

WHISTLEBLOWING BEST PRACTICES



Bisi Adeyemi
Managing Director, DCSL Corporate Services Limited

Over the years and across different regions all over the world, statutory, common-law, regulations, and best practice provisions have evolved towards defining the right mechanism for whistleblowing. Whistleblowing is generally defined as the disclosure by members of an organization (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action. Within the corporate context, whistleblowing is the disclosure of information by an employee or any stakeholder who alleges willful misconduct carried out by an individual or group of individuals within the organization.

Whistleblowing typically has the following elements:

- The whistleblower is a member or former member of an organization and not typically an outsider.
- The information that is revealed by the whistleblower is non-public information.
- The information concerns some significant misconduct by the organization or some of its members.
- The information is revealed outside of the normal channels of corporate communication within an organization.
- The information is revealed voluntarily and not compelled by a legal mandate.
- The information is revealed as a moral protest or with an aim to correcting some perceived wrong.

Whistleblowing took center stage across the world in economies and politics during the early 2000s. As a testament to the significance of whistleblowing, Time Magazine named three whistleblowers as its people of the year ENRON's Sherron Watkins, WorldCom's Cynthia Cooper, and the FBI's Colleen Rowley. Each in similar circumstances was faced with challenges regarding calling out the detrimental actions of her superiors to their respective organizations. Having experienced the futility of exploring corporate channels within their organizations, they went outside to blow the whistle.

A whistleblowing mechanism is a useful tool for business leaders as it reduces risk by enhancing ethical conduct. A safe reporting system allows free flow of information on organisational wrongdoing. The absence of such a system obliges employees to report wrongdoing through the regular communication channels outside the organization (including law enforcement agents and the press), which could have negative consequences for the organization.

To ensure organizational wrongdoing is exposed, much attention has been paid to processes that support, strengthen and protect the whistleblower. This includes legislative frameworks developed to define the limits within which the whistleblower

must operate in order to enjoy legal protection. Generally, international best practice requires the companies to establish whistleblowing guidelines with the objective of calling the attention of internal or external authorities to investigating allegations and rectifying the situation where necessary.

However, it would appear that much more is required to protect whistleblowers and encourage even more people to call out bad behavior. Despite their noble intentions, whistleblowers are still subjected to pejorative, implicit and very often explicit labels pertaining to their "deviant" actions. They are, moreover, often severely traumatised, and suffer huge material and relational losses. There is thus a need to shift towards institutionalizing whistleblowing. This will entail a deliberate adoption of ethical organizational culture that ensures illegal or unethical conduct is dealt with internally by means of established policies, procedures and structures on a routinized basis (Uys and Senekal, 2008).

Disclosures resulting from whistleblowing are to be treated in a confidential manner with the identity of the whistle-blower kept confidential unless otherwise desired. Leadership should ensure the effectiveness of its whistleblowing mechanism and continually affirm publicly, its support for and commitment to the company's whistle-blower protection mechanism.

The content of a whistle-blowing policy or "speak up policy" may include additional sector-specific legal requirements and unique industry practices. An effective whistleblowing policy should set out the objectives of the policy and emphasize that the organization's interest in the disclosure of unethical conduct is beyond regulatory compliance. It should clearly state the organization's intention to encourage and enable stakeholders raise serious concerns within, rather than ignoring a problem or 'blowing the whistle' outside especially to the press. The policy must clearly define its scope and those to whom it applies – which typically would be staff, shareholders, customers/clients, suppliers and other stakeholders.

It is also a useful practice to describe the kind of information the company desires to be disclosed. Whilst disclosures often relate to financial information such as fraud, embezzlement and misappropriation, a whistleblower can disclose any information related to a violation or suspected violation of any law or internal policy connected with the business of the company, its employees or stakeholders. The policy should encourage disclosure of concerns that could have a significant impact on the organization - such that it is differentiated from routine feedback and grievance channels available to employees. The whistleblowing policy could be linked to the company's code of conduct and cover serious code violation. The code of conduct should provide examples of possible breaches of the code of conduct and guide employees on how they should evaluate whether an act (or inaction) constitutes code violation.

A confidential reporting system is a mechanism whereby any member of the organisation can report any perceived wrongdoing within the organisation, without fear of victimisation. Reporting wrongdoing, therefore, becomes legitimate. It is essential that whistleblowers follow the safe reporting procedure of their employers in order to claim protection against victimisation, unless the whistleblower has reason to believe that the safe reporting system is inadequate.

The main objective of a safe reporting system is, therefore, to provide a safe avenue through which suspicions of unethical or illegal conduct can be raised. For such a system to be effective, a number of preconditions should be in place. These include the following:

- The information that is disclosed should be handled confidentially, and the anonymity of employees should be protected as far as possible.
- The reporting system should be complemented by a due process of investigation. Such investigation should be conducted in an inconspicuous manner to avoid suspicion, rumours, and embarrassment to employees and the accused person before hard evidence has been obtained.

- Rewarding employees whose reports of suspicious behaviour turn out to be true should be handled circumspectly. A reward system can easily be perceived as encouragement of employees to spy on one another, and should only be used if it is considered essential to the success of the safe reporting system

A safe reporting system is only viable if there is a high level of internal trust within the organization. If not, the reporting system is likely to come under suspicion and be abused for malicious purposes. The major benefits of such a system could be the following:

- Ensuring that concerns about wrongdoing in the workplace are properly raised and addressed;
- Promoting the whistleblower as a witness and not as a complainant;
- Reassuring workers with genuine concerns that there is a safe alternative to silence; and
- Helping everyone separate the message from the messenger.

One element of a safe reporting system is usually the outsourcing of the reporting channel to an independent entity that runs an off-premises call center facility. The outsourced entity then gathers the information and provides the organization with anonymous incident reports. These hotlines have become quite sophisticated over the years and have significantly encouraged more employees to blow the whistle. While outsourcing the whistleblowing apparatus typically guarantees anonymity, confidentiality, independence and effectiveness, it should not however substitute the oversight role of the Board.

A whistleblowing policy should provide details of internal and/or external persons to whom disclosure may be made. The team responsible for managing disclosures obtained through the whistleblowing mechanism should provide the Audit Committee or other designated Committee with a summary of reported cases, cases investigated, the process of investigation and the results of the investigations.

The team may comprise internal persons such as line managers, the Managing Director/Chief Executive Officer, Head of Human Resources, internal audit, Company Secretary or Legal Counsel, designated Ethics Officer, Audit Committee Chairman. Line management is generally perceived as less independent and as such the policy team should be composed of only persons who are likely to be more independent of management.

As a complement to the anonymous hotline, email, or mailbox, employees who could act as whistleblowing champions should be identified. These employees should be sufficiently senior to handle disclosures in an appropriate manner and should enjoy sufficient confidence from a large group of employees, so that they will be prepared to raise concerns about organizational wrongdoing with them. It is often beneficial to use retired senior staff as whistleblowing champions.

It is not recommended that the whistleblowing policy prohibits employees from raising concerns to external parties, such as the regulatory bodies but should encourage stakeholders to exhaust internal reporting procedure prior to external communication. The policy should not be an attempt by the organization to circumvent disclosures to regulatory bodies, as such disclosure to the appropriate authorities may be justified in certain cases.

The policy should require giving the company the opportunity to investigate the complaint whilst allowing the use of an external reporting mechanism where the whistle-blower is of the view that the complaint is best handled externally. The report must be made in good faith and not for the purpose of personal gain.

The policy should also be designed to ensure that concerns can be raised about wrongdoing or malpractice within the company without fear of victimization and reprisal in any form. The Board should pay keen attention to the treatment of whistleblowers and ensure that no whistleblower is

subject to any detriment on the grounds that he/she has made a disclosure. Where a whistleblower has been subjected to any detriment, he may present a complaint to the Board and/or regulators and may be entitled to compensation and/or reinstatement as appropriate.

The policy should clearly detail sanctions for those found to have taken reprisal actions or victimized the whistleblower. Whilst discouraging malicious allegations by prescribing disciplinary action for such, it should be emphasized that complaints made in good faith and with reasonable belief will not result in disciplinary action.

Acknowledging the receipt of a disclosure of the identity of the whistleblower disclosed provides comfort that the issue is taken seriously internally



and forestalls escalating the concerns externally. Investigation and confidentiality should be assured and the whistleblower should be informed of the progress and outcome of the investigations.

Anonymous reporting should not be prohibited or disregarded. The policy should state that concerns expressed anonymously will be investigated with consideration given to the seriousness of the issue raised, the credibility of the concern and the likelihood of confirming the allegation from other sources.

The whistleblowing policy should be widely disseminated to relevant persons covered by the policy. This may include posting the policy on notice boards, including the policy in the employee handbook and in particular on the company website.

Periodic information sessions should also be used to communicate Management's commitment to the policy.

Whistleblowing does not only have the capacity to eliminate wrongdoing but can also bring rewarding effects to both the organization and the employee. It plays a critical role in enthroning good corporate governance practices and organizational growth. A whistleblowing policy is a useful tool for a company's leadership to actualize its top priorities - ensuring transparency and good governance. It engenders a culture that reduces risk and enhances transparency and ethical conduct which in turn is by far the surest way of ensuring the sustainability of the enterprise. Corporate strategy as crucial as it is for corporate success, crumples like a pack of cards in the face of corrosive unethical corporate culture. ■

