"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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Who pays when doing the right thing doesn't come easily?

Cynthia Kardell

ONE OF THE MAIN PROBLEMS with the way all the whistleblower protection "systems" have operated to date is getting your employer to agree that your disclosure is being formally treated as a Public Interest Disclosure or PID. Most employers are loathe to give that assurance in case it allows a whistleblower to avoid the consequences of a deliberately bogus, but always procedurally fair, performance review somewhere further down the track.

You might think I'm being a bit extreme and that most organisations can be trusted to "do the right thing." If so, I'd say you'd be avoiding what you already know to be true and an obvious conflict of interest. The organisation is impliedly, directly and always vicariously, liable for the wrongs laid bare by your PID, which is why whistleblowers are eventually advised it depends on how successful they are in any claim they might bring for any injury or loss suffered due to a reprisal. In other words, the organisation is reserving its legal position and hedging its bets in case they decide to set the whistleblower up for a fall, after all.

I understand the "new" NSW Public Interest Disclosures (PID) Act 2022 plans to address this issue by expanding the number of those designated as PID "recipients" to include "a manager" presumably, to make it easier for the whistleblower. If so, they have got it all wrong, because in any contest as to whether a disclosure is counted as a PID, you'd be pitting a manager's skill set and power against say that of the organisation's in-house legal counsel.

I'm assuming this change is meant to reassure a whistleblower. It won't. To my mind, it's just one more opportunity in the employer's toolkit to toy endlessly with a whistleblower's very reasonable expectations. I understand the Ombudsman's Office could be asked to mediate, but I know who I'd put my money on, as the employer is seriously conflicted by the risk of reputational damage and its ability to bury that risk. It's like asking a whistleblower to trust a fox in the hen house, and we all know how that ends. It's been happening in NSW for nearly 30 years.

It's way past time for all the PID laws to recognize that whistleblowers must be able to trust the PID "system" and the only way to do that is to establish *internal investigative units, staffed by trained experts, who are financially and legally independent of the organisation in the decisions they take in relation to the PIDs they receive.* The whistleblower can check in with the unit, knowing they will know why they're there, and that they can trust the unit to operate independently of their employer.

This was really brought home to me by the circumstances surrounding the recent recruitment of Attila Brungs, the new Vice-Chancellor of the University of New South Wales (UNSW), and particularly when I learnt that the UNSW's in-house legal counsel apparently didn't recognize a PID as a PID.

Attila Brungs

The UNSW's failure to identify the complaints made by Chief Operations Officer (COO) Sarafina Mohamed and others as PIDs determined how they were handled by its in-house legal counsel, independent recruiters, legal representatives and inevitably, the Ombudsman and the Independent Commission Against Corruption (ICAC). You could say it was a comedy of errors or incompetence and cowardice or a deliberately illegal strategy like those laid bare by the Robodebt inquiry.

Is anyone surprised, I asked myself? Well, no, and that's the tragedy of it after nearly thirty years, because all the PID "systems" are remarkably similar in an operational sense. So, what chance would you give a hapless but sincere "manager" in any contest with UNSW's legal counsel if, say, the whistleblower took it up with the Ombudsman?

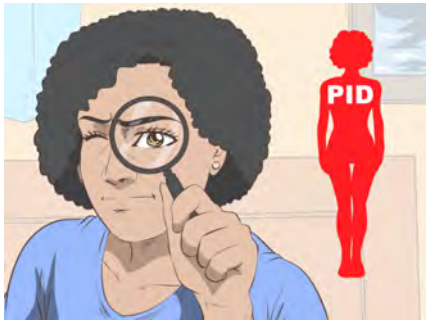
Sarafina Mohamed's story is also another reminder of how falsely held beliefs and assumptions about who you're dealing with can be used to justify an external investigative body like the ICAC closing the books on a whistleblower's claim. Inevitably, everything from lazy indifference through to knowingly helping a mate can get in the way of "doing the right thing," particularly when the funding is tight. It's relevant here, because ICAC took UNSW's assessment of her claim at face value, even though it must have known UNSW was always the "accused" in the story, not the accommodating buddy with a shared purpose in managing the "system."

Based on what we do know, the problems began in about May 2021 with a question raised by a member of the UNSW Council with the executive

search firm Boyden, concerning the recruitment of a new vice chancellor — as it was looking suspiciously like a done deal. It's a question that seems to have prompted a subcommittee, led by the Chancellor David Gonski, to cancel the planned second round of interviews and appoint Attila Brungs immediately, instead. It was a shot over the bow to anyone thinking they could interfere. It's as basic as that.

That same council member later complained in similar terms to the Human Resources head, Deena Amorelli. We don't know what came of it, but it should've been dealt with as a PID and investigated independently of the UNSW executive.

Then in September last year, the chief operating officer Sarafina Mohamed made a complaint in writing to UNSW's legal counsel, about the "process" and "subsequent management decisions." It should have been treated as a public interest disclosure and investigated, but apparently, UNSW's legal counsel didn't recognize it as a PID. Funny that!



Two days later an advertisement for what looked an awful lot like Sarafina Mohamed's job was advertised. We can only speculate about what went on behind closed doors, but two months later the "position search" was cancelled by David Gonski. So, somebody understood the connections at play here! I read that as an invitation of sorts and a warning about where things were heading if she didn't let it go.

After a "complaint," the Ombudsman referred Sarafina Mohamed's "matter" to ICAC. It's not clear what Sarafina's "matter" relates to, but we do know that the ICAC flicked it to UNSW, for it to engage an independent investigator to investigate Sarafina's "PID." It's what you do, when you choose to believe an organisation can be relied upon to "do the right thing" — even when it is legally, the accused. It's a mutually assured delusion to ensure the PID "system" delivers, with their integrity remaining ostensibly intact.

We also know that Minter Ellison, which later engaged Q Workplace Solutions for UNSW, says it didn't know it was a PID. You'll recall UNSW's in-house legal counsel, who probably hired Minter Ellison, didn't recognize Sarafina's complaint as a PID. Why does it matter? Well, for one thing, various protections kick into place for those questioned in a PID investigation.

Minter Ellison.

I suspect you won't be surprised to know that ICAC accepted Q Workplace Solutions' finding that Sarafina's "matter" could not be substantiated. Nevertheless, negotiations dragged on, as Sarafina's lawyer was not having any of it.

On 3 July Sarafina was still the COO when UNSW delivered its final slap down. Minter Ellison advised Sarafina's lawyer that UNSW planned to "disestablish" the position of COO, by upgrading it to a more senior, better-paid position of Chief of Staff, which coincidentally allowed them to exclude her from any consideration for redeployment to a more "senior" role. I wouldn't be surprised if they assured each other that it was all her fault for not coming across when she had the opportunity.

Later, in July, the former NSW minister for tertiary education referred the recruitment of Attila Brungs and the claims of retaliation to ICAC.

Sarafina Mohamed resigned in the same month, roughly a year after her concerns appear to have mobilized the chancellery, the vice chancellor's office, and the UNSW Council to come together to build sturdy roadblocks at every turn. It remains to be seen how keen the ICAC is to revisit its decisions now it seems it too, may have been stymied, even duped.

It's well past time to reflect on just how many times we have been down this path in the last thirty years, and particularly as the federal laws are in such serious disarray after the Commonwealth Director of Public Prosecutions charged whistleblowers Richard Boyle and David McBride with what amounts to criminal theft and unlawful disclosure.

The key here is to understand that employers are not a "class" of people we should be making responsible for the safety of whistleblowers. They are invariably implicated in the wrongdoing, if not simply because they are the employer with the control and the wherewithal to put their own interests first. It can be a dirty game, with reputational risk at its heart.

Not a PID

It's been a huge mistake, anchored in a steadfast reluctance to accept what we know about what goes on. Everything from doing the right thing through to slipping one past the boss, knowing you can justify it with a little help from your friends. There doesn't have to be any money involved. It's often just the thrill of getting one over someone or notching up a debt for later, and all of it made possible by the PID system itself, which requires a watchdog not to take on investigations if it can outsource it to

"trusted" others. Like the ICAC did here. This is why I want you to take the Robodebt findings to heart, to understand why it is never reasonable to make a whistleblower's protection conditional on an employer's integrity. It is akin to committing fraud on whistleblowers.

NSW must amend its new act before it comes into effect in October to require public sector entities to establish *internal investigative units, staffed by trained experts, who are legally independent of the organisation in the decisions they take in relation to the PIDs they receive.* It will liberate whistleblowing for the right reasons in satisfaction of the public's interest in transparent and accountable governance, by recognizing that at all times the employer is potentially the "accused." External regulators like the ICAC would be required to work across the divide with the internal investigators, not the organisation heads as they did in Sarafina Mohamed's story, when both parties appear to have wrongly assumed they had a common purpose. They didn't, and they shouldn't have done that.

Not a PID

This reform is made all the more urgent by Judge Kudelka's dismissal of Richard Boyle's civil claim for protection last July. I'm sure they're across her reasons for her decision, and its likely consequences if Richard Boyle fails on appeal, as all the PID "systems" are similarly unfair, unjust and unreasonable in this respect.

Kudelka J seemed to think Richard Boyle a bit of a vigilante for not leaving it to the experts, who incidentally did nothing. But be that as it may, we whistleblowers want results. We're not content just to lodge a claim in what is mostly a dead letter box. This is why NSW, for one, needs to take the opportunity provided by Kudelka J's decision to *redefine "making a PID" to include any reasonable action taken, including action to gather, collate and curate information, documents, and evidence in drafting, submitting, and ensuring that a PID claim is properly considered, investigated, and resolved openly to the public's satisfaction.* It is thirty years overdue!


Not a PID

If Richard Boyle's appeal last August fails, public confidence in *all the public interest disclosure acts* will plummet because of the way the federal government used the PID laws to punish Witness K, his lawyer Bernard Collaery, and Australian Tax Office and Defence whistleblowers Richard Boyle and David McBride. And you wouldn't want to risk the new NSW act going down with it when you can avoid it. Or would you? Is it always going to be a case of not asking whether something is right, but whether you can get away with saying it is? I hope not. The organisation's legal position as an accused is what it is, not what they'd have us believe it is.

Not a PID

I want to return to that vexed question about how to protect a whistleblower. These are structural changes, so they would liberate whistleblowing in the public's best interests. But the question of who pays, when "doing the right thing" doesn't come easily, will remain. We need to recognize that as a given and resurrect a very good idea that had its origins in a federal inquiry way back in 1994. We need an independent Public Interest Disclosure Agency or PIDA (as we called it) to be set up to look out for whistleblowers, to do the research, and to monitor the operation of the PID "system" itself. This is why, thirty years on, NSW should be looking to be the leader in whistleblowing law, not a laggard!


Not a PID

In August I wrote to NSW Premier Chris Minns, independent MP Alex Greenwich, Greens' MLC Sue Higginson and the Ombudsman, who chairs the relevant parliamentary oversight committee. I wanted them to work together, given that the Minns' government is a minority government. I wanted the NSW parliament to *defer the new act for further inquiry and consideration.* I get the sense that the new act might be thought of as a watershed moment in the state's history. It could be if they took the time to think about the obvious conflicts of interest that have been wrongly baked into the "system's operation to make sure that the existing power dynamic always came out stinky, but clean — if you see what I mean? It was never going to work. It was always wrong to make a whistleblower's protection conditional on an employer "doing the right thing."

Cynthia Kardell is president of Whistleblowers Australia.


Searching for a PID

Call for an end to whistleblower prosecutions

Human Rights Law Centre
12 September 2023

MORE THAN 70 ORGANISATIONS and individuals have signed a letter to the Australian Government, published in newspapers today, calling for an end to the prosecution of whistleblowers and for urgent whistleblower protection reform.

In November, David McBride — who helped expose war crimes in Afghanistan by leaking documents to the ABC — will face trial in the ACT Supreme Court. McBride will be the first person to face trial in relation to war crimes in Afghanistan — the whistleblower, not an alleged war criminal.

Next year Richard Boyle, who blew the whistle on unethical debt recovery practices at the tax office, will face trial in Adelaide. Earlier this year Boyle's defence under Australia's broken whistleblowing laws was unsuccessful — the judgment is currently on appeal.

The Attorney-General, Mark Dreyfus KC, has the executive power under the Judiciary Act to discontinue prosecutions. He exercised that power last year to end the unjust case against whistleblower Bernard Collaery.

In the open letter, which was published in *The Age, The Sydney Morning Herald, The Canberra Times* and *The Australian Financial Review,* the signatories underscore the important role that whistleblowers and journalists play in exposing injustice.

Signatories included dozens of leading civil society organisations, unions the Community and Public Sector Union and the Media, Entertainment and Arts Alliance, distinguished journalists, lawyers, retired judges, former whistleblowers and more.

Peter Greste, Chair, Alliance for Journalists' Freedom, said: "The media is the whistle of last resort — you cannot have press freedom without protection for sources. David McBride and Richard Boyle both contributed to transparency and accountability around grave wrongdoing. If the prosecutions go ahead, it will have a devastating chilling effect on others thinking of blowing the whistle."

Rawan Arraf, Executive Director, Australian Centre for International Justice, said: "Accountability for Australia's war crimes in Afghanistan is hindered by the ongoing prosecution of a whistleblower who helped expose those war crimes. It is deeply problematic that the first person on trial in relation to those war crimes is the whistleblower."

Rawan Arraf

Rex Patrick, Former Senator, said: "People are unlikely to engage in wrong doing if they know the person sitting beside them, or in the adjoining cubicle, or in the room next door might blow the whistle on them. Right now, this deterrence doesn't exist in work places because people know our whistleblower protection laws are inadequate and they can see the Government actually prosecuting whistleblowers.

"Blowing the whistle is already difficult. These prosecutions smash all confidence in coming forward and that's a completely unacceptable situation. The Attorney-General has the power to end these Coalition-era whistleblowers prosecutions."

Caitlin Reiger, Chief Executive Officer, Human Rights Law Centre, said: "Whistleblowers make Australia a better place. They should be protected, not punished. An end to the prosecution of whistleblowers, comprehensive reform and the establishment of a whistleblower protection authority must be key priorities for the Albanese Government."

Daniela Gavshon, Australia director, Human Rights Watch, said: "Australia's human rights reputation is undermined when those who expose wrongdoing, not the wrongdoers, are the ones on trial. As Australia continues to silence whistleblowers, this continues to have a chilling effect on freedom of expression. The world is watching."

Daniela Gavshon

Ed Santow, Former Australian Human Rights Commissioner, said: "Whistleblowers and journalists risk their safety to reveal important truths. Australians' human rights depend on the transparency and accountability that they enable."

Clancy Moore, Chief Executive Officer, Transparency International Australia, said: "The government campaigned on a commitment to transparency and integrity which was demonstrated through the establishment of the National Anti-Corruption Commission, whistleblower protection reform and more. But these prosecutions significantly undermine the good work being done and silence other brave Australians considering blowing the whistle on corruption and wrongdoing."

The Hon. Anthony Whealy KC — Former Judge, Supreme Court of NSW Court of Appeal, said: "Integrity is at the heart of our system of justice and democracy. Prosecuting

those who speak up about government wrongdoing undermines that integrity."

Toni Hoffman AM, Former Queensland Health Whistleblower, said: "When I spoke up about wrongdoing about patient safety at Bundaberg Hospital, I would have never imagined facing prosecution. Unless these cases are ended, prospective whistleblowers will fear the huge risk of speaking up. Australia will be less safe as a result."

Kerry O'Brien, Journalist, said: "Journalists cannot do their jobs, telling uncomfortable truths and keeping the powerful honest without whistleblowers, whose own lives have often been destroyed without protection. There is no public interest in prosecuting truth-tellers."

Hadi Marifat, Director and Co-Founder, Afghanistan Human Rights and Democracy Organization, said: "Australia must ensure accountability and redress for war crimes committed by its forces in Afghanistan. David McBride's truth-telling has been vindicated by the Brereton Report. And yet his prosecution continues."

Hadi Marifat

Bill Browne, Director of the Democracy & Accountability Program, The Australia Institute said: "Australia Institute polling has consistently found that the Australian public recognise the vital importance of whistleblowers to our democracy. Australians do not want whistleblowers on trial for speaking up about wrongdoing."

Michael Tull, Assistant National Secretary, Community and Public Sector Union, said: "The prosecution of whistleblowers has a chilling effect on public servants speaking up about government wrongdoing. We need urgent, robust reform to protect and empower whistleblowers."

How to protect whistleblowers

Kieran Pender
The Saturday Paper, 26 August 2023

WHAT WOULD WE NOT KNOW were it but for brave whistleblowers speaking up? And what do we not know right now because the cost of courage in Australia is too high? These are the questions that keep me awake at night, and they are the reasons the Human Rights Law Centre is this week launching the Whistleblower Project, a new initiative to protect and empower Australian whistleblowers.

Whistleblowers make Australia a better place. Workers who call out wrongdoing are the wellspring of public accountability, regulatory action and public-interest journalism. Think of the scandals that have rocked this nation in recent years: robodebt, war crimes in Afghanistan, misogyny at the highest levels in our public institutions, abuse in offshore detention, industrial-scale money laundering in casinos, widespread wrongdoing in the banking sector, mistreatment of children in youth detention, environmental devastation and climate inaction.

We know about this litany of wrongdoing because the witnesses to it — the whistleblowers — spoke up. Whistleblowers speak truth to power and, in doing so, empower all of us to demand justice. By exercising their right to free speech, whistleblowers protect the human rights of us all.

But right now in Australia, courage costs too much. Two whistleblowers, David McBride and Richard Boyle, are on trial. In November, McBride will be the first person on trial in relation to war crimes committed by Australian forces in Afghanistan – the whistleblower, not a war criminal. Boyle faces trial next year for exposing unethical debt recovery practices at the Australian Tax Office. Both have been vindicated by independent inquiries; both face jail time for telling the truth about government wrongdoing.

McBride and Boyle are the most high-profile current examples, but they are only the tip of the iceberg. Research shows most whistleblowers suffer workplace retaliation for speaking up. Some are sacked by their employers, others sued into submission. The psychological toll of speaking up can be enormous, and the financial cost — in lost earnings and legal fees — can be crippling.

Kieran Pender

Right now, wrongs are being committed in Australia that would make front pages, spark royal commissions, and lead to regulatory investigations. But they remain hidden because, faced with the prospect of jail time, lawsuits or being sacked, witnesses are staying silent.

Laws that are intended to protect and empower those who expose wrongdoing are not working. Research by the Human Rights Law Centre, to be published next week, has not identified a single successful case brought by a whistleblower under the relevant primary public and private sector regimes. Across all Australian whistleblowing laws, since the first ones were introduced in the early 1990s, there has only been one case of a whistleblower receiving court-ordered compensation for suffering workplace retaliation. They received a measly $5000.

The Albanese government has refused to drop the prosecutions of McBride and Boyle. It has been slow to act on substantive whistleblowing law reform. And it has walked back on a prior commitment, made ahead of the 2019 election, to establish a protection authority to oversee and enforce whistleblowing laws. Instead, the current

government has only promised a discussion paper to consider the idea, and only then for public sector whistleblowers.

The mistreatment of whistleblowers means prospective truth-tellers stay silent. Right now, wrongs are being committed in Australia that would make front pages, spark royal commissions, and lead to regulatory investigations. But they remain hidden because, faced with the prospect of jail time, lawsuits or being sacked, witnesses are staying silent. That is damaging for our society. It degrades our democracy. When darkness prevails over light, wrongdoing goes unchecked. When whistleblowers suffer, we all suffer.

That is why, this week, the Human Rights Law Centre launched an Australia-first initiative to help whistleblowers. Thanks to support from philanthropic and funding partners and pro bono assistance from some of Australia's leading law firms and barristers, we will help truth-tellers speak up safely and lawfully. The Whistleblower Project will ensure their testimony has impact, by working closely with journalists, civil society partners and politicians. And if the whistleblowers we assist face unlawful reprisals, we will explore legal action to vindicate their rights.

The concept of whistleblowing is as old as society itself. The ancient Greeks had a word for it: *parrhesia*, or fearless speech. The first whistleblowing laws came about in medieval England, when rulers incentivised subjects to speak up if others committed the heinous crime of working on the Sabbath. Abraham Lincoln adopted a similar approach during the American Civil War, enacting a law to help expose fraud and corruption that is still in use today. But it was not until the 1970s and '80s that the modern concept emerged, first in the United States through dedicated laws, and then around the world.

Australia was once a world leader in whistleblower protections. Queensland was the first in the country to enact them in 1990, following the Fitzgerald inquiry into police and political misconduct in the sunshine state — and as such it's fitting that Tony Fitzgerald, KC, formally launched our project on Wednesday. South Australia followed, before every state and territory enacted whistleblowing laws, with more at the federal level. But while these laws look good on paper, they do not work in practice. The laws are complex — one federal judge called them "technical, obtuse and intractable" — and whistleblowers have limited access to support.

In other countries, a critical aspect of the relative success of whistleblowing laws has been no-cost or low-cost access to legal support through civil society. Our project builds on the success of similar initiatives in England, Ireland, the United States, Serbia, France, Italy, Guatemala and, through *La Plateforme de Protection des Lanceurs d'Alerte en Afrique*, across Africa.

Thanks to the global peak body, Whistleblowing International Network, we have been able to learn from our counterparts about what works and what doesn't, and we have developed our own model adapted to the Australian context. Some of our counterparts have been successfully assisting whistleblowers for decades now. We hope our project might become an enduring part of the transparency and accountability landscape in this country.

Our work is strictly nonpartisan — wrongdoing is not unique to any political party. As a community legal centre with limited resourcing, we may not be able to help everyone. We cannot help national security and intelligence-related whistleblowers – the law makes that much clear. But in the months and years ahead, we hope to play our part in helping Australians expose wrongdoing in a lawful manner, maximising the impact of their disclosures while minimising the risk.

One focus of our work will be whistleblowing on climate and environmental-related wrongdoing. The climate crisis is the accountability and human rights issue of our time; we need truth and transparency around emissions reductions, new and existing oil and gas projects, carbon offsets, illegal logging, biodiversity loss, the destruction of First Peoples' sacred sites and more. We can help those who work for fossil-fuel companies, for lethargic regulators or for public-sector departments that aren't taking global warming seriously when they witness wrongdoing.

We will do all of this alongside our ongoing law reform and advocacy work, aiming to improve the legal framework in which whistleblowers speak up and urging an end to the prosecution of truth-tellers. We will continue to call on the attorney-general, Mark Dreyfus, KC, to overhaul related laws and establish a whistleblower protection authority — moves that cannot come soon enough.

No one sets out to become a whistleblower. I have been fortunate to work with dozens during my career, in all different sectors, in Australia and abroad. Universally they have told me they did not self-identify with that label. They merely thought they were doing the right thing in speaking up. It was only later, when things went sour, when they lost their job, when they were sued, when they were facing jail time, that they realised they had blown the whistle.

It should not be that way. As a society that values accountability and justice, respect for human rights, good government and good governance, we should applaud those who speak up. They should be heroes, not villains. Australia will be a better place when whistleblowers are protected and empowered, not punished and prosecuted. Too often they feel isolated and alone.

Some still speak up, despite the risks. Some have called out the scandals of our time, ensuring we knew about robodebt, war crimes, abuse, harassment, corruption, fraud and human rights violations. But I keep coming back to those questions: what if they hadn't spoken up? And what don't we know, because so many stay silent? We urgently need laws, institutions, structures and support to ensure that courage is less costly. I hope the Whistleblower Project is a step in the right direction.

Whistleblowing laws are fundamentally flawed, says former judge Tony Fitzgerald

Christopher Knaus
The Guardian, 23 August 2023

FORMER JUDGE TONY FITZGERALD points to ongoing criminal prosecutions, such as that of former tax official Richard Boyle, as evidence that the whistleblowing protection regime is flawed.

Anti-corruption champion and former judge Tony Fitzgerald has warned that Australia's whistleblowing laws suffer from "fundamental flaws" and are failing to properly protect those who speak out about wrongdoing.

Fitzgerald, who presided over the landmark 1989 inquiry into Queensland police corruption, has called for major and urgent reform to whistleblower laws, including a harmonisation of protections across the public and private sectors. He said current whistleblowing regimes left a "large gap between the role that legal protections are meant to play, in theory, and what is happening in practice."

In a speech to launch the Human Rights Law Centre's new whistleblower legal support service on Wednesday night, Fitzgerald said the "essential objective" of such laws was to prevent reprisals or other injustices, something which is "not yet being fully achieved."

"Our federal whistleblowing laws suffer fundamental flaws," he said. "This problem will continue to exist until governments are prepared to recalibrate the relationship between self-interest and the public interest."

The federal government has committed to whistleblower reforms for public sector workers and passed the first tranche of its proposal in June. Further reforms have been promised, based on the recommendations of the 2016 review of the Public Interest Disclosure Act by Philip Moss AM and other parliamentary committee reports. The government has also pledged to release a discussion paper canvassing the potential establishment of a dedicated whistleblower authority to provide advice and support to whistleblowers.

Fitzgerald's work in the 1980s was crucial to the foundation of whistleblowing laws in Australia. His inquiry prompted Queensland to become the first jurisdiction to introduce whistleblower protections in 1990, followed by other states and the Commonwealth.

Fitzgerald described the protection of whistleblowers as a critical, but complex, challenge.

Tony Fitzgerald

Fitzgerald cited research led by Griffith University professor AJ Brown showing that whistleblowers who clearly acted in the public interest faced some detriment in almost 60% of cases, including 29% who experienced direct damage such as harassment, dismissal or serious adverse legal consequences.

"It is plainly important that citizens speak up when things go wrong, especially perhaps, but not only, in the public sector," he said. "Those who confront that need should not have to suffer repercussions or setbacks to their lives or careers or financial exposure for doing so."

The comments were made as the HRLC launched the Whistleblower Project, a legal support service designed to help whistleblowers reveal and address wrongdoing under the protection of law.

Polling conducted by Essential Media for the HRLC shows 71% of Australians support stronger protections for whistleblowers, while 68% believe that whistleblowers should not be prosecuted by the government when they speak up in the public interest.

"People who courageously speak up when they see something wrong are vital to ending cultures of impunity," the HRLC chief executive, Caitlin Reiger, said. "They should be recognised as human rights defenders, not punished."

Prosecution of ATO whistleblower Richard Boyle is "insanity," says taxpayer he helped

Adele Ferguson and Hannah Meagher
ABC 7.30, 17 September 2023

ONE OF THE TAXPAYERS helped by Australian Taxation Office (ATO) whistleblower Richard Boyle has spoken out for the first time, describing the pursuit of the person who gave him a lifeline as "insanity."

Dirk Fielding told 7.30 his Melbourne-based family magazine publishing business would have collapsed without Mr Boyle's help.

He said he blamed himself for the predicament Mr Boyle was now in, which includes criminal charges, which could see him jailed for up to 46 years.

Mr Boyle became an internal whistleblower in October 2017 but when his complaints were ignored, he went public and told Four Corners about a disturbing culture at the ATO which included his area being instructed to use more heavy-handed tactics on taxpayers who owed the tax office money.

Mr Boyle's wife, Louise Beaston, has also spoken to 7.30 about the couple's "nightmare," which began in April 2018 when their home was raided in the early hours of the morning by ATO and Australian Federal Police officers.

"I saw the police officer standing in my bedroom doorway. And I just thought, Oh, my goodness, this is so scary," she said.

"I could see his gun in his holster. And yeah, I was in shock."

Boyle was charged with offences including taping private conversations without consent and taking photos of taxpayer information. With criminal charges hanging over him, he has been unable to work for five years.

"It was shocking to me that my husband could be considered on the

same level in terms of charges along with murderers and serial killers. It's unfathomable," Ms Beaston said.

"The hardest part of all of this, is the fact that there's no end in sight.

"That alone is enough to destroy someone's mental health," she said.

Ms Beaston has also written to the prime minister and attorney-general, urging them to stop the prosecution.

"I plead with you to drop the case and let Richard and I get on with our lives. All Richard ever did was tell the truth," she wrote.

Louise Beaston and Richard Boyle

"I begged for help"

Mr Fielding's world collided with Mr Boyle's when he sent a distressing fax to the ATO in May 2017, begging for help.

Mr Fielding's publishing business of 35 years was in serious trouble.

He was recovering from a ruptured aneurysm in his brain which had left him needing to learn to walk and swallow again.

After his wife Kaye took over the running of the business, they discovered an employee was systematically defrauding them.

The tax office came after them in pursuit of an outstanding tax debt using a garnishee notice, a debt-collection tool that allows the ATO to order a bank to hand over money from a taxpayer's account without their consent.

"The ATO took out 100 per cent of the money in our account," Mr Fielding told the ABC.

"I'm not saying I didn't owe the ATO money … but when the money was taken out, it virtually had shut our business down. And at that stage, I couldn't talk to anybody at the ATO. You can't email the ATO. The only way you can communicate with the ATO was through fax, and I sent faxes."

"I sent one fax to the ATO and … I begged for help. I didn't receive a response. And then I sent another fax to the ATO. And I begged again … I wasn't trying to avoid the tax. All I was saying was that I just needed to get back on my feet. And that's when Richard contacted me."

Mr Boyle decided to help him out by lifting the garnishee and setting up a repayment plan.

"It was just pure relief," Mr Fielding said.

"It was the difference between closing the doors and being able to trade … and we're still here today."

"I feel absolutely terrible"

Mr Fielding was not the only taxpayer Mr Boyle helped.

In October 2017 Mr Boyle was so concerned by some of the ATO's practices that he lodged an official whistleblower complaint.

When his complaint was dismissed, he went public on Four Corners.

He highlighted an email sent to 12 staff towards the end of a shift: "The last hour of power is upon us … that means you still have time to issue another five garnishees … right?"

Mr Fielding was contacted by Four Corners weeks before the program aired.

Instead of responding to the request he called the ATO and asked for Mr Boyle.

"I rang the ATO, and I asked for Richard Boyle. And I got asked a few questions. I said, hey, look, Four Corners has been on the phone to me … things blew up from there."

Soon after, Mr Boyle's home was raided.


Dirk Fielding

Mr Fielding remembers being told his tax information was found in Mr Boyle's home.

Nine months later, Mr Boyle was charged with criminal offences including taping private conversations without consent and taking photos of taxpayer information.

Mr Fielding said he felt partly responsible for Mr Boyle's predicament.

"I honestly feel that I am to blame," he said.

"I feel absolutely terrible for Richard who's put his life on the line to help me … and he's been persecuted to such an extent. It's just insanity."

Mr Boyle was vindicated in a series of inquiries and reports, including a report by the ATO watchdog, the Inspector-General of Taxation, which found "problems did arise in certain localised situations for a limited period, particularly so at Adelaide's local ATO site."

A separate investigation by the Australian Small Business and Family Enterprise Ombudsman found at the time that the ATO's use of garnishee notices was "excessive."

Whistleblower protections face key legal test

Before Mr Boyle's criminal trial starts next year, his lawyers lodged a case to try to get immunity from prosecution by testing the law on whistleblower protections.

In March, South Australian District Court Judge Liesl Kudelka ruled that Mr Boyle was not immune from prosecution.

The case is being appealed in the Court of Appeal of the Supreme Court of South Australia.

Kieran Pender, a senior lawyer at the Human Rights Law Centre, which is participating in the case as amicus curiae (friend of the court), said it was significant because it would determine the scope of protections for all current and future Australian whistleblowers.

"It was really important for us at the Human Rights Law Centre to advance a positive argument to say to the Court of Appeal in Richard's case, we need a better interpretation that protects whistleblowers," he said.

"If Richard Boyle goes to jail for exposing wrongdoing, that will have a real chilling effect on whistleblowers

everywhere. People won't speak up about wrongdoing. People already aren't speaking up about wrongdoing because this is what they see.

"It's not a good society to live in where people go to jail for telling the truth."

"**We've had to put our life on hold"**

There are growing calls for the Attorney-General Mark Dreyfus to pardon Mr Boyle.

Mr Dreyfus has the power under section 71B of the Judiciary Act to stop prosecutions that are not in the public interest.

Last July he exercised that power to discontinue the prosecution of Canberra lawyer Bernard Collaery, who was facing charges relating to allegedly revealing details of an alleged Australian spying operation in Timor-Leste during sensitive oil and gas treaty negotiations.

"If I had a chance to say something to Mark Dreyfus, it would be stop," Mr Fielding said.

"If he asked me to get on a plane tomorrow, I would be on a plane up there. And I would sit down with him. And I would tell him exactly that. Richard did the right thing by me."

In her letter to the prime minister and the attorney-general, Ms Beaston said their lives were shattered when the federal police and tax office raided their home in 2018.

"We are stuck in legal quicksand," she wrote.

"Every day we wake up and wonder when this nightmare will end. You have the power to stop this injustice."

Former senator Rex Patrick, who has supported Mr Boyle since the beginning, says the government should step in and stop the prosecution.

"This whole thing is a Shakespearean tragedy. We've got Richard the hero, we've got the dichotomy of good and evil. We've got all sorts of pressures taking place. And we've got the Australian Taxation Office."

A spokesperson for the attorney-general said in a statement: "The attorney-general's power to discontinue proceedings is reserved for very unusual and exceptional circumstances."

The spokesperson said as Mr Boyle's proceedings remained ongoing, it was inappropriate to comment further.

The ATO said in a statement that it was not appropriate to comment on specific matters which were currently before the court.

It said the ATO's processes and procedures on how to make a public interest disclosure were regularly reviewed and updated.

"We're in our sixth year now," Ms Beaston told the ABC.

"We haven't had children … We've had to put our life effectively on hold for years. That's a sacrifice I hadn't anticipated.

"It kind of feels like we're … already serving the punishment. The punishment has been the last six years of our life lost to fighting this."

Whistleblower policies driving compliance at companies

The Economic Times, 7 August 2023

A RECENT SURVEY by law firm AZB & Partners shows that companies in India are increasingly focused on compliance and ethics as they look to attract investment and quality employees. According to the survey, 74% of respondents believe that the use of whistle-blowing mechanisms is crucial for uncovering ethical issues within organizations. While the report shows that efforts to establish whistle-blower mechanisms are paying off, it also suggests there is still a way to go.

Increasing investments by foreign investors, including Foreign Direct Investment (FDI) in the country, has a push factor in driving the ethics and compliance culture in India, said a survey conducted by law firm AZB & Partners among its over 500 clients.

"A reputation for legal and fair business now has tangible and measurable benefits in terms of better valuations, availability of a deeper pool of external debt and equity capital at more favourable terms and of quality employees to run and grow the business," said Zia Mody, co-founder of law firm AZB & Partners. "In this era, it has become important for India Inc. to ensure that they are not only doing the right thing but are also seen to be doing the right thing."

Seventy-four percent of the respondents emphasised the critical role of the whistle-blowing mechanism in revealing ethical concerns within organizations, as per the study titled "A Survey of White Collar Crime in India.".

Companies are making progress in compliance due to changing regulatory requirements and greater awareness of whistleblower policies, however, India InC acknowledges the need for significant improvement in implementing a comprehensive and effective whistleblower framework to address ethical concerns and promote transparency in corporate practices.

The report suggests that the efforts that have been taken in relation to the establishment of the whistle-blowing mechanism by corporate India are showing results.

Also, it suggests that increasing investments by foreign investors, including Foreign Direct Investment (FDI) in the country has a push factor in driving the ethics and compliance culture in India.

According to the study, about 71% of participants believe that people are now more open and forthcoming in making complaints and raising red flags on ethical issues. Also, about 82% of the respondents stated that their organizations investigate anonymous or pseudonymous whistle-blower complaints based on merits.

"Limited Indian business ethos has evolved and matured — doing business in an ethical manner and addressing bribery and corruption risks, is fast becoming an integral part of the DNA of India Inc," said Deepak Parekh, Chairman of Housing Development

Finance Corporation Ltd in the report. "This structural change augurs well, increasing India's attractiveness as a preferred investment destination."

Deepak Parekh

About 58% of the respondents have observed that companies have become very conscious of the increased disclosure and liability norms and are being careful while undertaking transactions that could be questioned.

The study also indicated that only 18% of the respondents believe that Indian companies are well equipped to undertake internal investigations, while 73% believe that significant improvement is required in this aspect.

The results of the survey have brought forth several interesting trends, including on increasing awareness of risks related to white-collar crimes as also their increasing complexity, underscoring the need to ensure that the investigation approach and related legal advice are well coordinated and key issues are anticipated in advance, to identify, address and mitigate risk for all key stakeholders, says, Ajay Upadhyay, Practice Head – Compliance & Investigations, AZB & Partners.

The researchers said that more than 60% of the respondents feel additional regulatory enforcement actions are necessary to tackle the issues of fraud and corruption in India.

These concerns likely stem from delays in the judicial process, legislative gaps, and the absence of a comprehensive prosecution mechanism, calling for a thorough review of the prosecution and settlement system.

Additionally, 70% of the respondents mentioned that although investigative agencies are equipped to handle complex financial crimes, there is room for improvement in their capabilities, said the study.

Patient safety: listen to whistleblowers

Staff must be heard not threatened

Bill Kirkup and James Titcombe
BMJ, volume 382, 29 August 2023
(footnotes omitted)

THE CASE OF LUCY LETBY, convicted of the murder of seven babies and attempted murder of another six, has caused shockwaves among the public and health communities alike. The first reaction was naturally dismay and disbelief that a member of a caring profession deliberately and repeatedly harmed helpless babies in her care. There are precedents, of course, in the actions of Shipman, Allitt, and others, but the rarity of such cases makes them all the more dreadful and incomprehensible.

Although the intentional harm underlying this gross breach of patient safety is rare, the subsequent failures to identify and acknowledge serious problems are sadly much more common. Doctors at the Countess of Chester Hospital rightly thought that they were seeing more deaths than expected, but they were unable to convince managers in charge of services that this was not simply the result of chance. When the pattern continued, not only did they have their concerns dismissed as groundless but they were pressured into apologising to Letby. The delay in identifying the cause may well have contributed to further deaths.

Lucy Letby

Organisational safety failures

Both avoidable delay in recognition and refusal to acknowledge serious problems are almost universal findings in major organisational safety failures, regardless of underlying cause. Whether families or clinicians raise the alarm initially, the result has all too often been denial, deflection, and cover up; an inquiry will now determine what happened in this case. Previous investigations have consistently found that those in charge of services have put the reputation of their organisation, and by extension themselves, above the need for honesty.

Clinicians are well placed to identify systematic patient safety concerns, but the NHS's [National Health Service in the UK] track record is discouraging. Despite increased protection under the Freedom to Speak Up policy, introduced to improve staff confidence to raise concerns following a report in 2015, whistleblowers may still be met with ostracism and threats of disciplinary action and regulatory referral, sometimes followed through. It is hardly surprising that many clinical staff lack the confidence to report safety incidents, while those brave enough to voice more serious concerns jeopardise their livelihood and professional standing. The treatment of those who raise safety concerns stands in stark contrast to the response of other critical enterprises with a more mature safety culture—for example, the transport, chemical, and nuclear industries—which celebrate the identification of problems.

It may be difficult to remove entirely the risk of a malevolent actor seeking opportunity and cover within a caring profession, but it is certainly possible to make identification much quicker and more certain. The first recommendation of the independent investigation into safety failures at East Kent maternity services, published in 2022, was to establish a signalling system that can track the outcomes of maternity and neonatal care as they occur. Had this been in place at the Countess of Chester, it could have rapidly flagged a problem that demanded urgent investigation.

Another recommendation that could have greatly improved the prospect of early detection dates back to the inquiry into Shipman's murders, but the introduction of scrutiny of deaths by a medical examiner in England was inexplicably delayed for two decades before being introduced from 2021 in a

modified way without the full independence initially envisaged.

Moving on

If managers running NHS organisations see reputational advantage in denial and cover up, problems may remain unacknowledged, uninvestigated, and uncorrected even if flagged early. The result is unnecessary and avoidable harm, potentially catastrophic, to patients, their families, and the clinicians who try to report it. A mature safety culture would see all NHS staff—clinicians, managers, and others—embrace an open and honest response to any reporting of problems, including by whistleblowers.

As part of getting there, however, the incentives for those running NHS organisations need to be addressed urgently. Regulation of health service managers has been recommended but not implemented. The proposed Public Authorities (Accountability) Bill would place an enduring duty of candour on organisations and staff that is currently lacking; pending that possibility, health bodies' adoption of the voluntary charter currently being signed by police forces and other bodies would be a start.

If the allegations about the conduct of managers in the Letby case are true, this would again lay bare a pervasive culture of deflection and denial in the NHS linked to unnecessary tragedy and suffering. The heartless approach of protecting organisational and personal reputation at the expense of truth and safety should have run its course long ago. In the aftermath of this awful case, and the numerous inquiries into major safety failures that preceded it, we clearly cannot continue any longer in the same way.

Whistleblowers sacked by NHS fear no change after Lucy Letby case

Matthew Weaver
The Guardian, 1 September 2023

Police are investigating deaths at Royal Sussex county hospital, part of University Hospital Sussex NHS trust.
Photograph: Simon Dack News/Alamy

CLINICIANS who were sacked by the UK National Health Service (NHS) after blowing the whistle about avoidable patient deaths say they fear lessons from the Lucy Letby murder trial have not been learned and the case will make no difference to their own claims for unfair dismissal.

They say hospital bosses are still more concerned about reputation than patient safety, despite what emerged in the Letby case about the tragic consequences of ignoring consultants who first raised suspicions about her killing babies.

Two consultants and a junior doctor who were sacked at different hospitals after raising concerns about patient deaths are challenging their dismissals in the employment courts.

Mansoor Foroughi

They all predict that the public outcry over the way senior doctors were ignored on Letby will not help their cases despite a public pledge from NHS leaders of better treatment for NHS whistleblowers.

Mansoor Foroughi, a consultant neurosurgeon, was sacked by University Hospital Sussex NHS trust (UHST) in December 2021 for allegedly acting in bad faith when he raised the alarm about 19 deaths and 23 cases of serious patient harm that he said had been covered up in the previous six years. Those deaths and at least 20 others are now being investigated by Sussex police after allegations of medical negligence.

Foroughi, whose appeal against his dismissal is due to be held in the coming months, told the *Guardian*: "I don't think mine or anyone's chances of success has increased [after Letby], and only a change in the law will do that."

In his first public comments about his plight, he added: "The vast majority of punished employees cannot afford the legal costs involved for any attempt at justice and yet NHS hospital management can use vast amounts of taxpayers' money to pay incentivised and misguided legal professionals to throw the kitchen sink at the whistleblower behind closed doors."

A spokesperson for the trust said it could not comment on issues about personnel.

Usha Prasad

Usha Prasad, a consultant cardiologist, was dismissed by Epsom and St Helier hospitals trust. The trust said this was due to concerns over her capability and a breakdown in relations with colleagues; Prasad said these were not the real reasons. She too had raised patient safety concerns. These included

failures she identified that led to the avoidable death in September 2018 of a 76-year-old man referred to as Mr P.

The trust insists she was dismissed on competency grounds and not whistleblowing. Prasad disputes this. An employment tribunal in 2021 dismissed Prasad's claims of discrimination, victimisation, harassment and whistleblowing detriment; a further tribunal will be held regarding her dismissal.

She said that when the same disciplinary allegations were submitted to the General Medical Council (GMC), it found there was no case to answer.

In documents submitted to an employment tribunal hearing about costs in the case, which was due to be held last week, Prasad claimed she was told to change her report on Mr P's death to remove a recommendation to refer it to the coroner and the hospital regulator. The trust denies this.

The documents cite the Letby case as highlighting the consequences of "ignoring or punishing those who raise concerns." The trust has not had a chance to respond to that filing.

Prasad said the way the trust treated her and the costs involved in challenging the employment courts represented a chilling deterrent to those considering raising safety concerns.

She said: "I was subjected to dismissal and referral to the GMC. I was very pleased to be exonerated by the GMC following a thorough investigation."

A trust spokesperson said: "The employment tribunal heard a number of claims by Dr Prasad which they unanimously dismissed, and commented that some of them were 'completely misconceived'. The employment tribunal will hold a further hearing to decide whether Dr Prasad should pay a contribution towards the trust's costs."

It added: "We take patient safety concerns very seriously and encourage everyone who works at the trust to raise issues at every opportunity so we can make improvements to patient care."

Dr Chris Day has been fighting a long battle with Lewisham and Greenwich NHS trust (LGT) after he raised concerns as a junior doctor about understaffing. He claims he was subjected to a campaign to discredit him resulting in the deletion of his training number, forcing him out of a career.

Chris Day

An appeal is due to be heard in November against an employment tribunal judgment last year that found the trust did not deliberately conceal evidence when hundreds of emails related to his case were deleted by a senior executive.

Day is pessimistic about his chances. He said: "I have had 10 years of it in my own whistleblowing case and I fear nothing will change following Letby. Ten years on and £1m later, the NHS is still fighting me, who raised serious safety concerns about an intensive care unit in London linked to two avoidable deaths.

"The Letby example is an extreme example of the consequences of the NHS's poor speak-up culture where significant energy and public money is spent on ignoring or covering up difficult truths."

A spokesperson for LGT said Day's concerns were taken seriously when they were first raised and it had taken action to ensure employees were "empowered to speak up and are heard when they do."

They added: "We have made efforts to support Dr Day with his career, via an intermediary, including offering to help him recommence his consultant training with the NHS. He hasn't yet taken up this offer and has appealed against the most recent judgment in our favour, which unfortunately restricts us from commenting further on the details of his case."

Prof Philip Banfield, the chair of the British Medical Association's UK council, said: **"**We cannot continue with a culture in the NHS that puts the blame on those who raise legitimate concerns and that hounds them out of a career that is their life's work. Those who speak up with the sole aim of improving patient care and patient safety should be thanked, not ignored, pilloried or persecuted for fulfilling their professional duty."

How Megan Davis went from whistleblower to crime novelist

Megan Davis
CrimeReads, 1 August 2023

THE WHISTLEBLOWER cuts a lonely figure. Disruptive by definition, the whistleblower is the ultimate outsider — a shadowy player who ignores not only the rules, but the very team itself.

The whistleblower's motivations are often misunderstood, and their habit of exposing difficult truths means they are easily smeared by their detractors as troublemakers, fantasists and traitors.

All of these qualities make the whistleblower an excellent character in crime fiction.

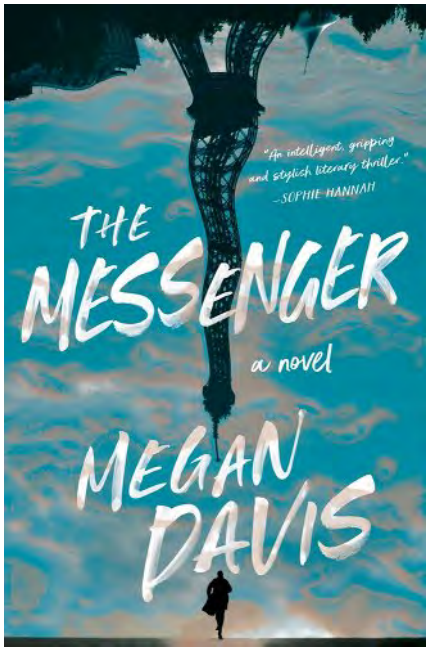
My novel, *The Messenger,* follows the journey of Alex, a young man who has just been released on parole for the crime of killing his father. Alex claims he was wrongly convicted, is desperate to prove his innocence and to find his father's real killer. Eddy, his father, was an investigative journalist in Paris, where the novel is set, and in his quest to reveal the truth about Eddy's murder, Alex uncovers secrets his father died trying to expose.

As Alex investigates Eddy's death, he discovers a ring of corruption with a stranglehold on the city, a conspiracy whose deep roots are entwined in the civil unrest Paris is famous for. As the novel progresses, Alex draws close to Eddy's enemies and comes to know his father in a way he never did when he was alive.

Like his father before him, the more Alex uncovers, the more isolated he becomes, and the more he is pursued for what he knows.

The novel has as its focus the insidious pull of corruption: how it drags people into its orbit whether they choose to get involved or not. The novel explores the dangers of staying silent and the even more risky act of speaking out.

In developing the characters and plot of *The Messenger*, I drew upon my own experience as a whistleblower in London's financial sector.



At the time, I was working as a lawyer in a fast-moving, niche area where cutting corners was the norm. The deals were at the sharp end of the law, but they were legal: nothing out of the ordinary in an era of freewheeling, light touch regulation. There was one high-value transaction, however, that went beyond that, pushing into the realm of fraud. When I expressed my reluctance to participate in the deal, my bosses said they would make it worth my while.

It was not immediately clear what that meant, but the proposition held a vague, unlimited promise. No figure was mentioned, but my imagination bloomed. The deal was in the hundreds of millions of pounds so the sky was the limit. My bosses were asking me to name my price.

I was stunned, and in that moment of disorientation I have to admit, I considered it.

Not out of greed, but because going along with their scam was easier than speaking out.

The best crime stories come from insiders, but as we know from crime fiction, being an insider is a dangerous game. Faced with the prospect of speaking up or staying silent, most people keep their mouths shut. If they don't then they are dealt with. The clock starts ticking; their days are numbered.

In real life too, whistleblowers are intimidated, victimised and harassed. Sometimes they are killed before their message gets out. That's why the most serious crimes are the ones we never hear about.

That invitation from my employers also held within it, of course, a vague, unlimited threat. Was it really worth my while to refuse? I considered pursuing a middle course – staying silent while backing away quietly, watching from the sidelines and not playing an active part. But I was fixed with knowledge of what they were up to and if the deal went ahead, I knew I would be dragged into it one way or another.

I had no choice but to speak out, to try and stop the transaction. But what would happen to me if I did, I wondered? I would lose my job for sure, but what other risks was I taking?

These are the dilemmas all whistleblowers face as they consider stepping forward into lonely and dangerous territory. How will they be treated once they refuse to play ball? Turning against the team is precarious, particularly when you get between people and their money.

I soon found out what it meant for me. Within an hour of refusing my bosses' offer, my access to the computer network was denied, security card cancelled and I was escorted from the building like a criminal. To this day I still don't know what my colleagues were told about my sudden disappearance from the office. No doubt word got around that I had done something terribly wrong.

And indeed it felt like it. Suddenly the tables were turned and my employers created trumped up charges against me that I was forced to defend with expensive lawyers. My bosses combed through my employment history, emails, documents and correspondence looking for evidence that would cast doubt on my judgement, skills and character.

They had to neutralise me now I had gone rogue. They had to shoot the messenger before the message got out and that meant bullying and intimidating me, undermining everything I said. If they couldn't find anything substantial against me, then they would wear me down with false allegations and legal fees.

Remarkably, there are lawyers who specialise in intimidating whistleblowers and the lawyers my employers engaged were experts in their field. They knew exactly how to scare me, sending motorcycle couriers regularly to my home to deliver intimidating documents. Once I was even served when I was in the playground with my kids. The message was clear from the helmeted, leather-clad messenger: not only did they know where I lived they knew my routine. So I stayed indoors, watching my legal bills rack up as I tried to make sense of the mess I was in.

The blueprint for this kind of treatment could have been plucked from the pages of a noir thriller: shatter the protagonist's worldview; destroy their identity, mission and purpose. Alone and isolated, their mind becomes warped. Gaslighting activates paranoia and intrusive thoughts. Nightmares lean into suicidal ideation.

My employers didn't find anything to hang me with and the charges they brought were baseless, but the process they instigated was frightening and deliberately drawn out, continuing for well over a year.

I hung in there, found another job while I fought the allegations and then finally, it was over. I received a settlement and critically, the transaction collapsed when financiers took flight at the adverse publicity. I had disrupted the deal, but at what cost to my health, family, career and sanity? I will probably never really know, but the experience certainly disrupted my view of the world and human nature.


Megan Davis

Sometimes, the information revealed by whistleblowers is so disruptive it causes a seismic shift in our understanding of how society works. This

happened in 2016 with the Panama Papers, history's biggest ever data leak. The information disclosed to journalists from an insider at the Panamanian law firm, Mossack Fonseca, showed the real workings of the global financial system. The Panama Papers revealed how the secret off shore industry was 'not as had been previously thought a minor part of our economic system, rather, it was the system'. The Panama Papers exposed the role of off shore structures in the increasingly aggressive accumulation of wealth by a rich and often criminal élite.

"Making the decision to compile the data available to me at Mossack Fonseca took days and felt like looking down the barrel of a loaded gun, but ultimately I had to do it," the Panama Papers whistleblower has said.

Another massive shift in public perception occurred in 2013 when NSA whistleblower, Edward Snowden, exposed the extent of global mass surveillance, including the extent to which the US and UK governments spy on their own citizens. Whistleblowers who expose the secret machinations of the State are in even more danger than those who expose financial wrongdoing because national security legislation often trumps whistleblower protection laws. This leads to uncomfortable questions regarding the safeguards that are meant to be in place to stop a government overreaching its legally mandated authority.

No other whistleblower more exemplifies our conflicting attitudes towards whistleblowers than Edward Snowden. He has been nominated for the Nobel Peace Prize, and also vilified as a traitor deserving of the death penalty. A month after Snowden's revelations, the US Department of Justice charged Snowden with violating the Espionage Act and stealing government property, following which the Department of State revoked his passport.

Ironically, Snowden finally found refuge in Russia, a regime that itself treats whistleblowers and journalists as traitors.

I have never regretted blowing the whistle, but I often wonder whether I would do it again. Many whistleblowers say the same thing. Upsetting the herd requires the kind of recklessness you can really only do once, when you don't know the ramifications.

Be careful about upsetting the herd.

Although the ending of my story was a satisfying one, the journey itself was harrowing. All whistleblowers subject themselves to the kind of treatment you wouldn't wish upon your worst enemy. In their mission to reveal the truth they are forced to take the kind of risks we wouldn't dream of, and mostly they do this not out of choice, but necessity.

Speaking up: why whistleblowers have become valued assets in financial services

Nick Marshall and Adam Lurie
International Banker, 1 June 2023

NOT long ago, the word *whistleblowing* was synonymous with *troublemaking*. Too often, fears of raising concerns and risks of retaliation meant that wrongdoing went unchallenged, sometimes with tragic consequences. However, the influences of greater legal protections and changes in society more generally have created a subtle but positive shift in how whistleblowers are perceived. The whistleblower's value in exposing wrongdoing and his or her place as a key pillar of good governance are now widely recognised and embraced.

The evolution of whistleblowing

As the 25th anniversary of the United Kingdom's whistleblowing laws approaches, the landscape is now very different from what it once was. The Public Interest Disclosure Act 1998 marked the UK as a pioneer in its protection of whistleblowers at a time when many European countries had no specific legal protections in place. But cultural changes did not happen overnight. The 2008 financial crisis was a stark reminder of how people continued to turn a blind eye to misconduct and failed to report it.

Recognising whistleblowers' critical roles in exposing poor practices, the UK's financial services regulators, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), announced their own detailed rules on whistleblowing in 2015. Despite an increase in the number of whistleblowers in the financial-services sector in the wake of the rules, 70 percent of respondents in one survey claimed that they were either victimised, dismissed or resigned, and 33 percent said that their concerns were ignored.

Various campaigns have aimed to reassure financial-services workers who raise concerns, as awareness of workers' rights under whistleblowing laws in the UK continues to grow steadily. (There has been a steady increase in awareness of whistleblowing laws over the years, from 26 percent in 2013, 33 percent in 2015, 38 percent in 2018 and 48 percent in 2021.) The rise in the number of whistleblowing claims in the UK's Employment Tribunal (from 1,395 in 2014–15 to 3,128 in 2020–21) also suggests that those who speak up in the workplace are more aware of their legal rights and are more willing to assert them.

In the United States, there are many whistleblower protections, but the two prominent statutes affecting financial services are the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) of 2010. Similarly,

the US has various regulators that cover financial services and institutions. The U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) have designated whistleblower programmes and rules as required under the Dodd-Frank Act. More recently, in August 2022, the SEC adopted two amendments to its rules governing the whistleblower programme. (The two rule amendments primarily focused on award payments concerning [1] non-SEC actions and [2] increases to dollar amounts.) Although there has been significant progress since the 2008 financial crisis, there are still concerns regarding workplace retaliation and whistleblower protections.

Further, the COVID-19 pandemic has positively impacted employee reporting. As more people worked from home, there were substantial increases in the number of whistleblower reports observed in both the US and the UK. (According to *Bloomberg*: "The isolation that comes with being separated from a communal workplace has made many employees question how dedicated they are to their employers, according to lawyers for whistleblowers and academics. What's more, people feel emboldened to speak out when managers and co-workers aren't peering over their shoulders.")

SEC 2021 annual report to Congress

In Fiscal Year 2022, the SEC received more than 12,300 whistleblower reports—the largest number received since the inception of its whistleblower programme. This suggests that whistleblower protections and the pandemic-induced (physical) distances between companies and their employees have further encouraged people to report wrongdoing.

The changing landscape in financial services reflects a broader culture shift as employers move away from seeing whistleblowing as a "problem" but instead as part of a healthy dialogue between staff and management. This culture shift is likely to have been fuelled, at least in part, by employers promoting speaking-up campaigns, for example, through whistleblowing training. Historically, many organisations focused their training on legal and compliance functions handling complaints and investigations—reflecting their attitudes that whistleblowers were a business risk that needed to be managed and defended against. It is now much more common for training to be rolled out across the wider workforce, encouraging workers to raise concerns and giving them the tools to do so (and reassurances that they will not be victimised) alongside training managers on what to do if someone blows the whistle *to* them.

And an evolution can be seen not just in the number of whistleblowers but also in the subject matter of disclosures (regardless of whether that subject matter would give the individual legal protections as a whistleblower). Strong environmental, social and governance (ESG) credentials are now at the top of many employers' (and employees') agendas. Growing concerns about the climate crisis have shone a spotlight on greenwashing (marketing that portrays an organisation's products, activities and/or policies as producing positive environmental outcomes when this is not the case), and employees are increasingly prepared to hold organisations to account for their (mis)statements and (in)actions. Take, for example, the former sustainability officer at an asset manager who blew the whistle, alleging that the organisation had overstated how sustainable some of its financial products were, leading to a significant SEC investigation.

Under the "S" umbrella, global social movements such as Black Lives Matter (BLM) and #MeToo have empowered more employees to challenge toxic work cultures and DEI (diversity, equity and inclusion) issues. In fact, human relations (HR)-related concerns, including racism and harassment, now make up the majority of whistleblowing complaints, according to one UK survey.[8]

Where are we now?

However, although once hailed as pioneering, the UK has arguably fallen behind.

In 2019, against the backdrop of a patchwork of rules across Europe and a number of scandals, including Lux-Leaks (Luxembourg Leaks) and the Panama Papers, highlighting the inconsistencies in protections for whistleblowers, the EU Whistleblowing Directive (the Directive) was born.

It recognised that those on the ground within a company are usually the first to learn about threats or harms to society. But the fact that whistleblowers often risk their careers, livelihoods and health by coming forward in the absence of clearly identified means of protection and safe reporting was a barrier to blowing the whistle.

In setting common, minimum standards for protecting whistleblowers exposing breaches of European Union (EU) law, including the requirement for companies to implement internal reporting channels, the Directive reinforces the important role whistleblowers play in the early detection and effective resolution of risks to the public interest.

Whilst the UK does not have to implement the Directive, the benefits that flow from facilitating reporting and embracing a strong speak-up culture are undoubtedly influencing market practices and providing a model for potential legal reforms. And those benefits are much broader than just reducing legal risks. Commercially, companies that foster speaking up can find themselves with competitive advantages, as both internal and external stakeholders

prioritise accountability and transparency, and critical concerns can be identified and addressed earlier, before they morph into more expensive, reputationally damaging or dangerous issues.

Listening up

However, whistleblowing policies alone will generally not be enough. Employers should be prepared to standardise their approaches to handling whistleblowing complaints and investigations to instil confidence in the process. For example, they should consider putting in place an investigation protocol that sets out how a whistleblowing investigation will be undertaken and by whom, ensuring that those responsible for investigating concerns receive appropriate training and are confident enough to undertake robust and impartial investigations.

Many employees are reluctant to come forward with concerns because they have little faith that those concerns will be investigated, or they are worried about retaliation. Regular updates on the status of the investigation and maintaining confidentiality (as far as possible) are therefore critical to encouraging trust in the process. For similar reasons, where possible, whistleblowers and other staff members should be updated once investigations are completed and told of any changes to systems and controls that will be implemented to help prevent the same issues from arising in the future. Open communication and being persuaded that speaking up is not futile contribute to a positive speak-up culture.

The UK Government announced in March 2023 that it would review the UK's whistleblowing framework. It remains to be seen whether any legislative changes will follow to match recent developments elsewhere. Similarly, on March 15, 2023, the U.S. Senate introduced the bipartisan SEC Whistleblower Reform Act of 2023, aiming to strengthen the SEC's whistleblower programme. Considering the amendments by the SEC in 2022 and the current legislative push to make it more whistleblower-supportive, we can expect further developments in the United States.[9]

Meanwhile, in the EU, the European Commission (EC) has commenced enforcement proceedings against several countries (including Germany) that failed to implement the Directive on time, raising concerns about how seriously some governments are taking whistleblowing.

What is clear is that multinational organisations will need to be alert to the growing patchwork of national and international whistleblowing laws as they adjust to a new culture of speaking—and listening—up.

[The online version of this article includes references, omitted here.]

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A whistleblower's advice: keep the faith in difficult times

Paula Pedene

Military Times, 30 July 2023

I'M IN GOOD COMPANY as we commemorate National Whistleblower Day on July 30. After all, two Navy Sailors, Samuel Shaw, a Revolutionary War naval officer, and Richard Marven, a midshipman, were the first whistleblowers in 1776.

Shaw, a midshipman, and Marven, a third lieutenant in the Continental Navy, were moved to act after witnessing the torture of British prisoners of war by Commodore Esek Hopkins, then Commander-in-Chief of the Continental Navy. In reporting the misconduct of the Navy's highest officer, they both were punished, dismissed from the Navy, and later faced criminal charges filed by Hopkins. Appalled by the case, the Continental Congress enacted a whistleblower protection law on July 30, 1778, and even helped provide resources to support their legal defense.

At the time, the law declared it "the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge."

The continuous issue we have today is what happens to whistleblowers after they have done their due diligence in reporting misconduct, fraud or ill will to others. Their truth-telling often significantly affects their careers, families, and life.

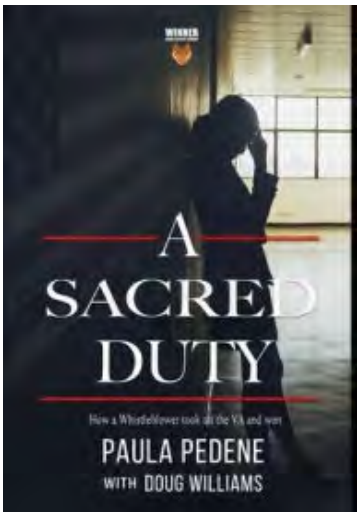
Paula Pedene

In my journey of exposing the Veterans Affairs (VA) wait time scandal, I dealt with each of these consequences. Leadership put my VA public affairs officer career on hold, undermining it. My children suffered immensely while watching their mom, who was so dedicated to caring for and serving veterans for decades, be treated so unjustly. And I discovered how complicated and painful it is to deal with depression.

But as the saying goes, challenges can make you stronger, and mine did. I learned many things along my journey, and I wanted to share some of my lessons learned of how to keep the faith in difficult times.

Continue to do good work: It was devastating when I was removed from my high-profile VA Public Affairs Officer position and banished to the basement library as a clerk. No longer was I in the inner circle of leadership and influence, where I could improve policy, shape public opinion, or create information that would benefit the masses. Instead, my daily chores meant checking in library books, buying the newspaper and putting it on the rack for people to read, faxing documents, working with patients on computers, making copies, and even sharpening pencils. The most important thing that didn't change for me was to do this job

to the best of my ability. After all, it was about supporting our nation's veterans.



Proactively manage stress: This took me a while since I immediately quit working out and cried for prolonged periods when I got home. It wasn't until I found yoga and meditation that I could feel some of the stress leave.

Learn what not to do: When you're involved in a lawsuit, your legal counsel warns you to watch what you say and be careful of whom you trust. I went from having thousands of people in my network to a hundred or so. Suddenly being ignored by people I thought were my friends, or worse, being thrown under the bus by them, was devastating. I learned to heed my legal team's advice, and I sought those who had enough courage to speak to me in public, send letters on my behalf and stand up for me based on my previous moral work.

Pray continuously: As a Catholic, I took comfort in Mass, the Rosary, reading the Bible, continuous prayers, and seeking God's wisdom at critical junctures along the journey.

Hold to your values: As a sailor, the Navy's core values are honor, courage and commitment. As a public relations practitioner, our code of ethics includes advocacy, honesty, loyalty, fairness and independence. I embraced all of these values throughout the journey, and stayed true to what I knew as the truth and became determined to ensure that I stood up to evil, even if it meant standing alone.

Although these are some insights I gained in the process, I also lost ground. What still haunts me to this day are the lives lost by those veterans trapped in the system, the crossroads VA faces, and the lingering aftermaths of the crisis my family still endures.

The whistleblower journey is not easy, but for some, it's a call we can't ignore.

Paula Pedene is the author of the memoir *A Sacred Duty, How a Whistleblower Took on the VA and Won.* She also serves as the executive director of Honoring America's Veterans..

Our democracy wouldn't last without whistleblowers

Sarah Cords
The Progressive, 29 July 2023

EVEN BEFORE the U.S. Constitution was ratified, the Second Continental Congress had approved the Whistleblower Protection Act of 1788. The act, passed on July 30, makes it incumbent on citizens to report violations of the law: "That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors, committed by any persons in the service of these states, which may come to their knowledge."

The text describes whistle-blowing not as a "right" but, instead, a "duty." There are real risks to those who blow the whistle: retaliation, loss of their careers, and even incarceration. But many who blow the whistle, like Edward Snowden, maintain they had no real choice—it was *their duty* to alert the public to illegality and fraud.

In recent years, many whistleblower advocacy organizations, most notably the National Whistleblower Center (NWC), have been working to make July 30 permanently recognized as "National Whistleblower Appreciation Day."

Currently, National Whistleblower Day (NWD) is celebrated each year on an "ad hoc basis," according to Stephen Kohn, whistleblower attorney and Chairman of the Board of the NWC. For the past decade, it has been declared annually by a U.S. Senate resolution; Kohn would like to see the president issue an Executive Order that would make the day of recognition permanent.

As he told *The Progressive*, "While the Senate has unanimously delivered on NWD for over ten years in a row, relying on Congress is not sustainable long term."

The NWC also hosts a national conference to provide support for, and raise awareness of, the importance of the role whistleblowers often play in democracy. This year, the conference was held on July 27, in Washington, D.C., and featured high-profile speakers like Republican Senator Chuck Grassley (long considered an ally of whistleblowers) and Enron whistleblower Sherron Watkins.

In his announcement of Whistleblower Appreciation Day, Grassley said, "Whistleblowers play a crucial role by shining light on wrongdoing." With Senator Ron Wyden, Democrat of Oregon, Grassley co-founded and co-chairs the Senate Whistleblower Protection Caucus.

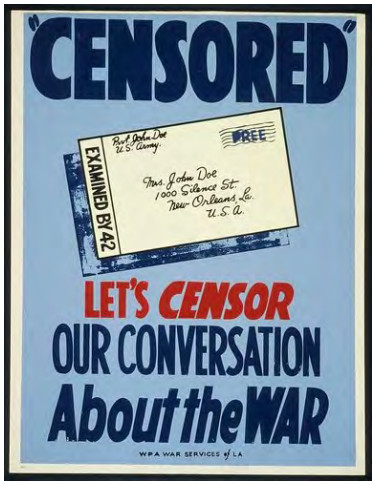
Each July 30, support for whistleblowers in business, government, and national security appears to be both strong and bipartisan. The typical experiences of whistleblowers, however, especially those in the military and national security sectors, reflect the government's fear of embarrassing or compromising leaks (as opposed to leaks politicians might find useful).

Take, for example, Daniel Ellsberg.

In 1971, Ellsberg, one of the most high-profile whistleblowers in history, was working as a military analyst, and, along with a colleague, photocopied thousands of classified pages that detailed America's complicated and often disastrous involvement in the Vietnam War. He first shared them with several senators, who did not act upon the information, and then with *The New York Times*. They became known as the Pentagon Papers.

Ellsberg would go on to support other whistleblowers, including Edward Snowden, and journalists and others who publish their stories, like Julian Assange. On June 16, 2023, Ellsberg, died from pancreatic cancer at the age of ninety-two. Although Ellsberg was fortunate enough to escape prosecution for revealing top-secret documents and has maintained that he wouldn't have done anything

differently, those intelligence-community whistleblowers who have received prison sentences under the punitive act in recent years often have much to regret.



One such whistleblower is Reality Winner, who revealed a classified document to the media outlet *The Intercept* that proved Russian interference in the 2016 presidential election. After an interrogation in her home without legal representation present (an event which is shown in horrifying detail in the recent movie *Reality*, based on the transcript of that questioning), Winner admitted to leaking the document, and was eventually sentenced to sixty-three months in jail, the longest sentence ever given to a whistleblower in a federal court.

In a recent panel event featuring both Ellsberg and Winner, Winner answered the question of whether she would blow the whistle again with no hesitation: "I absolutely would not do it again."

If that was at all unclear, she followed up by saying, "One hundred percent, zero out of five stars" and noting that "It didn't accomplish anything." Later in the presentation, Ellsberg noted that Winner's being charged under the Espionage Act gave her no opportunity to explain why she revealed the information she did. Addressing Winner directly, Ellsberg said, "You should not have been charged with a crime, especially under the Espionage Act … You did what I said earlier, what I would like people to do. You acted on what you saw in a timely way when it might have made a difference."

Whistleblowers like Ellsberg, Winner, Snowden, and Daniel Hale—individuals who had security clearances and were bound by nondisclosure agreements not to divulge classified information—knew their best (and perhaps only) defense was to attempt to remain anonymous.

When their identities were revealed, the Department of Justice charged each with crimes under the Espionage Act of 1917. The media outlets that they worked with—*The New York Times*, *The Intercept*, and *The Guardian*—have not, historically, been charged with disclosing top secret information. This long-standing precedent, which favors press freedom, is unfortunately in danger today.

In 2010, Julian Assange and his nonprofit organization, WikiLeaks, began releasing hundreds of thousands of classified documents revealing information about the Iraq War that were submitted by army intelligence analyst Chelsea Manning.

While a 2017 report from the Department of Defense found that Manning's disclosures "did not cause real harm," she was successfully prosecuted under the Espionage Act and received a thirty-five-year prison sentence. Although her sentence was commuted by President Barack Obama in 2017, she was sent back to prison in 2019 for refusing to testify before a grand jury that was investigating WikiLeaks.

Assange is currently being held in the Belmarsh prison in London, under an extradition order that seeks to bring him back to the United States to face seventeen counts under the Espionage Act and one count of "conspiracy to commit computer intrusion." On June 8, 2023, Assange and his legal team suffered a defeat when his appeal was rejected in a U.K. court. If all further appeals fail, Assange will be extradited to the United States to stand trial.

Numerous national and international advocacy groups—including Amnesty International, Human Rights Watch, and Reporters Without Borders—support Assange's defense. Their calls for action include petitions asking President Joe Biden to drop the charges against Assange and WikiLeaks. In the wake of the June 8 rejection of Assange's appeal, the Freedom of the Press Foundation's Director of Advocacy Seth Stern summed up the danger the Assange case poses to the freedom of the press: "The idea of Assange or anyone being tried in a U.S. court for obtaining and publishing confidential documents the same way investigative reporters do every day should be terrifying to all Americans."

Whether you know their names or not, odds are that you have benefitted somewhere, somehow, from a person blowing the whistle on their employer or organization. Whether they are alerting the authorities to medical device bribery schemes in VA hospitals, sounding the alarm regarding the safety of Tesla's Full Self-Driving system, or helping the Securities and Exchange Commission "recover millions of dollars for harmed investors," whistleblowers perform the vital function of providing transparency in business and governance.

At the very least, whistleblowers deserve for Biden to sign an Executive Order and give them their own permanent day of recognition, which would, as Kohn put it, "make a huge difference in improving the culture around whistleblowing."

An even simpler thing that all Americans could do to honor whistleblowers is to do the one small thing that whistleblowers have wanted them to do all along: Pay attention to the stories it is their duty to tell you.

Whistleblowers Australia contacts

Postal address PO Box U129, Wollongong NSW 2500
Website http://www.whistleblowers.org.au/
Facebook https://www.facebook.com/Whistleblowers-Australia-Inc-172621456093012/

Members of the national committee
http://www.bmartin.cc/dissent/contacts/au_wba/committee.html

Previous issues of *The Whistle*
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Whistleblowers Australia conference

Whistleblowers Australia's annual conference will be held at 9.00am Saturday 18 November at the Uniting Conference Centre, North Parramatta (Sydney), registration from 8.15. Keep up to date with developments by email notices.

For more information: Cynthia Kardell, 02 9484 6895, ckardell@iprimus.com.au

Annual General Meeting

Whistleblowers Australia's AGM will be held at 9am Sunday 19 November at the Uniting Conference Centre, North Parramatta (Sydney).

Nominations for national committee positions must be delivered in writing to the national secretary (Jeannie Berger, PO Box 458, Sydney Markets NSW 2129) at least 7 days in advance of the AGM, namely by Sunday 12 November. Nominations should be signed by two financial members and be accompanied by the written consent of the candidate.

Proxies A member can appoint another member as proxy by giving notice in writing to the secretary (Jeannie Berger) at least 24 hours before the meeting. No member may hold more than five proxies. Proxy forms are available online at http://www.whistleblowers.org.au/const/ProxyForm.html.

Whistleblowers Australia membership

Membership of WBA involves an annual fee of $25, payable to Whistleblowers Australia. 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.

Renewing members can make your payment in one of these ways.

1. Pay Whistleblowers Australia Inc by online deposit to NAB Coolum Beach BSB 084 620 Account Number 69841 4626. Use your surname/membership as the reference.

2. Post a cheque made out to Whistleblowers Australia Inc with your name to the Secretary, WBA, PO Box 458 Sydney Markets, Sydney, NSW 2129

3. Pay by credit card using PayPal to account name wba@whistleblowers.org.au. Use your surname/membership as the reference.

New members: http://www.bmartin.cc/dissent/contacts/au_wba/membership.html