

# WHISTLE BLOWING — AN INSIDE BARK

By: Shabbir Ahmed Pasha-APFA

## Introduction

We live in a complex world, the evidence is that our world is full of humans. Every day, decisions are made that can affect our health, safety, economic and human rights. Some of these decisions are made for the worst reasons. They are made by the corrupt, the incompetent or the lazy. Accidents happen or corruption flourishes because employees who know about wrongdoing are afraid to say anything in fear of losing their jobs.

## The Objectives:

The objective of the paper in your hands is to consider how far we have advanced towards the consciousness of a significant ethos of revelation. The consciousness of a significant ethos of revelation requires an empowering whistleblowing legal framework, meaningful implementation and enforcement within all organisations especially in the Public Sector Entities, bringing up the practices and protections provided in terms of the laws essentially and as well as the social culture which yield respect to the whistleblower.

Before getting in depth in it let us clear in our mind that what actually is Whistle Blowing?

- *US academics – Marcia P. :* Act of disclosure of illegal activities.
- *UK academics – Guy Dehn:* Act of disclosure to reduce and remove risks.
- *Australian academics – Peter Jubb:* Act of disclosure to rectify a wrongdoing.
- *Oxford English Dictionary:* Bringing an activity to a sharp conclusion as if by the blast of a whistle.
- *UK Committee on Standards in Public Life:* Raising a concern about malpractice within an organisation or through an independent structure associated with it.

- *Chambers Dictionary:* Giving information (usually to the authorities) about illegal or underhand practices.

- *US, Brewers Dictionary:* Exposing to the press a malpractice or cover-up in a business or government (origins) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.

Here actually we are talking about an effective system in place that allows ways of disclosure by any person of any information about misconduct, corruption, misuse of powers, misappropriations or illegal activity etc. which may leads towards some sort of protection as well as some kind on incentives to the whistle blower in order to promote accountability.

There are few countries in the world which have adopted Whistle Blowing National Laws a few are as under:

- US - Whistleblower Protection Act
- UK - Public Interest Disclosure Act
- Canada - Public Servants Disclosure Act
- Japan - Whistleblower Disclosure Act
- New Zealand - Protected Disclosures Act
- Romania - Act on the Protection of Whistleblowers

We also have following United Nations International Instrument on Whistle Blowing:

- Convention against corruption in 2003
- Convention against corruption in 2005
- 140 countries have signed for, as of 2011

Whistleblowing is relevant to all organisations and all people, not just those few who are corrupt or criminal. This is

because every business and every public body faces the risk of things going wrong or of unknowingly harboring a corrupt individual. Where such a risk arises, usually the first people to realize or suspect the wrongdoing will be those who work in or with the organisation. Yet these people, who are best placed to sound the alarm or blow the whistle, also have most to lose if they do.

"There are obvious tensions, public and private, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong. The enactment, implementation and application of the "whistleblowing" measures and the need for properly thought out policies in the workplace, have over the last three years, received considerable publicity from various quarters, including the valuable activities of an independent charity, Public Concern at Work, established in 1993 and experienced in providing assistance to both employers and employees."

*Lord Justice Mummery - giving the judgment of the Court of Appeal - in its first consideration of the Public Interest Disclosure Act. (ALM Medical Service v Bladon (2002) IRLR 807)*

## The dilemma

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

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

## Silence

Silence is the option of least risk both for the individual worker and for a responsible firm which comes across corruption. It will be attractive for many reasons. The whistleblower will realise that his or her facts could be mistaken or that there may



be an innocent explanation. Where colleagues or competitors are also aware of the suspect conduct but stay silent, the whistleblower will wonder why he or she should speak out. In organisations where labour relations are adversarial and in cultures where corruption is common, the whistleblower is likely to assume that he or she will be expected to prove that the corrupt practice is occurring, rather than see those in authority investigate and deal with the matter. Even though he or she has no control over it, the whistleblower may feel responsibility for any action that may be taken against the wrongdoer. Finally, unless the whistleblower believes there is a good chance that something will be done to address the wrongdoing, it is almost inevitable that he or she will stay silent.

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

The results of this culture of silence are that:

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

## Problems in whistleblowing

Whistleblowing always involves two parties with opposing rights and interests; on the one hand there is the whistleblower who has a right to equality, freedom of

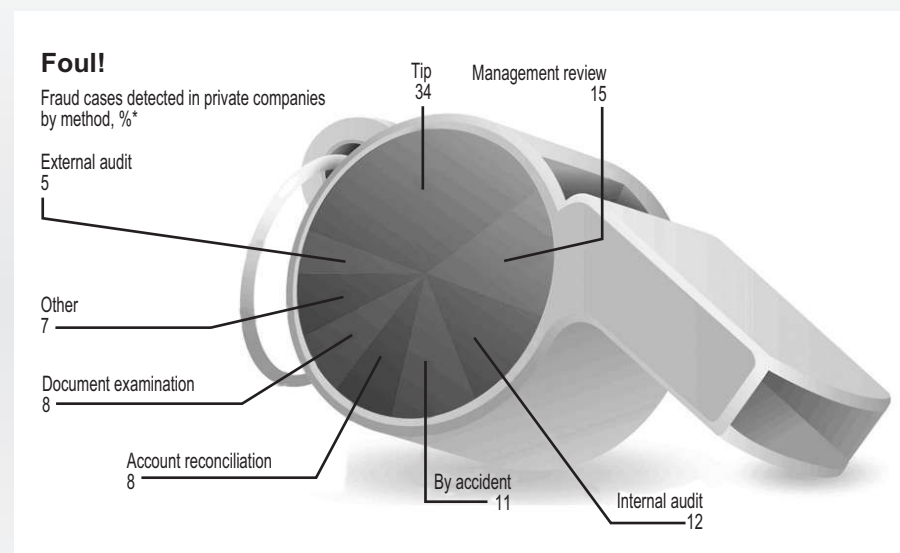
expression and fair labour practices; and on the other hand there is the organisation against which an allegation is made which has rights to a reputation and to loyalty from staff.

## The aims of a whistleblowing culture

The primary aim of a whistleblowing culture is that concerns about corruption and wrongdoing should be properly raised and addressed in the workplace or with the person responsible. Crucially, it sees the whistleblower as a witness, not as a complainant. Where communication channels in organisations are designed for grievances and complaints, that is how

and accepted option.

The main beneficiaries of a culture which disapproves of, and penalises, people who blow the whistle in good faith are those few corrupt firms and individuals. Knowing that the alarm will not be sounded, they are confident that their wrongdoing (especially if it is corruption or bribery) will go undetected and unpunished. (In any case, when the successful investigation and prosecution of criminal activity outside of the workplace depends overwhelmingly on the information the police receives, it is not clear why the communication of information about wrongdoing in organisations is generally assumed to be



they are used by the workforce. In the context of concerns about abuse, it is important to bear in mind that malicious and aggrieved people do already make damaging disclosures when there is not any recognised whistleblowing scheme. Recognising this a whistleblowing culture should be concerned with the silent majority who think it is not in their interests to blow the whistle on corruption or serious wrongdoing. Drawing on the theory of efficient markets (that competitive forces begin to operate once one quarter of consumers will consider switching suppliers), a whistleblowing scheme will help organisations and societies deter corruption and wrongdoing where a significant minority of those who now stay silent can be encouraged to see internal whistleblowing as a viable, safe

undesirable.) Quite apart from people with a predisposed criminal intent, the current culture adversely affects the conduct of the great majority of people. For them the strongest deterrent is the fear of being caught and the shame and embarrassment that goes with it. Where a culture of secrecy and silence exists, otherwise reasonable people may be tempted to engage in malpractice because they believe they will not be caught. Equally if such a culture exists in a society, then otherwise responsible organisations may feel they will be at a competitive disadvantage if they do not also pay bribes or engage in illegal practices.

## Blowing the whistle internally

the approach many organisations now take to information from workers is similar to

the attitude taken toward consumers thirty years ago (that they were troublesome, untrustworthy complainants). This is a mistake since not only is information from the workforce readily accessible and free to collect, but it enables the organisation to put a potential problem right before it causes any real damage to it, its reputation or its stakeholders. The self-interest of the organisation in whistleblowing is now being recognised and recently a few large firms have begun to use outside advice lines to encourage and reassure staff to raise concerns about wrongdoing.

These developments have been given added impetus particularly in the USA - by legal requirements to demonstrate due diligence, where safety, competition, finance and certain criminal laws have been breached.

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

## Blowing the whistle outside

If, however, it is not safe and accepted for people to blow the whistle internally, then we need to turn to the options which exist for those people who consider some action is warranted when they come across corruption. Without a safe internal route, the only option is for them to disclose the matter outside - be it to the authorities or more widely. This is an increasingly important matter since the opportunities for such wider disclosure particularly to the media and public interest groups are likely to be increased with new technology. A relevant example to consider in the context of any anti-corruption measure is where a worker or an audit firm discovers, or reasonably believes, that account books or entries may conceal

bribes. If they feel unwilling or unable to blow the whistle internally, the only options they will have are to blow the whistle outside, or to stay silent.

## Wind of Change

There is growing acceptance to



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

Whistleblowing as a means to deter wrongdoing, promote transparency and good governance, underpin self-regulation and maintain public confidence. It is the approach which has been put on a legislative footing in the UK and in South Africa in recent years.

## ESSENTIALS

**Essential 1 - Create an Anti-Fraud Policy**

- Outline an anti-fraud culture

- Outline the need for accountability
- Outline reporting mechanisms
- Outline the owners of the process
- Outline the authority of these owners

**Essential 2 - Create Case Management Framework**

- Outline incidents criteria
- Outline incidents level
- Outline incident response teams
- Outline investigative process
- Outline evidence retention timeline

**Essential 3 - Create a dedicated department**

- Legal experience
- Forensics Accounting experience
- IT Forensics experience
- Fraud experience

**Essential 4 - Get endorsements from the top**

**Essential 5 - Get endorsements from Clients**

**Essential 6 - Awareness, Awareness, Awareness!**

- The policy
- Anti-fraud culture
- The department

**Essential 7 - Investigate and Take Action**

- Investigate incidents reported
- Take action on the incidents reported

**Essential 8 - Protect the Whistle Blower**

**Essential 9 - Reward the Whistle Blower**

**Essential 10 - Encourage anonymity- Assess and evaluate the system**

- Is it working
- Is it yielding the intended results
- Are employees comfortable using it
- Are employees using it

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

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

Such a clear provision will also encourage managers to be receptive to concerns about corruption and to deal with them properly. As importantly it will reassure those in charge that managers will address the matter properly. It will give a clear indication to the authorities that the organisation is seeking to operate responsibly and this will influence the conduct of any investigation that may prove necessary (whether prompted by a whistleblower or not). It will also enable the authorities to readily distinguish reputable organisations from reckless

ones. The practical consequences of this provision will be that an organisation with a whistleblowing culture will be able to demonstrate that it is fit to regulate itself. Furthermore, it will itself be well placed to notify the authorities of any proven wrongdoing a whistleblower has raised with it.

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

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

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

### Five Factors to Success

1. Protection
2. Reward
3. Taking Action
4. Showing Action
5. Confidentiality

### Let's Agree

- That Fraud is here to stay
- That we need whistleblowers
- That we need whistle blowing system

### Recommendations

1. There is a need to develop a consolidated and consistent whistleblowing framework that provides equal protection to all whistleblowers and which imposes the same effective duties on organisations, in both the public and private domains, to promote a culture of disclosure that protects whistleblowers.
2. The law must be made comprehensive in the provision of an expanded scope of protection.
3. It must draw all potential whistleblowers into its protective field and allow disclosures to any person or agency that is able to do something about the allegation concerned.
4. Organisations may be via Audit Committees must be compelled and/or encouraged to proactively promote a culture of disclosure, adopt more appropriate and expansive interpretations of the whistle blowing related guidelines, and to be more proactive and attentive to effective implementation of obligations and protections provided by the guidelines at least until it got legislative cover/security.

### References

- *WHISTLEBLOWING & INTEGRITY: a new perspective* (Guy Dehn, Director, Public Concern at Work)
- *UK Committee on Standards in Public Life, Second Report, May 1996, page 22.*
- *Asia Week 19/11/99 – commented that Japanese culture deprecates whistleblowing yet seems to condone the resignation or even suicide of top executives when unchecked wrongdoing leads to major disaster.*
- *The Committee of Independent Experts, Second Report, para 7.6.9.*
- *Lord Nolan, who had also chaired the Committee on Standards in Public Life.*
- *See note 9 supra, para 7.6.10. The European Commission's proposals were published in Feb 2000.*
- *See OECD Labour/Management Programme – PAC/AFF/LMP(2000)1. This Paper is a revised version of the discussion paper set out in that report.*