"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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Bullying: the generic form of workplace harassment

The cause of stress revealed. Tim Field.

The Department of Health calculates that 3.6% of national average salary is paid to employees off sick with stress, whilst the CBI estimates the cost

of stress and stress-related illness to industry and taxpayers at (UK pound) £12 billion a year. However, whilst stress is on everybody's mind, the cause of stress often goes uninvestigated.

Stress occurs in two forms. Positive stress can be harnessed to enhance performance, and is the result of a well-managed and well-organised environment where managers accept responsibility, have excellent people skills and genuinely value staff. On the other hand, negative stress - which is what people mean when they use the word 'stress' on its own - is the result of a dysfunctional climate and lack of leadership where threat and coercion substitute for poor or non-existent people skills.

Negative stress also results from constant reorganisation, regular downsizing, uncertainty, insecurity, under-resourcing and understaffing, overloading, etc. This is also the climate in which bullying tends to be prevalent. In my view, the main cause of negative stress is bullying.

Types of bullying.

Many misperceptions exist, so I define three types of bullying. *Pressure bullying* (also called unwitting bullying) is where the stress of the moment causes the individual's behaviour to deteriorate in response to the stress. When the pressure is relieved, behaviour returns to normal; the individual is aware if they have behaved inappropriately and may apologise if necessary. The person also learns from the experience and is better prepared to deal with the situation next time it arises. This type of behaviour is common to all humans and 1 do not include it in workplace bullying which is comprised of two more serious types of bullying.

Corporate bullying is where the employer feels free to abuse their workforce without fear of being called to account. Examples include firing anyone who looks about to have a stress breakdown on the basis that it is cheaper to pay the costs of unfair dismissal at industrial tribunal (around £11,500) than risk facing a personal injury claim as in the John Walker case (£175,000). Another example is coercing employees to work 60, 70 or 80 hour weeks (or more) on a regular basis and making life hell for anyone who objects. These are morally unacceptable actions which breach individuals' rights and destroy family life.

The most serious type of bullying, from both the employer's and employee's perspective, is ***serial bullying****.* This is an individual to whom the source of dysfunction can be traced and whose profile is remarkably consistent. The serial bully has a Jekyll and Hyde nature, is a compulsive liar, lacks a conscience and shows no remorse, has a selective memory, is humourless, disruptive, devious, manipulative, selfish, insensitive, insincere, insecure, immature - but always plausible. Furthermore, the serial bully is unwilling to operate within the bounds of society (whilst insisting everyone else does), cannot tolerate minor frustrations and tends to act impulsively, randomly and recklessly, is unable to form stable relationships, and, most significantly, is unable to learn from experience, however unpleasant. It is estimated that one person in 30 may suffer from this antisocial personality disorder (APD), the modern euphemism for an unrecognised socialised psychopath. There are disturbing ramifications for the validity of such a person's testimony during investigation, disciplinary hearings or legal proceedings.

Both corporate and serial bullying constitute a breach of the Health and Safety At Work Act whereby employers have an obligation called a duty of care to ensure the physical and psychological wellbeing of employees.

The purpose of bullying.

The purpose of bullying is to hide inadequacy. Anyone who chooses to bull), is thus admitting their inadequacy, and the extent to which a person bullies is a measure of their inadequacy. Bullies are people with impoverished social, interpersonal and behavioural skills who project their inadequacy on to others both to avoid facing up to and addressing their inadequacy, and to divert attention away from their inadequacy. In an insecure workplace, this is how inadequate and incompetent people keep their jobs.

Whilst many managers claim that 'you have to bully people to get the job done', a moment's reflection shows the inadequacy of this view. Bullying results in de-motivation, de-moralisation, disenchantment, resentment and alienation. You can threaten anyone (with loss of job) into doing anything in the short term, but environments in which bullying is rife are characterised by inefficiency, dysfunction, low morale, and lack of team spirit, which lead to acute, prolonged negative stress. The best guide to the performance of any organisation is to examine the rate of staff turnover, levels of sickness absence, the number of stress breakdowns, also the frequency of oral and written warnings and uses of disciplinary action, involvement in industrial tribunals, and personal injury claims.

Bullying tactics.

Bullying most commonly manifests itself through constant criticism, fault-finding and nit-picking. Whilst presented in the guise of addressing shortfalls in performance, the real purpose of this behaviour is control and subjugation. Two factors reveal bullying: firstly, the criticisms start small, increase in seriousness, evolve into allegations (eg of complaints by third parties), and culminate in the imposition of first oral then written warnings. Secondly, the criticisms are specious (plausibly deceptive) and insubstantive (trivial and lacking in substance); incidents which are the basis of criticism are distorted, magnified, and often fabricated.

Other tactics by which bullies reveal themselves include marginalisation and exclusion (disempowerment to facilitate control and subjugation), singling one person out and treating them differently, humiliation (eg being shouted at in front of others), overburdening with work, or taking all work away, or giving one individual all the grotty jobs (whilst others get the easy or enjoyable work), being difficult with or denying annual leave, sickness leave, or - almost unbelievably - compassionate leave, increasing a person's responsibility but removing their authority, withholding information, setting unrealistic deadlines, and so on.

Why pick on me?

Contrary to popular belief, the average victim of a bully is a strong and skilled individual, as evidenced by the most common reasons for being picked on. Firstly, the individual is good at their job, often excelling, and popular with people. Envy (of abilities) and jealousy (of relationships) are strong motivators of bullying. Incidentally, bullying is not a gender issue, as females make worse (or is it better?) bullies than males. Other reasons for triggering bullying include blowing the whistle (eg on malpractice, illegality; breaches of health and safety regulations etc.), standing up for a bullied colleague, or, more subtly, unwittingly highlighting or revealing the bully's incompetence simply by being competent.

Predictability.

Serial bullying follows a predictable pattern with a foreseeable outcome. A victim is selected and subjected to a period of criticism, exclusion etc. as above. A trivial incident is then identified which is the excuse for imposing an oral warning. The victim is then subjected to a competency procedure and life is made as difficult as possible.

Eventually, the victim asserts their right not to be bullied, usually by reluctantly filing a complaint. Personnel then interview the bully who uses their Jekyll and Hyde nature, compulsive lying and plausibility to portray their victim as the liability. Unaware of the serial bully's true character (and the liability being incurred), personnel are hoodwinked into supporting the bully and getting rid of the victim as quickly as possible. As bullying is frequently hierarchical, personnel may then be instructed to scour the individual's work re cord from years ago to find any incident which can be pressed into service as the basis for a charge of gross misconduct leading to dismissal.

Effects of stress.

Bullying causes prolonged negative stress with a wide range of symptoms. The physical effects include migraines, aches and pains with no obvious cause, reduced immunity to infection, irritable bowel syndrome, thyroid malfunction, skin irritations (eczema, psoriasis, athlete's foot), sleeplessness, fatigue, and much more. Psychological effects include acute anxiety, panic attacks, trembling, sweating, palpitations, and extreme fragility. In addition, impaired concentration and memory have significant health and safety implications especially if the employee operates machinery, drives a vehicle, or is responsible for the welfare of others. Behavioural symptoms include tearfulness, irritability, anger, Sullenness, mood swings, withdrawal, indecision, loss of humour, etc., whilst the effects on personality comprise loss of self-confidence, self-esteem, and self-worth.

Almost all victims of bullying exhibit an obsessiveness as the experience takes over their lives. Responding to the bully's criticisms and allegations of shortfalls in performance, the victim works harder and achieves further success, unaware that success is a major trigger and stimulant of bullying. Furthermore, attempts to fight back also increase the bullying as the bully perceives an increased threat of exposure (of their inadequacy). Well-intentioned but misguided exhortations from colleagues and family to 'go back in and fight' and 'don't let him/her win' reveal society's lack of understanding of the hold that bullies exert and the unevenness of the battle.

At present, it is virtually impossible to deal with a serial bully by oneself, for the serial bully uses amoral behaviour (lying, cheating, deception, hypocrisy, duplicity, lack of conscience) and abuse of power in a climate of fear, ignorance, denial, acceptance of and reward for bully behaviour, also abdication and denial of responsibility by those in authority combined with inadequate employment legislation and lack of job opportunities.

Psychiatric injury.

Bullying causes psychiatric injury with symptoms similar to, but distinct from, mental illness. The extent of the psychiatric injury is dependent on the period and severity of abuse; reactive depression and stress breakdown are common outcomes. Ironically, the stronger and more resilient the person on the receiving end, the greater the psychiatric injury.

Recovery from a severe bullying experience may take between two and five years. Some people never fully recover.

Notable symptoms of psychiatric injury include hypersensitivity - almost every action and remark by others is perceived as critical, even when it is not -- and hypervigilance, which feels like paranoia but is not. In fact the differences between paranoia and hypervigilance make a good starting point for diagnosing psychiatric injury.

Paranoia is a symptom of mental illness with an internal cause, whereas hypervigilance is a symptom of injury whose cause is external. The paranoiac cannot see their paranoia and will often vehemently deny they are paranoid; the hyervigilant person recognises their acute state of awareness and will often say' I think I'm paranoid'. Paranoia tends to endure and may respond to drug treatment, hypervigilant people do not take kindly to drug treatment, and the injury gets better with time. More subtle differences include the paranoiac's delusions of grandeur and certainty that someone is persecuting them; in hypervigilance, the person often feels worthless and cannot believe that the bully is out to destroy them (an unfortunate misjudgement). Finally, the paranoiac is on constant alert because they know someone is out to get them; the hypervigilant person is on constant alert in case someone is getting at them.

As the distinctions become clear, abused employees are increasingly taking employers to tribunals for unfair or constructive dismissal and breach of contract under the Employment Rights Act and breach of duty of care under the Health and Safety At Work Act (Note: The Occupational Health & Safety Act administered by WorkCover NSW is an example of the equivalent Australian legislation). A growing number of traumatised employees are now also pursuing personal injury cases, the first of which will be heard early in 1998.

Trauma

For many, the trauma caused by bullying exceeds almost all other traumatic experiences in their life and prevents the victim from articulating what is happening to them. More distressingly, the present trauma may awaken and feed on past traumas (eg bereavement, particularly if one has not fully grieved) which bullies often exploit to play the mental health trap.

Often, the bully has shown an overly friendly attitude towards their victim in the early stages of the working relationship; this has nothing to do with rapport building, but is to find out personal details (past trauma, grief, illness, tragedy etc.) to which the person's later mental state can be attributed. Fearful that the increasingly obvious symptoms their victim is exhibiting (stress, anxiety, tearfulness, irritability, sullenness etc.) may cause questions to be asked, the bully draws attention to the person's 'mental health problems', perhaps advising them in writing (with copies to personnel, senior management, occupational health and others) that they Should seek counselling and psychiatric referral, or contact a mental health charity.

In this way, the bully abdicates and denies responsibility for the effect their behaviour has on others. Lawyers in personal injury cases also use this tactic and may embellish events from 30 years ago or more in a desperate attempt to defend their client. For many, pursuing legal action turns out to be worse than the original bullying.

Post Traumatic Stress Disorder.

The nearest diagnosis of the symptoms of bullying is Post Traumatic Stress Disorder, or PTSD. At present, the diagnosis obliges the sufferer to have experienced a life-threatening incident; however, this requirement is present because most of the research on PTSD has been undertaken with war veterans and those who have been involved in major accidents or acts of violence. A related diagnosis, Prolonged Duress Stress Disorder (PDSD), is more appropriate, for the stress disorder is caused by an accumulation of small incidents over rime rather than a single major incident. However, at the moment, whilst PTSD is a recognised diagnosis in ICD-10 and DSM-IV PDSD is not -- yet.

Stress and brain damage.

The need to identify the causes of stress has been boosted by recent research by Dr John T O'Brien at Newcastle University which links prolonged stress with damage to the hippocampus, an area of the brain associated with learning and memory. Survivors of bullying consistently report PTSD symptoms as well as impaired learning ability, forgetfulness, difficulty with concentration, and physical and mental exhaustion following simple casks.

Legal.

Bullying is behind most forms of discrimination, harassment, abuse and violence, and 1997 has seen a growing number of in and out-of-court settlements in which bullying was a major, if not always recognised, factor. In March, a 16-year-old girl was convicted of common assault for bullying an 11-year-old, even though she had not physically assaulted her. A legal precedent was thus established that assault can be psychological as well as physical.

In the same week, Herefordshire firewoman Tania Clayton was awarded (UK pound) £200,000 for being bullied and harassed for five years. In July, David Chan, a Chinese-origin valuer for London Borough of Hackney who was bullied out by his managers was awarded a record (UK pound) £I72,000 by an industrial tribunal. Taxpayers are likely to see increasing amounts of their council tax diverted to fund further huge payouts.

'Those who can, do; those who can't, bully'.

Reprinted from UK Health and Safety at Work, December 1997.

Report from the New South Wales Branch

NSW ANNUAL GENERAL MEETING SUNDAY 4 JULY 1999.

Venue: 1.30pm Presbyterian Church Hall, 7a Campbell Street, Balmain, NSW.

Agenda: Election of all NSW office bearers for 1999/2000.

Please note all current positions (President, Secretary and Committee) fall vacant at the opening of the meeting.

Nominations should be (1) in writing, (2) signed by two members of the association, (3) include the written consent of the nominee and (4) delivered to the secretary, Mr. R Taylor, not less than 7 days before the AGM.

Nominations to be delivered to: Mr. R Taylor, Secretary, NSW Branch, Whistleblowers Australia Inc., C/- 7-A Campbell Street, Balmain NSW 2041.

Update on HealthQuest (forced medical retirements)

In a letter to Whistleblowers dated 18 March 1999, Ms Helen Ford, Acting Senior Investigation Officer, of the Ombudsman's Office, indicated that they had had a meeting with representatives of the ICAC in February last to " determine a joint approach to the issues raised by the information (WBA) and others had provided to both the Ombudsman and ICAC". It was agreed that the Ombudsman would "inquire into the practices and procedures of HealthQuest" and ICAC, the practices and procedures of the employers in referring employees to HealthQuest.

The Premier's Memorandum 98-1 issued 6 January 1998, which sets out in some detail how HealthQuest is to deal with referrals from employers, post-dates a number of the complaints received by the Ombudsman. Therefore the Ombudsman decided, rather than focus on individual complaints, to confine its inquiry to referrals made within the time of its application.

Ms Ford also enclosed "a copy of the relevant part of the letter of inquiry sent to Dr Helia Gapper" (Director, HealthQuest) in which she states the Ombudsman is primarily concerned with "administrative aspects" which raise the possibility that "HealthQuest may, on occasion, receive referrals from departments where the issue leading to the referral could be more accurately characterised as an industrial, rather than a medical, matter. The complaints made raise the question of how HealthQuest deals with such referrals. This issue has been raised by a number of individuals, some of whom identify themselves as whistleblowers, and also as a general issue by Whistleblowers Australia. With the exception of one complaint which I will deal with later in this letter, I do not propose to focus on the detail of individual cases . . . . . (but to) ... discuss with you the current practices and procedures of HealthQuest."

The issues for discussion were listed as follows:

In what circumstances, if any, does HealthQuest decline a referral?

If referrals are declined, how many were declined in 1998 and for what reasons? Who made the decisions to decline the referrals?

The Premier's Memorandum sets out at page 4 information departments are required to provide with referrals to HealthQuest. What procedures does HealthQuest have in place to ensure referrals by departments comply with these requirements?

Does HealthQuest accept referrals which are made without the required information from the departments?

The Premier's Memorandum requires departments to provide the employee with a copy of the information sent to HealthQuest. Does HealthQuest ask employees if they have received this information? If

employees have not been provided with this information by their employer what, if any, action does HealthQuest take?

Does HealthQuest accept referrals from any departmental officers or is a certain level of seniority required?

Is there any type of information HealthQuest will not accept from departments making a referral?

Well-publicised complaints have been made alleging HealthQuest has been used inappropriately by departments attempting to deal with employees they see as "troublesome". When receiving a referral relating to a person who identifies themselves as a whistleblower, does HealthQuest have any additional procedures in place to ensure this is not the case?

What information does HealthQuest give to employees about the assessment process, the assessment decision and the reasons for the assessment decision?

Since that time WBA has forwarded to the Ombudsman information, relevant to the issues set out above, which has come to hand; in order to reinforce our contention that the HealthQuest operation is seriously flawed. For example, further details of individual accounts and advice that the predecessor to the Premier's Memorandum, dating back to Premier Wran's time, was in fairly similar terms.

If you have not already done so, please take the time to put pen to paper now. Or if you prefer, you may send your information to me in the first instance. But do keep in mind: the Ombudsman can only use factual information (not opinion) and cannot by law, resolve an individual's employment problem.

The Ombudsman can be contacted at Level 3, 580 George Street, Sydney or telephone (02) 9286 1000 and facsimile (02) 9283 2911.

NOTEWORTHY EVENTS 1999

The Hon. Mr. Barry O'Keefe, QC, Commissioner of the ICAC, finishes his term of office, as does Mr. Tony Harris, NSW Auditor General.

The Protected Disclosures Act 1994 (NSW) comes up for parliamentary review.

The National Annual General Meeting and WAG Conference last weekend in November in beautiful Brisbane, Queensland. Greg McMahon, National Director, for details, on (07) 3378 0042.

Cynthia Kardell, NSW President.

Bullying conference 2 & 3 July 1999, University of Queensland

The Beyond Association Inc. is holding its 3 rd international conference titled "Responding to Professional Abuse" on Friday 2 & Saturday 3 July 1999, at St John’s College University of Queensland, St Lucia campus. Cost (2 days including lunch) $180.00, or $100 concessional status

(students or unwaged). Further details Professional Abuse Conference Secretary, 35 Nurran St, Mt Gravatt East 4122; Tel.: 07 3216 8281 or email helenjc@powerup.com.au

Sydney University survey: Bullying, Structural Violence and the Workplace

Mary Moyer, a postgraduate student in the Department of Social Work, Social Policy and Sociology at the University of Sydney is undertaking research into the relationship between workplace bullying and structural violence. The title of the project for her master's thesis is "Structural Violence: How well does it explain workplace bullying?" Her aims in carrying out the research include: to identify factors which contribute to workplace bullying; to analyse the extent to which concepts of structural violence are adequate in explaining this phenomenon; to identify how structural violence functions to sustain bullying practices; and to identify factors other than structural violence in the process of workplace bullying. Part of the research involves surveying a number of people who have experienced bullying in the workplace. Because bullying has become a timely occupational issue it struck the researcher as a good example in which to explore the ideas of structural violence. By conducting this research it is hoped that gaps will be filled in understanding both structural violence and workplace bullying. The results of the investigation could possibly be put to use to help improve the understanding of workplace bullying, to improve responses to it, and finally be expanded on in further research.

If you have experienced workplace bullying and would like to donate 15 minutes of your time to complete the Bullying Survey questionnaire please contact: **Ms Mary Moyer at the Department of Social Work & Social Policy, University of Sydney 2006 (Tel. 02 9798 3518 or 02 9797 8133) or contact WBA NSW Branch (Tel. 02 9810 9468; Fax. 02 9555 6268).**

Report on the 23rd May 1999 WBA discussion meeting: The Relationship of the Public Servant Whistleblower to the Parliamentary System and to Members of Parliament.

The discussion meeting was organised by Richard Blake, NSW Committee Member.

This special meeting of the N.S.W. branch of Whistleblowers Australia was held in our usual venue at Balmain. In organising it, I received much help from the other Committee members, especially President Cynthia Kardell, who assisted in many ways, also from National Secretary Rachael Westwood, who assisted with the special mail-out.

The NSW Committee had approved this activity including for it to be a pilot for a series of similar meetings providing dialogue with various societal groupings with which whistleblowers have dealings, e.g. journalists, unions, the legal profession.

We invited a total of 22 Members of Parliament, all State (Federal ones too unlikely to be available at this time), as well as mailing a special notice to all Sydney WBA members plus as many non-metropolitan ones as we thought might be reasonably likely to make it to Balmain. The MP selection comprised what seemed to me to be a fair range of the major parties, the established minor parties, the new minor parties and the independents.

Acceptances came from four MP's and one staffer. As it turned out, the staffer phoned in sick and one of the four MP's did not arrive. In the end, the three who came were all MP's who had, in fact, had sympathetic involvement with us in the past: Kevin Rozzoli, Liberal Member for Hawkesbury; Dr. Brian Pezzutti, Liberal MLC; and Dr. Arthur Chesterfield-Evans, Democrat MLC. It was disappointing to get no new faces. And it is very much to the discredit of the Labor Party that they did not provide even a single representative.

Discussion was originally intended to be round-table and informal in style; but at the last moment we decided this was not really feasible and rearranged the circle to have a straight line of MP's at one end, facing the congregation, with the chairperson (me) in the middle of the line. It turned out then that questions and issues were successively raised by the general congregation and responded to by the MP's; and this seemed to work. A set of questions had been prepared for generating initial discussion, and when we attacked the first one the meeting flowed from there. We ended up hardly touching on most of the set questions, and I think it is a pity we did not address those relating to the Protected Disclosures Act, except fleetingly. In retrospect, I think I should have steered the meeting onto the PDA at some stage.

In order to allow the MP's to speak more freely, no official record was kept. This now drops me in a hole as far as writing a report is concerned, because, in order to keep faith with them, I cannot repeat what they said. I certainly cannot report their opinions.

However, I think it is fair if I report, as highlights, certain things that were generally accepted by all as important facts and that were discussed at length:

1. Public Service whistleblowers do get a hard time at the hands of the system and the situation does need to be improved.

2. There are some serious matters in relation to certain properties and land at Thredbo which have not properly been dealt with by appropriate authorities (one of the three MP's is likely to take this on board).

3. Certain practices of HealthQuest are, to say the least of it, questionable (one, at least) of the three MP's has taken this on board).

4. Certain practices of the Health Care Complaints Commission are questionable.

Kevin Rozzoli was not present during the discussion of items 3 and 4 above.

Another highlight was when an anonymous participant raised certain interesting issues with regard to whistleblowers' remedies through Members of Parliament and Parliament itself. These have been expanded

into a learned article entitled "What is Whistleblowing?" by this person printed elsewhere in this edition of "The Whistle".

The meeting was generally regarded as successful and we intend to go ahead with others in the series. Please give us feedback, ideas, and suggestions of what groups to invite in future.

Thank-you to everyone who came. Apologies to anyone we should have advised but missed.

1. In what circumstances, if any, should the Whistleblower refer the matter to:

(a) The Minister of his/her Department?

(b) The Shadow Minister?

(c) The Premier?

(d) His/her own Member of Parliament?

(e) An Independent Member?

(f) A Member of a minor party in the Upper House?

2. What should Ministers do, if anything, to encourage whistleblowing in their Departments?

3. What do Members of Parliament in general believe should be the expectations of a Whistleblower referring a matter to his/her own Member of Parliament?

4. Under the Protected Disclosures Act, what are the obligations of a Member of Parliament receiving a Protected Disclosure:

(a) With regard to the keeping of records?

(b) Generally?

5. Is the Protected Disclosures Act working against democracy by stipulating that Whistleblowers referring matters to Members of Parliament are only protected from reprisals if they have met certain stringent conditions?

6. What percentage of Members' of Parliament work is dealing with Whistleblower matters?

Richard Blake, NSW Committee Member

Whistleblowing: The Decline of Citizenship & the fall and rise of the ‘little republics’

Liberal constitutionalism; powers of the Executive arm of Government in Australia; administrative remedies for the whistleblower; and the distinction between legal, administrative and self-help remedies.

At the invitation of a member of Whistleblowers Australia Inc. the author attended the WBA NSW Branch discussion meeting, "The Relationship of the Public Servant Whistleblower to the Parliamentary System and to Members of Parliament". The author has a legal background and involvement in measures to protect the public interest. The article formalises the author's personal views and contributions to the discussion.

What is "Whistleblowing"?

From an ethical perspective, whistleblowing is a technical correction in the governance of a state. A person or persons perceive a problem. They act upon that problem by a variety of means. This action, at its simplest, means the laying of information, usually to some other person, agency or the world at large (usually through the media).

However, the ethical perspective deserves more detailed examination. In writing this article, it is instructive to recite the words of Drew Fraser, Lecturer at Macquarie University's Division of Law, who notes in his paper Legal Environmentalism, specifically on the concept of the 'decline in citizenship'. The following passage is a long quote but worth reciting, for it sets the tone of the remainder of this paper:

"That pluralist political process is concerned above all else, with who gets what, when and how. The interest of the whole is seen as the aggregate of the private preferences which receive effective expression in the economic (expressed in dollars) or the political (expressed in votes) marketplace. The rise of the capitalist market society has produced a crisis of human ecology which has matched the destruction of the natural environment. The universalization of exchange relations has unravelled the highly-textured social structures characteristic of traditional, customary, or "organic" societies. Those highly articulated social structures have been "hollowed out" by, among other things, a theory of liberal constitutionalism which enjoys a sharp formal separation of state and civil society.

"The result has been to drain the institutional life of civil society of political significance. It was not so long ago that the life of Anglo-American civil society took place within universities, municipal and business corporations, churches and households which could be, and were, conceived as "little republics". As such, these institutions possessed a clear political significance and a definite role in life of the whole polity which was itself conceived as "an association of persons formed with some good purpose".

"The decline of that whole battery of social institutions 'based on mutual aid, solidarity, vocational affiliations, creative endeavour, even love and friendship' is directly linked to the disintegration of the public sphere".

I quote this passage for the sheer richness in points it raises in the context of the discussion in Balmain cited above.

In specific reference to the public service, this is but one of the battery of the social institutions that has suffered the fate of the universalization of exchange relations that has so contaminated the ability to make its voice heard in the political sphere. The begging question of several attendees at this meeting is paraphrased thus:

"What do I do"? or "Who do I tell"?

The various attendees at Balmain share many demographic similarities as well as common histories. They are without exception, persons of considerable experience. They have all been aggrieved by some perceived wrong. They have all attempted the ‘treadmill’ of the morass of appeal structure and bodies, with little satisfaction to their cause. I will address this ‘treadmill’ issue below and how to deal with it. This point requires careful analysis.

Put more succinctly, the ‘universalisation’ of exchange relations has pervaded the psyche of the model of governance in Australia, which, as a political model based on the Anglo-American tradition, has not been spared from this influence of the market psyche.

We see the conspicuous effects of this universalisation in various phenomena, including corporatisation, privatisation and the collapse of duty-obligation through the ‘tearing up’ of the social contract between citizen and state (much like the more powerful contracting party who simply refuses to honour their performance under a condition of contract). What is the weaker party’s remedy in the political context? Revolution? Self Help? What is the answer when the contracting party is Government itself, acting in a privative way?

Suggested answers

These are but symptoms of a deeper ethical issue of governance affecting the operation of our inherited three-tier system of government in Australia, namely a division of powers split three-ways:

1. The Legislature,
2. The Judicature and
3. The Executive.

The education system has a lot to answer for. Most Australians, if asked the question "What is Government?" will think of our Parliaments. Few people in Australia have been educated to know that ‘government’, including the power of law making, is held by each of the three separate entities listed above.

The Constitutional issue

Over the last seven years, the writer has been observing discrete shifts in statute and common law on the operation of governance in Australia. The following observations indicate the dire situation Australia faces constitutionally, from its governance and ultimately ethical perspective.

The three-tier model above has provided the world, one of the most stable forms of governance models ever known. This ‘Anglo-American’ system has been the cornerstone of models and attempted to be emulated throughout the world. This system enshrines the most fundamental elements of all we hold dear to a political-scientific concept of the word ‘democracy’: namely

1. The application of decision theory in the Administrative Law context.

2. The application of fundamental Administrative Law principles in law making and administration of those laws, including the three key elements of natural justice, namely:
a. The Audi Altarem Partem rule (the ‘right to be heard’),

b. The Bias rule (decision making indifferent to the outcome), and
c. The Probative Evidence rule (decisions based on merit).

3. The Rule of Law, which asserts the predictability and uniformity of decision making.

4. The upholding of equity and equitable remedies in law, including the ecclesial court heritage of our Courts' Equity Divisions and powers in their various jurisdictions.

5. The separation of powers doctrine.

6. The preservation of the three-tier system mentioned above, especially the role of the Executive.

Those advocates urging a republic in Australia are warned of the consequences in adjusting the present balance of power. It is the writer's observation, that the balance in power between the Executive, Legislature and Judicature has indeed been occurring for many years, as seen in the discrete, almost imperceptible changes in our law.

As a proposition, it is asserted that the Executive has suffered at the hands of the Legislature over many years. Put another way, the Executive has been 'consumed' by the Legislature. This requires explanation.

Under our present constitutional system, the Executive consists of the Governor-in-Council of the various States and our Federal Government. The Governor-in-Council includes the Governors and Governor-General and his (her) Ministers ("The Executive in long-sleeves" as they are colloquially called). The "Short sleeve" version of the Executive is the name attributed to the 'Cabinets' of the States and Commonwealth (the Ministers minus the Governor). Technically, there is a fundamental difference between the short and long sleeve versions, namely, the presence and presiding influence of the Chairman - The Governors and Governor-General, respectively.

In practice, the cynical view is that the role of the President (Governor) is a 'rubber stamp' or merely honorary role. The Governor-in-Council is the Executive proper, not Cabinet. A fundamental role of the Executive is the proclamation of laws in the jurisdiction to which those laws apply. A statute cannot come into force without this proclamation and power being exercised.

The relevance to whistleblowing

Forgotten, is the traditional role of the Executive in its relation to the Legislature. Effectively, the Cabinet has become the Executive. This raises questions of mandate in the Executive, which is now notionally from 'the people' (whatever that is supposed to mean). Traditionally, the Executive's mandate was as agency of the Crown, in turn inspired by God and Divine Law, and Tradition by lineage. 'The people' at its technical level means mandate by proportional representation. But in terms of formulation of policy, is this a sufficient answer to deal with the day-to-day complexities of policy formulation and administrative implementation? The writer says it is not, and furthermore an insufficient criteria upon which to base decisions of government. One only has to look at the furious debate on the question of mandate for the Goods and Services Tax to see that such a 'mandate' is dubious at best, and totally unsatisfactory at worst.

If all this sounds esoteric, spare this thought:

Where lies effective power of the Executive function in the day-to-day operation of whistleblowing in Australia - namely, its overseeing role of the operation of the Legislature and Judicature, and application to day-to-day decisions?

Executive power in all its delegated forms through vehicles such as the common law. Executive power has been carved up amongst a plethora of bodies and agencies. It is more than sobering when we add up just how Executive power has been 'carved up' in Australian law. To this day, Executive power is divided into various institutions. I am amazed that, almost without exception, whistleblowers at first instance, run to the following bodies which are agents of the Executive, unwittingly, and in 'gattling gun' fashion seeking a higher justice. I say 'gattling gun' in that they fire barrel after barrel as each barrel seemingly fails to hit the desired target.

The following are all agencies of the Executive function. It is typically these bodies and instruments a whistleblower turns to, often in a random and piecemeal fashion:

1. The Ombudsman.
2. The Independent Commission Against Corruption (ICAC).
3. The Judicial Review jurisdiction of our Courts.
4. The Freedom of Information Act.
5. The Administrative Appeals Tribunal.
6. Certain elements of clauses contained within industrial instruments or standing alone.
7. Certain tribunals and other quasi-judicial forums.
8. The Governor's direct powers, for example the power to offer relief through remedies such as *ex gratia* payments.
9. Delegated Executive powers of the Minister (do NOT confuse this point with the Statutory Powers of a Minister) which are not Executive powers.

The following are sources of Executive power:

1. Common law (Judge-made law bestowing and clarifying the separation).
2. "The Constitution" (an unholy and complicated admixture of statute, common law and convention).
3. The Crown (as mentioned earlier, this diminishing and undermined source of power is steeped in our cultural heritage and contains the most cherished of our democratic institutions mentioned above). It should be noted that the notion of a 'bill-of-rights' requires the necessary shift of *authority* in the ***immediate rights*** of citizens away from the authority of the Crown ('God'), and into the hands of popular mandate ('the State'). Whilst this sounds intuitively appealing, it begs the question 'By what ethic do we adjudge 'good' and 'bad' by popular mandate e.g. what is 'right' and 'wrong'? This raises the natural law vs utilitarianism/deontological debate which is outside the scope of this paper, but I put to the reader the 'time honoured' political scientific question: ***"Is a thing forbidden because it is wrong, or is it wrong because it is forbidden?"*** Does mob rule prevail, or does a higher ethic prevail that may, and often does, run contrary to the whim of the majority? For example, did the Goods and Services Tax (GST) have a mandate or not? Hence, should the GST have been made law or not?

There are other Executive functions found elsewhere, but these are the more common places where Executive power is found.

The delegated powers of the Minister require explanation. There is a significant difference between the powers of a Minister under a Statute and the Minister's Executive powers. This is made more confusing when we see many Executive powers seemingly 'statutised' or having equivalence to a pre-existing Executive power. The real evil here is that we sub-consciously form the perception that the originating source of Executive power lies in the statute itself, rather than from any other source.

Put another way, we form the wrongful perception that the Legislature gives power to the Executive. This perception is false, based on a leap of logic that the Legislature's original jurisdiction alone is sufficient to give the Executive its mandate to perform those functions mentioned above, especially its 'watchdog' function, overseeing the Legislature. In fact, the Executive's role is far higher than mere statute.

It is interesting to note the traditional roles of the Executive, such as Commander-in-Chief of the armed forces, and its power to dismiss Government (as in the Whitlam government). Without entering into the specific merits of the Whitlam case, the power to dismiss government, to exercise military force to do so and restore the peace, including declarations of States of Emergency, are all examples of Executive reserve powers. At an operational level, this power includes the overseer 'watchdog' function of the operation of the Legislature itself.

This goes a long way in explaining the significance of the debate on the inclusion or exclusion of 'God' in our proposed Constitutional amendments is all about. Typically, the notion of appeal to the Judicature seeking redress is no option because it includes high costs and no guarantee of either success or adequate remedy. Equally, the Legislature provides no solace for the afflicted citizen, seemingly (but in reality not so) powerless to do anything. I will now explain this point.

The carving up of those Executive powers has caused great confusion amongst those whistleblowers seeking some higher justice to their cause.

In the 'gattling gun' approach, a whistleblower will 'do the rounds' of various agencies seeking higher justice. They will go to the Ombudsman, ICAC, the AAT, the Courts, their politicians and ultimately the media, or seek self-help remedies, sometimes violently so. [Note WBA does not support violence. Ed.]

Unwittingly at first, they will gravitate almost instinctively to the Executive branches of Government, usually the Ombudsman or ICAC. The more common reason is that of cost and the inexperience of people in it. Litigation is very expensive and the risk of failure is high. Litigation also places them directly in the firing line as a party and/or witness to proceedings. This is markedly uncomfortable to the whistleblower who reaches for the relative ease of supplying information to another agency and letting them do the work. It is also cheaper.

However, the frustration that ensues when statutory limitations and burden of proof issues causes great anxiety amongst whistleblowers. At first instance, they are unaware of the jurisdictional issues, including the operation of these bodies in their Executive role. They are equally

blissfully unaware of res judicata issues which may contaminate their cause.

Worse still, many whistleblowers turn to the media, further potentially contaminating their cause before its time, if the matter is sub judiciare giving the other side grounds of objection for the applicant or plaintiff 'blabbing' to the press in the course of litigation. Whilst at times this may give therapeutic relief, it may also deny the aggrieved person their 'day in court', including any just remedies owed to them. It is a two-edged sword.

Carving up Executive Power

The gist of this paper is to highlight the carving up of Executive power amongst the various agencies and how to navigate oneself around such limitations.

Careful case management is required. It is not sufficient to simply 'blab to everyone' hoping that enough mud will stick. This approach simply creates a culture of scepticism and cynicism amongst those agencies charged with responsibility of administering those complaints - it diminishes the credibility of both the informant and the cause.

The solution is to clearly identify which power it is that will achieve the desired result. This is very akin to the legal question of jurisdiction that faces every potential litigant:

Which jurisdiction do I choose?

Any single set of facts may typically generate several causes of action in separate jurisdictions. A personal injury matter, for example, may simultaneously give rise to:

1. Criminal proceedings.

2. Civil proceedings, including:
a. Compulsory Third Party claim
b. Worker's Compensation
c. Common law claims, including tort

3. Law of quasi-contract (restitution) etc.

In similar fashion, care should be exercised in the choosing the proper 'Executive jurisdiction'. I use the term 'executive jurisdiction' as a corollary to the concept that the Executive, like the judiciary, is split up among a complicated hierarchy of institutions who share widely differing powers and executive remedies.

The trick - "Keep your eye on the ball" - Who does what?

When commencing an action, ask yourself the following questions:

- **WHAT** powers do I want exercised?
- **WHAT** do I hope to achieve?
- **WHAT** remedies do I seek?

Simple questions, but profound in their implications.

It has been the writer's observation that the decline in the little republics and the consumption of the Executive into the Legislature has resulted in

the demise of remedies, or ports of entry, to Executive power. In some cases, certain Executive powers have evaporated completely.

An example

One example is now given for the purpose of clarity. The Environmental Protection Operations Act (EPOA) repealed the Environmental Offences and Penalties Act 1989 (EOPA) by scheduling the latter Act in Schedule 3.

Section 24 of the EOPA states that:

"(1) This section applies to a public body, being:
a) the council of a local government area; or
b) a county council of a county district; or
c) any other public body

(1) If, in the opinion of the Governor, the environment is harmed or is likely to be harmed because of (a) the failure or refusal of a public body to which this section applies to exercise a function conferred or imposed on the body by or under an Act; or (b) the manner in which the body exercises a function, the Governor may, by proclamation, appoint another person to exercise such functions of the body as a specified in the proclamation".

Interesting questions arise on this provision. Did the Governor hold this power purely by virtue of the Statute? Prior to the enactment of the EOPA, did the Governor hold by virtue of his Executive Office, the power to make such proclamation? Following repeal of the EOPA, does the Governor continue to hold this power at common law?

Put another way, is the Governor's power directly limited to the whim of the Legislature through the passing of statute? I leave this question open as a moot point.

Back on the issue of Executive power, and choice of jurisdiction, there is one avenue that was squarely the subject matter of the Balmain meeting referred to above. That is Parliament itself.

It is not too trite an observation that, for all practical intents and purposes, the Legislature has become the Executive. More particularly, the Cabinet has become the Executive, effectively reducing the Governor's Presidential role to all but the most mundane ceremonial responsibilities.

Therefore, the questions put in print at the Balmain meeting are very relevant. For this reason, the writer squarely raised the issue of Parliamentary Instruments at the Balmain meeting, including the following remedies available to aggrieved persons:

1. Questions on notice
2. Questions without notice
3. Adjournment debate speeches
4. Estimates Committee questions
5. House Inquiries
6. Examinations
7. Legal powers under Constitutional Convention and precedent to issue Court Process instruments such as subpoena, discovery and other instruments

As the writer notes, reference is again made to our cultural legacy of England, specifically the Executive role of the Privy Council. The Privy

Council is part of the English Court Appeal structure, and was for a majority of Australia's history, part of our appeal structure as well. Appeal to the Privy Council in Australia is now effectively abolished, but it is worth remembering what function it served.

When the right of appeal to the Privy Council was abolished, Australians lost a serious right of appeal ***THROUGH the Judiciary TO the Executive***. In the act of abolishing this right of appeal, in the conduct of a **privative** matter, there is **NO** redress for the act of either the Legislature (through the enactment of the 'rules of the game' under which the person gains or loses rights), or the role of the Judicature (through the issue of whether justice was actually done in light of higher public interest matters). Hence, the people are left ultimately powerless at the hands of the Judicature and Legislature who sway in preference to the powerful vested interests who dominate our current political arena. The Legislature and Judicature are increasingly influenced, if not totally influenced, by the 'national interest', which is synonymous with firstly, the activities of Government, acting in a privative way (the real consequence of privatisation) and secondly the powerful vested interests of big business.

It is the equivalent of the Senate adjudicating as a *tribunal of law and fact*, sitting **higher** than the High Court. This is anathema to the current legal appeals structure in Australia. However, this Executive function is totally absent in Australia. Put another way, the highest appeal body against the Legislature's bestowal of powers, and the administration thereof, is the Judicature (namely, the High Court of Australia).

This is why the Judicature, in the High Court, is often criticised as being 'higher' than the Legislature in decisions such as Mabo. This is because the public resent such application of powers without appeal in the hands of the High Court of Australia. That is not to say the Judicature simply assumes the Privy Council's role. Rather, it is a case of 'gap analysis': i.e. where this Executive 'Privy Council' role lies in Australia. The writer submits this role is entirely absent in Australia at present, or at best, only trace elements of it exist in the processes and procedures of our State and Commonwealth Legislatures.

The Privy Council, as agency of the Executive, has no equivalent in Australia. It has been forgotten, lost in antiquity. The Executive function has been squeezed out of the equation, with power of the Executive being carved up between the Legislature and the Judicature.

So what is the remedy here?

The answer lies in those Parliamentary procedural remedies listed above. If we must accept (for the time being) that the bulk of relevant Executive powers are nestled and hidden with in the bowels of Parliamentary process itself, then are these not the logical place to first turn?

I compare this course of action to the problematic and constraining options of other branches of Executive review, such the ICAC and the Ombudsman. These two institutions do not represent the totality of Executive power. In fact, they represent a very small portion of Executive power.

Turning to the people (media) is also problematic, for the public reaction to a problem does not necessarily represent authority in dealing judiciously or ethically with the problem. In many ways, it is tantamount to scandalising the issue in order to seek an outcome.

Scandalising in turn does not lead to good government. It is a barometer of the level of good government as to whether issues, when they arise, can be dealt with responsibly and in conformance with the rule of law, based on natural justice and in turn, vested with the authority that only a truly independent Executive can administer.

The simple answer to this complex question is to make full and accurate use of Executive power wherever it is found. This includes Parliamentary process itself. Corporatisation and Privatisation of Government entities now make the operation of Executive powers such as the Freedom of Information Act impotent, claiming privity. Therefore, other Executive powers need to be sought elsewhere to achieve the same rights that are conspicuously taken away by the act of corporatisation and privatisation, including the right to access of information. More disturbingly, it is government agencies acting on behalf of the Legislature in a privative way that is the source of much difficulty.

The threat is more than real, it is actual. That is, unless we act immediately to arrest the demise of the Executive in the hands of the Legislature and Judicature, we stand to lose more than we realise. Looking at the demographic mix of those present at Balmain, it is an admixture of people whose conscious minds are aware of those anomalies and seek to redress wrongs. But for the majority or 'great unwashed', they live in blissful ignorance of the forces at play around them. They do not care for the implications until it affects them directly. This is precisely how government is managed in Australia, playing on the majority notion of banal self-interest and ignorance of process. Often, finding out what to do, takes too long and is too little, too late.

Perhaps there is no other way than 'all arms tactics'. However, those who are hurting from the effects of the demise of Executive power know the high cost of such a demise. For the majority of them, it is life destroying, in many cases literally life destroying. Ignoring the issues is a great **injustice**, ('justice' meaning to bear your brother's and sister's burden). If we as a society have been unjust, it is for us to redress that wrong, not ignore it. I clearly think of Chelmsford as I write this. There are literally thousands of situations, as Kevin Rozzoli so aptly pointed out at Balmain, that fall into this category.

The paramount role of education

The real remedies are education: education of our people in their rights coupled with a better understanding of our processes. Gap analysis is the term to describe the Section 27 EOPA situation above, where gaps occur as a result of discrete elimination of rights at the hands of the public and by the hands of the Legislature. Selective amnesia sets in, as the laws of our land are forgotten of certain responsibilities. Several speakers and participators at the Balmain conference observed this point.

The role of education is paramount. It is also beyond the scope of this paper to deal with the systematic and deliberate disempowerment of people in depriving them knowledge and the capacity of cognitive reason. Germain Greer and many others have noted these '1984' Orwellian phenomena. The secret lies in procreation; the procreative function of man and woman, the role of parenting and the systematic attack on the family unit, again at the conspicuous hands of the Legislature in laws such as:

1. Family law
2. Children law

3. Child Support law
4. Marriage and de facto law
5. Education law, including powers against corporal punishment
6. Abuse of UN Conventions

Simply put, the stripping away of the immediate rights of parents to have care and control over their children is the subject of an increased role of the State through violation of the parenting function, or what is called 'the law of the bedroom'. This law used to be sacrosanct. There was a policy that denied the legal system interfering with the conjugal rights of spouses. Those days are history at the present time. The result is to systematically deny the procreative powers of parents, weakening them and denying them power over their own children, again in favour of powers of the State. State education laws then parade the "failure" of parents to be parents in the procreative function to educate. It is all too common for teachers in State and so-called private schools to proudly parade that they are the only 'parenting' many children receive. What is not being said, is that the family unit has been systematically decimated by intrusive State and Federal legislation in deliberate conspiracy over many years. The remedy here would be the repeal of many laws and fortification of family rights ***as of right***, through the de-statutisation of many powers that force rights into the hands of the State.

The drift towards dictatorship

The drift towards dictatorship and away from democracy is thus initiated if this trend is not arrested and the presidential, executive functions not restored independently of the Legislature.

It is put to Whistleblowers, that education on the full gamut of powers available to the various groups and persons that join with them be made a priority. Instruction of the community is a first priority. Otherwise, we fall into the Orwellian notion that 'Ignorance is strength'.

Anonymous author (name supplied). Submitted to promote member discussion and response. Please forward comments to The Editor, The Whistle, 7-A Campbell St., Balmain 2041.

Beneath the underdog & the underdog bites back. A personal bitch from the editor

The editorial baton has been passed on from Brian Martin to me (Robert Taylor, Secretary-WBA-NSW Branch). Since mid-1995 I have been a whistleblower in my (then) position of Co-ordinator-Actuarial Unit, WorkCover NSW. I was concerned that I would be scapegoated over the insolvency of the WorkCover Scheme and after seeking advice from the St James Ethics Centre made my decision to report my allegations of waste to the NSW Auditor-General and my allegations of corruption to the ICAC.

I was not scapegoated however my position of employment was made to be untenable. WorkCover NSW has overseen the NSW workers' compensation insurance scheme report losses of $2,470 million over the period 1994 to June 1998 (refer to Auditor General Report to Parliament 1998 Vol. 3, Part 2, especially pages 400 to 402 and 406 to 410). The WorkCover Scheme losses over the 4 years 1994 to 30/6/98 are equivalent to the Sydney Olympic Games infrastructure cost. Alternately

losses of $2,470 million are equivalent to the total annual costs for ten years for a major teaching hospital (eg RNSH at around $250 million pa). The WorkCover Scheme generated losses of $886 million over the twelve months to 30/6/98 (refer to WorkCover 1997/98 Annual Report page 117 etc.).

My experience confirms other whistleblower complaints that ICAC remains a 'black hole' repository of whistleblower allegations. In the 1997/98 ICAC Annual Report a case is made for additional funding, however many whistleblowers believe that funds could be better applied to funding the other investigation agencies.

Difficulties associated with the large volume of complaints received by the NSW Ombudsman make it advisable for whistleblowers to refer to the Act (and WBA) before lodging protected disclosures. The Office of the NSW Ombudsman has been known to permit reports of protected disclosures of mismanagement to slip through the net and not be investigated. Matters of the Ombudsman's jurisdiction and issues of 'form' of the disclosure, and even bad luck in the allocation of the investigator, can cause your disclosure to be ignored. Note that you do not get a second chance to have your report investigated if your original disclosure is not accepted.

The NSW Audit-Office provides for high level staff to accept reports of protected disclosures regarding serious and substantial waste, however the A-G is handicapped by the legislative requirement to conduct formal investigations of complaints (at a cost of around $150,000 per investigation). Consequently the budgetary constraints on the NSW Audit-Office mean that few investigations occur. The A-G is generally only able to act by issuing qualified audit reports to the financial statements of the agency. Unless politicians or the media are intent on exposing waste, qualified audit reports to the financial statements of an agency are of limited use in stopping waste. Too often severe warnings by the A-G are effectively ignored (eg WorkCover Statutory Funds financial statement to 30/6/95) where the A-G warned of the insolvency of the WorkCover Scheme. On 20/2/96 (W/C WorkCover Statutory Funds financial statements to 30/6/95, page 2) AC Harris, NSW Auditor-General qualified the accounts with several statements including drawing attention to the departure from AAS6 (Australian accounting standard). The Auditor-General went onto state: "If a similar level of prudential margin, to that first adopted in 1994, was recognised in the 1995 financial statements, the claims provision and the deficiency of income over expenditure would increase by $489 million to $3,940 million and $811 million respectively and the accumulated funds would decrease by the same amount to a deficit of $432 million". The NSW Parliament did not act effectively on this warning. Despite benefit reductions of 25% in permanent injury compensation & premium increases of 56%, the asset backing for claims of injured workers in the NSW WorkCover Scheme has collapsed from $1.11 at 30/6/94 to $0.77 at 30/6/98. Scheme assets can pay only three-quarters of claim entitlements. Are the representatives you elected on 27/3/99 displaying the required level of diligence to protect the public interest? I urge you to check.

I believe the main function of The Whistle is to disseminate information to ensure that the underdogs can bite back effectively. If members are to shed the under-dog status then the current generation of whistleblowers must not repeat mistakes that have undone past whistleblowers. To sustain the column "Beneath the underdog and the under-dog bites back" in future editions of The Whistle I urge you to submit newspaper articles,

legal decisions, personal experiences, support or gaffes from politicians, academic journal articles, internet references, original opinions, first hand advice and humorous asides. Ideally submissions should be concise (say 300 words; note that one full page of The Whistle represents around 1000 words & articles ideally should not exceed 3,000 words). We encourage readers to submit more extensive original articles or properly referenced published material to be published in The Whistle (Balmain address or Fax.: 02 9804 8857. Relevant topics for contributions might include:

1. whistleblower protection.
2. ICAC & investigative agencies.
3. OHS matters & workplace bullying, retribution, victimisation and harrying.
4. legal remedies. (Dr Max Spry argues that workers' compensation remains as the most effective form of legal redress for workplace harassment/whistleblowers. Refer to Max Spry articles in the Australian Journal of Labour Law 8/97 Vol. 10 No. 2, Australian Journal of Industrial Relations Vol. 40 No. 2, pages 232 to 246.)
5. workplace privacy (eg telephone call monitoring & video surveillance).
6. success stories illustrating the triumph of perseverance over adversity.

"Beneath the underdog" is one of the turns of phrase used by Charles Mingus, a US jazz bassist, referring to the discrimination of recording companies against black American musicians in the 1960's. Mingus speak can also be rephrased into:

"If Barry O'Keefe was a gun-totin' bird there'd be a whole lot of vindicated whistleblowers hanging around".

[Article by Tom Molomby, "Could Monica Lewinsky & Linda Tripp do it here?", *Law Society Journal,* March 1998, Vol. 36 No. 2, is not available here.]

ETHICS, ACTUARIES (AND ROBOTS)

A paper presented by Ian Robinson FIA FIAA ASIA ASA to the October 1998 sessional meeting of the Institute of Actuaries Australia. Extract from appendices D & K, pages 102 to 104, and 107.

WHISTLEBLOWING

- ***Common Objections to Whistleblowing***

The following objections (which will vary in strength depending upon the circumstances) have been made of whistleblowing and the informant should be prepared to respond to each of them before proceeding:

- It is informing, perhaps on professional colleagues, peers and mates, destroying trust and friendships in the workplace and profession;
- It involves disclosure of private corporate information without authorisation;
- It might unjustifiably destroy the organisation and the jobs of colleagues;

- The person might not be in the best position to judge if the public interest will be served by disclosure
- It breaks an employee contract with the employer or adviser contract with client; and
- An employee has a duty only to report concerns to superiors, not to rectify the problem personally.

In regards to the possibility of retribution Grace & Cohen (Grace, D & Cohen, S [1995] Business Ethics - Australian problems and cases. Oxford University Press, ISBN 0-19-553738-6) suggest, inter alia, that

"ideally there should be procedures and mechanisms for dealing with genuine concerns within an organisation, so as to minimise the need for heroism with its attendant risks and disincentives."

Seymour (Seymour, S [1988] The Case of the Wilful Whistle-Blower. Harvard Business Review, Jan-Feb 1988) suggests organisations usually react in one of two ways: respond to the message and ignore the messenger, or to avoid the message and, instead, shoot the messenger. Both reactions are wrong.

"Channels of communication are very important. ... Whistleblowers perceive themselves as going out on a limb - the worst thing to do is to cut them off. "

The organisation may also put the employee under immense psychological pressure, particularly if it has something to hide. The sheer struggle to have the truth recognised and accepted in the face of official denials can make them obsessive or appear to be so.

- ***Whistleblowing Criteria***

The action of whistleblowing should meet each of the following criteria:

- The matter has to be serious: the informant should have good evidence of potential harm to public interest; the evidence should be documented; the potential harm should be imminent and specific.
- The information has to be of public benefit: the public must have the right to know; the information should not be mischievous or malicious.
- Less damaging avenues for rectifying the problem: are not available; have been fully explored; and
- Blowing the whistle is likely to remedy the problem: good probability that going public will bring about change for the better.

The criteria are based on the twin notions that the public interest is threatened by the organisation's policy or procedure and the employee has tried to rectify through normal lines of responsibility and management.

If these criteria are met then the employee is considered by Grace & Cohen to have the to blow the whistle. Some argue that the employee has an *obligation* to do so but one must recognise the real possibility of resultant personal hardship to the employee, including retribution (but as we noted earlier, ethical decisions usually involve a personal sacrifice) any event, the means used should be proportional to the end to be achieved.

"Whistleblowing is, on the whole, a grey area. It is important to be aware of the conditions of its justification, but it is equally important not to be

beguiled into believing that the term names a clear, identifiable type of conduct which can be used as a template for resolving moral conflicts in the workplace. ... The good to be achieved by whistleblowing should be in proportion to the gravity of the act."

Some Cautions are Warranted

Nonetheless, the following cautions are offered by Grace & Cohen (in turn citing Robert Weber, 'Whistleblowing', Executive Excellence, July 1990):

1. Verify your evidence. Is it sufficient?

2. Are you objecting to illegal or immoral conduct? If the conduct is morally objectionable but legal, you might not have a future in the industry. Illegal conduct is not as likely to damage your career.

3. Discuss your proposed action with close stakeholders, namely, your family. They will be affected by what you do.

4. Exhaust organisational procedures for dealing with complaints and objections.

5. Consider whether it is better to act publicly or anonymously.

6. Document every action you take.

7. Don't spread your heat: keep the objection confined to those who need to deal with it, and be civil to those handling it.

8. If you are fired you may resort to publicity, but recognise that your right to free public discussion might be limited.

9. Consider a lawsuit.

10. Appreciate that your hands will get dirty whatever you do about unethical conduct.

Grace & Cohen offer the additional general caution that:

"Apart from the personal risks involved, it amounts to placing an individual judgement above that of the organisation, and forsaking the duty (sometimes a fiduciary duty) which an employee owes to an organisation. "

The employee should also understand whether the imperative to blow the whistle is for moral reasons or perhaps revenge (particularly if triggered after being sacked), not because the latter imperative is not legitimate (subject to criteria above being met), but because the employee's credibility may be affected.

Loyalty to colleagues should not override serious issues of immoral conduct -the question to be asked then is whether the silence of others can be excused. Loyalty should be seen as an emotion issue, not as a moral issue.

ETHICS CENTRES AND LEARNING

- *The St James Ethics Centre* - founded in 1989 by St James Anglican Church and incorporated in 1990. It is an independent non-profit, non-political organisation that provides a forum for the promotion of business and professional ethics.

It provides consultancy services (for example, assistance in drafting a code of conduct), a free counselling service for people who encounter an ethical dilemma and seek assistance for its resolution, other support to individual professionals, learning programmes for current and future leaders, as well as awards to people who have demonstrated leadership and moral courage. Worth noting is that the Centre has representatives on a number of corporate and professional ethics or disciplinary committees.

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- *Australian Association for Professional and Applied Ethics - formed* 1993 out of conference of academics and professionals from many different backgrounds. Its aim are to encourage awareness of applied ethics as a significant area of concern, to foster discussion of issues in applied ethics, and to foster and maintain lines with special interest groups. Each year it holds a conference.

It can be found in the Internet at http://www.arts.unsw.edu.au/aapac/

The author is aware that ethics is taught at the *Graduate School* of *Business at the University* of *Sydney* and *The University* of *New South Wales* (and no doubt at other universities an colleges).

The latter in fact offers the course Graduate Diploma in Professional Ethics which can be completed in one or two years of evening or distance learning. Details can be found a
http://www.arts.unsw.edu.au/philosophy/pg.htm

Quotations to vindicate and empower public interest whistleblowers

If every day a man takes orders in silence from an incompetent superior, if every day he solemnly performs ritual acts which he privately finds ridiculous, if he unhesitatingly gives answers to questionnaires which are contrary to his real opinions and is prepared to deny his own self in public, if he sees no difficulty in feigning sympathy or even affection where, in fact, he feels only indifference or aversion, it still does not mean that he has entirely lost the use of one of the basic human senses, namely, the sense of *humiliation*. **Václav Havel** (b. 1936), Czech playwright, president. *Living in Truth,* pt. 1, "Letter to Dr. Gustáv Husák," 8 April 1975 (1986).

Conscience is the inner voice which warns us that someone may be looking. **H. L. Mencken** (1880 - 1956), U.S. journalist. *A Mencken Chrestomathy,* "Sententiæ: The Mind of Men" (1914).

A hypocrite despises those whom he deceives, but has no respect for himself. He would make a dupe of himself too, if he could. **William Hazlitt** (1778 - 1830), English essayist. *Characteristics: In the Manner of*

Rochefoucault's Maxims, no. 398 (1823; repr. in *The Complete Works of William Hazlitt,* vol. 9, ed. PP Howe, 1932).

Democracy substitutes election by the incompetent many for appointment by the corrupt few. **George Bernard Shaw** (1856 - 1950), Anglo-Irish playwright, critic. *Man and Superman,* "Maxims for Revolutionists" (1903).

You ask can we ever trust the Bear? . . . I will give you several answers at once. The first is no, we can never trust the Bear. For one reason, the Bear doesn't trust himself. The Bear is threatened and the Bear is frightened and the Bear is falling apart. The Bear is disgusted with his past, sick of his present and scared stiff of his future. He often was. The Bear is broke, lazy, volatile, incompetent, slippery, dangerously proud, dangerously armed, sometimes brilliant, often ignorant. Without his claws, he'd be just another chaotic member of the Third World. . . . The second answer is yes, we can trust the Bear completely. The Bear has never been so trustworthy. The Bear is begging to be part of us, to submerge his problems in us, to have his own bank account with us, to shop in our High Street and be accepted as a dignified member of our forest as well as his. . . . The Bear needs us so desperately that we may safely trust him to need us. **John Le Carré** (b. 1931), British novelist. Smiley, in *The Secret Pilgrim,* ch. 12 (1990).

The doctrine of blind obedience and unqualified submission to any human power, whether civil or ecclesiastical, is the doctrine of despotism, and ought to have no place 'mong Republicans and Christians. **Angelina Grimké** (1805 - 79), U.S. abolitionist, feminist. "Appeal to the Christian Women of the South," in *Anti-Slavery Examiner* (Sept. 1836; repr. in *The Oven Birds: American Women on Womanhood 1820 - 1920,* ed. by Gail Parker, 1972).

We are like horses who hurt themselves as soon as they pull on their bits - and we bow our heads. We even lose consciousness of the situation, we just submit. Any re-awakening of thought is then painful. **Simone Weil** (1909 - 43), French philosopher, mystic. *Factory Journal* (1934 - 35; repr. in *La Condition Ouvrière,* 1951).

Oppression that is clearly inexorable and invincible does not give rise to revolt but to submission. **Simone Weil** (1909 - 43), French philosopher, mystic. *Factory Journal,* "The Mystery of the Factory" (1934 - 35; repr. in *La Condition Ouvrière,* 1951).

You take a number of small steps which you believe are right, thinking maybe tomorrow somebody will treat this as a dangerous provocation. And then you wait. If there is no reaction, you take another step: courage is only an accumulation of small steps. **George Konrád** (b. 1933), Hungarian writer, politician. *Sunday Correspondent* (London, 15 April 1990), on surviving as a writer in Communist Hungary.

A wise man hears one word and understands two. **Yiddish Proverb**.

May we never confuse honest dissent with disloyal subversion. **Dwight D. Eisenhower** (1890 - 1969), U.S. general, Republican politician, president. Speech, 31 May 1954, New York City.

First we kill all the subversives; then, their collaborators; later, those who sympathize with them; afterward, those who remain indifferent; and finally, the undecided. **General Iberico Saint Jean**, Argentinian soldier, politician. Quoted in: *Boletin de las Madres de Plaza de Mayo,* vol. 1, no. 6 (May

1985; repr. in Robin Morgan, *The Demon Lover,* ch. 4, 1989). General Iberico Saint Jean was governor of the province of Buenos Aires during the military rule in Argentina.

If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle. **Sun Tzu** (6th - 5th century B.C.), Chinese general. *The Art of War,* ch. 3, Axiom 18 (c. 490 B.C., ed. by James Clavell, 1981).

The more characteristic American hero in the earlier day, and the more beloved type at all times, was not the hustler but the whittler. **Mark Sullivan** (1874 - 1952), U.S. journalist and historian. *Our Times: The United States, 1900 - 1925,* vol. 3, ch. 9 (1930).

If a person tells me he has been to the worst places I have no reason to judge him; but if he tells me it was his superior wisdom that enabled him to go there, then I know he is a fraud. **Ludwig Wittgenstein** (1889 - 1951), Austrian philosopher. Conversation, 1930 (published in *Personal Recollections,* ch. 6, ed. by Rush Rhees, 1981).

Censorship is never over for those who have experienced it. It is a brand on the imagination that affects the individual who has suffered it, forever. **Nadine Gordimer** (b. 1923), South African author. "Censorship and its Aftermath," address, June 1990, to the international Writer's Day conference, London (published in *Index on Censorship,* Aug. 1990).

Don't join the book burners. Don't think you are going to conceal faults by concealing evidence that they ever existed. **Dwight D. Eisenhower** (1890 - 1969), U.S. general, Republican politician, president. Speech, 14 June 1953, Dartmouth College.

An expert is a man who has made all the mistakes which can be made in a very narrow field. **Niels Bohr** (1885 - 1962), Danish physicist. Quoted in: Alan Mackay, *The Harvest of a Quiet Eye* (1977).

It is surely a matter of common observation that a man who knows no one thing intimately has no views worth hearing on things in general. The farmer philosophizes in terms of crops, soils, markets, and implements, the mechanic generalizes his experiences of wood and iron, the seaman reaches similar conclusions by his own special road; and if the scholar keeps pace with these it must be by an equally virile productivity. **Charles Horton Cooley** (1864 - 1929), U.S. sociologist. *Human Nature and the Social Order,* ch. 4 (New York, 1902).

Whistleblowers Australia Inc. Regional Contact points

New South Wales: "Caring & Sharing" meetings, we listen to your story, provide feedback and possibly guidance for your next few steps. Held every Tuesday night 7:30 p.m., Presbyterian Church Hall 7-A Campbell St., Balmain 2041. **General meetings** held in the Church Hall on the first Sunday in the month commencing at 1:30 p.m. (or come at 12 noon for lunch and discussion. **Contacts:** Cynthia Kardell, Tel./Fax. 02 9484 6895, or messages Tel. 02 9810 9468; Fax 02 9555 6268.

Goulburn: Rob Cumming, Tel. 018 483 155. **Wollongong:** Brian Martin Tel. 02 4221 3763. **Relevant web site:** http://www.uow.edu.au/arts/sts/bmartin/dissent/

Queensland Contacts: Feliks Perera, National Treasurer, 1/31 Jarnahill Drive, Mt. Coolum Qld 4573. Tel./Fax. 07 5471 7659. Also Whistleblowers Action Group contact: Greg McMahon, Tel. 07 3378 7232 (a/h).

South Australian Contacts: Jack King, Tel. 08 8278 7853; John Pezy Tel. 08 8337 8912.

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