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Illusions of whistleblower protection

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For a less formal treatment of many of the issues in this paper, see "Solution illusions".

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Abstract

The most common response to the problems facing whistleblowers is to suggest better whistleblower legislation. Yet it is remarkable how ineffectual such legislation is. Not only are whistleblower laws flawed through exemptions and in-built weaknesses, but in their implementation they are rarely helpful. Indeed, it might be said that whistleblower laws give only the appearance of protection, creating an illusion that is dangerous for whistleblowers who put their trust in law rather than developing skills to achieve their goals more directly.

Government introduction of whistleblower laws can be explained in various ways: as a sincere attempt to help whistleblowers, as a form of symbolic politics to pacify

concerned citizens, or as a cynical attempt to entrap whistleblowers in a procedural abyss. The precise explanation is less important than an understanding that laws are not the best protection for whistleblowers. This same analysis applies, in large measure, to other official procedures regularly used by whistleblowers, such as Ombudsmen, anti-corruption agencies and the courts.

Far more helpful to whistleblowers are practical skills at understanding organisational dynamics, collecting data, writing coherent accounts, building alliances and liaising with the media. The value of such skills is obscured in the focus on official procedures. Skill development is a form of personal and group empowerment, whereas official procedures empower bureaucrats and lawyers. This suggests that a good way to assess means for aiding whistleblowers is to perform an inventory of skills needed and promoted.

Introduction

A public servant comes across some worrying information. It appears that contracts are being awarded without proper scrutiny. Being a conscientious sort of person, she reports the problem to her boss. No investigation results. Instead, there are rumours of difficulties with *her* work. Some colleagues seem to shun her. Then she is called in by her boss and confronted with a complaint about work she did two years ago. She loses confidence and starts making mistakes in her job that would never have occurred before. Before long she takes sick leave for stress - never to return.

This is a typical whistleblower story. There are many variations. Instead of the public service, the venue could be the police, a private corporation, a church or a school. Instead of contracts being awarded to insiders, the problem could be bribery, private use of company goods, favouritism in appointment and promotion, environmentally damaging practices, production of shoddy goods or any of a host of other issues usually fitting under the categories of corruption and hazards to the public and environment. Instead of reporting the problem to the boss, other scenarios are reporting it to a higher-level manager, to an internal hotline, to

an outside agency or to the media. Rather than being unsuspecting, some employees are aware of taking a risk, though seldom do they realise how big the risk is. As well as rumours, ostracism and questioning of the employee's performance, other reprisals include threats, petty harassment, reprimands, referral to psychiatrists, demotions, forced transfers, assignment to onerous or trivial duties, dismissal and blacklisting. The fate of the whistleblower is not an attractive one (Alford, 2001; De Maria, 1999; Dempster, 1997; Glazer & Glazer, 1989; Hunt, 1995, 1998; Miceli & Near, 1992; Miethe, 1999; Vinten, 1994).

One response to whistleblowing is to condemn it as treason or disloyality. Another is to blame the whistleblower for making unfounded allegations. The focus here, though, is on responses that accept that whistleblowers deserve protection because many of them provide a service to society. The next step is to ask how best to protect whistleblowers.

The most common approach to whistleblower protection is the establishment of formal procedures, including grievance committees, ombudsmen, auditors-general, anti-corruption agencies, courts and whistleblower laws. This general approach can be called "official channels." The emphasis on official channels as the most appropriate way of protecting whistleblowers is revealed in several ways:

• political debates about whistleblower laws and their introduction in many jurisdictions;

• the large amount of money allocated to bodies accepting public disclosures compared to other areas such as education, research, training or advocacy;

• attention to official channels in the media;

• attention to official channels by researchers into whistleblowing;

• attention to official channels by whistleblower advisers (Devine, 1997).

My argument here is in two parts: first, official channels do not work very well and cannot be expected to; second, a much more productive approach is to promote the development of understanding and

practical skills for survival in organisations. The implication is that official channels provide an illusion of protection and distract attention from much more effective avenues for intervention. I focus on whistleblower legislation, the approach that receives most attention; many of the conclusions drawn about it apply to other official channels.

Weaknesses of whistleblower legislation

Beginning in the 1990s, whistleblower laws have been enacted in most Australian states and territories, though not at the Commonwealth level. Such laws have a longer history in the United States, while Britain's law is quite new. The stated purpose of these laws is to protect whistleblowers from reprisals and more generally to encourage timely and responsible public disclosures to promote honesty in government. Few of the laws apply outside the public sector. Here I will first assess whistleblower laws at a theoretical level and then look at actual performance.

A fundamental problem with whistleblower laws is that they usually come into play only after disclosures have been made and reprisals have begun. As in the example at the beginning of this article, many employees make disclosures in good faith, not thinking of themselves as whistleblowers. As a result, they seldom have gathered sufficient evidence about the alleged problem to withstand a concerted cover-up. Not anticipating any adverse reaction, they may not be in a position to document reprisals. As a result, invoking whistleblower laws is seldom a practical proposition.

Another problem is that there are many subtle ways for employers to undermine employees without providing clear-cut evidence of reprisals. Rumours and ostracism are two of the most common responses encountered by whistleblowers but are virtually impossible to document. Petty harassment is also potent. It might mean such minor things as unavailability of a company car, awkward rosters, slowness in processing claims, or requests for excessive documentation. Ostracism itself can cause the equivalent of petty harassment, as a worker is denied access to everyday information needed to do the job efficiently. At a more serious scale

are job reassignments that reduce or increase work demands, either setting up the employee for failure or making the job tedious; in both cases it is often easy to camouflage the changes as necessary due to changes in the work environment or to a more general organisational restructuring. Ironically, it can be more difficult for an employee to deal with subtle undermining than with a more obvious attack such as demotion or dismissal. Subtle harassment can lead some employees to blame themselves whereas blatant attacks are more readily understood as reprisals.

Another problem with whistleblower laws is that they typically pit a lone employee against a powerful organisation. The organisation can pay for expensive legal advice and has little to lose by making the case as protracted as possible. Individuals in the organisation have little at stake; indeed, many of them may have moved on in the years it takes for a case to run its course. On the other side, the whistleblower is often alone in pursuing the case, sometimes without any income and seldom with dedicated backing from an organisation.

Whistleblower laws put the focus on whistleblowers and what is done to them. An unfortunate feature of this focus is a relative neglect of the original issue about which the employee spoke out. Whistleblower laws do not and perhaps cannot require an investigation into an employee's allegations. During the drawn-out process of assessing whether reprisals have occurred, the original issue is not addressed. For a dismissed whistleblower, "success" usually comes in the form of a settlement, not a reinstatement; success in terms of organisational reform is not part of the agenda of whistleblower laws.

These shortcomings of whistleblower laws are so systemic that it is worth asking why anyone would bother with them at all. Three types of explanations can be labelled sincere, symbolic and cynical.

Undoubtedly most of those who promote whistleblower laws are completely sincere. This includes many whistleblower activists whose sincerity cannot be doubted, given that they themselves are victims of reprisals. But sincerity of intent is no guarantee of effectiveness in execution. The flaws in the vehicle - whistleblower legislation - are seen as unfortunate weaknesses, due to poor drafting,

inadequate resources or ineffectual implementation.

A different explanation is that whistleblower laws are a form of symbolic politics (Edelman, 1964), serving to give the appearance of political action without any substantive change in institutional dynamics. Symbolic politics is deployed when popular pressure becomes strong. A law gives the appearance of government concern even though it may not lead to any change in behaviour. For example, governments can placate concerns about crime by passing laws even though there is little evidence that longer prison sentences form a deterrent to violent crime or that more than a tiny proportion of corporate crime is ever prosecuted.

Thoms (1992: 83), using a Weberian analysis, argues that "Whistleblower legislation strives to control the agenda of whistleblowers and to contain their disclosures to channels which are under the purview of the state. Under regimes of authorized whistleblowing, the potential for criticism and review of the operations of the state by the public it is said to serve are virtually non-existent."

The cynical explanation of whistleblower laws is that they are intended to encourage employees to speak out, revealing their identity and, rather than protecting them, instead making them easier targets for attack. This explanation is espoused by a few disillusioned whistleblowers.

These explanations are actually compatible. Promoters of whistleblower laws may be quite sincere but the laws in effect can serve to give the illusion of protection. They may also lead employees to believe, mistakenly, that they are protected and thus to become easier targets than if the laws did not exist.

At a broader theoretical level, it can be argued that effective whistleblower laws would be incompatible with hierarchical social structures. There is considerable evidence that various forms of abuse and corruption are found in all aspects of life and that those with more power are especially susceptible (Kipnis, 1981; Simon & Eitzen, 1982; Sorokin and Lunden, 1959). A whistleblower is, in essence, a person who believes that truth should prevail over power: a successful whistleblower brings down corrupt people in high places purely by exposing information. An often-cited analogy is to the emperor with no clothes.

If all politicians, executives, clergy, trade union officials and others who abused their positions - or even just cheated on tax - could be brought down simply by exposure, their ranks would be severely depleted. From this point of view, whistleblowers are a potential threat to nearly everyone in powerful positions and thus need to be domesticated.

These theoretical considerations thus lead to the prediction that whistleblower legislation will not be effective in practice. Assessing this prediction involves two stages: examining actual laws (as opposed to ideal laws) and looking at implementation of actual laws.

William De Maria (1999) has made the most incisive scrutiny of Australian whistleblower laws. He shows that these laws are riddled with weaknesses. For example, he analysed the Victorian Whistleblower Act 2001 using 24 performance standards, such as having an independent authority, a duty to investigate, private sector coverage, injunctive relief and counselling services for whistleblowers (De Maria, 2002a). Although he thinks this is the best whistleblower law in Australia so far, he nonetheless concludes that imperatives of government secrecy are given fuller expression in the act than any commitment to openness or protection.

It is worth highlighting the law's coverage of whistleblowers who disclose to the media. De Maria (2002a) comments:

- One of the strongest criticisms one can bring to bear on the Victorian Act is its failure to protect *media whistleblowers*. None of the schemes in the other parts of the world, bar the United States, appear to protect media whistleblowers. It is common knowledge that the media is often the only door open to the whistleblower determined to expose wrongdoing. It is also common knowledge that government often will only move on allegations once they have been aired in the media.

The "common knowledge" about the value of the media as an ally of the whistleblower is revealed in manuals giving advice for whistleblowers (Devine, 1997; Martin, 1999). The law's failure to protect whistleblowers who go to the media is a clear indication that the law is oriented to domesticating

dissent rather than empowering the whistleblower or putting priority on action against wrongdoers. To take advantage of the law requires that the whistleblower pursue official channels that keep the matter of concern under wraps, with no alert given to wider constituencies that might apply pressure for action. Given that the procedures involved may take months or years while the problem remains unchallenged, this provides a perfect method to minimise challenges to organisational hierarchies.

De Maria (2002b) has also looked at whistleblower laws, both proposed and implemented, in other Australian states and in several countries, reaching similar conclusions. Indeed, he finds that whistleblowers acts are copied, in large part, from one jurisdiction to another, usually perpetuating the same sorts of shortcomings.

Even an ideal law on the books means little unless it is implemented forcefully and conscientiously. In Australia, there have been many disclosures made under the various whistleblower acts but not a single prosecution of anyone who has acted against a whistleblower. In South Australia, members of Whistleblowers Australia have for years urged the government to act in relation to a particular case, so far unsuccessfully. It is beyond belief that the laws have completely deterred reprisals, since reports of reprisals are received regularly by Whistleblowers Australia. Instead, it appears that agencies responsible for implementing the laws do not see it as their role to initiate prosecutions. Rather, the laws are allowed to operate as symbolic deterrents.

For example, in the case of the Education Testing Centre at the University of New South Wales, it was reported that the internal whistleblower had suffered serious reprisals. The major impetus to reform seems to have been media reports about the problem following official investigations. Ironically, investigating agencies in this case seem to have had their main impact via the media while at the same time the state's Protected Disclosure Act gives protection only if the whistleblower does not go to the media.

In many cases, the agency that receives protected disclosures refers them back to the organisation concerned. In other words, an employee concerned about wrongdoing makes a disclosure to an outside

body, in an attempt to promote independent scrutiny, only to find that the matter is referred back to the employer. In one sense this is understandable: an outside body seldom has the resources or detailed knowledge to get to the bottom of an internal matter. This practical limitation reflects the theoretical point that whistleblower laws are inadequate because they operate after the fact. They also point to the fundamental point that it is unrealistic to expect a law to undermine powerful organisational hierarchies.

A common response of whistleblowers to these shortcomings has been to press for *better* whistleblower laws. For example, Whistleblowers Australia (2001) has produced a leaflet, "Whistleblowers of national significance," using four prominent whistleblower cases to argue for better legal protection, in particular the establishment of an independent agency to receive disclosures. Yet this may be a futile hope, given the theoretical and practical shortcomings of even the best laws.

Whistleblower laws are only one avenue for handling disclosures and protecting whistleblowers. Other official channels include hotlines, auditors-general, ombudsmen and courts. De Maria and Jan (1996), in the most comprehensive survey of whistleblowers carried out in Australia, found that whistleblowers reported that less than one in ten approaches to official bodies provided any benefit, and in some cases they reported being worse off as a result. This is compatible with the practical advice by Devine (1997) concerning official channels in the US, which is basically that extreme caution is advised, with no channel providing a secure avenue for redress. Even the much-touted False Claims Act, which can result in large pay-outs to successful complainants, is far from an easy road. These assessments can be explained, in a general way, in the same way as the shortcomings of whistleblower laws: it cannot be expected that any formal procedure could be enacted and implemented that would enable single individuals, backed solely by the truth, to reliably win against powerful organisational elites.

Skills for challengers

Rather than assuming that the solution to wrongdoing

lies in official channels, an alternative approach is to look at a wider range of options, with a focus on empowerment. Concerning a range of options, it is revealing to ask, who is given power? When a person makes a disclosure to an agency, it is the agency that then takes the running, giving more power to officials in the agency. When a person takes a matter to a court, power is given to lawyers and judges. In general, official channels give power to bureaucrats and lawyers and do little to develop alternative sources of power.

The concept of "power" is a notoriously contested one and the speak of "empowerment" can be ambiguous. More precision is possible by talking of skills that are useful to an employee who might need to deal with a problem at work. Conveniently, there is a fair degree of consensus among those who give advice to whistleblowers (Devine, 1997; Lennane, 1996; Martin, 1999). Here are some of the key skills.

• **Collecting data.** Whistleblowers are repeatedly reminded to collect lots of documents - more than they would imagine are ever necessary - and to make copies and keep them in safe places. "Collecting data" sounds straightforward but actually involves a considerable degree of understanding and skill. Employees may only realise too late that they should have collected documents about the employment performance, including statements from supervisors and co-workers, to protect against attacks on their competence. For those who decide to disclose anonymously - in other words, to leak - certain skills are valuable for avoiding detection (Hager & Burton, 1999: 240-247).

• **Writing coherent accounts.** It is immensely valuable to be able to write a concise, informative, unemotional account of an issue, in order to make others aware of the issues quickly and efficiently. Such an account can be used as an introduction to a fuller disclosure to an agency or to introduce a person's story to co-workers, media or outside action groups. All too often, whistleblowers are so close to the issue that they cannot readily explain it to outsiders: potential supporters are put off by receipt of a centimetre-thick pile of documents. One of the reasons that media attention is so useful to whistleblowers is that journalists know how to write a compelling story.

• **Understanding organisational dynamics.** Many whistleblowers say, down the track, that initially

they were naive: they trusted "the system" and did not realise that their disclosures would result in such savage reprisals. Basically they did not understand organisational dynamics. It is commonplace for people to believe that the world is just (Lerner, 1980); reprisals against conscientious, honest employees simply do not fit this picture. Whistleblowers are likely to think of organisations as administrative systems, hence their trust in official channels. An alternative perspective is to think of organisations as systems of power, indeed of bureaucratic organisations as analogous to authoritarian states (Weinstein, 1979).

• **Building support.** In order to have a chance of bringing about a change in an organisation, it is necessary to gain support, in effect to create an alliance. This can include co-workers, unions, outside agencies and community groups. The skills relevant here are close to what is involved in community organising (Alinsky 1971; Fisher 1984), but both inside and outside organisations.

• **Using the media.** Media coverage is frequently a key source of support for whistleblowers. Understanding the dynamics of the media, such as news values and journalists' expectations, often can make the difference between favourable and unfavourable coverage, or whether there is any coverage at all. Large organisations have units to handle public relations but few employees have, or have access to, equivalent skills.

• **Self-understanding.** Understanding one's own motivations, aspirations, capabilities and vulnerabilities is immensely valuable for anyone, especially those who are taking a risk in an organisation. Potential whistleblowers are commonly advised to assess their motivations: being driven by envy or resentment is not a good basis for effective action. Wyatt and Hare (1997) argue that shame is a central dynamic in organisations and that understanding and separating oneself from shaming is a key to survival.

These skills provide a firm foundation for any employee wanting to take action concerning problems in an organisation. This list no doubt could be augmented and refined, but for the purposes here it is only necessary to point out that it is a potentially powerful but relatively neglected option compared to

use of official channels. Table 1 lists a number of differences between the use of official channels and skill development.

Table 1. Use of official channels and skill development, as options for whistleblowers, compared on a number of dimensions.

	Official channels	**Skill development**
Assumption about justice	Provided by official bodies	Achieved through social action
Locus of action	Official bodies	Employee
Importance of evidence	Great	Great
Role of media	Nonexistent or incidental	Potentially large
Links to others in the same situation	Not necessary or common	Important
Biggest costs	Lawyers; agency staff time	Employee's time
Timing	After blowing the whistle	Preferably before taking action
Learning spin-offs	Official bodies learn how to handle cases	Employees learn how to take action

This table indicates the big differences between the options of using official channels and developing skills. Both options are built on collection of evidence. In the official-channel option, this is where the role of the employee begins and ends: the evidence is turned over to official bodies, which thereafter take the running. In the skill-development option, the employee retains a much larger responsibility in choosing how to use the evidence, including how to understand what is happening, whom to consult, how to build support and how to promote change in the organisation.

At the moment, governments invest millions of dollars into official channels; corporations invest a much

smaller but still significant amount. In contrast, investment in skill development for dealing with organisational wrongdoing is minimal. In NSW, the Independent Commission Against Corruption puts effort into increasing managers' and employees' awareness of the Protected Disclosures Act. This can be considered a type of education, but oriented to using official channels.

Most relevant skill development occurs through practical experience. When employees discover a problem and speak out about it, they may subsequently undergo a crash course in understanding the dynamics of organisations, collecting evidence, building support and learning how to contact the media, this "course" consisting largely of the lessons provided through the "school of hard knocks." Experienced organisational activists - some labour organisers qualify here - can be sources of advice, as can whistleblower groups. When outside groups - such as environmentalists - are concerned about an organisation, they may be able to provide assistance in developing skills. In general, developing skills to deal with organisational wrongdoing is unsystematic, sporadic and, for many employees, an unknown continent.

Skill development and use of official channels both rely on collecting data, but they also have a number of connections not mentioned so far. Skills in self-understanding, writing accounts, building support and using the media can be quite useful even for those who decide to use official channels. For example, well-written letters or tactical media coverage can be effective in pushing along an official investigation. Those who pursue official channels, especially those who are actively involved in their cases, often develop a number of the skills mentioned here, skills that can be employed in later organisational struggles. Nevertheless, there are some significant differences, notably that skills developed through using official channels are typically oriented to those channels in an attempt to redress reprisals, whereas skills developed prior to any disclosure can be used in a preventive and proactive fashion.

Conclusion

Reading about whistleblowers can be depressing: their experiences are traumatic, the way they are treated is grossly unfair and their success rate in leading to reform in organisations is extremely low. It is an additional source of disillusionment to find that official bodies - despite the good intentions of most of those who work in them - are so seldom helpful. But there are a few signs of hope.

First, the very concept of whistleblowing is only a few decades old. Abuses of employees are as old as organisations as is the visiting of reprisals on those who expose problems. The naming of a problem is often a large step towards dealing with it. There has been an increasing recognition of whistleblowing in English-speaking countries in the past decade, especially due to media stories, aided by Hollywood portrayals such as *The Insider*, the story of tobacco company whistleblower Jeffrey Wigand.

Second, whistleblower legislation, though it may serve primarily as a form of symbolic politics that gives only the illusion of protection, nevertheless reflects social expectations that something be done about organisational abuses. In many countries there is no whistleblower legislation and virtually no recognition of whistleblowing as a course of action. For all their weaknesses, official channels offer an acknowledgement that whistleblowing is legitimate and socially valued, raising expectations of action and justice.

Third, whistleblowers and their supporters are sharing their insights and experiences. Books and articles provide a valuable resource. There is an ever-larger amount of material on the web, providing information and contacts. In Australia, Britain and the US, there are organisations whose members are whistleblowers, providing mutual help and support. The sharing of information and experience provides a rich form of learning that is especially powerful because of the personal trauma of whistleblowing. In years gone by, most whistleblowers would have been likely to suffer in silence, often blaming themselves. This still occurs, but it is now more common for workers to search the web, find relevant information and contacts and plot a course of action with a better chance of success.

As workers develop better skills, they will have higher expectations of official channels. A well-informed and

well-connected employee will not turn to official bodies unless they promise better prospects than what individuals can achieve through their own efforts. Why make a protected disclosure when a leak or a well-planned campaign is safer and more effective? This suggests that the best way to improve the performance of official channels is to develop workers' understanding and skills.

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