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Whistleblowing – a litmus test of a firm's culture

Most people agree, in theory, that those who speak out in good faith against misconduct or malpractice in an organisation play a key role in promoting transparency and highlighting misconduct. However, in practice, employees hesitate to speak up for three main reasons: Lethargy ("nothing will change"); Apathy ("everyone knows it's happening – so why should I be the one to call it out") and Fear ("I can't afford to lose my job; I don't want to be shunned"). This article analyses these three reasons through the lens of a firm's culture – with the aim of gaining a better understanding of the concerns on both sides, firm and whistleblower. We conclude that the way in which a firm deals with whistleblowing is a litmus test of the health of the firm's culture more generally.

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Introduction

Having a culture which encourages employees to speak up in a safe environment where they will not feel victimised is a stated aim of most organisations, globally, today. In the UK, over the past few years, there has been a flurry of whistleblowing hotline openings and "Speak Up" Champion appointments. Significant operational resource has been devoted to training in conduct and culture, expressly to encourage speaking up and calling out misconduct – particularly non-financial misconduct, a policy priority of the FCA. In Australia, amendments were made to the Australian Corporations Act 2001 (Cth) earlier this year to strengthen the protection offered to whistleblowers, with the introduction of a mandatory requirement for certain companies (including all public companies) to have a whistleblowing policy in place by 1 January 2020[1]. In the United States, the Sarbanes Oxley Act was enacted in response to corporate and accounting scandals such as Enron, and whistleblowers are protected from retaliation, while the Dodd-Frank Act protects whistleblowers relating to securities or commodities law violations. Sarbanes Oxley also requires the audit committee of a publicly listed U.S. company to set up a complaint notification system or whistleblower system to allow for complaints received by the company regarding accounting, internal accounting controls, or auditing matters.

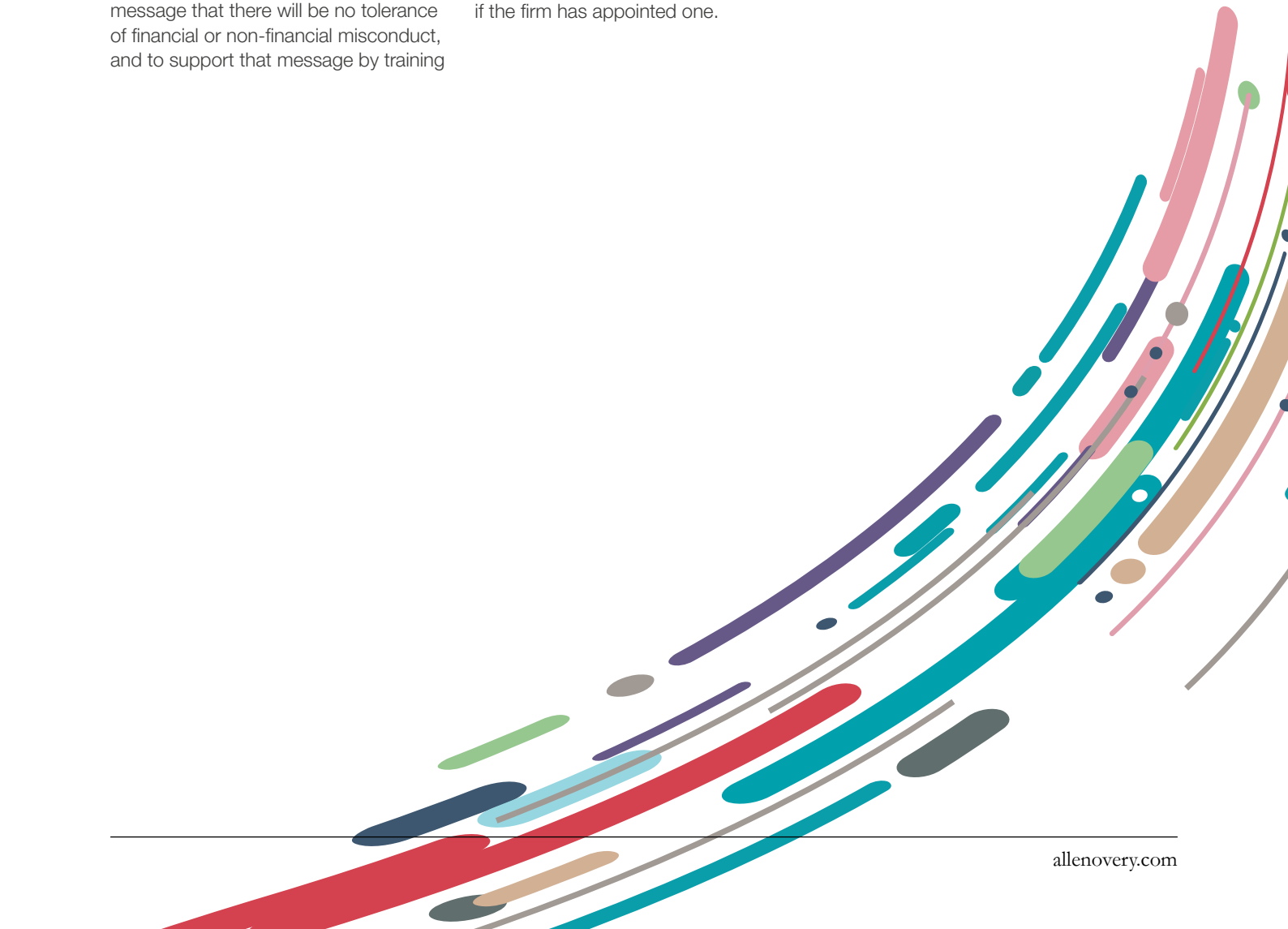
In an "ideal world" the investigation process would be blind to the seniority and status of both whistleblower and the employee/s subject to investigation – and employers would want issues to be raised early and through internal routes so that they can be dealt with quickly and effectively, with minimum disruption to the organisation and in such a way as to prevent reputational damage. In the case of concerns about the way business is being conducted, for example, this can help prevent serious errors of judgement, process, control or risk arising – which could be damaging to that particular business, the firm, its markets and its clients. In the case of complaints about individual behaviour such as bullying, harassment and lack of respect, whistleblowing – and the way in which the subsequent investigation is handled by the firm – is a useful litmus test for broader cultural issues which, if unchecked, can cause harm to individuals and be very damaging to the firm's reputation. So, why, in reality is this "ideal world" scenario seldom the case? The sad truth is that most of us would hesitate before raising our hand, particularly if the misconduct we see or experience derives from a more powerful or more senior colleague, and indeed we focus on this scenario of non-financial misconduct alleged against a senior figure – in what follows – as it exposes most acutely the fissures in the culture of a firm. Most firms, despite giving the right message and having correct written policies and framework in place, have difficulties engendering the right culture to ensure the fair treatment and confidentiality of both the whistleblower and those subsequently investigated. This is not easy to achieve – regulators globally have been criticised for failing to protect whistleblowers sufficiently and for a perceived reluctance to prosecute on the basis of the information supplied.

In the scenario outlined, our experience is that employees hesitate to speak up for three main reasons: Lethargy ("*nothing will change*"); Apathy ("*everyone knows it's happening – so why should I be the one to call it out*") and Fear ("*I can't afford to lose my job; I don't want to be shunned*"). This article analyses these three reasons through the lens of a firm's culture – with the aim of gaining a better understanding of the concerns on both sides – firm and whistleblower. In this way we hope to help pave the way for firms to implement a more trusted and effective whistleblowing framework.

01_The Australian Securities and Investments Commission ("ASIC") has, however, relieved companies limited by guarantee that operate on a not–for profit basis from the whistleblowing policy requirement, for so long as the company's consolidated revenue each financial year is less than USD1 million. See ASIC Corporations (Whistleblower Policies) Instrument 2009/1146 made on 13 November 2019.

Lethargy – *Nothing will change*

The personal and professional costs to call out bad behaviour – particularly the less tangible and perhaps more subjective non-financial misconduct – in a senior employee are high. There is no incentive to do so if the whistleblower does not have faith that the culture of the organisation will support and enable a genuinely independent investigation of concerns raised – whatever the seniority of the employee investigated – and that the framework in place for the investigation is objectively fair, supportive and transparent. Written policies are a necessary ingredient in addressing this lethargy and fostering a culture that encourages speaking up, but they are not sufficient. What is needed is visible leadership from the top of the organisation in giving employees the message that there will be no tolerance of financial or non-financial misconduct, and to support that message by training and coaching which explains in an open and transparent manner exactly what the investigation process involves, and how the systems work in practice to ensure fairness. It is our experience that a proportion of whistleblowing disclosures are either unfounded or more appropriately dealt with through the firm's channels of grievance or the usual HR channels. Further, any investigation must afford a scrupulously fair hearing to the employee being investigated. To ensure this happens, once a disclosure is considered genuinely to be within the whistleblowing regime of the firm, the process should mandate clarity of allegations, genuine independence of process, and (in the most serious cases) leadership from the Whistleblowing Champion, if the firm has appointed one.



Clarity of allegations

Investigating whistleblowing allegations against a senior leader in an organisation is a complex and stressful process for the firm, and for all individuals concerned. Our experience suggests that the negative reactions to whistleblowing allegations can be accentuated, and the investigation process complicated, when the allegation against the senior person is "broad brush" and unspecific. Allegations such as "*the culture of the trading desk is one of fear; the Head of Trading does not do enough to stop this*" leave an organisation struggling to address the allegations in a sufficiently rigorous way, given that the organisation must also be practical about not spending disproportionate amounts of time and money on unspecific allegations. It should be the role of the designated whistleblowing team to address this issue and to ensure that allegations are clarified before the whistleblowing investigation process gets underway.

Independence of process

Investigating a senior person in the organisation can place pressure on the independence of the investigation process itself, particularly if those tasked with investigating do not have equal power within the organisation compared with the senior figure being investigated. The internal conflicts management process has a key role to play in navigating this complex challenge, as does senior leadership who need to ensure processes are clear and properly followed so that there can be no suggestion of whitewash. If the investigation is outsourced to a third party, then consideration must be given to how the process is governed. If such a sensitive investigation is conducted by the third party with an underlying remit of not upsetting the firm or damaging the relationship, this may compromise the perceived – or actual – independence of the investigation.

Whistleblowing Champion may have a vital role

In the UK, the FCA has mandated that for certain regulated firms (ie. dual-regulated UK headquartered banks) there should be a Whistleblowing Champion, who should have a level of authority and independence within the firm and access to resources (including access to independent legal advice and training) and information sufficient to enable them to carry out that responsibility. In the most serious cases, whether or not mandated by a regulator, having strong support from a Whistleblowing Champion – who should be a senior leader in the firm, and where possible a Non-Executive Director on the Board, can be key to the success of the process, in terms of ensuring communication with both parties, managing of expectations and reporting progress to the Board. While the mandatory appointment of a Whistleblowing Champion has not been widely adopted as yet in relation to all firms or by international regulators, we consider such a role is valuable in the most serious cases.

Apathy – *Everyone knows it's happening, so why should I be the one to call it out*

Everyone who has been in the organisation more than a few months will know who the ego-centric, bullying or badly behaved star manager or leader in their part of the business is, should there be one. These "rainmakers" are often senior figures – influential men and women, high earning, well-connected and/or powerful in the structure of the organisation. Everyone knows who they are – more junior employees may have been the butt of their jokes or the target of their bullying and other bad behaviour, while more senior figures may look on, bemused but inert. However, the way in which a firm deals with these figures on a day to day basis – not just when someone blows the whistle – is a powerful message to more junior employees as to the true culture of an organisation. Rewards and bonuses to star managers, bad behaviour notwithstanding, can speak louder than any other internal messaging about culture and values. If the star manager's bad behaviour goes unchecked by any financial sanction, then the clear message is that lack of respect – or even bullying and misconduct – will be tolerated, so long as the star is earning the firm enough money. In this context, it is significant that more regulators around the world are starting to implement or extend[2] individual accountability regimes (Hong Kong, Singapore and Australia) as well as pressing firms to design incentive structures – including bonuses, promotion decisions and consequences management – specifically to encourage the right conduct and to discourage poor behaviours. In the UK, the FRC wrote to the 6 largest audit firms in July 2019 reminding firms of the five key "pillars" of the FRC's Audit Firm Monitoring and Supervision (AFMAS) framework, and – under the Values & Behaviours pillar, requesting those audit firms to provide the FRC with their policies and procedures relating to *inter alia* internal whistleblowing. The FCA asks regulated firms expressly (see the FCA's 5 Conduct Questions) whether any activities of the firm might undermine strategies put in place to improve conduct – this would include bonuses and rewards to employees who behave badly. The FCA has identified themes from research so far in relation to conduct and culture in regulated firms, including the following key points which have relevance wider than just regulated firms as they reflect good practice generally.

02_The FCA has extended the Senior Manager and Certification Regime (which already covers banks and insurers) across other sectors so that from 9 December 2019, SMCR will apply to almost all FSMA authorised firms. One of the key expectations of the FCA (see the FCA's 5 Conduct Questions) is that the Board and ExCo (or appropriate senior management) should gain oversight of the conduct issues within their organisation.

Board and CEO engagement essential

First, Board and CEO engagement in calling out misconduct are critical, this cannot be left to compliance or HR functions; senior executive accountability for delivery, design and business-led ownership of good conduct are key to changing culture in organisations and dispelling the notion that the firm turns a blind eye to bad behaviour. This is key to driving away apathy in the organisation, and to encouraging speaking up.

Conduct Management Information ("MI")

Second, MI on conduct is essential – key risk indicators should focus on elements such as misbehaviour, rule breaches and mandatory training compliance. This MI should be collated and reviewed regularly by senior leadership. In this way, a full picture may be gleaned about the cultural profile of the organisation. Such a picture can help also to identify cultural concerns within specific areas of a firm and this can assist any investigation that may become necessary in time. If the MI around conduct displays a pattern of relevant misbehaviour, the whistleblower's disclosure will be investigated against that background and context.

Promotion and remuneration linked to conduct

Performance assessment, promotion and remuneration systems should include conduct objectives, so that conduct that is in accordance with the firm's culture is rewarded financially and in terms of promotion – whereas misbehaviour, lack of respect, rule breaches and misconduct impact negatively on promotion and discretionary remuneration prospects. This links directly to another of the FCA's 5 Conduct Questions, namely as to what support the firm puts in place to enable those who work for it to improve the conduct of their business or function. If there are robust "360 degree" performance reviews and if bad behaviour, called out by all employees – however junior – impacts negatively on promotion and reward, this leaves middle management and employees empowered rather than apathetic, as their observations and experiences of conduct actually make a visible difference. This is a powerful driver of change and an equally powerful antidote to apathy.

Fear – *I can't afford to lose my job; I don't want to be shunned*

This may be the most difficult cultural barrier to break down. Whistleblowers in financial services, professional services and NGO sectors tend to pay a high personal and professional price for speaking up, despite the legal protection afforded to qualifying disclosures in the public interest.
A recent study "*Post-disclosure Survival Strategies: Transforming whistleblower experiences*" undertaken by Professor Kate Kenny, NUI Galway and Professor Marianna Fotaki, Warwick Business School, considered data from an 18 month study carried out between 2016 and 2018 that involved interviews with 58 whistleblowers and 17 experts, along with quantitative data from a survey of 92 whistleblowers (the majority from the U.S. and UK). Of the 92 people surveyed, 62% had been demoted or given a more menial role within the organisation after their disclosure, and, ultimately, 63% reported that they had been dismissed and 28% had resigned. Incredibly, 40% of respondents had spent over 1,000 hours on their disclosure. The protection afforded by legislation does not compensate for these consequences.

The impact of stress and mental health issues resulting from the conflict generated within the organisation when an employee makes a disclosure can be severe. In October 2019 the UK Supreme Court gave a unanimous judgement in the case of District Judge Claire Gilham, ruling that the UK Employment Rights Act should be read and given effect so as to extend its whistleblowing protection to office holders, including the holders of judicial office. However, the case disclosed that the District Judge had initially raised her concerns about the working of the court system (administrative failures, cost-cutting, severely increased workload and a lack of secure court rooms) with senior court staff, but after disclosing her concerns, the Judge claimed that she was seriously bullied, ignored and undermined by fellow judges and court staff, such that her health deteriorated – leading to mental health problems and having to be signed off work due to stress from 2013. She sued the UK Ministry of Justice in the employment tribunal and tried to bring a whistleblowing claim, which generated the appeals to the UK Supreme Court, and a judgment 7 years later. The ruling means she can proceed in the employment tribunal, so further proceedings will continue and matters are not yet resolved. Similar cases abound – the FT reported recently on Wendy Addison, who blew the whistle in 2000 on a fraud committed by the joint CEOs of her South African employer. The joint CEOs were eventually jailed 11 years later and released early, serving only 19 months of their 7 year sentences, while she had to flee the country and was forced to re-establish herself professionally. We contacted Wendy Addison, who is now the CEO and Founder of SpeakOut SpeakUp Ltd; she told us that in her experience, "*Legislation and internal whistleblowing procedures remain mere scaffolding unless individuals and teams are empowered through their behaviours*".

Further relevant to the "Fear" factor, and to add insult to very real injury, recruitment agencies will often inform whistleblowers – trying to salvage their careers after leaving their organisation following a disclosure – that formal and informal blacklisting is common, and getting a whistleblower re-employed can be very difficult. In the study mentioned above, of the 77 respondents who answered as to whether they had been blacklisted in the industry, 63% of these had written proof that they had been formally blacklisted, and 21% had been informally blacklisted.

When asked, most people would agree, in theory, that people who speak out in good faith against misconduct or malpractice in an organisation play a key role in promoting transparency, rooting out misconduct and highlighting wrongdoing and corruption. Yet when someone blows the whistle in their own office, they can encounter negative attitudes from peers in the workplace for speaking up. The defence/protection mode of the group can be triggered, with anger generated at the perceived or real reputational damage to the organisation. This may lead to the whistleblower being ostracized and in extreme cases, the organisation turning on the whistleblower and instituting disciplinary proceedings. One such case – of a whistleblower in the Metropolitan police – ended with the whistleblower marched from the building on a fictitious disciplinary charge – by the officer who was the subject of his disclosure. The whistleblower received substantial damages after a lengthy action through an employment tribunal but suffered from being under a cloud and colleagues giving him the cold shoulder in the meantime, the stress and loneliness of that time all too real. It is therefore understandable that people are reluctant to speak out, even when policies are in place to encourage genuine whistleblowing in the public interest. How can a firm counter this fear?

First, the fear of speaking out should be validated and the personal and professional risks to the whistleblower acknowledged, rather than glossed over in the firm's culture and conduct training and also during any whistleblowing investigation. Second, the firm needs to foster a culture of acceptance of genuine whistleblowers as constructive for the firm's long term good. This needs to be a message from the top of the organisation – if the leadership of the firm is genuinely open to honest criticism and sees the wider benefits of whistleblowing to the firm's economy, then the whistleblowing process is more likely to function successfully. Whistleblowers are not necessarily heroes or traitors, but mostly ordinary employees of integrity who have had the courage to speak up to highlight wrongdoing in their organisations. Third, firms should be astute to ensure that a whistleblower, whose disclosure results in a finding of misconduct does not subsequently find that their career stalls, declines or ends as a result of the disclosures. We suggest that a genuine whistleblower should also receive appropriate support, coaching and mentoring to continue working within the organisation as a valued employee if that is their preference, once the process is at an end. Firms should also consider monitoring the metrics around promotion, remuneration and wellbeing for a period of up to 2 years following the closure of the investigation or case. For those who leave the organisation after a disclosure of misconduct which is found to be justified by the investigation, the legal costs and income reduction, combined with intangible costs related to disclosure, such as costs to health and family life, can be very damaging, and firms should consider how these might be alleviated by, for example, pro-bono legal or counselling services.

Conclusion

When a senior employee in a firm is accused of wrongdoing, the complexity of the situation faced by the firm means that difficult and sensitive issues arise at a time of great vulnerability for both employees and the firm, so that the whistleblowing investigation becomes a litmus test of the firm's culture; further, the culture of the firm plays a significant role in the success or failure of a firm's whistleblowing policy. It is in the crucible of a whistleblowing investigation that the true culture of a firm is tested to its limit, and either found wanting or found to be robust.

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