"All that is needed for evil to prosper is for people of good will to do nothing"—Edmund Burke

The Whistle

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Newsletter of Whistleblowers Australia



Bradley Birkenfeld, taxation whistleblower (see pages 9–11)
Photo: http://www.whistleblowers.org

Media watch

Burma "executing whistle-blowers"

BBC News, 7 January 2010

TWO Burmese officials have been sentenced to death for leaking details of secret government visits to North Korea and Russia, the BBC has learned.

The officials were also found guilty of leaking information about military tunnels allegedly built in Burma by North Korea, a source in Burma said. A third person was jailed for 15 years, the source added.

The military rulers in Burma (Myanmar) have so far made no public comments on the case.

The source told BBC Burmese that Win Naing Kyaw, a former army major, and Thura Kyaw, a clerk at the European desk of Burma's foreign ministry, had been sentenced to death by a court in Rangoon on Thursday. They were found guilty of leaking information about government visits to North Korea and Russia, which reportedly took place in 2008 and 2006.



Win Naing Kyaw

The two men were also convicted of leaking details of a network of tunnels reportedly being built in Burma. It is thought the tunnels were built to house communications systems, possible weapons factories and troops in the event of an invasion. The third man, Pyan Sein, was given 15 years in prison on Thursday.

Burma still has capital punishment, but it has not carried out executions in recent years.

Praise for plan but "states must be brought in line" for it to work

Chris Merritt

The Australian, 18 March 2010, p. 2

THE federal government's plan for a powerful new law to protect public service whistleblowers has triggered calls for the states to match the commonwealth's approach.

Whistleblowers Australia president Peter Bennett said: "What we need now is one national whistleblower law … This is an enormous move in the right direction."

Mr Bennett's praise for the scheme is in line with the view of legal academic A.J. Brown, who said Special Minister of State and cabinet secretary Joe Ludwig's plan was comprehensive.

It built on work done by a House of Representatives committee chaired by Labor backbencher Mark Dreyfus and had retained the best elements of the Dreyfus scheme.

But Dr Brown and Mr Bennett both pointed to the lack of detail in the scheme outlined to parliament, concerning the penalties that will be imposed on those who seek to victimise whistleblowers or prevent public interest disclosures.

"The government deserves praise, but this is a major issue," Mr Bennett said.

"It is simply not good enough to set out the procedures you can use to disclose information without also setting out clearly the action that can be taken against people who victimise whistleblowers or attempt to stop disclosures."

Mr Bennett was also concerned that some disclosures to the media would only be protected if they had been ignored by the public sector complaint-handling system for a "reasonable" period.

"I think one week is reasonable," Mr Bennett said.

"The legislation should then require an agency to come back to a whistleblower outlining a timeline showing when decisions will be made and what will happen."

Senator Ludwig said last night that, for some matters, a delay of one week before a whistleblower could approach the media "might be too long."

"You have to use a term like 'reasonable' to make sure that it is fair to all parties," Senator Ludwig told *The Australian.*



Joe Ludwig

Dr Brown, who led a national research project on whistleblower reform, said he did not believe the term "reasonable" was a flaw.

He believed the scheme was much better than the Dreyfus committee's proposal on limited protection for disclosures to the media.

"I think this can work, but they will need to resource it," Dr Brown said.

"The government could be on track to introduce something approaching world's best practice."

Mr Dreyfus said it was pleasing to see that the government had accepted, in whole or in part, 22 of his committee's 26 recommendations.

Whistleblower says watchdog failed her

Des Houghton

The Courier-Mail,

5 December 2009, p. 74

A BUNDABERG nurse has called for a royal commission into the Crime and Misconduct Commission for failing to investigate serious incidents including an assault on a baby, falsifying of

records, bullying, and medical neglect that resulted in a patient dying on a trolley at the hospital.

The whistleblower, Christine Cameron, broke her silence yesterday, saying the CMC was amateurish and inept and had failed in its duty by flick-passing her complaints to other agencies for investigation.

These investigations led to "fabrications" and a "whitewash," she said in statements tabled in Parliament.



Christine Cameron
Picture: Paul Beutel, *The Sunday Mail*

Cameron, 48, said she was dumbfounded to discover most of the complaints she listed in official incident reports weren't investigated at all.

But more perplexing was how the "bureaucracy" managed to shuffle her complaints from one agency to another until no one seemed to know who was investigating what.

She sensed this was a deliberate tactic to delay investigations until the media had lost interest.

"When I rang the CMC in January, they told me the case was now in the hands of Steve Hardy, the director of the (Queensland Health) Ethical Standards Unit," she said.

"Then I was told by the Ethical Standards Unit it wasn't really an ESU matter at all and that the complaints had been referred back to district health manager Kevin Hegarty.

"Later Kevin told me he had complete oversight of the investigation.

"I understood the CMC still had oversight of the case but they said, no, the case was no longer with them."

Meanwhile, some matters were referred to the Health Quality and Complaints Commission and a review of the hospital's emergency department was done by Prince Charles Hospital's executive director of medical services, Dr Stephen Ayre.

At the time the AMA Queensland president Dr Chris Davis prophetically questioned Ayre's role.

"Queensland Health is essentially investigating itself," Davis warned.

He cited a "culture of concealment" identified by Geoff Davies, QC, in his investigations into the Bundaberg tragedy.

Cameron said she presented written proof that records had been falsified.

"Yet the ESU said the claims were unsubstantiated," she said. "I'm dumbfounded. How could they get away with it?

"We are asked to report incidents but I quickly realised the official policy is to cover things up. I was told the expense required to determine whether medical practitioners are providing appropriate care would be an unjustifiable use of resources.

"This is very frightening, especially given the fact that they are investigating issues surrounding the Bundaberg Base Hospital.

"It's wrong, wrong, wrong."

Cameron's allegations are contained in statements tabled in the House by Rob Messenger (LNP, Burnett).

Messenger backed Cameron's call for a royal commission, saying the investigations lacked integrity.

"At the very least, this is unethical behaviour. At worst, this is corruption and cronyism in the Labor Party," he said.

The CMC didn't take the matter seriously because it was "underresourced, undermanned," he said.

Messenger said Cameron may have been deliberately misled into believing the Ethical Standards Unit was investigating the matter when it wasn't.

Cameron said: "This bungled investigation is a clear indication of how unreliable the process is when the CMC delegates investigations to government departments — especially when it means that a government department has the opportunity to investigate itself.

"It is my contention that the ESU investigation was staged and corrupt.

"It is also my belief that now, realising that they may be exposed, management and investigators at all levels are doing their best to distance themselves from this abortion of a report.

"It is my belief that I have been treated unfairly from start to finish, with extreme bias being directed against me by hospital management and the ESU investigation itself.

"It is my firm belief that the ESU has sought from start to finish to help cover up the errors and failings of hospital management, as well as possible untrue responses, and I will be seeking all possible investigation into all these matters."

Cameron said she acted only in the interests of patients whom she believed were getting inferior treatment.

There had been marked improvements in the emergency department at Bundaberg since Ayre's report, she said.

Doctor was offered £90,000 pay-off to keep her quiet

Martin Shipton
Western Mail, 17 December 2009

A DOCTOR who raised concerns about the competence of colleagues was offered a £90,000 pay-off if she agreed to a "gagging" clause in settlement of an employment tribunal claim.

Last night an MP said it was disgraceful that NHS officials had tried to silence her instead of investigating her concerns properly.

Dr Lucy Dawson, who worked at Nevill Hall Hospital in Abergavenny as an associate specialist in accident and emergency, raised a serious clinical concern about the management of a seriously injured young patient by a medical colleague.

She believes that if she had not intervened, the patient may have died.

Instead of investigating her concerns and treating her disclosure as confidential under whistle-blowing legislation, Dr Dawson said managers took no statements about the matter and informed the doctor whose treatment was in question that it was she who had complained.

About four weeks later the doctor was made Dr Dawson's line manager.

When she took the matter to an Employment Tribunal earlier this year, the Gwent NHS Healthcare Trust offered her a £90,000 pay-off including a confidentiality clause, which she refused. She is now working in another hospital.

Dr Dawson said: "I would like the Aneurin Bevan Health Board to make a public statement that gagging clauses will not be used in future and that whistle-blowers will be protected."

Her local MP David Davies said: "I am amazed at the way Dr Dawson has been treated.

"Doctors and others working in the health service who raise concerns about the treatment of patients deserve to have the issues they raise properly investigated.

"I think it is disgraceful that the NHS sought to make her sign a gagging order.

"It is in the public interest that there should be full transparency about matters of this kind. The only reason for getting a doctor to sign a gagging order is to prevent details of the serious concerns they have raised entering the public domain.

"The fact that the NHS Trust was prepared to pay her £90,000 if she gave an undertaking to keep quiet speaks for itself."

An Assembly Government spokesman said: "We expect NHS organisations to have a culture of openness, which encourages staff to raise concerns to senior management.

"The Public Interest Disclosure Act gives significant statutory protection to employees who disclose information reasonably and responsibly in the public interest and are victimised as a result.

"In relation to the Assembly Government's policy on whistle-blowing, it states that the identity of a whistle-blower will be kept confidential for as

long as he or she wishes and as long as the matter remains under the Assembly Government's control. The only exception to this is where revealing the whistle-blower's identity to the police is necessary for the proper investigation of a suspected criminal offence.

"The Assembly Government has a policy of not using confidentiality clauses as a matter of good public sector practice in any document relating to termination of employment or a departure agreement.

"This follows guidance in HM Treasury's Handbook Propriety and Regularity, published in June 1997, and recommendations in Assembly Audit Committee reports in 2000 and 2003."

A spokesman for the Aneurin Bevan Health Board, which took over the responsibilities of the Gwent Healthcare NHS Trust in October, said: "There are a number of issues in this case that were the subject of a formal investigation carried out by the former trust and it would be inappropriate to add any further comment.

"The Aneurin Bevan Health Board has a policy of not using confidentiality agreements in respect of settlements reached which is in line with Assembly Government guidance."

Tenfold rise in whistleblower cases taken to tribunal

Campaigners fear workers deliberately undermined despite repeated promises to protect them

Rajeev Syal

The Guardian, 22 March 2010, p. 14

THE number of employees claiming to have been sacked, mistreated or bullied for exposing corrupt practices at work has increased tenfold over the last decade, according to official figures.

Employment tribunal statistics show that the total number of people using whistleblowing legislation, which aims to protect workers from victimisation if they have exposed wrongdoing, increased from 157 cases in 1999 to 1,791 10 years later.

The figures, compiled for the first time, will increase fears among campaigners that whistleblowers are being deliberately undermined or removed from their workplace, despite repeated promises to protect them.

The information was collated by the charity Public Concern at Work in a report into 10 years of whistleblower protection. Catherine Wolthuizen, its director, said that the figures showed a persistent refusal by many employers to accept that staff had the right to expose wrongdoing.

"Each claim is evidence of a breakdown in relations between employer and employee … our report suggests British employees are not being told that it is safe and acceptable to speak up about wrongdoing in their workplace," she said.

The Public Interest Disclosure Act came into force in 1999 with the specific aim of protecting whistleblowers. It covers disclosures that expose wrongdoing including dangers to health and safety, breach of legal obligations or attempts to cover them up.

The act was supposed to protect those who raise wrongdoing inside an organisation, and offers limited protection to those who raise problems through the media.

Figures show a year on year increase in the number of people taking cases to employment tribunals under the act. The charity's report, to be released on Wednesday, will disclose that most cases are settled before they get to tribunal. Those that are successfully taken forward result in an average payout of £113,667, with the biggest amount being £3.8m.

High-profile cases include Tom Lake, a police whistleblower sacked after accusing colleagues of keeping a piece of human skull as a souvenir. He was awarded £400,000 after a court heard that he had reported a colleague for keeping the grisly keepsake from a fatal rail accident but was then fired for "grassing" on a fellow officer. He eventually won a three-year legal battle for unfair dismissal.

Jim Glencross, a railway worker from Carlisle, was awarded £200,000 after a tribunal found that he had been unfairly dismissed for exposing poor equipment which had injured a colleague. The court heard that he had been asked to lie by managers after witnessing an accident. When he refused to do so, he was sacked.

Glencross, 58, represented himself during the hearing. "I had to learn to take on lawyers, it was a very daunting experience. I liked my job, but I couldn't lie," he told the BBC. Network Rail said they were disappointed by the decision and were considering their position.

Nearly a third of calls to a helpline set up by Public Concern At Work have been from the health and social work sector. The charity has been made aware that outlawed gagging clauses are still being used by the NHS to silence concerns about patients' safety.



Nurse Margaret Haywood blew the whistle on shocking care of elderly patients in Sussex by filming undercover. She was struck off, but the high court reinstated her last month.
Photograph: Christopher Thomond

Peter Bousfield, a senior consultant who raised fears about patient safety at the Liverpool Women's NHS trust, was given early retirement and a payoff. A confidentiality clause prevented him raising concerns with anyone other than the hospital board and the secretary of state for health.

Another doctor who raised concerns about the competence of colleagues was offered a £90,000 payoff if she agreed to a gagging clause in settlement of an employment tribunal claim.

Dr Lucy Dawson, who worked at Nevill Hall hospital in Abergavenny as an associate specialist in accident and emergency, raised a serious clinical concern about the management of a seriously injured young patient by a medical colleague. She said that if she had not intervened, the patient might have died.

Instead of investigating her concerns and treating her disclosure as confidential under whistleblowing legislation, Dawson said managers took no statements about the matter and informed the doctor whose treat-

ment was in question that it was she who had complained. About four weeks later the doctor was made Dawson's line manager.

When she took the matter to an employment tribunal last year, the Gwent NHS healthcare trust offered her a £90,000 pay-off including a confidentiality clause, which she refused. She is now working in another hospital.

Last April, there was widespread public outrage after Margaret Haywood, a nurse who filmed undercover to expose shocking care of elderly patients in Sussex, was struck off for breaching patient confidentiality, even though no patient or relative complained. She was reinstated by the high court last month.

Whistleblowers punished for warning of aviation security lapses

Barbara Hollingsworth
Washington Examiner
29 December 2009

THEY'VE been frantically trying to warn America for the past six years: aviation security is a joke, and it's only a matter of time before terrorists destroy another airplane full of innocent passengers.

The close call in Detroit on Christmas Day has vindicated a group of highly experienced experts — including former airline pilots, federal air marshals and Federal Aviation Administration inspectors — who were fired or demoted for pointing out obvious flaws in the nation's post-9/11 aviation security system to their chain of command.

Even now, facing financial ruin after their careers were trashed and their families destroyed, courageous members of the Whistleblowing Airline Employees Association refuse to be silenced. Former United B-777 Captain Dan Hanley was forced out of the cockpit after filing federally mandated complaints in 2003 about the lack of federal air marshals and onboard cabin cameras aboard his high-risk London-to-New York flights.


Captain Dan Hanley

Six years later, there was still no federal air marshal aboard Northwest Flight 253 from Amsterdam to Detroit, even though both cities are well-known hotbeds of radical Islamic activity.

Robert MacLean, hand-picked as one of the first federal air marshals, was fired for publicly criticizing the Transportation Security Administration's plan to remove marshals from nonstop, long-distance flights — in violation of the Aviation and Transportation Security Act of 2001 — because the agency didn't want to pay their hotel bills.

Former FAA inspector Gabe Bruno uncovered evidence that an airline mechanic certification school was being run by a criminal syndicate. He's still trying to get somebody — anybody — in the federal government to find out where all the bogus mechanics are currently employed.

Fellow FAA whistleblower Rich Wyeroski was canned for asking too many questions — and pointing out the lunacy of forcing passengers to take off their shoes when the airplanes they board are serviced offshore in completely unsecured facilities.

Former TSA Red Team Leader Bogdan Dzakovic, one of the world's top experts on aviation security, was demoted to human answering machine after he testified at the 9/11 Commission's second hearing that safety issues were still not being addressed.

The U.S. government's No. 1 job is to protect American citizens, but it didn't stop Umar Farouk Abdulmutallab, a 23-year-old Nigerian who was already on the terrorist watch list, from buying a ticket — in cash — directly above the aircraft's fuel tank, or from boarding the Detroit-bound flight with explosives sewn into his underwear.

"This individual should not have been missed," fumed Maine Senator Susan Collins, ranking member of the Senate homeland security committee, in a classic example of understatement.

But the harsh punishment meted out to whistleblowers has had its predictably chilling effect. "Who's going to speak out if you have a 2 percent chance of success and your career will be trashed?" Hanley asked.

The few brave souls who lost everything to warn Americans of the ever-present danger in the skies have been kicked to the curb, while those who failed to perform the Department of Homeland Security's core mission — led by Secretary Janet Napolitano and her claim that "the system worked" in the Detroit incident — continue to collect their government paychecks, aided and abetted by an irresponsible Congress.

As Robert Spencer, author of *The Politically Incorrect Guide to Islam,* told *The Examiner*: "In reality, nothing worked. … All the stupid and humiliating airport security procedures, all the little Baggies for toothpaste and shampoo, all the padding through the security scanner in stocking feet didn't work."

The dirty and dangerous secret about airline security is that it's all just political theater designed to calm passengers' very real fears. If the system allows a young, radicalized Islamist known to U.S. authorities to board a plane with 80 grams of pentaerythritol tetranitrate sewn into his pants, nobody is safe.

Meanwhile, your government is too busy bailing out failed banks and car companies and taking over the health care industry to provide for the common defense. Just don't say you weren't warned.

Whistle-blowing nurse is acquitted in Texas

Kevin Sack
New York Times, 12 February 2010

A WEST TEXAS jury took but an hour Thursday to acquit a nurse who had been charged with a felony after alerting the state medical board that a doctor at her hospital was practicing unsafe medicine.

The uncommon prosecution had ignited deep concern among health care workers and advocates for whistle-blowers about a potential chilling effect on the reporting of malpractice.

But after a four-day trial in Andrews, Texas, a state court jury quickly found that the nurse, Anne Mitchell, was not guilty of the third-degree felony charge of "misuse of official information." Conviction could have carried a prison sentence of up to 10 years and a fine of up to $10,000.



Anne Mitchell

The prosecution said Mrs. Mitchell, 52, who had been a nurse at Winkler County Memorial Hospital for 25 years, had used her position to obtain and disseminate confidential information — patient file numbers — in her letter to the medical board with the intent of harming Dr. Rolando G. Arafiles Jr. The prosecutor argued that state law required that reports of misconduct be made in good faith, and that Mrs. Mitchell had been waging a vendetta against Dr. Arafiles since his arrival at the hospital in April 2008.

Witnesses testified that they had heard Mrs. Mitchell refer to Dr. Arafiles, a proponent of alternative medicine and herbal remedies, as a "witch doctor."

But other nurses vouched that Mrs. Mitchell's concerns were legitimate, and that internal complaints were not dealt with adequately by the hospital's administration.

The jury foreman said the panel of six men and six women voted unanimously on the first ballot, and questioned why Mrs. Mitchell had ever been arrested.

"We just didn't see the wrongdoing of sending the file numbers in, since she's a nurse," said the foreman, Harley D. Tyler, a high school custodian.

Mrs. Mitchell, who did not testify in her defense, said after the verdict that she had been trying only to protect her patients.

"It's a duty to every nurse to take care of patients," she said, after wiping away tears of relief.

The prosecution has so polarized the small town of Kermit, where the hospital is located, that the judge moved the trial to a neighboring county. The case was investigated by Sheriff Robert L. Roberts Jr., a friend and admiring patient of Dr. Arafiles, and tried by the county attorney, Scott M. Tidwell, a political ally of the sheriff and, according to testimony, Dr. Arafiles's personal lawyer.

Sheriff Roberts said he was disappointed in the verdict but did not regret the prosecution.

"The defense had to spin this as a reporting issue, that nurses were not going to be able to report bad medical care, and it's never been that," he said. "We encourage people to report bad medical care. But I encourage public servants to report it properly."

Mrs. Mitchell and Vickilyn Galle, a co-worker who helped her write the anonymous letter to the medical board, were fired by the hospital last June, shortly before being indicted. The charges against Mrs. Galle, 54, were dismissed late last month at the prosecutor's discretion.

After the verdict, the nurses' lawyers pivoted quickly to the lawsuit they have filed in federal court against the county, the hospital and various officials, charging that the firings and indictments amounted to a violation of due process and their First Amendment rights.

"We are glad that this phase of this ordeal has ended and that Anne has been restored to her liberty," said Mrs. Mitchell's lawyer, John H. Cook IV, "but there was great damage done in this case, and this does not make them whole."

Mr. Cook presented broad evidence that the nurses' concerns about Dr. Arafiles, 47, were well founded, and that Mrs. Mitchell had violated no laws or regulations in alerting the governmental body that licenses and regulates physicians. He walked the jury through a series of questionable cases involving Dr. Arafiles, including one in which the doctor performed a skin graft in the hospital's emergency room, despite not having surgical privileges, and another where he sutured a rubber tip to a patient's crushed finger for protection.

Some watchdog groups worried that the prosecution would stifle reporting of improper medical care, regardless of the outcome. But Rebecca M. Patton, president of the American Nurses Association, called the verdict "a resounding win on behalf of patient safety."

Ms. Patton said, "The message the jury sent is clear: the freedom for nurses to report a physician's unsafe medical practices is non-negotiable."

Jim Mustian contributed reporting from Andrews, Texas.

Moving from bystander to witness to whistle-blower

Marc Gerstein with Michael Ellsberg

An extract from their book *Flirting with disaster: why accidents are rarely accidental* (New York: Union Square Press, 2008), pp. 266–269

One of the most important pieces of advice in this book is not to be a bystander. Often unsafe situations (such as *Challenger's* O-rings or BP's Texas City refinery) or unethical acts (such as Enron's shamelessly misleading financial reporting) persist because people look away or in other ways make it clear that others' danger-producing or immoral actions are none of their business. In one's role as a community or organizational member, reducing risk and achieving *moral* course corrections often takes very little effort.

Psychologist Petruska Clarkson used to tell a story that makes the point in the day-to-day context. A woman observed two policemen harassing a

member of an ethnic minority. Rather than intervene directly, the woman made herself a "conspicuous observer," carefully watching the unfolding events from a safe distance. Realizing they were being observed, the policemen became less aggressive and more respectful of the man they were questioning, eventually letting him go. The policemen then went their way and the observer hers.

Sometimes just "active watching," visibly taking notes or writing a concerned e-mail, is enough to change the course of a situation. I am not advocating recklessness. I am, however, suggesting that being visible and questioning clearly inappropriate actions rather than fading into the background often makes a difference, even if it is not a decisive action. Equally important, when someone else takes a stand-up action, lending visible support matters a great deal. While each single person may be relatively impotent, two or more in mutual support quickly break the spell that the wrongdoers can operate outside the boundaries of ethics and prudence. Doing something is always better than doing nothing, and once you let go of the grandiose notion that your actions must definitively resolve the problem, or the equally erroneous idea that apparently minor actions have no beneficial impact, you have a greater number of choices about how to behave.

One other benefit from becoming engaged in life's dramas involving ethics and risk is that it is likely to make you feel better. Silently colluding with wrongdoing or risk-making is debilitating to the psyche, while taking action activates the sense of heroism in each of us while encouraging other observers' sense of the legitimacy of an oppositional stand.

At work, of course, the situation is always complicated. If a supervisor directs one of his employees to engage in an unsafe practice or to falsify or destroy records in order to meet a production goal or cover up a misdeed, taking any visible action invites the threat of management retaliation or peer-group ostracism if one's co-workers are complicit in the wrongdoing. The key question is whether the boss is acting on his own or is part of a larger pattern, as was the case in most of the examples in this book.



Marc Gerstein,
author of *Flirting with Disaster*

If the work situation is more benign — and many are — the key to taking action is finding allies. Many organizations have formal groups such as safety officers, human resource specialists, and union representatives to whom one can turn for advice and assistance. If two or more people go together when voicing their concerns, it strengthens the argument manyfold. Assuming that the organization is merely blind to its risks rather than deliberately hiding them, opening the door will usually be enough (although you should be prepared to furnish some documented proof of your concerns).

On the other hand, an overly defensive organization engaged in a cover-up will usually block or subvert the channels of complaint. In such cases, simply standing by may do little, even if multiple people get involved. Unfortunately, the transition from simply standing by to organized resistance and whistle-blowing is a big one, and not to be taken lightly. Research reveals that whistle-blowers in hostile organizations encounter severe resistance. They are often subjected to harassment and punishment, sometimes becoming the object of a counterclaim if they don't back down. Most steadfast whistle-blowers lose their jobs or privileges, and many require legal counsel. So why do they do it?

According to research, committed whistle-blowers in hostile organizations tend to be people with strong and unwavering principles. At work, their colleagues are likely to consider them picky about the facts and not prone to convenient memory lapses. Potential whistle-blowers often face up to their responsibilities with deep ambivalence, caught between the need to do the right thing so that they can live with themselves and the certain knowledge that they will be persecuted. Many whistle-blowers in celebrated cases become pariahs in their organizations, forced to transition to new careers as ethical advocates. If they are heroes, they are usually reluctant ones.

The key to successful whistle-blowing is documentation. Unsubstantiated accusations are easily deflected, even if they are true. Unfortunately, that means many potential whistle-blowers are stymied by both corporate and government rules that categorize many documents as proprietary or classified. This may make their external disclosure either a contractual violation or illegal. Expert legal advice is essential. (See our Web site, www.flirtingwithdisaster.net, for resources.)

In light of the likely consequences, despite the moral imperatives, I do not advocate anyone casually becoming a whistle-blower. It is an act of conscience, a personal and family decision involving considerable sacrifice quite separate from benefits to others. On the other hand, I do not condone colluding with any cover-up that may follow the revelations that may come to light by other means. Despite the fact that "There are careers at stake," as one NASA manager said in the wake of the *Challenger* disaster, even passively contributing to a cover-up is an immoral second offense, as tempting as it may be to hope that the storm will blow over without blowing you down with it.

Before the story breaks, cautious legal advisers suggest making one's protests within the chain of command or other legitimate avenues, but then departing the organization on as good terms as possible if one's complaints come to naught. In comparison with remaining as a silent co-conspirator once you know the truth, or running the risks of being a whistle-blower, that is sound advice.

Unfortunately, most people choose

silence, for departure has its own costs. In most cases, it seems safer to just keep a low profile. The question is, "Safer for whom?"

Whistleblowing: a get-rich-quick scheme?

Stephen M. Kohn
Forbes.com, 21 December 2009

IN RECENT days, numerous credible news media outlets have reported on what the UBS whistleblower, Bradley Birkenfeld, may make as a result of turning-in his former employer, the Zurich, Switzerland-headquartered bank, UBS AG.

Birkenfeld blew the whistle on the bank's illegal off-shore tax schemes to the United States Department of Justice, the Securities and Exchange Commission, the Internal Revenue Service and the Senate many months before he was indicted. The impact of his disclosures has been unprecedented. UBS has entered a deferred prosecution agreement with the United States and has paid a $780 million penalty. More than 14,000 U.S. taxpayers have admitted to holding undisclosed offshore accounts.

Based on the extent of the fraud Birkenfeld exposed, there has been speculation that he might be entitled to a billion dollars or more under a relatively new IRS law that rewards whistleblowers for voluntarily providing credible information on large tax frauds (usually above a $2 million threshold). As one of Birkenfeld's current lawyers, and as a long-time advocate for whistleblowers, I believe it is safe to predict that neither Birkenfeld nor any other whistleblower will collect a billion dollars — or anything approaching that amount — from the federal government.

What really happens to employees who blow the whistle and seek a reward? Birkenfeld, like most whistleblowers, has lost his job and career. He was forced to resign from UBS after his internal protests regarding illegal bank practices were ignored. His career as an international banker was cut off — as were his lucrative salary and benefits.

Yes, the law makes Birkenfeld entitled to a reward. But to date, he has received nothing. The government does not simply hand out checks after whistleblowers report fraud. The process is long, technical and often very disappointing, especially to the whistleblowers whose careers have been ruined.

Furthermore, in Birkenfeld's case, the Department of Justice refused to provide him with any whistleblower protections, let alone immunity in light of his substantial and crucial contributions to the case against UBS. Instead, Birkenfeld was personally attacked by the DOJ and indicted for his role in helping one client, Igor Olenicoff, evade taxes. Far from becoming a billionaire, Birkenfeld will commence serving a 40-month sentence on January 8, 2010. He lost his job. He will soon lose his freedom. What about the new IRS whistleblower-rewards law? This law contains a reward provision similar to the now famous False Claims Act. Under both laws, employees are encouraged to disclose fraud committed by their employers. Both laws provide a reward provision that entitles these whistleblowers to a percentage of the monies recovered by the United States as a result of their disclosures. Generally speaking, that is 15% to 30%.

Theoretically, then, whistleblowers can get rich from these laws. But what is the reality? Here are the real facts:

• Between 1987 and 2009, the average False Claims Act reward paid to a whistleblower was $1.9 million dollars.

• In the 22-year history of the False Claims Act, no reward paid to a single whistleblower has, to my knowledge, approached the $100 million mark, regardless of the amount of money obtained by the government.

• Since 2006, when the tax laws were amended to provide for whistleblower rewards consistent with the False Claims Act, no whistleblower has obtained any reward from the IRS under the new legal standards.

Whistleblower cases are hard. Employees who blow the whistle suffer both professionally and personally. Blowing the whistle is not the way to make money quickly in the United States. Even the few employees who have obtained sizable rewards usually had to wait years for a recovery, and almost universally lost their jobs in the meantime, costing themselves and their families millions of dollars in lost income and benefits.

How much will Birkenfeld actually obtain as a result of his whistleblowing? Any answer is completely speculative. Given the unprecedented nature of his disclosures, and the lack of judicial or administrative precedent under the new IRS law, any attempt to place a monetary value on his whistleblowing is pure guesswork. The IRS must initially review the claim, and any amount of reward may be subject to judicial review.

This speculation actually serves to further harm Birkenfeld. He is facing 40 months in prison; that is the reality. Furthermore, no government agency has yet to confirm he is entitled to one penny based on his whistleblowing. The DOJ refused to provide him with any whistleblower protections or immunity, despite Birkenfeld's pleas since he first communicated with that agency in early 2007.

Lost in the speculation over the theoretical size of Birkenfeld's reward is the fact that when Birkenfeld first blew the whistle at UBS, the law that provides for the reward did not yet exist. The record demonstrates that between June and August of 2005, Birkenfeld learned that UBS had entered into agreements with the United States prohibiting many of its offshore banking practices, Birkenfeld sent multiple e-mails and interoffice memoranda to the heads of the UBS legal and compliance departments demanding answers as to how the bank could engage in apparently illegal tax evasion schemes. UBS' legal and compliance mangers refused to answer any of his concerns. In response to this silence, and over concerns that UBS was willfully violating the law, Birkenfeld, of his own accord, quit his job. He felt he had no other choice.

In early 2006, Birkenfeld filed a formal whistleblower complaint in accordance with three internal UBS policies. The UBS whistleblower procedures were not designed to reward or compensate employees; instead they were part of a corporate compliance program designed to investigate and remedy wrongdoing. But instead of serving an independent audit function, the UBS program was controlled by the company's Group

General Counsel, Peter Kurer (who would later become the chairman of the board, and subsequently resign amid the scandal).

Birkenfeld thought he was properly reporting wrongdoing and giving the bank an opportunity to investigate and fix the problems. He was wrong. UBS' compliance program was broken and compromised. Instead of fixing the problems, the compliance program was used to cover up the crimes. The deferred prosecution agreement between UBS and the Department of Justice acknowledged these defects, and UBS conceded that had it properly investigated Birkenfeld's allegations, it would have uncovered the crimes he later reported to the U.S. government.

When he blew the whistle internally, Birkenfeld was not seeking a "reward" under the UBS whistleblower program — no such reward existed. He was trying to fix massive violations within the company's procedures. Like most whistleblowers, Birkenfeld started his journey not seeking any reward, but trying to get his employer to do the right thing. Yet in most cases, a lone employee is powerless in a corporate culture that thrives on breaking the rules.

It is true that Birkenfeld formally approached the U.S. government after Congress passed the new IRS whistleblower law. But the record also shows that in 2006 — before it was passed — that Birkenfeld traveled to the United States and hired attorneys for the specific purpose of exposing UBS misconduct to the U.S. government.

At his sentencing hearing, Birkenfeld's extensive efforts to report and fix the UBS misconduct in 2005 and 2006 were simply ignored. The focus at the hearing was not on the fact that Birkenfeld, for two years before Congress enacted the reward provision, had attempted to report and fix the UBS misconduct. Instead, the Justice Department fixated on the fact that Birkenfeld had sought protection under the new IRS whistleblower rewards law.

Never mind that he lost his job and career. Never mind that he was facing 40 months in prison. The mere fact that he sought the benefits and protections of U.S. laws was turned against him. Somehow the Department of Justice argued Birkenfeld was not a real whistleblower because he sought protection under a new federal whistleblower law.

What's next? If the United States government is actually serious about encouraging employees to blow the whistle on tax fraud, the Birkenfeld precedent is simply not the way to accomplish those goals. If rewards are simply pie in the sky, and employees who uncover massive tax fraud by large banks face unending economic retaliation, legal battles and potential prosecution when they try to report the crimes to their government, what are the future prospects for any employee in the banking industry who tries to stop massive tax fraud against the American people?

Whistleblowing is not a get-rich-quick scheme.



Stephen Kohn

Stephen M. Kohn has represented whistleblowers for 25 years. He is executive director of the National Whistleblowers Center and a partner at Kohn, Kohn & Colapinto, LLP.

Where have all the whistleblowers gone?

Corbin Hiar
Mother Jones, 12 March 2010

WHEN President Barack Obama's jobs bill passed the House in early March, it contained a little-noticed provision to recover part of its $35 billion price tag by cracking down on offshore tax evasion, which costs the US some $100 billion a year in lost revenue. The provision, which requires foreign financial institutions to report more data to the Internal Revenue Service, was likely prompted by a 2008 Senate investigation that revealed the systemic efforts made by Swiss bank UBS to help moneyed Americans hide massive sums from the IRS.

The insider information that formed the backbone of the investigation — insight that eventually helped the feds recover billions in unpaid taxes — was provided by a former midlevel executive at UBS, American-born Bradley Birkenfeld. Birkenfeld is the only international banker who has ever blown the whistle to the US government on Switzerland's legendarily secretive banking practices. He is also the only person connected to UBS' massive tax evasion scheme to have been sent to prison: Birkenfeld is currently serving a four-year sentence for fraud. Whistleblower advocacy groups warn that this punishment could have a "chilling effect," discouraging other financial whistleblowers from coming forward. Did Obama's Department of Justice (DOJ) exact retribution that could cost US taxpayers billions?

Birkenfeld first raised alarms about UBS' banking practices in a series of emails to his superiors in 2005, after a colleague allegedly brought to his attention a year-old memo that forbade soliciting Swiss banking services while either the banker, client, or prospect were on American soil. "When I read it," Birkenfeld said in an October 2007 Senate deposition, "I was very concerned about what was going on in the bank because this contradicted entirely what my job description was." From at least 2001 until he resigned from UBS in 2005, Birkenfeld had worked to help rich people hide millions in taxable assets from the US government. Birkenfeld claims he only realized that what he was doing was criminal after reading the memo.

Two years later, Birkenfeld began providing the US government a cache of UBS internal documents, business emails, and insider knowledge. The US used this information to extract a plea agreement from the Swiss government and UBS, in which the bank agreed to pay a $780 million penalty and to release the names attached to 4,450 of its 19,000 undisclosed US accounts. Those accounts hold a significant portion of the estimated $20 billion in previously hidden assets held by UBS' US clients. This agreement, which is

now pending in the Swiss parliament, could be a model for indicting other banks in offshore tax havens — countries with low (or no) taxes on banking assets, and strict secrecy laws to conceal the identity of their depositors. That is, provided the US can convince more whistleblowers with evidence of financial crimes to speak up.

In the wake of the Birkenfeld conviction, whistleblower advocacy groups say that's unlikely to happen anytime soon. Jesselyn Radack, the national security director at the Government Accountability Project, says that her organization has been in contact with at least four financial whistleblowers — including clients and employees of major Swiss banks — that "saw what happened to [Birkenfeld] and are not going to come forward." She adds, "I can't in good conscience tell someone to go to the government given its treatment of Birkenfeld." When Birkenfeld was locked up, whistleblower advocates mounted a campaign to commute his sentence — which they referred to as "an American tragedy" and "a disgraceful miscarriage of justice." Stephen Kohn, the director of the National Whistleblowers Center, says the message sent by the US government was: "If you come forward, you will go to jail and have your life ruined."

But the story is a bit more complicated than that. Birkenfeld wasn't indicted simply because he was involved in the illegal activities at UBS that he helped expose. The primary reason was his failure to disclose in his initial June 2007 meetings with DOJ the longstanding relationship he had with a former client named Igor Olenicoff, a billionaire real estate developer then on trial for tax evasion. In April 2008, Olenicoff was sentenced to work 120 hours of community service, put on two years probation, and forced to pay a $52 million fine for dodging $7.2 million in taxes.

The DOJ argues it could have won a harsher judgment against Olenicoff had Birkenfeld been more forthcoming. In May 2008, when the DOJ claims to have first discovered the connection between the banker and billionaire, it charged Birkenfeld with conspiracy to defraud the US government. During his trial, Birkenfeld pled guilty and admitted to, among other things, smuggling diamonds into the US in a toothpaste tube for Olenicoff. "Oh, it was just a way of carrying them so I wouldn't lose them," Birkenfeld told 60 Minutes. "Where would you put two diamonds?"

In a letter to Attorney General Eric Holder asking him to reconsider Birkenfeld's case, his attorneys argue that because he mentioned his relationship with Olenicoff to Senate investigators, as well as other inquiries that were being conducted by the IRS and Securities and Exchange Commission, Birkenfeld was not trying to shield his client from the law. They also contend that Birkenfeld would have been more forthcoming had he been offered the full immunity from prosecution that he'd requested. That explanation didn't wash with Holder. The attorney general's office, which did not directly respond to Birkenfeld's complaints, said in a written statement that his case had been "carefully considered" by the district court. Gerald Lefcourt, the former president of the National Association of Criminal Lawyers, agrees with Holder. "The Senate is politics," he explained. "What's important is making a deal with the US attorneys … the other stuff is icing on the cake." Lefcourt adds that the sentence simply indicates the DOJ's low tolerance for witnesses who are not entirely cooperative. Notorious mafia informant Sammy "the Bull" Gravano "got five years for 19 murders," he points out. "It's in the public interest to see that if you cooperate, you will get just rewards."

But even taking into account Birkenfeld's failure to be fully frank with the DOJ, the whistleblower groups contend that he got a disproportionately harsh punishment. Judge William Zloch of Florida's Southern District Court handed him a sentence 10 months longer than the 30 months the prosecution had requested.

Whistleblower advocates say there's one thing the government could do to encourage other Wall Street insiders, accountants, or corporate financial officers to expose fraud: Cut Birkenfeld a big check. Under an IRS whistleblower reward program, informants are eligible for 15 to 30 percent of the collected tax proceeds resulting from any details they provide on a scam that they weren't directly involved in creating. But the program hasn't awarded a payout since it was created in 2006. Kohn of the National Whistleblowers Center is one of two lawyers representing Birkenfeld in his application for the award (and may earn a sizeable cut of the reward if it's successful). The Government Accountability Project's Radack, a Bush-era whistleblower profiled by *Mother Jones,* noted that a payment from the IRS "could hopefully defrost the current chill on whistleblowers coming forward."

The idea of imposing a lighter punishment — or making a hefty payout — to someone who has admitted breaking the law may sound distasteful. But the economic crisis has illustrated that there's no shortage of financial malfeasance to be uncovered, and as Birkenfeld has shown, just one whistleblower can make a big difference. There's no way to know whether the DOJ is working with other informants behind the scenes — but if it eventually turns out that Birkenfeld's prison sentence did dissuade more financial whistleblowers from coming forward, then he may be one fraudulent banker who didn't belong behind bars.



Bradley Birkenfeld pauses during a press conference outside the Schuylkill County Federal Correctional Institution in Minersville, Pennsylvania, Friday, 8 January 2010, before reporting to the federal prison.
AP photo: Carolyn Kaster

National conference, 2010

Whistleblowers Action Group and Whistleblowers Australia

Emmanuel College,
University of Queensland
Thursday-Sunday
25–28 November 2010

The programme for 25–26 November will be four half-day workshops, on

- Dealing with the bureaucracy {Brian Martin, facilitator]
- Dealing with bullying [Bill Wilkie, facilitator]
- Dealing with stress [Anne McMahon, facilitator]
- Dealing with work performance issues [Greg McMahon, facilitator]

The conference on Saturday has the theme "Watchdogs & whistleblowers" with presentations on the following watchdogs.

Ombudsman Associate Professor Anita Stuhmcke, Faculty of Law, UTS, researcher into performance of the Commonwealth Ombudsman's Office
Justice commissions [speaker invited]
Media Alan Jones
Parliament Ray Halligan, former Chair of Parliamentary Committee overseeing the Corruption & Crime Commission WA
The courts [speaker invited]

Opening address by Col Dillon on *History of whistleblower-watchdog relationships in Queensland*

Also:

- a press conference and/or peaceful demonstration about abuse of persons in care
- presentation of Whistleblower of the Year Award on Saturday
- WBA annual general meeting, workshops and fellowship on Sunday

The organisers will provide a map to show attendees living in where the local shops and restaurants are (just around the corner) and the bus terminal (around the bend).

Compensation for whistleblowers and workers

Mim Dekker

Workers compensation can be so damaging and hazardous for work injury applicants that they should consider not applying for it or delaying, Cynthia Kardell and union officer Janet Giles explain (*The Whistle,* January, p. 12). The pain, anguish and suffering that work-injured people experience by applying for their compensation entitlement are indicated in the compassionate comments of Ms Kardell and Ms Giles. On the other hand, no one should have to forego their entitlement to compensation. Whistleblowers too need compensation if going public impacts on their health, lives or careers.

The suggestion that work-injured persons, instead of applying for compensation, should take sick leave or annual leave, as this would relieve the pressure on them, is a concerned response. But if the injury is permanent, delay can cause loss of compensation rights and a lifetime suffering injustice. And why should the work-injured have to lose their annual leave when it is needed even more after work injury? If sick leave is used, what happens when sick leave is needed after return to work? When work-injured, I took annual leave, long service and two years' leave of absence and lost not only my workers compensation but also my job.

The hardship and disadvantage work-injury applicants experience when applying for compensation is a symptom of systemic disease that treats the work-injured too harshly. It is not unknown and, as documents show, procedures required to be applied by the insurer for workers compensation (Workcover or some other body) are not always applied as they should be. The anomalies extend to problems as to whether the insurer obtained all evidence about the work performed and whether the employer or the officers recorded all work accidents and work injury reports. A work-injury officer said that while some work contracts today contain a full description of what is involved in the performance of the work, many merely name the title of the work. The latter militates against the worker proving that work s/he did caused the injury. Documents show the insurer does not always obtain information about all work performed nor fix incorrect information from the employer about work performed. It should be mandatory for the insurer, before any hearing or decision, to inform all applicants what evidence will be used for or against them.

When people disclose work-caused injury, it can expose the employer when there is lack of safety. And when compensation is granted it leads also to higher insurance premiums. Employers may lose incentive rewards. Some employers — not satisfied with the removal of fault from the statutes, which means most work injury cases are denied access to common law and higher courts — now use unfair means already mentioned, depriving genuine work-injury cases their entitlements.

The then Parliamentary Minister, The Honourable Tom Barton, said, "It could not happen that the workers compensation office uses the wrong and missing work to claim an applicant should be denied compensation — because there is a safeguard." That safeguard is the "Statutory Claims Procedure" that says the insurer is required to inform the applicant when the employer contradicts what the applicant says is the work performed or report about work injury for example. When the Minster was informed that the insurer failed to apply the required procedure, he sprang up, sending his chair flying. and dismissed the informant. This happened at Queensland's touted democratic Community Cabinet where ministers are supposed to listen to the people.

A Brisbane psychiatrist, concerned about the undue suffering the workers compensation system causes numbers of work-injured people, disclosed publicly that the insurer uses "hired gun doctors." These doctors, usually specialists in their field, allege that

applicants for compensation are lying. Or taking a page out of oppressive regimes, they claim that sane people are "mental." Former journalist John Barton said that it is claimed in the face of doctors' adverse statements, "what can the work injured person do about it?" When a car is damaged and loss results, we expect compensation insurance will be paid. Insurance is paid for machines — how much more should it be granted for whistleblowers and genuine work-damaged human beings?

A comment was that giving compensation does not address the original workplace issues causing injury. This is a significant gap. But this could be addressed by integration: by asking the applicant why and how they think the work caused the injury and for suggestions on how to correct it — to stop it happening to others. But a work-injured person said that the employer only implemented some of what Worksafe on inspection said needed to be done, and what was left undone could again cause injury. Monitoring could address this problem.

But in the experience of teacher Robina Cosser, who applied to many monitoring systems intended to rectify mistakes of others — the Queensland Crime and Misconduct Commission (CMC), Director-General of Education Ken Smith and others — her experience was that, "most Queensland public service 'reforms' are designed by the abusers to protect the interests of the abusers" (*The Whistle,* January, p. 6). This is my experience too including the Ombudsman Office and the office of the Information Commissioner.

The answer is not suppression or denial of work-injured people's rights and entitlements. The veil of the culture of cover up and blame the victim must be lifted from the workers compensation system. Both whistleblowers who disclose publicly, and work-injured people who disclose work-caused injuries and lack of safety, deserve and should be entitled to compensation for damage and loss of health and career. Instead we must continue to speak up about the failure of the present monitoring and reform systems meant to deal with anomalies in the workers compensation insurance system but that often fail. This lack of rigour exists on Queensland, if not other states also. We must speak up until our voices are heard. Edmund Burke said it: "All that is needed for evil to prosper is for people of good will to do nothing."

Mim Dekker is a member of Queensland Whistleblowers and Whistleblowers Australia and founder of the Injured Workers Support Network.

Stay in the driver's seat

Comment by Cynthia Kardell

Mim is right to be concerned about you losing out, but my point is that you should make sure you stay in charge of your affairs, when it matters most.

There's plenty of time to bring a worker's compensation claim at the end, when you've successfully got yourself back to work on your own terms. So you need to be more strategic and stay in control, whether you want to return to work or not.

Think about when you make a motor vehicle accident claim. Once you make the claim, you've legally given your insurer the right to decide what's to be done: even to the point of being able to sell your car back to you if you don't want it written off. Workers compensation insurance is no different. Once you make your claim, your employer is legally entitled to involve itself in your affairs and dictate how, when what and why. Your employer gets to be in control, largely in tandem with their agent, the insurer.

It's an all too familiar story. Your own doctor's views are no longer seen to be important. You have to see their psychiatrist, not yours. S/he invariably operates on your employer's version of your history, not yours.

Some awful things happen. A person once told me how as he said goodbye, the psychiatrist grasped his hand saying sympathetically I bet you feel like killing the bastards sometimes. The whistleblower grimaced, barely raising a smile. You guessed it: the report came back with something like he shook his fist at me, shouting he'd kill the bastards. People do bad things for very little reason sometimes and money makes it all too easy.

Now if you can use your own leave entitlements, then you, with your doctor stay in control. Your employer generally can't direct you to see anyone without your agreement and it has to take notice of your doctor's instructions. You would need to make sure your doctor is kept fully informed on a regular basis. All your medical certificates should provide details of your symptoms and sheet home the blame to your employer. If you don't have a doctor, get one. Get a referral to a psychiatrist or psychologist. Your doctors should keep a detailed record of what's going on. Then, after you get back to work or decide to leave you can put in what is known as a 'closed period' workers compensation claim. Plus you'll have the only record and the best record.

It's known as a closed period claim because it is for a set period and made after the fact. You would be claiming all the usual things: monetary reimbursement for the leave entitlements you've used, all related expenses and compensation if applicable. That is, stay in the driver's seat.

You can do the same if you opt for medical retirement, but use your leave entitlements upfront and then claim them back at the point you leave work, because that way you stay in control of your affairs for as long as you can.

Note that every employer in Queensland, unless a licensed self insurer, must have a workers compensation insurance policy with WorkCover Queensland. In other states the WorkCover authority is just one of the insurers and is also responsible for workplace health and safety regulation. In Queensland, the Workplace Health and Safety division of the Department of Employment and Industrial Relations oversees all workplace health and safety.

Cynthia Kardell is national secretary of Whistleblowers Australia

Blowing the whistle on the whistleblowing project

Executive summary of a critique of the Whistling While They Work project

Greg McMahon

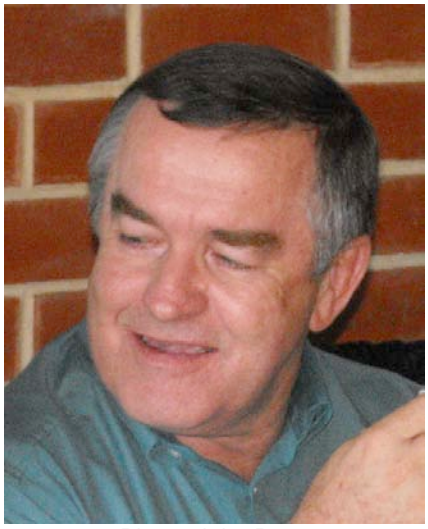


Photo: John Pezy

The Whistling While They Work project has only a partial coverage rather than a comprehensive coverage of whistleblower situations in the Public Sector in Australia.

Robert Needham, Chair of the Queensland Crime & Misconduct Commission, announced the beginning of the project, back in February 2005. Needham chaired and hosted the first meeting of the steering committee for the project.

On 25 November 2009, however, in response to yet another scandal in the Queensland Government, Needham is reported to have stated: "I would be interested in ways in which public servants can be empowered to say no." After $1 million in funds and public servant hours, the project appears to have failed to deliver this primary outcome for its partner organisations

The project has simply failed to address the forms of systemic wrongdoing, of which the sports rort allegations may be a current example of a continuing phenomenon. The coverage that this project has provided is of the minor or secondary or lower volume forms of whistleblowing and reprisals taking place in government offices.

The project, and its conclusions and recommendations, may thus constitute a health and safety risk for the majority of public servants who make public interest disclosures about wrongdoing in their workplace.

The risk may occur where the conclusions and the recommendations of the project are applied in situations that have not been researched and analysed by the project.

The conclusions and recommendations from the project have standing with respect to situations

- where the whistleblower has disclosed wrongdoing by co-workers and supervisors,
- where the agency is a well intentioned agency that shares the employee's concern for the wrongdoing to be removed, and
- where the reprisals are less serious in nature,

that is, essentially in co-worker wrongdoing and reprisal situations, colloquially termed as *the "dobbing" whistleblower* situation.

The conclusions and recommendations, however, do not appear to be drawn from a deliberate and structured analysis of situations

- where the whistleblower has disclosed wrongdoing by the organization and its management
- where the agency is affected by systemic corruption, and is intent on a close-out of any disclosures about its wrongdoing, and,
- where the reprisals are more serious and very serious in nature,

that is, where the employee is showing resistance or dissent to wrongdoing by the organization, termed in the research literature as *the "dissent' whistleblower* situation.

Professionals engaged in whistleblower advisory, whistleblower protection and whistleblower support activities need to exercise a duty of care towards all employees, not just whistleblowers. Whistleblowers are employees, and should be shown that duty of care in any advice, protection measures and support that are provided to them prior to, during or after a disclosure has been made, and/or a suspected reprisal has been experienced.

Such activities by integrity professionals should *not* be carried out *recklessly,* without regard to the assumptions and scope limits and background circumstances from which guidelines and factors have been deduced.

The press releases and interviews, submissions and papers from the project do not appear to be accepting this boundary between what has been researched and analysed, and what has not.

The conclusions and recommendations from the project may be being advanced as a set of guidelines for all whistleblower situations.

The project does contain some secondary data and anecdotal evidence that is useful for the more serious and more dissent-oriented whistleblower situations. Even the bulk data from the co-worker oriented survey is helpful. The secondary data, the anecdotes and bulk results, however, only serve to identify that the occurrences of systemic corruption and dissent whistleblowing are a real part of the public service in Australian jurisdictions. These circumstances of systemic wrongdoing thus should have been a part of any comprehensive study of whistleblowing in Australia.

The project is unable to define the critical parameters, the relationships, the risk rates and other information sufficient to provide guidelines for the more serious reprisal situations and dissent whistleblowing and systemic corruption scenarios.

As a result, there is the prospect, real and immediate, that the Whistling While They Work project may become part of the problem for whistleblowing management in the systemic wrongdoing scenario, as well as part of the solution where the wrongdoing of co-workers is the issue at hand.

At worst, the project may be acting to paint the situation for whistleblowers in Australian jurisdictions using colours that are much rosier than the real situation merits.

The GUS documents appear to have more the characteristics of a consultant's report. The terms of reference for that consultancy may reflect only the view of the world held by the client organizations, and this may have led to a major omission. The GUS documents may not have the characteristics of independent research extending the state of knowledge of organizational dynamics associated with wrongdoing against the public interest.

The causes for this limitation on the applicability of the project appear to be:

- the failure of the project to consult with whistleblower organizations so as to gain the whistleblower perspective
- the large scale consultation effort that was made, focused on the agencies and watchdog authorities, that led to an apparent bias towards the perspectives of these stakeholders

Some technical aspects to the project contributed to its failure in important regards:

- The definition used for whistleblowing diluted the figures on whistleblowing with disclosures that had no public interest relevance (and thus were not about whistleblowing). Efforts to cure the study of this dilution effect tended to confuse the analysis with switches during argument amongst multiple populations of different types of "whistleblowers"
- The cross-sectional survey acted to omit from analysis most whistleblowers who had or would experience termination as a result of their whistleblowing, including those who simply exited the organization to free themselves from any involvement or association with the wrongdoing
- The linkages to the state of knowledge about whistleblowing, both from past research, from the major whistleblower cases, and from recent inquiries arising from disclosures by whistleblowers, were underdeveloped or non-existent
- Critical parameters, such as the seriousness of the allegations made, and the degree of systemic corruption established within agencies and watchdogs, were crudely structured or over-simplified. Any peaks in the stratifications that would be expected to dominate these parameters were smoothed out by the crude treatment and simplifications.

The credibility of the project also suffered as a result of practices used and claims made by the project:

- The project did not include the possibility of the systemic-wrongdoing or dissent-whistleblowing situation in its analytical framework, when the retaliation rates from higher management were seen to be dominating, by 3 to 1, the retaliation rates from co-workers.
- The project claimed that it had discovered the strength of retaliations coming from higher management, when the literature appeared to show that others were well advanced, by as much as 10 years, upon this discovery by the project
- The project criticized whistleblowing organizations and academics as having an "anti-dobbing mentality," when these stakeholders had been on the record for a decade about systemic wrongdoing, regulatory capture and dissent whistleblowing
- The figures on retaliation are biased by the absence from the survey of the terminated whistleblowers, where termination is the worst form of retaliation imposed upon whistleblowers
- The project referred to the whistleblower cases in Quentin Dempster's book *Whistleblowing* as "mythic tales." This may reflect a reluctance by the project to accept as real the major whistleblower cases or as real the evidence that they offer about systemic corruption amongst organizations similar to the partner organisations of the project
- The press releases advertised retaliation rates as low as 22%, where these figures were gained from self-nominating whistleblowers. The 22% figure was selected when sections of the study for known whistleblowers suggested that the retaliation rates might be 66%. The 66% figure, if adjusted for a likely percentage of terminated whistleblowers, might have been 80%
- The inconsistency, where the project dismisses prior research because of the way that that research formed its study group of whistleblowers, but then the project uses the same methodology for gathering its group of known whistleblowers
- The assertion made without research that *only in very rare cases is the nature of the reprisal such that it could meet the legal thresholds required to prove criminal liability on the part of any individual*
- Use of language like *absence of commitment*, *violation of systemic procedural justice* and *less positive reporting climate* when words like "the presence of systemic wrongdoing" seemed more to the issue or at least of similar likelihood
- The use of a systemic wrongdoing scenario, not to explain the results from the project survey, but to argue mitigation of the error made by the project in the definition of whistleblowing
- Admitting the flaw in the methodology, namely that the cross-sectional survey approach meant that the results did not include those who *have suffered re-trenchment, forced transfer or dismissal* but then using this bias in the results to claim that *when bad treatment does occur, it is unlikely to involve a single decisive blow such as a sacking*
- The rejection of one result from the survey of managers and case handlers, by claiming that the unexpected result indicated that the managers did not know their own organization
- The prospect that the conclusions and recommendations may be close to or aligned with *government spin* on the integrity of our administrative and justice systems

It is recommended that the whistleblower organizations derive their own policy as to what constitutes best practice research into whistleblowing.

Greg McMahon is national direction of Whistleblowers Australia and secretary of the Whistleblowers Action Group, Queensland.

Whistleblowers Australia contacts

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New South Wales
"Caring & sharing" meetings We listen to your story, provide feedback and possibly guidance for your next few steps. Held 7.00pm on the 2nd and 4th Tuesday nights of each month, Presbyterian Church (Crypt), 7-A Campbell Street, Balmain 2041
Contact Cynthia Kardell, phone 02 9484 6895, fax 02 9481 4431, ckardell@iprimus.com.au; Peter Bennett, phone 07 6679 3851, bennettpp@optusnet.com.au
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WBA membership

According to WBA's constitution, you remain a member until you formally resign your membership by notice to the secretary. Membership fees are due each year before 1 July. Any outstanding subscriptions/fees accrue as a debt until paid. A member must clear all debts before resigning. (See the WBA constitution, clauses 6, 8 and 10, at http://www.whistleblowers.org.au.)

What this means in practice is that if you were a member in 2000, didn't pay for ten years and decide to start paying in 2010, you owe ten years' worth of back membership fees — because you didn't know about the requirement to resign, or didn't bother doing it.

A lot of people think that if they stop paying, they're no longer a member — but according to WBA rules, they remain members: they are unfinancial members or in other words members in arrears. So what? The main practical effect is that they can't vote at general meetings until they pay their arrears.

The issue of WBA membership fees was debated at length at the December annual general meeting, with disagreement about the way memberships *should* operate intermixed with disagreement about the way they do operate, according to the constitution.

The WBA constitution on this matter follows the model rules for incorporated bodies in NSW.

If you think the constitution should be changed on this or any other matter, you can propose a motion for the next general meeting. It would be a good idea to check the constitution to make sure you do everything according to the rules!

WBA annual membership costs a modest $25, unchanged for many years.

Whistleblowers Australia membership

Membership of WBA involves an annual fee of $25, payable to Whistleblowers Australia, renewable each June. Membership includes an annual subscription to *The Whistle*, and members receive discounts to seminars, invitations to briefings/ discussion groups, plus input into policy and submissions.

To subscribe to *The Whistle* but not join WBA, the annual subscription fee is $25.

The activities of Whistleblowers Australia depend entirely on voluntary work by members and supporters. We value your ideas, time, expertise and involvement. Whistleblowers Australia is funded almost entirely from membership fees, donations and bequests.

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