Whistling while they work

towards best practice
whistleblowing programs
in public sector organisations

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Draft Report

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New South Wales	Independent Commission Against Corruption New South Wales Ombudsman
Queensland	Crime & Misconduct Commission Queensland Ombudsman Office of the Public Service Commissioner
Western Australia	Corruption & Crime Commission Ombudsman Western Australia Office of the Public Sector Standards Commissioner
Victoria	Ombudsman Victoria
Northern Territory	Commissioner for Public Employment
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Comments on this report

Comments on the contents of this report are invited by **30 September 2009** and should be directed to:

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Summary

This Report

This draft report sets out the results of four years of research into how public sector organisations can help maintain their integrity and value their employees, by developing and implementing new models for better practice in the management of whistleblowing.

It represents the second and final report of the Australian Research Council-funded Linkage Project, *Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (2005-2009). It follows the first report, *Whistleblowing in the Australian Public Sector,* published by the Australia & New Zealand School of Government and ANU E Press in September 2008 (Brown 2008).

Whistleblowing is the "disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action" (Miceli & Near 1984: 689). In this report, whistleblowing is also taken to mean disclosures by organisation members about matters of "public interest" – that is, practices where the suspected or alleged wrongdoing affects more than the personal or private interests of the person making the disclosure.

This report describes, in practical and qualitative terms, the required elements of new, better practice whistleblowing programs in organisations. The research is based on the experience of the 16 case study agencies to the project, seen in the light of the wider research, including:

- the quantitative analyses undertaken in the first report and further analyses undertaken for the purposes of this report, including extensive comparative analyses;
- qualitative data obtained from the interviews of internal witnesses, managers, investigators and support staff as well as free text responses to the surveys; and
- results of a series of workshops of representatives of case study agencies.

The report provides a new framework of elements and sub-elements, common to the needs of all organisations – large and small – for establishing a successful program for:

- encouraging public officials to report wrongdoing within or by their organisation, to those that can effect action;
- ensuring effective investigation and action in response to those reports; and
- supporting and protecting employees who report.

These recommendations for a new generation of whistleblowing programs are aimed at all organisations who wish to develop or improve their whistleblowing policies and procedures.

Two key messages come out of this research. The first is that organisations can and should adopt a policy of 'when in doubt report' to encourage the reporting of wrongdoing. This means that organisations should not set artificial administrative thresholds for receiving reports, but rather encourage staff to bring forward any issue that is concerning them. It is the view of the research team that it is better for organisations to receive too much information about wrongdoing than too little, or too late.

The corollary of this approach is that organisations will be accepting an active obligation to take each report seriously and to take appropriate action. This action may well be to inform the reporter that their suspicions have not been backed up and explaining to them the reasons for that conclusion.

The second key message to come out of this research project is that organisations need to improve their performance in supporting and protecting persons who come forward with reports of wrongdoing. There was ample evidence that this is one area where organisations are currently falling down. This is the area where our research suggests organisations now have much to gain, through a new approach to whistleblowing programs in which public sector agencies can be more confident that they have the tools to ensure both the accountability and integrity of our public institutions, and the health, safety and well-being of officials who fulfil their public duty to report wrongdoing.

The program framework has been developed in conjunction with a Standards Australia working group now reviewing the *Australian Standard on Whistleblower Protection Programs for Entities* (AS 8004-2003), and provides a working basis for the proposed key elements of that revised Standard, for the guidance and assistance of organisations throughout Australia.

Against each of the five fundamental elements of a whistleblowing program, the report provides a checklist of the key items that are required by any organisation wishing to have successful policies, a guide to key complex issues in the management of whistleblowing, and select sample procedures for operationalising the framework:

1. Organisational commitment

It is a major conclusion of the project that legislative provisions and black letter procedures can only go so far in creating an effective whistleblower reporting and protection regime. The research has shown that an essential ingredient in any whistleblowing program is the commitment from each organisation to encourage reporting, act on the reports where they have been verified and to protect reporters from any adverse consequences.

The first required element in a best practice whistleblowing program is a clear statement by senior management of organisations in support of the concept of reporting wrongdoing and the principal of whistleblowing. Senior management also need to commit themselves to undertaking a credible investigation process upon receipt of reports and, where some wrongdoing or failure has been verified, acting upon that. Our research has found that employees who do not believe that their report will be taken seriously are far less likely to report wrongdoing, to the detriment of the organisation involved.

Not only should these commitments be reflected in policies and procedures, they need to be actively pursued on a day-to-day basis. This means that organisational management need to take every opportunity to commit themselves to encouraging reporting and protecting reporters – walking the talk. This needs to be backed up with training and awareness.

The research has shown that in many organisations, even where there is commitment from senior management to the principles of whistleblowing, that line managers can sometimes be skeptical and obstructive. Given that line managers are the front line for the receipt of reports of wrongdoing it is essential that they understand the agencies commitment to whistleblowing, its policies and procedures and possess the management skills to be able to

sympathetically deal with reporters. As well, it will be line managers who are best positioned to prevent any reprisal action being taken against reporters.

The qualitative research undertaken in this project indicated that some line managers have negative and prejudicial views about employees who come forward with reports of wrongdoing. This is a challenge for organisations to directly face up to these attitudinal issues and to address them through real leadership and training.

This report has found that, overall; organisations do not generously resource their whistleblowing functions. One of the key recommendations in this report is that this function be adequately resourced. Following on from that, it is essential that whistleblowing policies and procedures are seamlessly interwoven into every organisation's governance arrangements. Audit committees, or the equivalent, should regularly evaluate and monitor the effectiveness of the whistleblowing policies and procedures, just as they evaluate and monitor all other governance issues.

2. Encouragement of reporting

Encouraging the reporting of wrongdoing is the first major objective of any whistleblowing program. Across the agencies studied, the research confirmed that this objective is well reflected and well-embedded in most whistleblowing programs and procedures.

A very large part of the procedures and policies assessed, and the experience of individuals surveyed and interviewed, concerned staff willingness to report, the ease of reporting, and familiarity with the means of doing so.

Although a considerable of reporting of wrongdoing by public employees occurs, the project also gathered considerable evidence of the reticence of employees to report, or to do so in a timely fashion. Some of the reticence may relate to deficiencies in formal systems, including the complexity and lack of comprehensiveness of formal whistleblowing legislation, providing barriers to the establishment of an 'if in doubt, report' culture within organisations and the general public sector.

More pervasive problems relate to the reporting climate within organisations, where the bulk of evidence of wrongdoing is identified but where employees and organisation members can face natural disincentives to stay silent – ranging from a desire to protect one's career and avoid workplace conflict, to uncertainty over the seriousness of the problem, to fear of reprisal, to unwillingness to 'rock the boat' or challenge friends and colleagues.

The research confirms the importance of a number of key elements if a whistleblowing program is to successfully encourage reporting. Some are basic and practical – clarity as to who is covered, what is covered, and how the organisation should coordinate its handling of different types of reports.

A further key element is the availability of multiple reporting pathways, whereby employees can bring forward reports of wrongdoing either to their line managers – currently the recipients of the vast majority of whistleblowing disclosures – to alternative reporting points within the organisation, or externally to agencies like Ombudsman's Offices and anticorruption bodies. Organisations are encouraged to advise employees that these bodies are an alternative point where reports of wrongdoing can be received. As well, they should maintain close and positive working relations with these organisations.

The research shows that the awareness and accessibility of these alternative pathways may be vital to not only maximizing the chances of employees reporting, but of ensuring that disclosures are properly handled, and the whistleblower effectively supported.

A final key component in encouraging reporting is for the organisation to have credible mechanisms for offering anonymity, backed up by realistic undertakings of confidentiality, for reporters. While this raises the first of many complex issues in the management of disclosures, the research suggests it is a worthy objective that every organisation should aim for. Where employees believe that making a report of wrongdoing will be immediately spread through the informal gossip grapevine within the organisation, it is unlikely that they will come forward with reports of wrongdoing.

3. Assessment and investigation of reports

The second major objective of any whistleblowing program is the effective investigation of whistleblowing reports, followed by effective action. However these responses rely on effective assessment of what the disclosure is about, so that it can be handled in the most appropriate way. These elements are crucial to any program.

Most key elements discussed in this section, arise from the key finding in the first report that the vast bulk – around 97 per cent – of public interest whistleblowing occurs internally in agencies, with the vast bulk of this occurring to supervisors and line managers, rather than to reporting hotlines or internal specialists in the first instance.

The research identified two further key elements that agencies need to build into the assessment stage of disclosures. The first is the lesson that by virtue of their informal receipt, an overwhelming majority of reports of wrongdoing may not end up being handled within the formal reporting processes of the organisation, due to the common ambiguity about when reports should be handled informally by line managers and where they should be made part of the formal reporting processes. It is accepted that many reports of wrongdoing will be dealt with in the day to day process of management. However, it is essential that organisations develop policies that very clearly set out where managers should handle matters themselves, whether and where they should be recorded and where they should be referred to internal or external organisation mechanisms.

The second key lesson is the importance that efforts to support and protect employees who report wrongdoing should commence at the point of disclosure, rather than when problems begin to arise. Even though it was almost unanimously agreed that risk assessment processes should be applied to whistleblowing, in practice, in most case study agencies, this was hardly ever done, with few organisations having a credible risk management processes in place. Risk management is a key component in protecting reporters from reprisals, but it also can be applied to the broader organisational issues that are faced with reports of wrongdoing.

Other components include the need to preserve and manage confidentiality, to begin planning for when confidentiality is not available, and to deal with issues of equity and natural justice that often arise at early stages of investigations. However it is the overarching focus on building risk management into the early stages of the assessment and investigation of disclosures that represents the key finding.

4. Internal witness support and protection

The support and protection of whistleblowers is the third, and arguably most important major objective of any whistleblowing program. However the provision of organisational support to whistleblowers is currently the single weakest area of most agencies' responses.

It is clear that the bulk of agencies, in most jurisdictions, need to give active and urgent consideration to strategies for providing whistleblower support. In particular, agencies need to develop programs, commensurate with their own size and needs, for ensuring that support strategies are directed and where necessary, directly delivered, by persons with an institutional role that conflicts as little as possible with the challenges often implicit in providing that support.

Nevertheless, the results across the case study agencies show that some organisations are considerably more successful than others in tackling this challenge.

All agencies confront the dilemma of the appropriate scale, resourcing and organisational model of internal witness support. Whichever options are chosen, evidence from across the case study agencies points to common elements, *all of which* must be present in any organisation's approach *in some form* if the program is to have some prospect of success.

Beyond simply the question of compliance with legislative compliance, lies the reality that while positive or successful whistleblowing experiences often go unnoticed by the bulk of other employees in an organisation, negative outcomes can often become well-known, costly and debilitating to organisational moral and performance.

An even more pervasive reason for providing support, was confirmed to be the importance of disclosure experiences for defining whether the agency was able to deliver on commitments to provide its employees with a safe, healthy and productive workplace.

A particular breakthrough from the research, was the lesson for some agencies that internal support for whistleblowers was not necessarily a totally new or different strategy to other programs for maintaining or restoring healthy relationships within the workplace – even if more complex than most other workplace health and safety issues.

No internal witness support strategy can hope to eliminate every case in which a whistleblower feels aggrieved – whether because in some cases, employee expectations are simply unable to be met; or because the degree of conflict between the employee and management becomes too great or unresolvable; or because despite best efforts, damage to a whistleblower's wellbeing or career is not able to prevented. However the experience in case study agencies confirmed that most agencies have both an opportunity – and a responsibility – to significantly reduce the number of employees falling into these categories, thereby fulfilling their obligations to their employees, lessening the costs of disclosure-related conflicts, and earning greater public confidence in their own integrity.

5. An integrated organisational approach

As outlined through the previous sections, the three major objectives of a whistleblowing program are to encourage employee reporting of wrongdoing; ensure effective assessment, investigation and action; and support and protect whistle blowers. While this must be underpinned by organisational commitment to the program, the research has also confirmed that clear and sometimes hard decisions are needed to operationalise an effective approach.

Organisational commitment to the program must move beyond procedures setting out the responsibilities and obligations to be fulfilled by staff, to an approach which also emphasises the responsibilities of the organisation as a whole, including the most senior management.

The research into the case study agencies confirmed the value, on the whole, of more organised and proactive programs, in terms of measurable results. The following elements are intended to help ensure that the many complex issues involved in embedding a whistleblowing program in the organisation are addressed in a holistic fashion.

The Checklist: Required elements for a whistleblowing program

1. Organisational commitment

1.1. Management commitment

- ☐ Clear statements by senior management of the organisation's support for the reporting of wrongdoing through appropriate channels ('if in doubt, report')
- ☐ Senior management commitment that a credible investigation will follow the receipt of a whistleblowing report, that any confirmed wrongdoing will be remedied, and that whistleblowers will be supported
- ☐ Commitment to the principle of whistleblowing among first- and second-level managers
- ☐ Understanding of the benefits and importance of having whistleblowing mechanisms among first- and second-level managers
- ☐ Knowledge and confidence in policies among first- and second-level managers.

1.2. Whistleblowing policy

- ☐ Easy to comprehend whistleblowing policy, including guidance on procedures, relation to other procedures, and legal obligations
- ☐ Broad staff awareness of the whistleblowing program
- ☐ Broad staff confidence in management responsiveness to whistleblowing
- ☐ Broad staff awareness and acceptance of responsibility to report

1.3. Resources

- ☐ Staffing and financial resources dedicated to implementation and maintenance of the program, commensurate with organisational size and needs
- ☐ Specialised training for key personnel, and inclusion of whistleblowing management issues in general induction and management training

1.4. Evaluation and engagement

- ☐ Regular evaluation and continual improvement in the program
- ☐ Positive engagement on whistleblowing issues with external integrity agencies, staff associations and client groups

2. Encouragement of reporting

2.1. Comprehensive coverage

- ☐ Clear identification of all key categories of organisation members (employees, contractors, employees of contractors, volunteers, at-risk clients) needing inclusion in the whistleblowing mechanism

2.2. Defining reportable wrongdoing

- ☐ Clear advice on types of wrongdoing that should be reported
- ☐ Clear advice on appropriate reporting points for all different types of wrongdoing (including grievances as opposed to public interest disclosures)
- ☐ Clear advice on level of information required/desired
- ☐ Clear advice that staff are not protected from the consequences of their own wrongdoing by using the whistleblowing mechanism, nor for false or deliberately misleading information
- ☐ Clear advice that staff can nevertheless seek and be granted immunity from consequences from their own less serious wrongdoing, when reporting more serious wrongdoing by others or by the organisation

2.3. Multiple reporting pathways

- ☐ Clear *internal* reporting paths and advice on *to whom* and *how* whistleblowing reports should be made, including alternatives to 'up the line' reporting
- ☐ Clear *external* reporting paths, including external (contracted) hotlines and advise about relevant regulatory or integrity agencies
- ☐ Clear guidance on when reporters should consider reporting outside the normal management chain, or outside the organisation
- ☐ Clear advice regarding contact with the media

2.4. Anonymity

- ☐ Clear advice that anonymous reports will be acted upon wherever possible, and as to how anonymous reports/approaches can be made
- ☐ Commitment to the confidentiality of whistleblowing reports to the maximum extent possible, with clear advice about possible limits of confidentiality.

3. Assessment and investigation of reports

3.1. Identification and tracking of reports

- ☐ A coordinated system for tracking all significant reports of wrongdoing (including grievances) at all levels of the organisation
- ☐ Advice to supervisors on when, how and whom to notify about staff complaints and possible whistleblowing reports

- ☐ Organisational procedure for early notification of external regulatory or integrity agencies about significant or higher-risk reports

3.2. Assessment procedures

- ☐ Skills and procedures for differentiating, as appropriate, between different types of wrongdoing (including grievances), and initiating appropriate investigations
- ☐ Flexibility in the type, level and formality of investigation to be conducted, including clear criteria for when no further investigation is required
- ☐ Early and continuing assessment of the risks of reprisal, workplace conflict or other adverse outcomes involving whistleblowers or other witnesses

3.3. Confidentiality

- ☐ Procedures for maintaining the confidentiality of whistleblowers and other witnesses to the maximum extent possible
- ☐ Procedures for consulting and, where possible, gaining consent of whistleblowers prior to action that could identify them, including to external agencies
- ☐ Strategies for supporting employees and managing the workplace when confidentiality is not possible or cannot be maintained

3.4. Equity and natural justice

- ☐ Clear procedures for the protection of the rights of persons against whom allegations have been made
- ☐ Appropriate sanctions against false or vexatious allegations
- ☐ Clear advice to supervisors about to whom, when and by whom information about allegations need be given, for reasons such as natural justice

4. Internal witness support and protection

4.1. Whistleblower / internal witness support

- ☐ One or more designated officers with responsibility for establishing and coordinating a support strategy appropriate to each whistleblowing case
- ☐ Proactive (as well as reactive) operation of the support strategy, i.e. management-initiated rather than simply complaint/concern-driven
- ☐ Support arrangements tailored to identified risks of reprisal, workplace conflict or other adverse outcomes
- ☐ Involvement of whistleblower in risk assessment and support decisions
- ☐ Involvement of identified support person(s) ('confidant', 'mentor', 'interview friend' or similar) and negotiation of their role

4.2. Information and advice

- ☐ Provision of information, advice and feedback to internal witnesses on actions being taken in response to disclosure
- ☐ Provision of information about how to manage their role in the investigation process, including whom and when to approach regarding issues or concerns
- ☐ Access to appropriate professional support services (stress management, counseling, legal, independent career counseling)
- ☐ Information and advice regarding external regulatory or integrity agencies that can be accessed for support

4.3. Preventing and remedying detrimental action

- ☐ Clear commitment that the organisation will not undertake disciplinary or adverse actions, or tolerate reprisals including by managers, as a result of disclosures
- ☐ Mechanisms for monitoring the welfare of organisation members who report wrongdoing, from the point of first report
- ☐ Positive workplace decisions regarding prevention or containment of the risks of conflict and reprisal
- ☐ Direct engagement of supervisors or alternative managers in support strategy and related workplace decisions, to maximum extent possible
- ☐ Clear authority for support personnel to involve higher authorities (CEO, audit committee and external agencies) in whistleblower management decisions
- ☐ Specialist expertise (internal or external) for investigating alleged detrimental actions or failures in support, with automatic notification to external agencies
- ☐ Flexible mechanisms for compensation or restitution where there is failure to provide adequate support, or prevent or contain adverse outcomes

4.4. Exit and follow-up strategy

- ☐ Exit strategies for concluding organised support to whistleblowers
- ☐ Follow-up monitoring of whistleblower welfare, as part of regular evaluation of program and to identify ongoing, unreported support needs

5. An integrated organisational approach

5.1. Clear choice of organisational model for support

- ☐ 'Standing', 'devolved', 'case-by-case' support strategies
- ☐ Clear understanding of whistleblowing-related roles and responsibilities of key players, internal and external to the organisation

5.2. Separation of investigation and support functions

- ☐ Operational separation of functions
- ☐ Clear and direct lines of reporting from support personnel to audit/integrity committee and/or CEO, and external agencies

5.3. Shared responsibility for whistleblower support

- ☐ Clear lines of communication to ensure manager(s) retain responsibility for their workplace and workers to maximum extent possible
- ☐ Clear lines of communication with external agencies re: incidence, nature and status of active cases

5.4. Embedded policies and procedures

- ☐ Integrated & coordinated procedures (not 'layered' or 'alternative')
- ☐ Integrated complaint/incident recording and management systems
- ☐ Whistleblower support integrated into human resources, career development, workplace health & safety (WH&S) policies.