PCAW_Review_beyondthelaw.pdf, 2011, 9.

[29] Public Concern at Work, *op. cit.*, 9.

further questions. The 0SC sends the form for all non-trivial issues to the appropriate agency and later checks for response. That process of following up does not appear to exist in the UK.

Research on the extent to which regulators respond to concerns raised is of urgent priority in the UK. Until that research is undertaken, it seems reasonable to conclude that a large percentage of the wrongdoing by organisations in the UK remains uncorrected. It is likely that most of the "hushing up" of the whistleblower occurs in private sector claims, but such an assumption also needs to be checked.

The UK system also has the unfortunate requirement that the genuine whistleblower has to experience the retribution first, before he /she can claim any compensation. It does seem arguable that to prevent the retribution in the first place is a more laudable objective.

In 2013 PcaW set up an inquiry into the efficacy of the current whistleblowing legislation – the Whistleblowing Commission. It would appear likely that the Commission will recommend on the issue of the extent to which the current system of sending ET forms to the regulators does instigate an investigation. The Commission, it should be noted, is an example of a voluntary agency questioning current institutional practices. It is hoped that the many researchers, teachers and practitioners in ethics and whistleblowing practices become aware of the Commission's findings and incorporate them, as appropriate, into their own work. Note also that the Government has also set up an Call for Evidence into whistleblowing practices and the efficacy of the Public Interest Disclosure Act, 1998.

7. One Legislative Act versus Many

Another difference between the UK practices and those of other countries is that the UK legislation covers both private and public sectors. The United States, as does Australia, has separate acts for the private and public sectors. The US has over fifty-five acts covering different issues in the private sector. It is a near impossible task to sort one's way through them. As Stephen Kohn writes in a section that has as its title "Finding the law that protects you": "To this day, Congress has not passed a comprehensive national whistleblower law"[30]. And a little later:

[30] S. M. Kohn, *The Whistleblowers Handbook*, Lyons Press, Connecticut, 2011, 9.

> if you are going to blow the whistle, you must understand the complex maze of federal and state laws that govern your conduct, and ensure that you obtain the maximum legal protection.

Kohn's advice is to find a lawyer to provide assistance. However, this action is neither desirable nor feasible for many employees, and constitutes a further roadblock in the path of those who are wondering whether to speak out against wrongdoing in their own organisation.

Australia, however, has only one private sector statute with a whistleblowing support capability- the Corporations Act. Its provisions are not effective and it is admitted by government that they "appear to have been poorly regarded and rarely used". At the time of writing, only four whistleblowers had ever used these protections to provide information to ASIC"[31].

The government instituted an inquiry into the efficacy of the whistleblower provisions of the Corporations Act in 2009. Most respondents advocated strengthening and extending the protections[32]. The dominant reason for the failure of the Act is that the protections are limited to contraventions of the Act itself. Examples of wrongdoing not covered under this legislation include "health and safety matters, breaches of anti-discrimination laws, environmental damage, waste and corruption"[33]. The government listed nine issues that it believed worthy of investigation. In submissions to the inquiry respondents listed another four that should be protected under the Act[34]. If the Australian government should widen the protection for whistleblowers under the act, it is hoped that it can adopt the UK system of just one statute covering all wrongs, although with an ability to ensure that whistleblower complaints are investigated.

It is also possible for the United States to reconstitute its legislative structure to provide just one act providing protection for exposing the wrongs that companies commit. Such a simplification would certainly assist whistleblowers. Currently however, there appears to be no movement to simplify the US legislation.

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[31] C. Bowen, Minister for Financial Services, Superannuation and Corporate Law, Attorney-General's Department, *Improving Protections for Corporate Whistleblowers: Options Paper*, Canberra, 2009.

[32] P. Bowden, *Stopping Corporate Wrongs – The Effectiveness of Australian Whistleblower Reforms,* in *Australian Journal of Professional and Applied Ethics*, vol. 12 , n. 1 & 2, 2010, 55-69.

[33] J. Pascoe and M. Welsh, *Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia,* in *Common Law World Review,* vol. 40, 2011, 144-173.

[34] Bowden, 2010, *op. cit.*

A final observation on Australian, UK and US hotline services. Each country has numerous agencies, some of them supplied by the forensic arms of the large accounting companies, who offer a whistleblowing hotline. They sell their services on the basis that they facilitate fraud prevention. Their advertisements promote the benefits of reducing fraud against the company. Under a hotline system, commercial or internal, retribution will likely become less of an issue. Employees who report thefts or fraud against the company, are unlikely to suffer any major retributive damage. They may, of course experience disagreement or even rejection from other members of staff.

Commercial hot-line services raise a further concern, however, in that they report to a senior manager within the company. If the wrongdoing is by an official and is of benefit to the company, the organisation can still cover up the wrongdoing. An independent "mother" however, can provide an alternate location for the whistleblower to bring the action into the open.

A related issue is whether it is acting the public interest to report a fellow worker who is behaving in an unethical or unacceptable way, but who does no wide spread damage to the public interest. An example might be someone in the cubicle next to you downloading porn on his/her company computer. Or to report a colleague whom you know is cheating on their expenses claim. The legislation in the UK and Australia is titled Public Interest Disclosure Acts, designed to protect persons who reports such acts. An issue of debate, however, is whether reporting such actions is acting in the public interest. Public interest issues could be considered broad wrongdoings – activities that endanger public health, safety, general well-being or the environment, or that raise anti-discrimination concerns. Broadly, a disclosure in the public interest is information that brings our attention matters about which we, in a participative society, should be aware; and include a disregard for the law – dangers to our health and safety, or possible harms to society at large or groups within it , now or in the future, whether direct or indirect.

Reporting an action such as stealing from the company then, is acceptable as whistleblowing, and would be protected. It is an issue that does need clarification, however, for one of the reasons behind the apparently inadequate investigations in the United States and in Australia, mentioned earlier, may be a decision not to investigate as the issue was a concern to the organisation, not the investigators.

8. Learning the Effective Practices

So far we have concentrated on those institutional components of whistleblowing systems where countries might avoid pitfalls currently being experienced. There are lessons, however, where countries can learn of more effective approaches from each other. One such example is the False Claims Act in the US and the extension of the reward systems under Dodd Frank and related acts – Internal Revenue, Commodities Exchange, and the Securities Exchange Acts.

Neither Australia nor the UK has such qui tam actions. Yet the benefits are clear. Department of Justice statistics show that in 2012 it recovered $3.3 billion in settlements and judgments under the whistleblower provisions of just the False Claims Act. Over $US40 billion was recovered through the legislation in the 25 years to September 2012. Some of the recoveries are massive: Glaxo Smith Kline: $3 billion to settle whistleblower charges of kickbacks and doctoring research, Pfizer $2.3 billion for fraudulent sales claims, Abbott Laboratories $1.5 billion, Johnson &Johnson a $158 million. Other organisations include the State Street Bank, Bank of New York Mellon, BankAmerica, Toshiba, Schering-Plough Inc. All are companies that operate in the UK and Australia.

Stephen Kohn states that the False Claims Act "has proven to be the most effective anti-fraud act in the United States and perhaps in the entire world."

The reason why Australia and the UK have not developed their versions of a False Claims Act may possibly be a belief that whistleblowers should not be rewarded for reporting dishonesty. If so, they reflect the views of the US Attorney General during WW II, Francis Biddle, who, in 1943, emasculated the FCA. The rise in false claims that followed, however, proved the value of the Act. It was reconstituted in a series of amendments in 1986.

If "bounty hunting" is the reason why the UK and Australia have rejected this very effective whistleblower system, each may wish to consider approaches where the whistleblower is compensated, but less obviously so. One such approach is for the whistleblower to be awarded costs from a fund built up from the fines, or savings, from this and previous actions[35]. Dreyfus argues for a defence fund to cover legal costs, but variations are possible – one being to provide damages as well as costs.

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[35] S. Dreyfus, *Keeping Us Honest: Protecting Whistleblowers, The Conversation,* http://theconversation.com/au , 2 April 2013, (accessed July 7, 2013).

Others are to incorporate all reward systems into one piece of legislation, instead of four as in the US. A third is to find an institutional approach where the individual does not have to initiate the qui tam action. An examination of the various qui tam actions in the US will evidence that great effort over a long period is required. They are the actions of people with great fortitude.

The current PCaW inquiry into whistleblowing in the UK has this issue as one of its terms of reference. The advantages of the US qui tam system are so obvious, as are the difficulties faced by the whistleblower, that it is likely that the inquiry will recommend the adoption of some form of compensating the whistleblower for the difficulties he or she has endured.

9. Then Who Should Be Mother?

This article is working towards the thesis that effective whistleblowing comprises a multi-faceted, multi-disciplinary set of issues; that there are several outstanding questions to be resolved and that no one single discipline can be responsible for all answers. It is also working toward the conclusion that whistleblowing effectiveness will benefit from having one discipline or one oversighting institutional structure promoting, perhaps even coordinating, the research and the learning across disciplines and nations. It could also promote widespread teaching of effective whistleblowing practices. This one oversighting institutional structure would be for one country, but there is still a need for countries to learn from each other.

One such mother could be the existing disciplines. Teachers, trainers, consultants can draw particularly on law, business and public administration researchers that write about whistleblowing. But then such disciplines need also to be aware of the demand across disciplines and across countries and that the lessons need to flow more widely than within the discipline or within the country.

10. Moral Philosophy as Mother?

A related argument is that whistleblowing is an ethical issue. Ethics is a subject taught in universities and colleges around the world. Many universities require of their graduates additional attributes over and above the specific knowledge and skills of their degree. Such attributes usually include an understanding of ethical behaviour. The University of Glasgow, for instance, requires its graduates to be "ethically and socially aware," a requirement that is documented in considerable detail. The University of Sydney requires ethical, social and professional understanding. To meet these requirements, many disciplines and faculties offer ethics courses. Such classes in undergraduate or graduate programs need to include whistleblowing. It is, after all, the most effective way to identify wrongdoing. The teachers of these courses, as do teachers in the colleges and other training institutions, have an obligation to learn sufficient about whistleblowing to be able to provide a worthwhile course. As academics, they would also be expected to contribute to the many outstanding research questions.

Let me first spell out the problems faced by a university lecturer who volunteers to teach the newly approved ethics course in his/her discipline. Or the employee, who, in increasing numbers these days, puts up their hand to be the new ethics officer. Whistleblowing would be a compulsory component of that workload. The lecturer or ethics officer has to become familiar with the more common ethical transgressions in the discipline or in that industry. Each, however, has additional learning requirements. These are primarily to become familiar the moral theory underlying ethical practices. He or she will read the more common texts on ethics – an extensive task, stretching perhaps from the early Greek philosophers, but certainly to modern texts on ethics. They will also draw their material from the ethics books in their disciplines – if an engineer, from the engineering ethics books, or if for a business class, from the business ethics texts, if a nurse or doctor, from the medical ethics books. Beauchamp and Childress, for instance, is a near universal textbook for the health services industry[36]. Even the briefest of inspections, however, will tell you that those books contain very little information on whistleblowing.

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[36] T. Beauchamp, J. Childress (6th edition), *Principles of Biomedical Ethics*, Oxford University Press, Oxford, 2008.

I would like to put forth the assertion that philosophy is the ideal discipline mother. But unfortunately, none of the texts on moral philosophy publish research on whistleblowing or even present any substantive discussions on the issue. A couple of examples might illustrate this point. A recent book on ethics by two philosophers, Julian Baggini and Peter Fosl, The Ethics Toolkit[37], provides an accessible and engaging compendium of concepts, theories, and strategies that encourage students and advanced readers to think critically about ethical behaviour. They argue that moral philosophy should guide action. Their book has no mention of codes of ethics or whistleblowing systems.

The second example is the Journal of Applied Philosophy. It has one article and a 2004 book review on codes of ethics, but nothing on whistleblowing.

Many other examples can be quoted. A search for "whistleblowing" in the Springer range of some 35 or so professional journals produced 290 articles. None was in a philosophy journal, of which Springer has a half dozen or so. Typically philosophy departments at universities and colleges will offer two or three courses in ethics. It is unlikely that they will cover whistleblowing in any depth. As one contribution toward establishing this overarching "mother", therefore, we need to convince our philosopher colleagues that speaking out against wrongdoing has perhaps the greatest potential of all activities in reducing unethical behaviour.

So where do the teachers of ethics in engineering, business, pharmacy, etc., and most importantly, moral philosophy, go to find out about whistleblowing? And obtain basic information and teaching materials? They can, of course, keep their eyes open for new articles in the law and the business journals. And for any new books on the topic from other disciplines.

They can also draw on the whistleblowing NGOs. The only how-to-blow-the-whistle books with any depth are those put out by the whistleblowing support groups – PCAW (Public Concern at Work), GAP (Government Accountability Project), POGO (Project on Government Oversight), etc. In a sense, these whistleblower support groups are "mother." Each teacher and ethics officer in the work force, however, has to interpret what he or she discovers. The result could be many different interpretations of whistleblowing systems that are taught.

They can draw on the International Whistleblowing Research Network. The majority of members are researchers and teachers in law or

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[37] J. Baggini, P. Fosl, *The Ethics Toolkit*, Blackwell, London, 2007.

administration. There are a sufficient number of other disciplines to make sure that a multi-disciplinary balance can achieved. The network does not have the resources, or remit, to fill a complete mother role. However, it can and does even now, work towards filling some roles – the cross discipline and cross country interchange of ideas and methods.

11. The Voluntary Agencies as Mother?

Reading the complaint handling cases on the PCAW website (pcaw.org.uk), a reader is struck by the high degree of competence and insight shown by PCAW staff. Many whistleblowing NGOs offer similar assistance. The same reader will also note the frequency with which PCAW and others intervene in the problem. It is often direct assistance - more than advice. The question then arises whether this intervention should be provided by a public body, such as the Netherlands Commission discussed below. Such a body can provide support, but also, for those whistleblowers that they meet face to face, handle the wider issue of doubtful whistleblower claims. An obvious benefit is bringing greater certainty to the validity of the whistleblower allegation, and for those that are genuine, helping ensure that the wrongdoing is investigated and stopped - a benefit that could overcome the dismissal of many claims under current systems.

It should also be readily apparent that increased advisory and regulatory capacity will increase whistleblower efficacy. Nielsen[38] that the whistleblowers can assist in this process - by blowing the whistle in ways that helps regulators understand the key issues; and that assists regulators to prosecute wrongdoers. The voluntary agencies or an independent agency can also assist whistleblowers in this process.

12. A Separate Support Body?

For this writer, the overriding question is in the administrative effectiveness of the steps between the whistleblower speaking out and the ultimate resolution of the problem. I will argue that a separate body would be advantageous; also that it be independent but part of the disclosure and

[38] R. P. Nielsen, *Whistle-Blowing Methods for Navigating Within and Helping Reform Regulatory Institutions,* in *Journal of Business Ethics,* vol. 112, n. 3, 2012, 385-395.

investigative process. The whistleblower must be able to use it as a support and as a second avenue of appeal .This writer has repeatedly argued in submissions to legislative enquiries that organisations with internal whistleblowing systems cannot always be expected to handle whistleblower complaints honestly. There are too many examples of respected institutions which, on becoming aware of wrongdoing within their ranks, have attempted to cover up the wrong. Such an oversight body could have several functions – of support and advice, of preliminary investigation, of supervision of the overall process, of fostering research, of undertaking its own research, and publishing relatively widely. The creation of such a body also places the whistleblowing emphasis on the administrative processes of dealing with a whistleblower's complaint, not on the effectiveness of the whistleblowing legislation.

Such a body would of necessity be national, but it, along with the current contributors, and the International Whistleblower Support Network, would endeavour to maximise leaning across international boundaries.

A support institution would also ensure that if the whistleblower is reluctant to report internally, the accusation can still surface and be investigated. Research tells us that the majority of whistleblowers speak out internally first. If no action is taken, this body would give the whistleblower an alternate location to which to appeal. The external body would also be an initial screen that if satisfied ensures that the complaint goes to a regulator and is investigated.

A related question to be answered is how and to what extent this whistleblower body should assist the whistleblower. Whistleblowers will tell you of the sometimes insurmountable personal conflicts that they face when they come across wrongdoing. Examples are seen in a study of the emotional difficulties faced by nurse whistleblowers in Australia[39]. Even a little imagination, however, will tell you that if you are a single individual contemplating exposing a fraud by a large company or government agency, you will be very aware of the power and resources that this large organisation can bring to bear against you -resources far in excess of those that you can command.

Of interest, therefore, is the recent establishment of an independent advice centre of the Government of the Netherlands - the Commission for Advice and Information on Whistleblowing (CAVK). It came into being on 1 October 2012. The decision established CAVK on an interim

[39] K. Peters et al., *The Emotional Sequelae of Whistleblowing: Findings from a Qualitative Study. Journal of Clinical Nursing*, vol. 20, 2011, 2907-2914.

basis. After 2 years it will be evaluated, and the legislation strengthened on the basis of the evaluation. The CAVK does not have a mandate to investigate, although an extension of its activities to embrace investigative aspects of whistleblower exposures is currently being considered - an extension of responsibilities that would seemingly negate its initial screening and supporting role. Its current task is to give information and advice to potential and actual whistleblowers in both the public and the private sectors on how to raise concerns, and how to avoid juridical difficulties and pitfalls. Whistleblowers may approach it before they go to their line managers. It will check whether there are ways to raise the matter internally and if not it will assist the whistleblower to prepare the issue to be brought to an external agency. It also provides information and advice to employers. The centre aims to play an important role in preventing escalation of a dispute. Whether the Commission has any impact on sorting out the doubtful whistleblower from the genuine one remains to be seen, but it would seem reasonable that in their early interviews, Commission personnel will distinguish the difficult "whistleblower" from the genuine article. They will also be able to distinguish the genuine employee with a personal grievance. Such an initial screening is possible by ascertaining, at least to a preliminary extent, the existence of a wrongdoing. This role could be taken on by a voluntary support agency, or by an official or semi-official organisation.

13. Summary

Is continuing as we have done in the past the best approach? In other words, each person from any discipline undertaking their research into whistleblowing as they see it best from their own professional perspective, and publishing under the auspices of that discipline? I argue no. That approach leaves the individual whistleblower, the ethics officer in the workplace, and the multiplicity of teachers of ethics across our universities and colleges, to do their own searching, and to pull together their own package of information. That package will vary widely, with a corresponding multiplicity in the practices their listeners and readers adopt. I argue that the ideal "mother" is moral philosophy – for it is already "mother" to a large number of ethics related activities. I recognise the reluctance, however. And possibly the limited ability of that discipline to undertake some of the more rigorous quantified research. But I assert that such teaching in ethics classes and the associated research, writing and consulting will introduce large numbers of students to whistleblowing

practices, and in the long run, have a beneficial impact on ethical behaviour in our organisations and institutions.

Failing or even in addition to that option, I argue for a multi-fold solution. Each discipline need widen the awareness of its responsibilities. That awareness extends to human resource managers or corporate governance specialists in devising whistleblowing policies and procedures. The whistleblowing support and network groups (PCaW, GAP, etc,) would be "mothers", supported by the International Whistleblowing Research Network. But at the core, to the extent that the volunteer mothers are unable or unwilling to provide assistance to whistleblowers, the creation of a semi government support agency, if you like, an ombudsman, in addition to the regulatory bodies, would be the first line of support for people wondering whether to speak out against wrongdoing.

Such practices will help ensure that the research is multi-disciplinary, that spreading the more effective practices reaches all fields, and that effective speaking out against wrongdoing becomes a routine, and successful, aspect of our social structures.

Adapt International Network

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

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