SELECTED PAPERS FROM THE INTERNATIONAL WHISTLEBLOWING RESEARCH NETWORK CONFERENCE AT MAYNOOTH UNIVERSITY

September 2021

Edited by Lauren Kierans, David Lewis & Wim Vandekerckhove

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Chapter 1: Introduction

Lauren Kierans, Maynooth University
David Lewis, Middlesex University
Wim Vandekerckhove, University of Greenwich

1.1 The International Whistleblowing Research Network

In June 2009, a conference was held at Middlesex University to mark the fact that whistleblowing legislation had been in force in the UK for a decade. This event included a public lecture and attracted delegates from a range of backgrounds, including academics, legal and management practitioners, trade unionists, whistleblowers and students. At the end of the conference the decision to establish an 'International Whistleblowing Research Network' (IWRN) was taken. People can join this network simply by consenting to their email address being put on a list and used for distribution purposes. At the time of writing, December 2021, there are over 220 members of the network. The current convener is David Lewis who can be contacted via d.b.lewis@mdx.ac.uk.

Following the IWRN conferences in 2011, 2013 and 2015 two eBooks 'Whistleblowing and Democratic Values' and 'Developments in whistleblowing research 2015' and a special issue of the E-Journal of International and Comparative Labour Studies were produced. In 2017, an eBook entitled 'Selected papers from the International Whistleblowing Research Network conference in Oslo' was published and the Utrecht conference in 2019 resulted in a special issue of *Accountancy and Business*. Thus, this ePublication, which uses material presented at the September 2021 IWRN virtual conference hosted by Maynooth University in Ireland, maintains the network's tradition of disseminating papers relevant to research in the field.

1.2 Chapter summaries

In their chapter entitled **'Who is Speaking Please? The role of identity in attitudes towards whistleblowing'**, Meghan Van Portfliet and Arron Phillips explore how people actually feel about whistleblowing and whistleblowers by drawing on data from surveys conducted in the UK, Australia and Ireland. They argue that analysing responses from employers and managers/directors of organizations and comparing them with the responses of employees

yields surprisingly different results. Thus, they assert that how one "feels" about whistleblowing depends on what role they are occupying when they are asked. For example, employers tend to be more optimistic and sympathetic, and employees tend to be more critical. Building on previous studies, they propose that perceptions may be fluid, potentially changing within individuals as their roles shift. Their contribution to knowledge is two-fold. To theory, they offer implications for a more nuanced way of understanding societal attitudes to whistleblowing, and to practice they offer potential insights to how protections may be more or less effective, depending on who is being called on to support the whistleblower.

Theo Nyrerod and Stephen Kohn use their chapter entitled '**Whistleblowing in the EU: the enforcement perspective'** to assert that, while whistleblower protection is essential in democratic societies, it may not be sufficient to achieve the objective of enhancing law enforcement. They suggest that further incentives, such as monetary rewards for whistleblowers, may be necessary to achieve a desirable level of detection and deterrence of wrongdoing. The authors make this point by highlighting some issues with protections in enhancing enforcement relative to the perceived level of economic wrongdoing in Europe. They then consider in detail, evidence about whistleblower rewards from the US, discuss how such programmes could be designed and implemented in Europe and offer some conclusions.

In '**Whistleblowing in the time of Covid-19: findings from FOIA requests'**, Ashley Savage and Richard Hyde provide an overview of key findings from a research project which aims to determine the impact of the Covid-19 pandemic on the making and handling of whistleblower reports. The authors used Freedom of Information requests as a research methodology to obtain data from NHS organisations in England, Wales, Scotland and Northern Ireland. The authors present their analysis of the responses received to critically evaluate whether Covid-19 has had a significant impact on the volume of reports received by organisations. The chapter commences with an overview of whistleblowing in the NHS and the Covid-19 pandemic, it then discusses the use of freedom of information requests as a research method and concludes by providing some commentary on the implications of the data.

In '**South Africa's State of Capture: The Role of Whistleblowers and Civil Society in Exposing Wrongdoing',** Ugljesa Radulovic and Tina Uys observe that whistleblowers, assisted by the media and civil society organisations, have played a prominent role in recent revelations about corruption in state organs in South Africa. As the allegations of

whistleblowers emerged, it became evident that it was not mere corruption that was occurring but rather what is referred to as state capture. In contrast to corruption, where individuals opportunistically abuse their positions of power for personal gain, state capture refers to repeated and well-organised collusion practices through which actors use state power to extract personal benefits. This chapter considers the role of civil society organisations in aiding whistleblowers in dealing with the aftermath of the responses to their revelations. Their findings are based on semi-structured interviews conducted with both whistleblowers and members of civil society organisations.

1.3 Contributors

Richard Hyde is Professor of Law, Regulation and Governance at the University of Nottingham.

Stephen M. Kohn is a partner in the whistleblower law firm of Kohn, Kohn and Colapinto, the Chairman of the Board of the National Whistleblower Center and an adjunct Professor at the Northeastern University School of Law. He is the author of eight books on whistleblowing, including *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (Lyons Press 2017). For the past 35 years Kohn has represented whistleblowers in retaliation, reward, and qui tam cases. In 2012, his client obtained a $104 million whistleblower reward based on sanctions issued against UBS for illegal offshore banking.

Theo Nyreröd is a Ph.D student at Brunel Law and has published numerous articles on whistleblower laws with a focus on reward programs and their effectiveness at detecting and deterring economic wrongdoing.

Arron Phillips is a lecturer in corporate governance and business ethics at Birkbeck College, University of London. He teaches at the postgraduate level in the areas of international business ethics and legal perspectives of governance. He recently successfully defended his Doctoral thesis looking at the role of trade unions in whistleblowing. Arron's research interests focus on whistleblowing and external agents in the whistleblowing process. Before undertaking the PhD, Arron completed his

Bachelor and Master's degrees at Middlesex University in Law and Employment Law respectively with the latter focusing on the UK's prescribed persons regime within the whistleblowing legislation.

Meghan van Portfleit is a Lecturer at the University of Cork Business School and an Associate Member at the Whitaker Institute, NUI Galway. Her work centres on whistleblowing and advocacy work, looking at practical ways that whistleblowers can be protected outside of legislation. She is also interested in the intersection of whistleblowing and gender, and the use of strategic ignorance in organizations. She has published in journals such as *Ephemera* and *Journal of Business Ethics*, and has also made submissions to the Irish, Australian, and Scottish governments, providing insights from her research and best practice for whistleblowing policies.

Ugljesa Radulovic completed his degree in sociology, honours and Master's degrees in industrial sociology at the University of Johannesburg. His aster's dissertation was concerned with academic dishonesty and whistleblowing. He is presently doing his doctorate entitled: "State Capture, Non-governmental Organisations and Whistleblowing under the Zuma Presidency". His fields of interest are group dynamics and clinical sociology with a particular focus on whistleblowing. He taught group dynamics, conflict studies and clinical sociologyfrom 2014 to 2021.

Ashley Savage is an Independent Scholar and Consultant based in Vienna.

Tina Uys is Professor of Sociology at the University of Johannesburg. During 2013, she was a Fulbright Visiting Scholar at George Washington University in Washington, DC and at the University of Cincinnati, Ohio. Her most recent book is a co-edited volume titled *Clinical Sociology for Southern Africa*. She specialises in clinical sociology and has published widely on whistleblowing.

Chapter 2: Who is Speaking Please? The role of identity in attitudes towards whistleblowing

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Keywords: Identity, whistleblowing, attitudes, perception

Abstract

Whistleblowers have been associated with words such as saint (Grant, 2002), traitor (Rothschild and Miethe, 1999), parrhesiast (e.g. Weiskopf and Tobias -Miersch, 2016), stigma (Van Portfliet, 2020) and a plethora of other terms. The increasing implementation of legislation to protect whistleblowers hints at a societal acceptance and acknowledgment of importance for them, yet stories consistently emerge in the media of the mistreatment and suffering experienced when one speaks out about organizational wrongdoing. How *do* people actually feel about whistleblowing and whistleblowers? In this paper, we explore this question, by drawing on data from surveys conducted in the UK, Australia and Ireland. Analysing responses from employers and managers/directors of organizations, and comparing these with the responses of employees of organizations yields surprisingly different results. Investigating this, we propose that how one "feels" about whistleblowing depends on what role they are occupying when they are asked. Employers tend to be more optimistic and sympathetic, and employees tend to be more critical. While the ambiguity in attitudes has been noted (Hersch, 2002, Heumann, et al, 2016) studies have highlighted how these change based on, for example, the content of the disclosure and whom the report is made to (Callahan and Collins, 1992), one's value orientation (Park et al. 2014), and one's cultural orientation (Park, et al, 2008). We build on these valuable studies, proposing that in addition to these influences, perceptions may be more fluid, potentially changing within individuals as their roles shift. Our contribution is then two-fold. To theory, we offer implications for a more nuanced way of understanding societal attitudes to whistleblowing, and to practice, we offer potential insights to how protections may be more or less effective, depending on who is being called on to support the whistleblower.

1. Introduction

Why should we care how others feel about whistleblowing? After all, legal protections are increasingly being implemented across the globe (IBA, 2021), so personal opinions should be irrelevant. The answer is that legal protections are not enough (IBA, 2021; Lewis, 2008). Whistleblowers that suffer retaliation face costs that are difficult to legislate against like stigma (Van Portfliet, 2020), blacklisting and financial and time costs related to fighting a court case (Kenny and Fotaki, 2019), isolation (Lennane, 2012) among other reprisals that there is no law prohibiting. To survive these trials, whistleblowers require access to sympathetic others (Van Portfliet, 2020) and so understanding how people feel about whistleblowers and whistleblowing is paramount. The literature on whistleblowing recognizes this, as is detailed in the review below. In this study, we build on this work by looking at how attitudes toward whistleblowing are affected by the role- or identity- of the whistleblower. By understanding how one's perception of whistleblowing changes depending on what role they are speaking from, we can better understand how attitudes can be positively changed to ensure that the "soft" consequences that whistleblowers face can be reduced, therefore providing more comprehensive protections.

The literature has also examined how retaliation differs between internal and external whistleblowing (e.g. Dworkin and Baucus, 1998; Park, Bjørkelo and Blenkinsopp, 2020). Studies show that retaliation is more common and severe for those that speak up to sources outside the organization such as regulators or the media (Park and Lewis, 2018). This may be because whistleblowing has been shown to be a protracted process (Vandekerckhove and Phillips, 2020), so matters that make it externally have likely not been dealt with (or potentially suppressed intentionally by the organization). This study adds to the existing literature in this area by showing that attitudes toward external whistleblowing can shift, depending on what role an individual is inhabiting. Most large-scale studies of the experience of whistleblowers focus on employees, but all that we know of examine the *responses of a particular group*, thus limiting our knowledge of how one feels when they are speaking from a particular identity. Identities, however, are multiple and fluid, and thus we explore how the perception of whistleblowing may change depending on *what identity position one is speaking from*.

Our contribution is thus two-fold: to whistleblowing literature, we provide a more nuanced view of attitudes towards whistleblowing- one that is not statically tied to an individual, but is

dynamic and shifting depending on the context; to practice, we build on the research findings that highlight the response of colleagues and managers is more effective in protecting whistleblowers than support of NGOs and advocacy groups (Park, Bjørkelo and Blenkinsopp, 2020) by offer an understanding of how the perceptions of these audiences are fluid.

The paper is structured as follows: we begin with a review of the relevant whistleblowing literature on attitudes toward whistleblowing. We then detail the method of our study, which incorporates external survey data from the UK, Ireland and Australia. Next, we present the results from the survey data, before discussing their relevance to theory and practice, and then we conclude with the limitations of the study and practical recommendations for policy and future research.

2. Literature Review

The most common definition of whistleblowing is "the disclosure by organization members (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" (Near and Miceli, 1985, p. 4). Others argue that retaliation is required for speaking up to qualify as "whistleblowing", as otherwise all reports of organizational infractions made by, for example, compliance officers, auditors and internal watchdogs whose job it is to disclose, would count as blowing the whistle, as would disclosures that do not attract any reprisals (e.g. Alford, 1999, 2007). The former definition allows space for "successful" whistleblowing, while the latter is more limited, only allowing those that have suffered for speaking up to count as whistleblowers. This study adopts the former definition, as we are interested in attitudes towards whistleblowing, and the latter definition is more focused on whistleblowers that suffer, and therefore indirectly biased towards negative attitudes.

Research on speaking up in organizations has grown over the past twenty years, with studies exploring areas such as motivations (e.g. Miceli et al, 2008), characteristics (c.f. Mesmer-Magnus and Viswesvarian, 2005) experiences (e.g. Alford, 2001; Glazer and Glazer, 1989), and costs of speaking up (Kenny and Fotaki, 2019). Recipients of whistleblowing disclosures have been less explored but noted as important (e.g. Contu, 2014; Kenny and Bushnell, 2020). There is often more than one recipient in each case of speaking up (Vandekerckhove and

Phillips, 2020) and it has been pointed out that this is an area that requires some attention, as recipients are not objective, unbiased observers, they are individuals embedded in the organization (Moberly, 2014). Research on organizational responses to whistleblowing is even less explored, but recent work by Kenny, Fotaki and Vandekerckhove (2019) explore how speak up systems can positively affect both organizations and whistleblowers. There have also been studies into perceptions of, or attitudes toward, whistleblowing and whistleblowers. These span national contexts including Turkey, South Korea and the UK (Park et al, 2008) Australia (Brown, Vandekerckhove and Dreyfus, 2012) the USA (Callahan and Collins, 1992) Ireland (Transparency International Ireland, 2017), and more, and generally show mixed results, as can be expected. This paper builds on these studies, which evaluate attitudes and perceptions of static groups, by proposing that perceptions of, and attitudes toward, whistleblowing are fluid, fluctuating and sometimes contradicting as the identity from which one is speaking changes.

Attitudes toward whistleblowers

The academic literature provides contrasting perspectives of whistleblowing. On the one hand, they are champions of the public interest, exposing corporate crime (ACFE, 2018), saving organizations money and reputation (Stubben and Welch, 2020) and motivated by selfless, pro-social behaviours (Miceli et al, 2008). Grant (2002) goes so far as to liken them to "saints of secular culture".

Others frame them differently, holding that they are traitors to their organizations (Rothschild & Miethe, 1999) and can be motivated by spite or personal gain. Stein (2019) states there is an "implicit assumption in the literature that whistleblowers are hated and stigmatized" (p. 1), and a plethora of research highlights the ways that they suffer, hinting at the intolerance that organizations, colleagues and the media have for those that speak up (e.g. Bjørkelo 2013; Mesmer-Magnus and Viswesvaran, 2005).

Between these opposing views, some research takes the middle ground. For example, Contu (2014) illustrates the ambivalence exhibited towards whistleblowers in her analysis of Antigone, and offers a different view of the whistleblower as one that is not motivated by "universalizing norms" (393) or a sense of morality, but that the act of speaking out is unique to the individual, the situation that they face, and who they speak out to. She highlights how whistleblowing is relational, difficult to understand and even more difficult to generalize. In

the same vein, Hersch (2002) comments:

> "On the one hand there is a belief that whistleblowing is an ethical or even praiseworthy act, which is required to expose abuses of all kinds and avoid moral complicity in them. On the other hand whistleblowers may be seen as informers who betray colleagues and the organisations they work for" (244).

Ambivalence is also visible in the media coverage of whistleblowing. For example, media coverage of the whistleblower Edward Snowden was positive, (e.g. Chakrabarti, 2015), negative, (e.g. Keck, 2013) and both (e.g. Kelley, 2013). This indicates that *public* opinion of whistleblowing may be mixed- and research has explored this area as well.

Empirical Research into Attitudes Toward Whistleblowing

Turning our focus to empirical research, several studies have examined the attitudes of various groups. Park, Blenkinsopp and Park (2014) studied the attitudes of Korean college students toward whistleblowing, showing those with a legal/moral value orientation were more accepting, while those with an economic value orientation were less supportive, except when done anonymously. This has practical impacts as it demonstrates how education around whistleblowing can be framed differently for different audiences to have the greatest impact around uptake of whistleblowing hotlines or other speak-up channels.

Brown, Vandekerckhove and Dreyfus (2012) looked at survey data from the UK and Australia, as well as responses to the World Online Whistleblowing Survey (from whistleblowers, potential whistleblowers and non-whistleblowers) and found that "in both Australia and the UK, overwhelming majorities […] support whistleblowing as defined by the surveys" (p. 14). This data, which we draw on in this study, links perceptions of whistleblowing with trust, highlighting that while attitudes are generally positive, perceptions of the acceptability of whistleblowing are somewhat lower. In other words, people are personally accepting of whistleblowing, but somehow think that others are less accepting. This incongruency between individual opinion and perception of public opinion is echoed in a study by McGlynn and Richardson (2017) which found employees privately supported colleagues that spoke up, but publicly alienated them, indicating a perception that public acceptance of whistleblowing was low, even if personal acceptance was high.

Various reports also indicate the perception of whistleblowing. Heumann et al (2016) conducted public opinion polls and found that 47% supported whistleblowing, and 53% were cynical about it. The APPG (2020) found that more whistleblowers are taking sick leave (40% in 2018 compared to 15% in 2015), which indirectly implies the negative attitudes toward speaking up. In 2013, Public Concern at Work (now Protect) in partnership with Greenwich University published a study of 1000 calls to PCAW's advice line (Public Concern at Work/University of Greenwich, 2013). While this study only covers people that called to get advice, and therefore are most likely whistleblowers or potential whistleblowers, there are some findings in the report that indicate the broader attitudes towards whistleblowers. One such statistic is that only 40% of callers that made a disclosure reported any response from management. This means that 60% of the time management does not respond at all, sending a clear signal as to the importance of whistleblowers.[1] Where management did respond, it was often with reprisals, but there was also some support. The response from management was supportive 7% of the time after the first disclosure, and there was support from co-workers 2% of the time. These studies, while helpful in painting the picture of how the public feel about whistleblowing in various contexts, downplay some of the nuances of whistleblowing. One of these nuances, whether a disclosure is made internally or externally, is central to the findings of this study. We therefore briefly present the literature on internal and external whistleblowing, before concluding this section with an overview of the empirical work that examines how attitudes differ depending on whether a disclosure is made internally or externally to an organisation.

Internal v External Whistleblowing

In early whistleblowing research, models were put forward that describe the process of whistleblowing, identifying the decision points that whistleblowers and organizations face (see, for example, Near & Miceli, 1985; Near & Miceli, 2008). Distinctions have typically been drawn between internal disclosures - where workers report to a line manager or other individual within the organization - and external disclosures – where workers report to someone external to the organization like a journalist, ombudsman or regulator (Jubb, 1999; Pohler and Luchak,

[1] It is important to note, however, that the survey was of callers to a helpline, and it may be the case that those that spoke up and got answers were less likely to call the helpline in the first place.

2014). However, it has been shown that almost all disclosures made externally are made internally first, so the external disclosure is part of the same whistleblowing process that starts internally (Miceli et al., 2008; Rothschild and Miethe, 1999; Vandekerckhove and Phillips, 2020). Vandekerckhove and Phillips (2020) show how disclosures move from internal to external recipients as whistleblowers seek increasingly independent recipients to report to when they feel their disclosure is not taken seriously.

Despite this recognition of external whistleblowing as a continuance of an internal disclosure, debates are ongoing as the efficacy of each type of whistleblowing. Some think that internal whistleblowing is less effective, as organizations are more powerful than the whistleblower and therefore can ignore, silence or neutralize their disclosures (cf. Du Plesis, 2020; Miceli, Near, & Dworkin 2008). Other studies have explored the differences in attitudes toward internal and external whistleblowing as well, which we present next.

Attitudes toward internal v external whistleblowing

In general, there is more support for internal whistleblowing than external whistleblowing. In Callahan and Collin's (1992) survey, 93% of employees agreed that an employee that had reported illegal acts to their supervisor and had been fired should win a lawsuit. Further, 89% agreed that the fired employee should win a lawsuit if the report concerned unethical practices. Less support, however, was shown for reporting to law enforcement (86% agreed that the lawsuit should be won for reporting illegal practices, 64% when the practice was unethical) and even less support when the report was made to the media (74.6% for reporting illegal practices, 61% for unethical ones). This shows support for whistleblowers that report internally, but less support for those that blow the whistle outside the organization. Park et al (2014) found similar patterns of support (higher support for internal whistleblowing than external) and correlated attitudes to value orientation.

The difference in attitudes toward internal and external whistleblowing can also be seen in the legal landscape: most legislation leans toward internal first. For example, it is a provision of the Dutch legislation that the "House of Whistleblower" can refuse to look at your disclosure if you haven't spoken up internally first. This approach is not unmerited, however, as studies have shown that those that speak up to external sources experience more retaliation (Dworkin

and Baucus,1998; Park, Bjørkelo and Blenkinsopp, 2020), and therefore encouraging internal disclosures is one way to help ensure whistleblowers are protected as much as possible. That employees and employers have more positive attitudes toward internal whistleblowing than toward external- may be based on cultural norms.

In this study, we explore how this particular nuance is affected by an individual's identity position, looking at whether employees' and managers' opinions change based on the type of disclosure. We therefore briefly introduce the concept of identity before presenting the details of our methodology.

Identity

Identity is a very complex topic, incorporating many factors relating to who we are as people. It has to do with the question "who am I?" and "who do others think I am?" (Kenny, et al., 2011). Identity can include physical characteristics, such as sex, height, and hair colour, and also more fluid characteristics of the roles we occupy like being a mother, employee, leader, or student. Individuals can occupy several identities at one time, for example, one can be not just an employee, they can be also a friend, a woman and a college graduate, and all of these together influence how one acts in certain situations. There are many theories of how this identity comes about, and identity is a highly contested and researched term. In this paper we are interested in the roles that individuals occupy, and while roles are not synonymous with identity, the work that one does is an "essential part in the development of identity" (Dejours & Deranty, 2010: 172). Identity has been explored somewhat in whistleblowing literature, but primarily from the standpoint of the whistleblower (e.g. Kenny, 2012; Weiskopf and Tobias-Miersch, 2016). In this paper, we investigate how a non-whistleblower's role is associated with attitudes and perceptions of whistleblowing, as this has impacts for how others treat those that speak up. We do this by analysing survey data, and we present the methods employed in gathering and analysing this data next.

3. **Methods**

This study utilised pre-existing data from two prior studies. Firstly, the authors were granted access to two datasets by Transparency International Ireland ('TI Ireland'). The first dataset

was of employees while the second was of employers. The datasets were collected as part of TI Ireland's Integrity at Work ('IAW') research in 2015 and published in their Speak Up Report 2017. Both datasets did not provide the raw data but rather the analysed data, where, in some cases, responses had been grouped. The second study provided a single dataset and was collected as part of the World Online Whistleblowing study 2012 looking at Australia and the United Kingdom[2]. Before analysing the data, the second study dataset was split into two, separating out the data from the UK and Australia into separate datasets. This was done purely for the convenience of the researchers in their analysis.

The authors started by comparing the datasets with the relevant code books to ensure they had an understanding of each aspect of the data. As the data provided to the researcher had been analysed previously some of the coded responses had been amalgamated. In these cases, we were not clearly able to identify how an individual responded to the specific question against the original code book so we excluded them from our dataset.

Having completed this comparison, the questions from the code books in the two prior studies were analysed. First, we identified questions that were identical allowing us to compare answers across contexts. Looking at answers to these questions, we identified themes that may enable us to usefully analyse the remaining data: identity and external disclosure. We also collated where we could identify roles which would enable us to explore the idea of role impact on whistleblowing which this paper seeks to do.

We then used SPSS to run simple descriptive crosstabs using different roles against the questions that existed across the data. Due to the way the original data files were provided and the different purposes of the original data it was not possible to undertake any meaningful statistical analysis of the data. Hence we can only make limited claims and seek to use our analysis later in the paper as foundational for further work.

4. **Findings**

We present below findings from our analysis of the surveys, where attitudes toward whistleblowing in general, but also important differences between employees and employers were noted. While the main findings have been noted elsewhere, our interpretation of them differs from previous studies. We begin with our findings on attitudes toward whistleblowing.

[2] The authors wish to express their thanks to Transparency International Ireland, Professor Wim Vandekerckhove and Professor AJ Brown for granting us access to this data.

Attitudes toward whistleblowing in Ireland

The data showed clearly that employers had more positive attitudes toward whistleblowing in general. This is evident when looking at the word association questions. We assigned a value to each word: 'Hero' and 'Worker' were positive associations, 'Witness' was a neutral association, and 'Informer' and 'Traitor' were negative associations. Table 1 shows that employers overwhelmingly chose more positive and neutral associations, although over half also associated whistleblowing with the word 'Informer'. Employees, on the other hand skewed more negative associations, with the top association being 'Informer' and the second most common association being 'Witness'.

Table 1: Employee v Employer Word Association

	Employee %	**Employer %**
Hero	82.3	45.3
Informer	50.3	56.4
Traitor	9.1	11.6
Witness	35.8	72.8
Worker	36.4	64

Employers also showed more positive attitudes toward whistleblowing in their responses to the question of whether they thought corrective action would be taken if they spoke up. While slightly over half of employees (52%) agreed that "I am confident that if I raised a concern it would be acted upon without detriment", (Table 2) 91% of employers agreed that this would be the case (Table 3).

Table 2: Employee Confidence in Raising a Concern

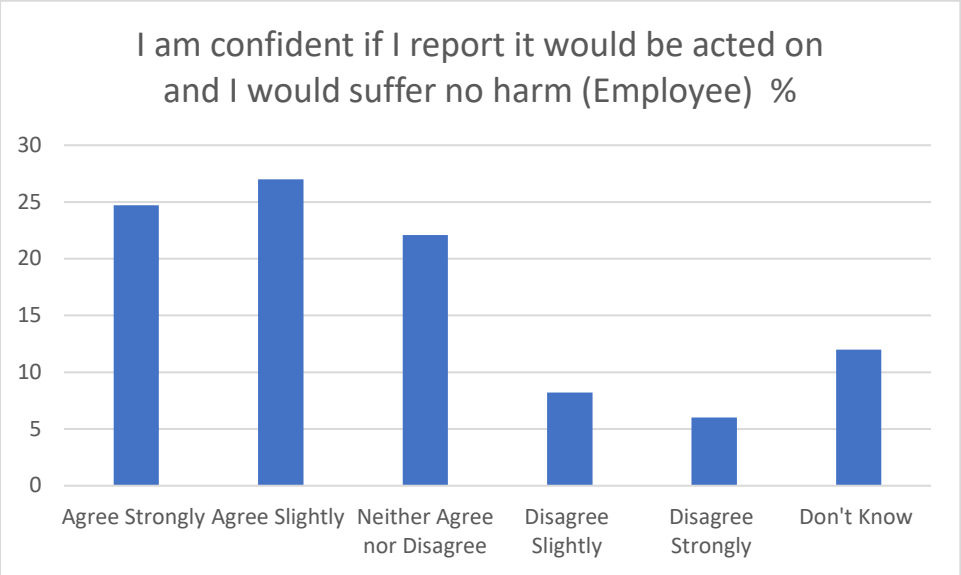

Table 3: Employer Confidence in Raising a Concern

While this may signal a lack of confidence in the employer, rather than a sceptical view of whistleblowing, looking at the responses by sector (Table 4) reveals that perceptions are similar across different sectors for employees, indicating that either there is a low trust in Irish management in general, or that perceptions of whistleblowing are more negative among employees than employers.

Table 4: Employee Confidence in Speaking up by Sector

I am confident if I report it would be acted on and I would suffer no harm						
Sector	Agree Strongly %	Agree Slightly %	Neither Agree/Disagree %	Disagree Slightly %	Disagree Strongly %	Don't Know %
Tech Manufacturing	26.5	29.4	26.5	2.9	8.8	5.9
Other Manufacturing	26.2	33.3	14.3	11.9	0	14.3
Construction	20.7	22.4	29.3	12.1	5.2	10.3
Retail and Wholesale	25.7	31.2	17.4	4.6	10.1	11
Hotels, Bars, Restaurants	30.9	18.5	27.2	6.2	6.2	11.1
Transportation	16.7	27.8	33.3	5.6	8.3	8.3
Tech, IT and Comms	27.7	34	19.1	6.4	4.3	8.5
Financial Services	27.3	34.1	25	4.5	0	9.1
Public Government	23.1	28.6	19	12.2	6.8	10.2
Service	20.3	25.4	23.7	8.5	0	22
Agriculture	8.9	24.4	26.7	6.7	15.6	17.8
Other	29	23.9	19.9	9.1	5.1	13.1

This view is interesting when compared with questions of whether it is acceptable to be a whistleblower, and whether people should be supported if they speak up (Tables 7 and 8). Employers were more likely than employees to think that whistleblowing was unacceptable in Irish society (57.2% vs 41%) (Table 5 and 6) but that whistleblowers should be supported (91.5% vs 78%) (Table 7 and 8), where employees were more likely than employers to think it was acceptable in Irish society (47.4% vs 41.4%) but less employees thought that whistleblowers should be supported (78% vs 91.5%). While *most* employees thought whistleblowers should be supported, it was still a smaller percentage than employers that answered that question in the affirmative.

Table 5: Employer Perception of Acceptability of Reporting

	#	%
In Irish Society it is unacceptable to be a WB	202	57.2
In Irish Society it is acceptable to be a WB	146	41.4
Don't know	5	1.4

Table 6: Employee Perception of Acceptability of Reporting

	#	%
In Irish Society it is acceptable to be a WB	360	41
In Irish Society it is acceptable to be a WB	416	47.4
Don't know	102	11.6

Table 7: Employee Perception of Whether Whistleblowers Should be Supported

	#	%
People should be supported when speaking up, even if confidential information is disclosed	685	78
People should not be supported when speaking up if confidential information is disclosed	94	10.7
Don't know	99	11.3

Table 8: Employer Perception of Whether Whistleblowers Should be Supported

	#	%
People should be supported when speaking up, even if confidential information is disclosed	323	91.5
People should be supported when speaking up if confidential information is disclosed	23	6.5
Don't know	7	2

Attitudes toward whistleblowing in AUS/UK

The questions on whether whistleblowing is acceptable, and whether whistleblowers should be supported was also presented in the AUS/UK surveys. Analysing these surveys showed mixed results. For example, in Australia, most employers and employees thought whistleblowers should be supported (86.6% and 84.9% respectively) with slightly more employers agreeing with this statement than employees. However, more employers also thought people should be punished for speaking up than employees (10.4% and 7.0% chose this response). See Table 9 below.

Table 9: Australian Attitudes Toward Whistleblowing

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
People should be supported for revealing serious wrongdoing, even if it means revealing inside information	86.6	84.9	84.1	87.3
People who reveal inside information should be punished, even if they are revealing serious wrongdoing	10.4	7.1	7.9	6.3
Neither/Can't say	3	8	7.9	6.3

More managers thought it was unacceptable to speak up in Australian society than employees, with 38% of managers indicating this answer compared to only 29.1% of employees (Table 10).

Table 10: Australian Attitudes on Whether Speaking Up is Acceptable

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
In my society it is generally unacceptable for people to speak up about serious wrongdoing if inside information is revealed	38.8	29.1	35.1	35.4
In my society it is generally acceptable for people to speak up about serious wrongdoing even if it means revealing inside information	53.7	55.4	55	58.2
Neither/Can't say	7.5	15.5	9.9	6.3

Table 11 shows that in the UK there was more support overall for whistleblowers, 84.3% of employers and 81.9% of employees indicated they believe that whistleblowers should be supported. However, managers were more likely to think it was unacceptable in British society to speak up (39.8%) than employees (33.4%) (Table 12).

Table 11: UK Attitudes Towards Whistleblowing

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
People should be supported for revealing serious wrongdoing, even if it means revealing inside information	84.3	81.9	86.4	90
People who reveal inside information should be punished, even if they are revealing serious wrongdoing	8.4	5	4.9	1.4
Neither/Can't say	7.2	13.1	8.6	11.4

Table 12: UK Attitudes on Whether Speaking Up is Acceptable

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
In my society it is generally unacceptable for people to speak up about serious wrongdoing if inside information is revealed	39.8	33.4	29.2	34.3
In my society it is generally acceptable for people to speak up about serious wrongdoing even if it means revealing inside information	47	48.3	51.9	44.3
Neither/Can't say	13.3	18.2	18.9	21.4

Attitudes to speaking up by role

There were other questions in the UK/AUS data that hinted at role/identity being important too. There were questions that asked about who it was acceptable to report *on*, with options being "People in Charge" (Table 13 and 16), "Other Staff" (Table 14 and 17) or "Family or Friend"(Table 15 and 18). Here, employers were more likely to say it was "highly acceptable" and employees were more likely to say it was "fairly acceptable" across the board, but more employees and managers think it is more acceptable to report on those in charge than on other staff, and more acceptable to report on other staff than on a family member or friend.

Table 13: Australian Attitudes Toward Speaking Up About People in Charge

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
Highly Acceptable	61.2	52.8	59.6	60.8
Fairly Acceptable	22.4	29.6	27.8	30.4
Neither Acceptable nor Unacceptable	11.9	9.9	5.3	2.5
Fairly Unacceptable	1.5	2.1	4.6	0
Highly Unacceptable	1.5	2.5	0.7	1.3
Can't Say	1.5	3.1	2	5.1

Table 14: Australian Attitudes Toward Speaking Up About Other Staff

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
Highly Acceptable	56.7	42.3	53	45.6
Fairly Acceptable	20.9	37.3	27.2	34.2
Neither Acceptable nor Unacceptable	14.9	12.2	11.9	6.3
Fairly Unacceptable	4.5	2.9	4	5.1
Highly Unacceptable	1.5	2.1	1.3	2.5
Can't Say	1.5	3.3	2.6	6.3

Table 15: Australian Attitudes Toward Speaking Up About Friends or Family

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
Highly Acceptable	37.3	28.1	34.4	29.1
Fairly Acceptable	26.9	34	29.1	30.4
Neither Acceptable nor Unacceptable	22.4	20.7	19.9	16.5
Fairly Unacceptable	6	7.3	7.9	8.9
Highly Unacceptable	3	5.2	4.6	8.9
Can't Say	4.5	4.8	4	6.3

Table 16: UK Attitudes Toward Speaking Up About People in Charge

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
Highly Acceptable	60.2	55	61.7	77.1
Fairly Acceptable	19.3	15.7	17.3	15.7
Neither Acceptable nor Unacceptable	7.2	8.4	3.3	1.4
Fairly Unacceptable	2.4	4.2	4.1	2.9
Highly Unacceptable	8.4	11.7	10.7	2.9
Can't Say	2.4	5	2.9	0

Table 17: UK Attitudes Toward Speaking Up About Other Staff

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
Highly Acceptable	50.6	41.6	51.4	62.9
Fairly Acceptable	25.3	29.2	25.5	22.9
Neither Acceptable nor Unacceptable	8.4	7.9	5.8	2.9
Fairly Unacceptable	7.2	5.4	6.6	7.1
Highly Unacceptable	6	10.6	7.8	1.4
Can't Say	2.4	5.2	2.9	2.9

Table 18: UK Attitudes Toward Speaking Up About Friends or Family

	Manager Director %	Employee %	Self Empl/ Volunteer %	Other/None %
Highly Acceptable	36.1	31.1	39.1	41.1
Fairly Acceptable	30.1	28.1	27.6	30
Neither Acceptable nor Unacceptable	15.7	15.2	12.3	10
Fairly Unacceptable	6	8.4	8.2	11.4
Highly Unacceptable	6	9.7	8.2	1.4
Can't Say	6	7.5	4.5	5.7

When considering that questions like the ones set out above can be interpreted as “as a friend/colleague/employee, how acceptable is it to blow the whistle?” a gap between roles becomes clearer. We discuss the implications for whistleblowing research and for practice in the subsequent section.

5. **Discussion**

It is important to note the data sets we analysed have informed other studies. Brown et al (2014) analysed the Australian and UK studies in their chapter exploring the relationship between trust, transparency and whistleblowing. In that chapter, they point out that support for whistleblowing is higher than is often believed, a relevant finding to our analysis that focuses on attitudes. The chapter goes on to highlight that this support is not due to a mistrust in institutions, but there is a common *perception* that whistleblowing is not supported. It also highlights attitudes toward external whistleblowing to the media are more negative than attitudes toward internal whistleblowing. Our paper, which looks at the same data, builds on these insights, segmenting responses differently and uncovering an area that may be useful to consider in addition to these valuable findings, that is that attitudes are also affected by what role someone is occupying when answering questions about whistleblowing. This provides researchers with new avenues to explore with some suggestions for this made at the end of this paper.

TI Ireland also analysed the Irish survey in their Speak Up Report 2017 (Transparency International Ireland, 2017). In this report, they note the discrepancy between employer and employee attitudes, highlighting how employers need to do more to assure employees that disclosures will be acted upon. They also indicate that the espoused support from employers seems to break down when questions about whether they would hire a whistleblower, for example, are analysed. The report points to a lack of awareness and a need for more education on the part of employers to ensure that employees can speak up safely in their organization. Our study builds on this important work by suggesting there is more nuance to attitudes toward whistleblowing: that they may change based on the role one occupies. This compliments the TI Ireland (2017) report by providing an additional suggestion for why attitudes might diverge. As employees move into management roles, they may be more exposed to information about whistleblowing, or they may see it in a different light than they did as an employee.

The implication that attitudes may change based on role or identity adds to the literature on attitudes towards whistleblowing. In general, whistleblowers have been portrayed as heroes (Grant, 2002), traitors (Hersch, 2002; Rothschild and Miethe, 1999), parrhesiasts (e.g. Weiskopf and Tobias -Miersch, 2016) and stigmatized (Stein, 2019; Van Portfliet, 2020).

Others have noted that all of these attitudes seem to co-exist (e.g. Contu, 2014). Previous empirical studies have found that attitudes toward whistleblowing are impacted by, for example, value orientation (Park et al, 2014), cultural orientation (Park et al, 2008), and who the disclosure is made to (Callahan and Collins, 1992). This range of descriptions of whistleblowers hints at the complex, unique and situated aspects of speaking up and show that how whistleblowers are perceived is not straightforward. Our study adds another layer of complexity to these valuable studies. Empirical studies to date have been static- they examine how a particular group of people perceive whistleblowing at a particular point in time. Our analysis indicates that these attitudes may not be fixed, however, and may shift over time. By considering these studies together, and building on them, a more nuanced understanding of how attitudes are formed emerges. This may seem like a small step forward, but the nuance has implications for not only whistleblowing research, but practically for whistleblowers as well.

6. **Conclusion**

In this paper, we have presented our analysis of three different surveys, highlighting the differences between employee and employer attitudes. We also pointed to several questions in the Australian and UK data that showed differences in perceived acceptability about who it is okay to report about, which we also interpreted as an indication of difference in attitudes based on role/identity. While our analysis is necessarily constrained, the potential implications that we identified are an important area for future research: how does one's role/identity impact their attitude toward whistleblowing?

Limitations

Although our findings are interesting, the surveys that we analysed were not designed to assess differences in attitudes based on role. They are cross-sectional surveys that are only partially about attitudes. The surveys are also constrained to three countries, and results in similar surveys in different cultural context may yield different results. Moreover, identity is more than one's role- aspects such as gender, class, political beliefs, etc. also factor in to one's identity, and these characteristics were not consistently captured across the surveys. Therefore, our findings are necessarily limited and future research, for example, a dedicated, longitudinal survey that uses the same questions across contexts, is needed. Despite these limitations, the findings do have some practical implications.

Practical Implications

Further research is needed in this area, but the implications of our findings are very important. Understanding how and why attitudes change could help identify better protections. We know that laws are not enough to protect those who speak up (IBA, 2021; Lewis, 2008), and having sympathetic others is crucial to protecting whistleblowers (Park, Bjørkelo and Blenkinsopp, 2020). Therefore, understanding how to influence attitudes would be an important addition to research in this area, as it would both inform whistleblowers and advocates about how they can approach others to get the support they desire, and it would allow for protections to be more tailored, for example, by having training available for certain roles. More practical implications may also be identified through future research in this area.

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Chapter 3: South Africa's State of Capture: The Role of Whistleblowers and Civil Society in Exposing Wrongdoing

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1. Introduction

There is widespread recognition of whistleblowing as a mechanism to combat fraud and corruption in society. Corruption is not a new phenomenon in South Africa – it was abundant throughout the apartheid regime manifesting in economic crimes in collusion with reputable companies in 'reputable' states (van Vuuren, 2017). Shortly post-1994, it appeared that "old habits and predispositions may well sustain much of the existing administrative corruption" but could also have been the by-product of change (Lodge, 1998: 187). Even the public service sector exhibited "unacceptably high levels of corruption" (Schwella, 2001: 387); and the arms scandal involving Schabir Shaik (a South African businessman found guilty of corruption and fraud, who rose to prominence due to his relationship with Jacob Zuma) and Tony Yengeni (a South African politician and member of the ANC, also found guilty of corruption linked to the arms scandal), highlighted South Africa's susceptibility to corruption (Hyslop, 2005).

There have been allegations of corruption in South Africa even before the start of the Zuma presidency, however, the Zuma era presidency (2009-2018) appeared to have reached a grand scale of corrupt relations and actions. From early on, the Zuma presidency was, in fact, plagued by allegations of 'state capture' which, broadly defined, happens "when resource allocation – a core function of government – is controlled by outside agents" (Labuschagne, 2017: 52).

Whistleblowers, assisted by the media and civil society organisations, played a prominent role in the recent revelations regarding corruption in state organs in South Africa. As the allegations of whistleblowers emerged, it became evident that it was not mere corruption that was occurring but rather what is referred to as ‘state capture’. In contrast to corruption, where individuals opportunistically abuse their positions of power for personal gain, state capture refers to repeated and well-organised collusion practices through which actors use state power to extract personal benefits (Labuschagne, 2017: 52). It entails high-level corruption that is pervasive enough to control votes, influence courts, and obtain favourable executive decisions

(Smith & Thomas, 2015: 778). Alarmingly, state capture stretches beyond the looting of state resources to assume total political power and ensure long-term political survival (Bhorat et al., 2017: 5).

This paper considers the role of civil society organisations in aiding whistleblowers in dealing with the aftermath of the responses to their revelations. The findings are based on ten semi-structured interviews conducted with both whistleblowers and members of civil society organisations. Four prominent whistleblowers and six civil society members (two NGO members and four members of media outlets) were interviewed. The interviews lasted between 60 and 120 minutes each. All of the participants were interviewed once (except for one whistleblower who was interviewed twice). Three interviews were conducted in-person (two whistleblowers and one member of a media outlet). The remainder of the participants were interviewed virtually due to the research coinciding with the Covid-19 pandemic restrictions that prevented meeting participants physically. All the online interviews were, however, conducted with video transmissions for better communication with the participants and for the detection of non-verbal cues.

2. The emergence of the Zuma-Gupta relationship

In 1994, South Africa's apartheid government negotiated itself out of power to make way for a non-racial, multiparty democracy. It would appear that South Africa was particularly vulnerable to various forms of opportunism during this transitional period (much like the vulnerability of post-Soviet states, as their oligarchs emerged). This transition might have opened the doors to various individuals and organisations, such as the Gupta family, to swoop in and establish relationships with high-ranking officials within the ANC for what would eventually be of great benefit to them.

Bhorat et al. (2017: 2) suggest that a silent coup occurred "that has removed the ANC from its place as the primary force for transformation" in South Africa. At the centre of this coup was a relatively small collection of individuals and companies connected to the Zuma-Gupta network. To fully understand how this network had managed to establish a stranglehold over various South African institutions and companies, it is imperative to trace back its origins.

The Guptas had begun to establish relationships in South Africa even prior to solidifying the

one with Zuma. Ajay, Atul and Rajesh Gupta immigrated to South Africa, from India, in 1993 (Pauw, 2017: 20). Thabo Mbeki and Essop Pahad (a minister during the Mbeki presidency) met Atul Gupta in 1996 and Pahad already established a relationship with Atul during their second meeting. Essop Pahad and Thabo Mbeki introduced the Gupta family to Jacob Zuma (Myburgh, 2017: 31-33).

It appears that the Guptas and Zumas entered into some form of a mutually beneficial relationship as early as 1998. Allegedly the Guptas had, at this very early stage, carefully selected Jacob Zuma (and backed him for the presidency), which eventually evolved into the state capture scenario. From 2001, Jacob Zuma's son, Duduzane, began benefitting from his father's business relationship with the Guptas (Basson & du Toit, 2017: 59-60).

Allegations of Duduzane Zuma's involvement in the state capture scenario are abundant. Desai (2018: 499) notes that the Guptas' influence over Jacob Zuma (and in turn the state) "consisted of an entanglement of friendship and economic ties between members of the Zuma and Gupta families". Jacob Zuma used his presidential position "to give preferential treatment to businesses owned by the Guptas and his son Duduzane Zuma" (Desai, 2018: 500). They received lucrative state contracts and got access to various mendacious mining deals. Even government advertising was intentionally redirected towards two Gupta-owned media companies: the New Age newspaper and ANN7 (a television channel) (Desai, 2018: 500).

In October 2019, Duduzane Zuma admitted to setting up a meeting between Mcebisi Jonas (the then-Deputy Finance Minister), the Guptas and himself (Ntsabo, 2019). Jonas had alleged that the purpose of this particular meeting was to offer him the position of Finance Minister "together with a R600 million bribe to do the family's [the Guptas] bidding" (Ntsabo, 2019). Nhlanhla Nene, himself, claimed that he was fired by former then-President Jacob Zuma as "he refused to approve projects such as the nuclear programme that benefited the Guptas" (Ntsabo, 2019). However, Duduzane Zuma refuted that this meeting and his association with the Guptas were corrupt or related to financial malversations and state capture.

The then Public Protector, Thuli Madonsela's (2016) 'state of capture' report collated testimonies from several whistleblowers that ultimately put in motion the Zondo Commission of Inquiry into State Capture. This public inquiry, in turn, has significantly contributed to information regarding the scope of state capture entering the public domain. Such testimonies

would have been impossible if various non-governmental organisations and media outlets did not support the whistleblowers. The obstacles faced by the whistleblowers were abundant, and the support of civil society was key in advancing the whistleblower's individual resilience.

3. State capture whistleblowers

The Gupta Leaks exposure was arguably the single most important event in bringing state capture to the fore, when two whistleblowers came into possession of hard drives of Sahara, a Gupta company, containing 300 000 emails detailing the unsavoury relationship between the Guptas and the Zuma regime. The emails were exposed by the NGO, amaBhungane, which indicated that "the Gupta family has a central role in manipulating the awarding of government contracts" (Bhar, 2017). Essentially, amaBhungane gave the whistleblowers credibility through availing of these emails containing ample evidence with regards to the depth of corruption. In fear for their lives 'Stan' and 'John' were relocated abroad and remain anonymous.

Mosilo Mothepu is the former CEO and Executive Director of Trillian Financial Advisory. Soon after her promotion to this position, she became aware of the close ties that Trillian, through its owner Eric Wood, maintained with the Gupta family and the favourable contracts that Trillian had with the State-Owned Enterprises (SOEs) Eskom, Transnet, SAA, SA Express and Denel. There were even instances where Trillian received funds from state-owned enterprises without rendering any services. She resigned from Trillian three months after becoming its CEO and later blew the whistle to the Public Protector, Thuli Madonsela, who was compiling the 'state of capture' report.

Following her disclosures, Mothepu experienced character assassination and was labelled a fraudster, liar and disgruntled employee in some media. She was accused of cybercrime, extortion, fraud, contravention of her employment contract, theft of confidential information, perjury, and defeating the ends of justice. She took her former employer to the South African Council for Conciliation, Mediation and Arbitration (CCMA) at a cost of R1.3 million in legal fees. It took her sixteen months to clear her name of these charges. She still lives in fear of being assassinated and is struggling to find a permanent job.

The SOEs Eskom and Transnet were "the primary vehicles for managing state capture" (Bhorat et al., 2017: 3), as was South African Airways (SAA) which formed part of a "much bigger,

more ominous and carefully orchestrated long-term plan" to choreograph state capture (Bhorat et al., 2017: 21). Cynthia Stimpel served as the group treasurer of SAA at the time she blew the whistle. She became concerned about a R256 million contract that SAA proposed to give to service provider BNP Capital. She approached various banks and acquired significantly lower quotes from two of them. However, when she raised her concerns with the SAA board, they informed her that this was none of her concern. SAA accused her of misconduct, refused to recognise her whistleblower status and suspended her.

They used delaying strategies (such as their lawyer not appearing in court) in order to avoid bringing the issue to a resolution. Eventually, Stimpel had no choice but to enter into a settlement. In her interview with the researchers, Stimpel indicated that she feels that she was labelled a snitch, an impimpi (a derogatory term referring to a police informer or collaborator), and as 'ratting on others'. She has been unable to find new employment and currently teaches yoga as a means of survival.

A separate case of state capture during the Zuma presidency is that of the Public Investment Corporation (PIC). The PIC is responsible for the management and safeguarding of state pension funds. Simphiwe Mayisela was approached by the PIC to be the Head of IT Security. An anonymous whistleblower using the pseudonym James Nogu/Noko accused "various board members and management of impropriety and corruption delving into their personal lives" (Dlamini, 2019). Mayisela was asked to investigate the origin of information that uncovered irregularities within the PIC (this, itself, being an attempt to stop the dissemination of the information of the anonymous whistleblower James Nogu/Noko). Upon realising the severity of the claims, Mayisela blew the whistle on the wrongdoings occurring at the PIC to the police, after a very short tenure at the SOE. A disciplinary hearing determined that he did not show good faith (a requirement to make a protected disclosure in terms of the South African Protected Disclosures Act 2000) by not informing the CEO that he was collaborating with the police in investigating wrongdoing at PIC. This finding led to his dismissal. Prior to blowing the whistle, Mayisela was the type of candidate that would be guaranteed employment due to his qualifications and resume. Now, the opposite is true as it is impossible for him to find employment (due to negative labelling) and he has had no option but to start his own consultancy firm.

Altu Sadie served as an executive at West Africa's Ecobank Transnational. He blew the whistle

on alleged accounting irregularities at Ecobank and questioned the investment made by the PIC into Ecobank. At the time of the investment, Ecobank was on various rating agencies' watchlists for a downgrade making the investment speculative at best. Sadie was accused of being a disgruntled former employee. Sadie felt that the negative responses he had received from colleagues and in the media dragged his name through the mud and discredited him. He and a supportive subordinate were dismissed. He fought an unfair dismissal case requiring a large sum of money in legal fees. He ultimately won the case, but his former employers are still appealing in an attempt to delay the resolution of the case. He has been rendered unemployable and he feels that his life has been irreversibly changed. He now owns a small coffee shop.

4. The role of civil society

The success of these whistleblowers in exposing such high-level corruption required the active support of civil society organisations, before, during and after making their disclosures. These civil society organisations acted independently of the state and were bound by a common concern, believing that they could have an impact on the experiences of whistleblowers as well as broader South African society.

Li (2006: 18) defines a harmonious society as "[a] democratic society under the rule of law, based on equality, honesty, compassion and justice". Civil society is a necessary component for an effective democracy (O'Connell, 2000: 477) that advances the rule of law, equality, honesty, compassion, and justice.

Civil society generally consists of a wide array of formal and informal associations that advance public interests and ideas independently from the state, the public sector, and the for-profit private sector. Civil society is the voluntary participation of individuals that act in their private capacities, independent of the state. These individuals are bound by a common concern about issues that could impact broader society (Dunn, 1996: 27). What constitutes civil society is "a web of autonomous associations independent of the state, which bind citizens together in matters of common concern" (Kligman, 1990: 420). Non-governmental organisations and the media are included in this definition of civil society.

For civil society to pursue the advancement of public interests and ideas, two demands need to

be met. Firstly, a broad representation is necessary that focuses on various people rather than narrow interests (Lewis, 2006: 694). Since the public interest must be socially constructed, a dialogue process is necessary that is open and free from oppressive constraints (Lewis, 2006: 700). Secondly, in order to engage with the duties and values associated with public interests, four facets need to be addressed (Lewis, 2006: 694). These are: 1) *democracy,* as democratic values balance individual and private interests (which are aggregated by the political system into public action) whilst maintaining receptivity and accountability; 2) *mutuality,* which concerns mutual interests and common concerns regarding mutual public interests with ethical norms being added to democracy; 3) *sustainability,* as no generation should deprive future generations' quality of life, therefore providing a 4) *legacy*, which is an obligation to future generations, accomplished by ensuring that there are accountability systems in place such as a Chapter Nine Institution[1] for whistleblowers.

5. Lack of civil society support

Altu Sadie notes that he "tried so many people" to find solutions to the dire circumstances he found himself in. In terms of NGOs, he acknowledges that he did reach out to AfriForum[2] for assistance but that they were unable to help because he had not taken legal action (such as lodging a case at the police station), thus their hands were tied, and they were not capable of following further legal procedures. Altu notes that he also approached Business Leadership SA[3] for assistance but to little avail. He believes that these institutions are more concerned with fighting the high-profile state capture cases and appear to be fearful of powerful corporates as they often have shares in many of these businesses.

Due to his experiences, he developed a distrust for the media. He felt that the media just wanted to publish a story and wanted to use him. Thus, support from media (the fourth estate) appeared to be lacking in Altu's case. Moreover, it appeared to have a detrimental effect on Altu due to him feeling that he was being used. He further supports his statement by referring to Bruce Whitfield from 702[4], whom he had asked to report on his story. Bruce Whitfield rejected this

[1] Chapter Nine Institutions are a group of organisations that have been established in terms of Chapter 9 of the South African Constitution for the purposes of safeguarding democracy. There are currently seven organisations (one of which is the Office of the Public Protector) which fall within the classification.
[2] AfriForum is an NGO operating in South Africa, that protects the rights of minorities.
[3] An independent South African organisation that engages business across government, civil society, and labour.
[4] A commercial radio station based in Johannesburg, South Africa and mostly concerned with political and business discussions.

request as he is sponsored by Nedbank. Hence, Altu illustrates that these powerful banks (that have been associated with firms where corruption occurs) have a considerable amount of influence on various civil society organisations that are supposed to advocate for people such as Altu. Altu does, however, still feel that people such as Alec Hogg from Money Web and the Daily Maverick are positively involved in civil society in attempting to assist and advocate for whistleblowers.

6. Civil society support to whistleblowers

PPLAAF (The Platform to Protect Whistleblowers in Africa)

The French NGO PPLAAF took a proactive stance in supporting whistleblowers. This meant that they actively approached whistleblowers, such as Mosilo Mothepu, once they learned of their narratives, for example, reading about Mothepu's experiences in the South African newspaper *Mail & Guardian* and thereafter reaching out to assist her.

A main form of support that PPLAAF provides is by paying for the whistleblowers' various financial expenses. PLAAF paid Mothepu's legal fees and "they continue to pay, until this day". She does, however, feel that "until this day, civil society is sleeping", and that civil society is doing "absolutely nothing to assist the whistleblowers". Mosilo says that she was, however, supported by various independent citizens and groups, such as the CEO of MTN, who offered her a contract after reading her story. This had, essentially, financially rescued her during a time of need.

Mayisela was also offered support by PPLAAF. They created "a shield of protection around" him and assisted him with legal and other funds. He says that they created a lot of support for him, and that they did so all "from their own pockets". He added that they are "just doing it out of their own good will" (aiding whistleblowers). He credits PPLAAF with providing him with a lot of monetary support. Mayisela notes that no other NGOs approached him to provide support. He received no emotional support, nor did he receive any counselling. PPLAAF provided some degree of informal psychological support in the late-night phone calls to Mothepu.

Moreover, they provided security advice (even upgrading the security systems in Mothepu's home). They went as far as to relocate a whistleblower from the country for a brief period when

that whistleblower felt vulnerable. Most importantly, they engaged in advocacy to gain the support of other civil society organisations and to get journalists interested in the whistleblowers' stories.

OUTA

The Organisation Undoing Tax Abuse (OUTA) is unique in that it provides a platform to lay complaints if the internal whistleblowing process has failed. They possess a full legal team that provides support to whistleblowers. They have taken the initiative and have defended whistleblowers at their own cost. Stimpel contacted OUTA because she was advised to do so by a friend and former colleague of hers that served as moral support. OUTA and their attorneys were key in Stimpel coping with the situation, namely by providing resources and launching a legal battle against the wrongdoers. She worked tirelessly for ten days with the pro bono department of the attorneys. The outcome was that "SAA did not pay that R256 million out to BNP Capital". OUTA, therefore, played a crucial role in aiding Stimpel in stopping the SAA transfer of funds through an urgent interdict. OUTA also provided resource aid to engage in a legal battle against her former employer, both at a labour arbitration forum (the CCMA) and the South African Labour Court. The key to OUTA's success in providing support to Stimpel was that they shared her story with the media as quickly as possible.

Today, OUTA employs (on a part-time basis) some of the whistleblowers whose lives were irreversibly changed as a by-product of blowing the whistle on state capture. Bianca Goodson is one such example – having been the second whistleblower to have exposed the occurrences at Trillian and their connections to SOEs. OUTA has supported hundreds of whistleblowers who would benefit from having their stories heard but preferred anonymity, though Stimpel and Goodson are two who are known and prominent in the public domain.

Wayne Duvenage (CEO of OUTA) sees OUTA as an attack dog that engages in lawfare to challenge the government rather than being a watch dog like other NGOs. Lawfare is defined as "the use of law, or exploitation of aspects of a legal system, to achieve tactical or strategic advantages in the context of conflict" (Martin, 2019). This strategy was apparent in the role that OUTA played in employing court process to support Stimpel when challenging SAA.

Media exposure as support

The free press, being one of the fundamental aspects of civil society, published the #GuptaLeaks (emails and documents regarding malversations in the Gupta companies). These emails helped to flesh out some elements of state capture and supported the allegations of the whistleblowers (Basson & du Toit, 2017: 195-196). They played a pivotal role in assisting state capture whistleblowers by providing them with an avenue to present their allegations, and also supporting their allegations through the exposure of documents that complemented them. Through the collation of all this information, they added legitimacy to the whistleblowers' claims. The amaBhungane Centre for Investigative Journalism and the Daily Maverick are two of these key outlets.

Exposing wrongdoing came across as a frequently occurring theme. It appeared to be a mechanism used by media outlets to provide some safety net for the whistleblowers (in terms of retaliation). Branko Brkic (the editor-in-chief of the independent newspaper Daily Maverick), however, notes how the relationship between a whistleblower and a journalist (or media outlet) is also mutual one.

Mothepu said that "the role of investigative journalism was very important in exposing the companies, the individuals and the modus operandi of state capture". She does, however, note that her case was very specific as she "had not given a single journalist a single shred of information". Despite several media outlets wanting to talk to her, she had not spoken to any of them. She does however note that Jessica Bezuidenhout's (of the Daily Maverick) article titled 'How to bleed a whistleblower dry' was key in providing her some protection from Eric Wood's lawyers. Mothepu notes that due to this article coming out, PLAAF approached her, and this was the first support from civil society that she received. AmaBhungane's reporting was also key in presenting whistleblowers' narratives, therefore Mothepu feels they had a key role in providing support to whistleblowers.

Stimpel identifies that the involvement of 'free press' media outlet Daily Maverick was a critical moment for her, essentially acting as an NGO and being an active element of civil society by providing her with a platform to discuss her experiences as a whistleblower. She notes that the very Daily Maverick forum that she was given a chance to speak at is the one

where she received a public apology from Pravin Gordhan[5], and thus this immediately raised her "case to the top". Moreover, this resulted in her name being vindicated in the broader public domain. She also notes that the Daily Maverick played an additional role, one where she is acknowledged and praised for her 'truth and honesty'. This appears to have made Stimpel feel like she is receiving positive appraisal, which is evidently having a positive effect on her psychological well-being, especially considering that she was ostracised by her friends and colleagues once she blew the whistle.

Mayisela is one whistleblower that feels that the media did not support him in any way. He was approached by the media when his case of blowing the whistle was prominent, but they only wanted to report on it and were not prepared to give him any assistance.

John, an independent journalist that opted to remain anonymous, feels that in terms of whistleblower support "there wasn't really much that [they] could offer except of actual exposure of the story". Generally, he believes that exposing the story "that is one of the most important forms of defence". He asserts that "if you're a powerful person who stands to be exposed, you can silence that person and your problem goes away". However, John still believes that one should always be prepared for retaliation when exposing wrongdoing.

John also feels that reporting on state capture was the riskiest position of his "working existence". There was "bombshell information" that "that posed a real risk to very dangerous people in power". The journalists' main goal was to report on the information as quickly, fairly, and accurately, and as possible. Only once this done, was the risk for both the whistleblower and journalists reduced, thus offering some protection (which we could consider support for the purposes of this research). Post-whistleblowing retaliation remained a factor for both parties. In summary, actual exposure of the wrongdoing (in media) is a key form of support provided by journalists to whistleblowers, as it provides some degree of defence. John emphasises that this is the best way in which a journalist can support a whistleblower and adds that he was generally not involved in organising counsellors or exile. This view also is expressed by the USA's Government Accountability Project, which emphasises the importance of publicity as power when protecting whistleblowers.

[5] A South African politician that served as the Minister of Finance at the time of Stimpel's disclosure, currently serving as the Minister of Public Enterprises.

Stefaans Brummer, journalist and co-owner at the independent media outlet amaBhungane, maintains the same perspective, believing that publishing a story raises warning signs for the wrongdoers. They decided to publish the story of the Gupta Leaks whistleblowers four days after it was scooped by the Sunday Times because they felt that it would be good for the whistleblowers' safety and would mean putting "up another flag". Thus, by immediately running with this story, amaBhungane and Daily Maverick offered additional protection to the whistleblowers. While exposing the evidence, they also protected the identities of the whistleblowers.

Anonymity for 'Stan' and 'John'

The Gupta Leaks exposure, as presented by amaBhungane and the Daily Maverick, was critical in bringing state capture to the fore while protecting the anonymous whistleblowers 'Stan' and 'John'. In complete contrast to the exposure of a story, whistleblower anonymity appeared to have been a key factor in those instances where the whistleblowers felt that their lives were in danger. Mandy Wiener, a prominent South African journalist, says that it is a fundamental practice in journalism to protect one's source, regardless of the topic.

Brummer had initially advised the Gupta Leaks whistleblowers to come out and say who they were and what they were exposing. He felt this might give them protection. When the whistleblowers indicated their discomfort, every effort was made to protect their identities. Maintaining their anonymity was done "all on a handshake" and no written agreements were made.

Brkic says that the most important thing for some whistleblowers is to stay "alive and unknown", whilst they assist them in communicating their story to the broader public. Brkic believes, that by maintaining a whistleblower's anonymity, a journalist is providing the best form of support that they can offer them. This is accomplished by 'forgetting that the whistleblower exists' and offering coverage by making sure that there is no way that anyone can trace this information back to the whistleblower. Much like Brkic, John feels that the role of the whistleblower can become compromised when they "become the story" and adds that the "whistleblower's life can be compromised in ways that are not always easy to predict but are seldom good". Thus, like other journalists and media outlets, he would "tread extremely

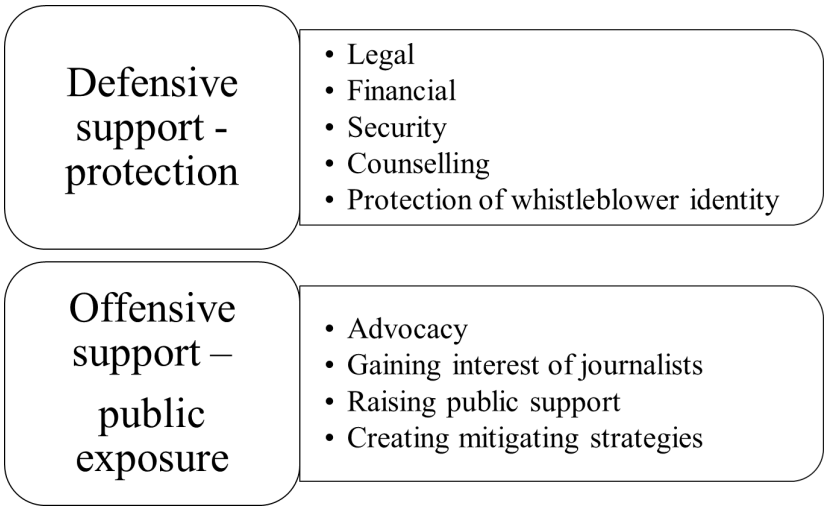
carefully" when handling information about whistleblowers. He emphasises that the most important security concern is the interest of the source, the whistleblower. John does, however, try to implement as many measures as possible to protect his 'sources' (he believes that whistleblowers immediately qualify as a source) but that he does this "much more imperfectly and necessary" than what he believes is ideal.

7. Offensive and defensive support

An analysis of the types of support provided by civil society produced a typology that differentiates between defensive and offensive support. Defensive support entails defending whistleblowers from various charges and threats and providing them protection. This support includes legal and financial aid. Legal aid is used to defend whistleblowers from trumped up criminal charges (such as the accusations faced by Mothepu) and giving assistance to ensure fair labour proceedings regarding unfair dismissals, reduced remuneration and side-lining (as was the aid provided to Stimpel by OUTA). Financial aid is used to support whistleblowers when they lose their income and find themselves in a dire financial situation due to blowing the whistle. Defensive support also entails providing security advice and implementing upgraded physical security systems. This support can also include counselling as a defensive mechanism when the whistleblowers felt overwhelmed by their situation. Finally, protecting the identities of whistleblowers can be considered a form of defensive support.

Offensive support constitutes exposing state capture to the public; thus, it entails the NGO being involved in the act of entering the state capture domain. Garnering support for the whistleblower from civil society is accomplished by advocating for the whistleblower. Through advocacy, NGOs are able to get journalists interested in the narratives of the whistleblower. This is important as it becomes easier to raise public awareness for a whistleblower due to their story becoming public information. The creation of mitigating strategies is the final element of offensive support. This entails an offensive safety net should something happen to the whistleblower. The most common mitigating strategy is the preparation of documents that would specifically name the wrongdoer should any harm come to the whistleblower who made a disclosure. Such a strategy should act as a preventative measure against more severe forms of retaliation. The following figure illustrates the typology of defensive and offensive support.

Figure 1: Typology for defensive and offensive support



8. Discussion

Defensive support entails protecting the whistleblowers from various charges and threats whilst offensive support entails advocating for whistleblowers, gaining the interests of media in reporting the whistleblowers' narratives, as well as raising public awareness and support. Civil society was instrumental in providing both offensive and defensive support to state capture whistleblowers. It is a strong recommendation that this typology should be implemented when considering the forms of support provided to whistleblowers in the future.

The NGOs OUTA and PPLAAF were very active in supporting whistleblowers. Most commonly they provided legal and financial aid, essentially trying to protect the whistleblowers. They also used some offensive strategies to provide further exposure. These NGOs continue to support some of these whistleblowers.

Various independent media outlets had played a significant role in supporting whistleblowers. The roles of amaBhungane and the Daily Maverick are undeniable, considering that they relocated the Gupta Leaks whistleblowers utilising their own resources. Public exposure through presenting the whistleblowers' narratives appeared to have been a form of support.

9. Recommendations

Recommendations can be made on two levels. Firstly, on a policy level which would assist with the protection and support of future whistleblowers as well as in the better organisation of

civil society. Secondly, and related to the support recommendation, a set of measures need to be implemented for full whistleblower support.

i) Since the state offers inadequate protection to whistleblowers, it is necessary to fill this gap. This can be accomplished by pursuing the public interest through the creation of a Whistleblowing Complaints Authority (WCA) as a Chapter Nine Institution for protecting and supporting whistleblowers and ensuring accountability of public officials.

ii) Some whistleblowers struggle to access support from civil society, and support is also fragmented among many organisations. Through the incorporation of a WCA, various civil society organisations could find a mechanism for pooling their resources together and offer comprehensive support to the whistleblower. It would also entail an easier avenue for accessing whistleblower support agencies. The limited whistleblower support that is currently available, should be expanded to include the compensation of financial costs; providing for intangible costs related to disclosure; a development of career rehabilitation programmes for whistleblowers; structured assistance in engaging with media, legal and political supporters; as well as mandatory measures to investigate and address perceived wrongdoing.

10. Conclusion

South Africa still has a long way to go, despite the fact that it has recently "launched a government unit aimed at rooting out corruption through encouraging and protecting whistleblowers in the public service" (Khumalo, 2021). However, without the establishment of a dedicated whistleblowing oversight agency that could conduct investigations, monitor the impact of the legislation, and provide support across many facets, whistleblowers in South Africa will continue to exist on the fringe. The establishment of a Chapter Nine Institution such as a Whistleblowing Complaints Authority along the lines recommended in Transparency International's Best Practice Guide for Whistleblowing Legislation or the campaign for establishing an Office of the Whistleblower in the UK would provide comprehensive support and immunity from corrupt forces.

Civil society organisations have attempted to aid whistleblowers to the best of their abilities and capacities. They could coordinate their efforts further and work together with such an authority to provide a coordinated network of support for whistleblowers. Without such measures, corruption and state capture will likely continue to run free in South Africa and erode its democracy.

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Chapter 4: Whistleblowing in the time of Covid-19: findings from FOIA requests

Ashley Savage and Richard Hyde

1. Introduction

This paper provides an overview of key findings from a research project which aims to determine the impact of the Covid-19 pandemic on the making and handling of whistleblower reports. The authors used Freedom of Information requests as a research methodology to obtain data from NHS organisations in England, Wales, Scotland and Northern Ireland. The authors present their analysis of the responses received to critically evaluate whether Covid-19 has had a significant impact on the volume of reports received by organisations. The authors use a time period from the previous year (pre-pandemic) as a comparator and assess the challenges and limitations of this method. It should be noted that these initial findings represent the early stages of data analysis which is part of a wider study. This paper will start by providing an overview of whistleblowing in the NHS and the Covid-19 pandemic. It will then discuss the use of freedom of information requests as a research method before providing an analysis of the data.

2. Background

2.1 – Whistleblowing in the National Health Service

The National Health Service ('NHS') is the publicly funded healthcare service in the United Kingdom. Established in 1948, it aims to provide critical and non-critical medical care that is free at the point of use.[1] Although the NHS covers the whole of the UK, in reality there are four separate National Health Services, as health is a devolved matter and there are therefore separate health services with separate policies and practices in England, Wales, Scotland and Northern Ireland.

Whistleblowing has been defined by Near and Miceli (1985) as "disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons or organisations who effect action." The (mis)handling of

whistleblowing disclosures in the NHS has been a long-term issue. Disclosures raising concerns over Harold Shipman, a General Practitioner in Greater Manchester who was found guilty of murdering fifteen patients in his care and is thought to have been responsible for over 200 deaths, were ignored (Smith 2003). Disclosures were also made and not acted upon in other health service scandals, such as the issues that arose with paediatric heart surgery at Bristol Royal Infirmary. Whistleblowing disclosures, when properly handled and acted upon, clearly have the potential to improve patient care and health outcomes within the NHS.

The Public Interest Disclosure Act 1998 ('PIDA'),[2] which added a new Part IVA to the Employment Rights Act 1996, was drafted and enacted against the background of a number of incidents that could have been prevented if information had been disclosed and acted upon. PIDA provides a right of action for workers who suffer dismissal or detriment following the making of a protected disclosure. In order to be protected under PIDA, the worker must make a 'qualifying disclosure.' The worker must reasonably believe that the disclosure is in the public interest and that the information falls within one of the categories set out in PIDA section 43B(1). The categories of disclosure protected extend to information regarding: (i) a criminal offence, (ii) a failure to comply with any legal obligation, (iii) a miscarriage of justice, (iv) danger to the health and safety of any individual, (v) damage to the environment, (vi) or the deliberate concealment of information tending to show any of the matters listed above. Disclosures in the NHS may particularly fall into categories (i), with criminal offences including gross negligence manslaughter, (iv) and (vi) and (ii) the failure to comply with any legal obligation, for example relating to the duty of care owed to patients.

The Act operates a "stepped" disclosure regime. At the lowest 'step' a worker will most easily receive protection if they report concerns internally to someone in their line management chain, a nominated officer or their employer. The worker is required to show that the disclosure was made in the public interest and has the reasonable belief that the information raised is true. A worker may also raise a concern with a person designated by his or her employment contract or workplace policy, or to a responsible person. The second 'step' allows for protection if a concern is raised to a 'prescribed person.' Prescribed persons are identified in the schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014 (as amended). The listed prescribed persons include health regulators, including the Care Quality Commission. The prescribed persons list was expanded to include further health service bodies following the *Freedom to Speak Up* report discussed below. The third and final 'step' which is contained in

s.43G and s.43H allows for wider disclosures, for example to the media. It requires more stringent evidential conditions to be satisfied before the whistleblower will be afforded protection.

Against the background of PIDA and sections 100 and 44 of the Employment Rights Act 1996 which provide protection for reporting concerns in health and safety cases, the NHS in the various nations of the UK put in place policies and procedures for responding to disclosures. However, the arrangements for receiving concerns and responding to them in the NHS were exposed as inadequate by the Francis Inquiry into the poor care provided at Stafford Hospital ('Mid Staffs inquiry') which was estimated to have cost between 400 and 1200 people their lives (Francis 2013). One of the recommendations of the Francis Report was a statutory duty of candour, introduced by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The duty of candour requires organisations to act in an open and transparent way with people receiving care or treatment from them. It does not directly deal with whistleblowing disclosures, although Francis (2013) expressed concern that more staff had not raised issues regarding care.

Subsequent to the Mid Staffs inquiry, Sir Robert Francis chaired *Freedom to Speak Up, a review of whistleblowing in the NHS*, which was set up in response to "continuing disquiet about the way NHS organisations deal with concerns raised by NHS staff and the treatment of some of those who have spoken up" (Francis (2015) page 8). PIDA was felt to be ineffective within the NHS for a number of reasons, including the failure to provide protection in recruitment, the failure to place any obligations to respond to protected disclosures on NHS bodies and regulators and the restriction of PIDA protections to workers only. In response to the criticisms in the report, PIDA was subsequently amended to include protections for student nurses who make qualifying disclosures and further regulatory bodies were added to the prescribed persons list.

Freedom to Speak Up made a number of recommendations with regard to the handling of disclosures in the NHS in England, on areas such as culture, handling cases, measures to support good practices and measures for vulnerable groups. In relation to culture, Francis (2015) recommended that a culture should be created where "all staff feel safe to raise concerns" and organisations "welcome and encourage the raising of concerns by staff." Francis (2015, 16) recommended that "All NHS organisations should ensure that there is a range of

persons to whom concerns can be reported easily and without formality. They should also provide staff who raise concerns with ready access to mentoring, advocacy, advice and counselling." These recommendations have been operationalised through the creation of Freedom to Speak Up polices and Freedom to Speak Up Guardian roles in NHS bodies in England. Of course, as well as encouraging staff to speak up, there must be a willingness to hear and act by organisations (Mannion and Davies 2019). In Scotland, Wales and Northern Ireland, whilst there have been some changes to the policies and procedures relating to the receipt of and response to disclosures, there has not been the institution of the Freedom to Speak Up Guardian Role.

Whilst the attempt to change the culture relating to disclosures is laudable, there is undoubtedly some way to go to achieve the culture identified by Francis (2015) (Jones 2021). The Covid-19 pandemic, the most serious public health crisis for at least a generation, had the potential to present severe challenges to the culture of speaking up (Adams et al, 2020)

2.2 – The Covid-19 Pandemic in the UK

In early January 2020, the World Health Organisation announced that the respiratory illness detected in Wuhan in China in late 2019 was a novel coronavirus The virus was named severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2, and the associated disease was named Covid-19. The World Health Organisation declared the outbreak of COVID-19 a Public Health Emergency of International Concern on 31st January 2021 and on the same day the chief Medical Officer for England confirmed that two patients had tested positive for Covid-19 in England. In early February, regulations were made pursuant to the Public Health (Control of Disease) Act 1984 providing for the screening and detention of persons reasonably suspected to have been infected with SARS-CoV-2.

On 2nd March 2020 the first death of a person who had tested positive for Covid-19 was recorded in the UK. As the number of cases in the UK increased, there were a series of escalating interventions undertaken by the governments of the various devolved nations in the UK The interventions focused first on voluntary non-pharmaceutical interventions, such as encouragement of increased hand-washing, followed by increasingly stringent restrictions on people and businesses (such as the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020, which required restaurants, cafes, bars and public houses to

close), culminating in the imposition of a stay-at-home order (or lockdown) on 26th March 2020.

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 provided that people should not leave the place where they were living without reasonable excuse and provided that many businesses should shut. These restrictions were accompanied by a slogan, "stay at home, protect the NHS, save lives." Similar regulations were issued in Scotland, Wales and Northern Ireland. With some amendments (including changes which allowed garden centres and car showrooms to reopen, and for limited numbers of people to meet outside), these regulations remained in force until 4th July 2020. The lockdown regulations were similarly lifted in Scotland (with beer gardens and cafes opening on 6th July 2020), Wales (with indoor areas of pubs and restaurants allowed to open on 3rd August 2020) and Northern Ireland (with hotels, restaurants and bars that sell food opening on 3rd July 2020). Following the easing of these restrictions, there remained in place non-pharmaceutical interventions designed to reduce transmission with masks being made compulsory. These restrictions increasingly tightened as the summer of 2020 turned to autumn, including the introduction of the "rule-of-six" and local lockdown measures.

During the first waves of Covid-19 there were reports that there was inadequate preparation, testing and provision of personal protective equipment. A number of healthcare workers fell victim to Covid-19 and the NHS was stretched close to breaking point. A number of anecdotal concerns about care and safety within the NHS were shared by media organisations and on social media. The effect of the pandemic on disclosures was therefore an important object of study.

Further waves of Covid-19 occurred in Autumn and Winter 2020, leading to the imposition of further national lockdowns in England, between 5th November 2020 and 2nd December 2020 and 5th January 2021 and 12th April 2021. National lockdowns were also introduced in Scotland, Wales (with a so-called circuit breaker lockdown between 23rd October 2020 and 9th November 2020) and Northern Ireland (with lockdowns between 16th October and 20th November, 27th November and 11th December and 8th January 2021 and 12th April 2021). At the time of writing, the pandemic continues, although the restrictions placed on individual freedoms have lessened due to the availability of vaccines, which have reduced the chances of individuals suffering severe illness, being hospitalised and dying.

3. Methodology

The use of FOI requests as a tool to gather data for qualitative and quantitative research is increasingly popular (Savage and Hyde (2014); Walby and Luscombe (2019)). In England, Wales and Northern Ireland, the Freedom of Information Act 2000 permits individuals to request that public bodies disclose information that they hold; in Scotland, the Freedom of Information (Scotland) Act 2002 provides a similar mechanism.

These Acts provide the right for 'any person,' which includes non-natural persons such as companies, to be informed in writing as to whether a public authority holds the information specified in a request for information. Public authorities include NHS bodies. If the public authority possesses the information requested the individual has a right for that information to be communicated to them. The information must be disclosed unless it falls within one of the exemptions provided by the statute. The exemptions take the form of either 'harm-based' or 'class-based' exemptions. A 'harm-based' exemption requires a public authority to identify that the release of the information requested by the applicant would, or would be likely, to cause 'prejudice' to the interest specified in the exemption. In contrast, class-based exemptions require the public authority to identify that the information requested falls within the class of information contained in the substance of the exemption. As noted below, one NHS Trust in England relied on exemptions.

In this study, 224 NHS Acute Trusts in England were sent Freedom of Information Act (FOIA) requests. Seventeen NHS organisations in Scotland were sent Freedom of Information (Scotland) Act (FOISA) requests. In Wales, three NHS Trusts covering the whole of Wales (the Welsh Ambulance Service, Velindre University NHS Trust and Public Health Wales) and seven local health boards were sent FOIA requests. In Northern Ireland, six health and social care trusts were sent FOIA requests.

It is necessary to design the FOI requests appropriately in order to enable the research questions to be answered, and to obtain information of the sort that the public body is likely to possess. In this case, the research was intended to provide a picture of the effect of the covid-19 pandemic on whistleblowing disclosures, so the questions were designed to allow an

exploration of this issue. The request submitted appears in appendix 1.

The methodology adopted does not present any ethical issues, as the analysis is of publicly available data (although such data was made public in response to the request made by the researchers). However, given the timing of the requests, during the Covid-19 pandemic, the researchers adopted a sensitive approach to the responses provided by the NHS Trusts. If the NHS Trust requested more time to comply with the FOI request, then the researchers granted that request. If the Trust did not respond, the researchers did not chase the Trusts for a response, and if the Trust claimed that an exemption under the Act applied, then the researchers did not pursue the matter further. This means that the data is descriptive, and cannot be taken to be representative, as it is not clear that the organisations that responded constitute a representative sample.

4. Analysis of the data

The authors requested that each public health and social care organisation provide the total number of whistleblowing concerns received between two fixed time periods, pre-pandemic 1st March 2019 and 31st August 2019 (hereinafter "the first period") and during the first wave of the pandemic, 1st March 2020 and 31st August 2020 (hereinafter "the second period").[3] The aim of this exercise was to determine whether Acute Trusts had received a significant increase in the number of concerns reported as a result of the pandemic. Conversely, the authors wanted to know whether Covid-19 working arrangements (which resulted in non-essential staff being required to work from home) had resulted in a significant decrease in the number of reports received.

Whilst some trusts experienced an increase or decrease in the number of reports comparatively from the first and second periods, the authors have chosen to only highlight instances where there is evidence of a significant increase or decrease (the authors define this as an increase or decrease of ten or more reports) as opposed to a slight increase or decrease in reports (an increase or decrease of five or less reports).

It is submitted that there are a number of factors which could lead to a significant increase or decrease in reports which may not be attributed to the Covid-19 pandemic. First, it is common sense for the number of reports received in the first and second periods to be different, there is no reasonable justification to expect the number of reports in either period to be at the same

level because the frequency and need to make reports is not dependent upon a particular time period. Second, there may be multiple reports by multiple persons about the same issue. Third, there may be multiple reports on the same issue by the same person, however, the trust may count these as separate reports. This could be a deliberate action or policy by the trust to record reports in a certain way or it could be unintended, whereby the same person could make multiple anonymous reports about the same issue, but the recipient of the report is unable to determine that the reports were made by the same person. Fourth, the trust could have changed the way that reports are categorised and recorded. Fifth, an increase in reports could have been the result of efforts by the organisation to promote Freedom to Speak Up/ Whistleblowing within the organisation. Sixth, a decrease in reports may be due to action taken by an organisation to rectify an issue and could indicate a positive improvement rather than a negative consequence of the Covid-19 pandemic. Based upon the aforementioned factors, it is necessary to not only identify whether there has been a significant increase or decrease in reports but to analyse this against information provided on what those reports contain. Moreover, as will be discussed later, it is suggested that further and more in-depth research is required to fully determine the impact of Covid-19 on whistleblowing in NHS organisations. This paper will now provide an overview of the responses received and key findings in each of the respective jurisdictions.

4.1.England

Two hundred and twenty four NHS Acute Trusts in England were sent Freedom of Information Act (FOIA) requests. One hundred and thirty seven Trusts provided the authors with a response. Thirty five Trusts provided us with incomplete data. One NHS trust, Great Ormond Street Hospital for Children NHS Foundation Trust, refused the request entirely by relying on the exemptions contained in s.41 (confidentiality) and s.36 (information prejudicial to the effective conduct of affairs) FOIA 2000.[4]

Of the 107 NHS Acute Trusts that provided us with data covering the first period and the second period, 19 NHS Acute Trusts showed a significant increase in the number of concerns received in the second period as compared to the first period.[5] Three of these trusts provided a detailed breakdown on the number of reports which were Covid-19 related.[6] Two trusts identified that they had received Covid-19 related reports but did not specify the number.[7] Data from the 14 remaining Acute NHS Trusts showed a significant increase in the number of reports received

over the second period but did not provide sufficient data to accurately assess whether these reports were related to the Covid-19 pandemic. For example, Brighton and Sussex University Hospitals NHS Trust received 20 reports in the first period and 51 in the second period.[8] This represents a 155% increase in the number of reports received but it was not possible to ascertain whether these reports were related to Covid-19.

Trusts with a significant increase in reports directly attributable to Covid-19

Barnet, Enfield and Haringey Mental Health NHS Trust received 19 reports in the first period and 61 reports in the second period.[9] This represents an increase of 221%. Out of the 61 reports received in the second period, 20 reports were categorised as: "Concerns relating to Covid including PPE availability, infection control, donning and doffing, safety of staff, physical health monitoring of suspected Covid patients."[10]
Two reports were categorised as: "concerns on redeployment to Covid ward for senior member of staff/partner shielding." The "Lack of social distancing in Senior Leadership Team meetings" was also identified as a problem that had been reported, however, the response did not indicate how many reports concerned this specific issue.[11] In addition to the aforementioned Covid-19 specific issues, two reports were categorised as "work from home concerns". These reports may also be related to Covid-19, however, it is not possible to accurately determine this without further information.[12]

Royal Surrey NHS Foundation Trust received 25 'contacts' in the first period and 86 'contacts' in the second period, a term which the authors will address further below.[13] This represents an increase of 244%. The Trust identified that 46 of the concerns were Covid-related and provided the authors with information on how Covid-19 related reports were categorised and handled:

> "In this particular period a separate category was created for concerns about Covid - these were escalated immediately and responded to in the same day, with typical actions including revisions and updates to our Covid action cards and further and improved communications about Covid."

The data provided by Royal Surrey NHS Foundation Trust provides strong evidence of the impact of Covid-19 on reporting. However, it should be noted that the Trust identified in their response that:

> "This Trust has a Freedom to Speak Up Guardian (FtSUG) who deals with whistleblowing concerns although those concerns are not necessarily restricted to the parameters of whistle-blowing legislation in accordance with the National Guardian Office."[14]

Whilst the aforementioned explanation could be used to account for the high number of reports received, it is submitted that this does not have a detrimental impact on the data provided by the trust. The Trust used the term 'contacts' to describe the number of reports received. However, in response to question three of the FOIA request, which asked for a summary of the whistleblowing concerns, the Trust answered that they had received '46 Covid related concerns.'[15] The statement does suggest an issue with the way in which NHS Acute Trusts are utilising terminology and the impact that this is having on the reporting of data. For example, it appears that some trusts have chosen to not use the term 'whistleblowing' at all, instead adopting and 'applying the term freedom to speak up.' Some trusts are alternatively making a distinction between FTSU and whistleblowing reports and this has impacted on how concerns are being handled and reported upon in the data. The authors will discuss this issue in detail in a forthcoming article.

Trusts with a significant decrease in reports directly attributable to Covid-19

Only three NHS acute trusts showed a significant decrease in the number of reports received. Oxleas NHS Foundation Trust received 59 reports in the first period and 41 in the second.[16] This represents a 31% decrease in the number of reports received. Seven of the reports received were categorised as involving a "Management issue – covid" and two reports were classified as "system/process – Covid." Without further data, it is not possible to ascertain why there was a decrease in reports in the second period in contrast to the first period.

Norfolk and Suffolk NHS Foundation Trust received 85 reports in the first period and 50 reports in the second.[17] This represents a 41% decrease in the number of reports. Whilst this number is significant, without further information it is not possible to determine whether the decline in reports is due to Covid-19 or other factors. The data provided also did not provide sufficient detail to assess whether the trust had received Covid-19 related reports. Sussex Community NHS Foundation Trust received 73 reports in the first period and 62 in the second, a 15% decrease in the number of reports received. Again, it was not possible to determine why

this occurred without further information.

4.2.Scotland

Seventeen NHS organisations in Scotland were sent Freedom of Information (Scotland) Act (FOISA) requests. Sixteen provided the authors with a response. Five trusts provided us with incomplete data on the basis that disclosure of such information was either exempt under s.36 (confidentiality) FOISA or s.38 (personal information).[18] In these instances the NHS Trusts in question had received less than 5 whistleblowing reports and to provide further information may lead to identification of the whistleblower. NHS Orkney cited the "small size of the Orkney population and the small sample size" as a reason to exempt disclosure of the information under s.38(1)(b) FOISA 2002 (NHS Orkney, FOIA response, 04/12/2020). Out of the remaining NHS organisations, two identified that they had received reports in the first period but had received no reports in the second period. The number of reports was very small.[19] Two NHS organisations disclosed that they had received reports in the first and second period, however, again the number of reports was very small.[20] The State Hospital received no reports in the first period and only four reports in the second.[21] Six NHS Trusts responded that they had not received any whistleblowing concerns in either the first or second period.[22]

Based on the aforementioned findings, there were no significant increases or decreases in the number of reports. Further research is required to ascertain why the number of reports is so low. There could be several reasons why this is the case: firstly, (albeit unlikely) NHS organisations in Scotland may not have encountered any matters of concern over either period. Second, the geographical location of several trusts and population size may impact on whether staff feel empowered to raise concerns. Third, there could be problems in how information is being recorded by NHS organisations (for example, it may be kept at a local level, but it is not tracked and monitored centrally) or disclosed in FOISA responses. Fourth, there could be a need to promote whistleblowing more actively across NHS organisations in Scotland.

In England, the National Guardian's Office supports a network of Freedom to Speak Up Guardians. NHS organisations in England are required to report data to the National Guardian's Office. The first National Guardian was appointed in 2016 and the Office has been engaged in supporting awareness raising activities across NHS organisations. In Scotland, the Independent National Whistleblowing Officer (hereinafter "INWO") was established

following the coming into force of The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2020. Each NHS organisation is required to have a Confidential Contact (a person tasked with receiving reports) and a Whistleblowing Champion (a non-executive director position).[23] In April 2021, INWO published National Whistleblowing Standards and supplementary information, which post-dates the first period where data was requested by the authors.[24] As the standards were published in the second month of the second period when the authors requested data, it is not unreasonable to determine that the reforms introduced by INWO were yet to take full effect, particularly as this period fell within the first wave of the Covid-19 pandemic.

4.3. Wales

In Wales, the National Health Service is organised into three NHS Trusts covering the whole of Wales (the Welsh Ambulance Service, Velindre University NHS Trust and Public Health Wales) and seven local health boards. All of the aforementioned organisations were sent FOIA requests. Eight organisations provided the authors with a response. Cardiff and Vale University Health Board refused to provide details for each whistleblowing report on the basis that to do so would prejudice the exercise of a public authority's function to protect persons other than persons at work against a risk to health and safety (s.42(2)(j) FOIA 2000). Two NHS organisations disclosed that they had received no reports in either period.[25] The Welsh Ambulance Services NHS Trust received one report in the first period but no reports in the second period.[26] Only two NHS organisations who disclosed information to the authors received whistleblowing reports in both the first and second period. Hywel Dda Health Board received eight reports in the first period and seven reports in the second. This does not represent a significant increase of reports during the first wave of the Covid-19 pandemic. In contrast, Cardiff and Vale University Health Board received 2 reports in the first period and 11 reports in the second. It did not disclose detailed information about the concerns raised. Whilst no reports were specifically categorised as Covid-19 related, two reports related to PPE and one related to social distancing.

As with Scotland, the low number of reports could be due to a range of different factors. NHS Wales does have a procedure for staff to raise concerns which has been adopted by all trusts and health boards. Moreover, Cardiff & Vale University Health Board has adopted a Freedom to Speak Up Safely scheme which includes a 24-hour helpline for staff and a 'safety valve'

process whereby staff can raise concerns to the Chair of the board.[27] However, whilst England and Scotland have developed solutions to provide central oversight and support training and awareness raising, Wales does not currently have an equivalent authority. On 12th June 2021, the BBC reported that NHS staff in Wales encountered a "culture of bullying" which "leaves people scared to raise issues."[28] Responding to the report, a spokesperson for the Welsh Conservatives called for the establishment of freedom to speak up guardians.[29]

4.4.Northern Ireland

In Northern Ireland, the health and social care provision is organised into six health and social care trusts. The authors sent a FOIA request to all of the trusts. Five trusts provided a response. Relying on s.40(2) FOIA (third party information) Southern Health and Social Care Trust provided figures of <5 because the low number of reports could result in identification of the whistleblower. In making the decision, the trust took into account the "small geographical area" and the "sensitivity of the information requested" (Southern Health and Social Care Trust, FOIA response, 17/12/2020).

The Northern Ireland Ambulance Service Health and Social Care Trust disclosed that it had not received any reports during either period.[30] The remaining four health and social care trusts all reported that they had received reports in the first and second periods.[31] However, these numbers did not exceed more than 10 reports and the numbers remained relatively stable despite the first wave of the Covid-19 pandemic. Whilst the reported numbers are small, further data is needed to assess how trusts are handling whistleblowing reports and promoting internal reporting mechanisms.

5. Conclusion

This paper has provided an overview of whistleblowing in public health and social care service organisations across the United Kingdom in periods before and during the Covid-19 pandemic. This paper highlights that whilst there were some examples of significant increases and decreases in the number of whistleblowing reports received, in the Trusts that provided information to us. However, whilst the data suggests that the Covid-19 pandemic did not appear to have a major impact on the raising of concerns, further research is required to develop a clear picture on the impact of Covid-19 on whistleblowing. This study highlights a limitation of using FOI requests to obtain research data. The data provided in responses to freedom of

information requests can only indicate *what* has happened and there is no requirement for organisations to provide detailed responses. In order to determine why the significant increases and decreases occurred, it would be necessary to utilise different research methodologies, for example, semi-structured interviews and questionnaires with health and social care practitioners in the organisations concerned.

This paper also highlights some issues concerning how reports are being categorised and reported upon. For example, some organisations had replaced use of the term 'whistleblowing' entirely, instead using the term 'freedom to speak up.' Whilst it is evident that the effects of the Francis Review and the work of the National Guardian's Office has meant that NHS organisations in England have adopted FTSU, this impacted on the data disclosed in responses with some trusts identifying that they did not hold information on whistleblowing, only freedom to speak up. In contrast, other trusts seemed to adopt a 'hybrid' approach whereby FTSU concerns were handled by the FTSU guardian and 'whistleblowing' concerns were handled by Human Resources. Evidence from some responses identifies that trusts believed the term 'whistleblowing' only applied to concerns which would meet some form of legal threshold to fall under PIDA. These responses were particularly concerning and showed a misunderstanding of how PIDA operates in practice. The authors will explore these issues in detail in a forthcoming article.

The authors also received data on how the reports were handled by health and social care organisations. The data suggests that in Acute NHS Trusts in England, FTSU guardians were actively referring reports to line managers or to senior management to take further action. In some instances, FTSU guardians were taking more of an active role, convening meetings to rectify issues and even engaging directly with persons accused of misconduct. Again, full analysis of this data will be the subject of a forthcoming article.

Further research is required to determine the reason for the low number of reports in Wales, Scotland and Northern Ireland, the disclosures made in the second and third waves of the pandemic, and to consider the effect of the pandemic on the culture of speaking up.

Appendix 1:

FOI Request: Handling of Whistleblowing Concerns During Covid:19 Pandemic

To whom it may concern,

1. Please provide the total number of whistleblowing concerns received between 01/03/2019 and 31/08/2019 by [name of NHS organisation]

2. Please provide the total number of whistleblowing concerns received by [name of NHS organisation] between 01/03/2020 and 31/08/2020

3. Please provide the following information for each whistleblowing concern received by [name of NHS organisation] between 01/03/2020 and 31/08/2020:
a. A brief summary of the whistleblowing concern.

b. Whether any action was taken following the concern, and if so, a brief description of the action taken.

c. If the person provided the information anonymously (i.e. they did not provide you with their name and/or contact details) please indicate this.

Further information:

Professor Richard Hyde, University of Nottingham and Dr. Ashley Savage, independent consultant are conducting research on the handling of whistleblowing concerns by organisations during the Covid-19 pandemic. Please direct any questions to Dr. Savage in the first instance: [email address]

We acknowledge that there may be a delay in responding to this Freedom of Information request due to the current situation,

With many thanks in anticipation of your response,

Yours sincerely,

Ashley Savage
Richard Hyde

Appendix II

Acute NHS Trusts in England with a significant increase and decrease in concerns received between 01/03/2019 to 31/08/2019 and 01/03/2020 to 31/08/2020.

Name	01/03/2019 to 31/08/2019	01/03/2020 to 31/08/2020	Total difference
Avon and Wiltshire Mental Health Partnership NHS Trust	26	62	36
Barnet, Enfield and Haringey Mental Health NHS Trust	19	61	41
Bradford District Care NHS Foundation Trust	25	34	9
Brighton and Sussex University Hospitals NHS Trust	20	51	31
Calderdale and Huddersfield NHS Foundation Trust	35	54	19
Chelsea and Westminster Hospital NHS Foundation Trust	9	28	19
Croydon Health Services NHS Trust	2	34	32
Dorset Healthcare University NHS Foundation Trust	26	55	29
East Suffolk and North Essex NHS Foundation Trust	17	46	29
Kent Community Health NHS Foundation Trust	2	13	11
Norfolk and Suffolk NHS Foundation Trust	85	50	35
Oxleas NHS Foundation Trust	59	41	18
Royal Surrey County NHS Foundation Trust	25	86	61
Sheffield Children's NHS Foundation Trust	32	60	28
Southport and Ormskirk Hospital NHS Trust	82	47	35
Sussex Community NHS Foundation Trust	73	62	11
The Queen Elizabeth Hospital, King's Lynn. NHS Foundation Trust	9	20	11
The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust	39	77	38
University Hospitals Dorset NHS Foundation Trust	27	43	16
University Hospitals Of Morecambe Bay NHS Foundation Trust	67	91	24
University Hospitals of North Midlands	22	43	21
Walsall Healthcare NHS Trust	22	84	62
Warrington and Halton Hospitals NHS Foundation Trust	10	20	10

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[1] In England, some services, such as prescriptions, eye tests and dental treatment are means tested rather than free to all.
[2] Or the Public Interest Disclosure (Northern Ireland) Order 1998 in Northern Ireland, which is in the same terms as PIDA.
[3] See further, appendix I: FOI Request: Handling of Whistleblowing Concerns During Covid:19 Pandemic.
[4] Great Ormond Street Hospital for Children, FOIA Response, 8 February 2021.
[5] For further information see Appendix II to this paper.
[6] Barnet, Enfield and Haringey Mental Health NHS Trust, Dorset Healthcare University NHS Foundation Trust and Royal Surrey County NHS Foundation Trust.
[7] Chelsea and Westminster Hospital NHS Foundation Trust and Sheffield Children's NHS Foundation Trust.
[8] FOIA Response, Brighton and Sussex University Hospitals NHS Trust, 16 December 2020.
[9] FOIA Response, Barnet, Enfield and Haringey Mental Health NHS Trust, 17 December 2020.
[10] Ibid.
[11] Above, n 6.

[12] Above, n 6.
[13] FOIA Response, Royal Surrey NHS Foundation Trust, 10 February 2021.
[14] Ibid.
[15] Above, n 13.
[16] FOIA Response, Oxleas NHS Foundation Trust, 4 February 2021.
[17] FOIA Response, Norfolk & Suffolk NHS Foundation Trust, 21 January 2021.
[18] NHS Fife, NHS Shetland, NHS Tayside, Scottish Ambulance Service.
[19] NHS Ayrshire & Arran (2 reports in first period 0 reports in the second period), FOISA Response, 01 December 2020, NHS Borders (1 report in the first period 0 reports in the second period, FOISA response 17 December 2020).
[20] FOISA Response 17 December 2020, NHS Dumfries and Galloway (1 report in the first period 1 report in the second period), FOISA Response 02 December 2020, NHS Lothian (5 reports in the first period 1 report in the second period),
[21] FOISA Response, The State Hospital. 09 December 2020.
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[28]John Arkless, NHS in Wales: 'Culture of bullying' among staff, 12 June 2021: https://www.bbc.com/news/uk-wales-57413875 (last accessed 19th November 2021)
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[30] Northern Ireland Ambulance Service Health and Social Care Trust, FOIA Response, 22 December 2020.
[31] Belfast Health and Social Care Trust (7 reports received in the first period 10 received in the second period) FOIA Response, 16 December 2020, Northern Health and Social Care Trust (8 reports received in the first period, 10 reports received in the second period), FOIA Response, 27 November 2020, Southern Health and Social Care Trust (9 reports received in the first period 9 reports received in the second period), FOIA Response, received 17 December, 2020, Western Health and Social Care Trust (7 reports received in the first period 4 in the second period), FOIA Response, 15 December 2020.

Chapter 5: Whistleblowing in the EU: the enforcement perspective[1]

Theo Nyreröd[2] and Stephen M. Kohn[3]

Abstract

More countries are adopting whistleblower protection laws, often with the aim of enhancing enforcement. While whistleblower protection is essential in democratic societies, it may not be sufficient to obtain this objective to a desirable degree. Further incentives, such as monetary rewards for whistleblowers, may be necessary to achieve a desirable level of detection and deterrence of wrongdoing (Schechter, 2017). In this paper, we make this point by highlighting some issues with protections in enhancing enforcement (Section 1) relative to the perceived level of economic wrongdoing in Europe (Section 2). We then consider evidence on whistleblower rewards from the US (Section 3), discuss how such programs could be designed and implemented in Europe (Section 4), and conclude (Section 5).

1. The EU Directive and protections

Whistleblower protection is of utmost importance in democratic societies. It serves to hold accountable those who seek to abuse laws or persons for self-gain, and protection laws signal the public commitment to those who report on abuses that damage public interests. One of the more recent and important developments in whistleblower law is the new EU Directive on whistleblower protections (Directive 2019/1937), with the objective "to strengthen enforcement in certain policy areas and acts where breaches of Union law can cause serious harm to the public interest" (Recital 101).[4] By the 17 December 2021, all twenty-seven European member states must enact national laws that satisfy the Directive's requirements, which, among other things, includes that whistleblowers should be protected from retaliation for blowing the whistle (Article 14), a reversal of the burden of proof in cases of alleged retaliation (Article 15), and the establishment of internal reporting channels for firms with more than fifty employees (Article 5). The EU Directive follows the spirit of prior laws that protect whistleblowers, such as the Public Interest Disclosure Act 1998 (PIDA) in the United Kingdom and the Sarbanes-Oxley Act ('SOX') of 2002 in the United States.

Yet, experience and evidence are ambiguous as to the ability of whistleblower protections to enhance enforcement to a significant degree. PIDA and SOX have had uncertain results in

terms of effectively remedying whistleblowers,[5] and whistleblowing cases have a low success rate under these laws.[6] Internationally, a recent review of whistleblower laws in thirty-seven countries also provides a rather discouraging view of the current state of whistleblower protection laws, finding that "Fifty-nine per cent had *no* reported whistleblower decisions at all (22 out of 37)." (Government Accountability Project, 2021). Moreover, even in the few cases where whistleblowers file retaliation complaints, they only succeed in 21% of cases (80 merits wins out of 378 merits decisions) (Government Accountability Project, 2021, p.10). It is therefore uncertain whether the EU Directive will be a significant enhancer of enforcement, especially considering the range of possible responses by wrongdoers to these laws.[7]

One of these responses has been to inject "gag clauses" into employment contracts or make employees sign non-disclosure agreements (NDAs) that discourage whistleblowing (Moberly, Thomas, and Zuckerman, 2014; Dworkin and Callahan, 1998). This remains an issue even in states and countries with decades of experience with whistleblower laws, such as California. Rogal (2021) outlines how three whistleblowers in the Theranos (based in Silicon Valley) blood testing scandal endured legal threats, professional dislocation, and two suffered substantial financial losses. Employees were required to sign NDAs before interviewing for the job, which Theranos justified on the grounds of protecting trade secrets. California has decades of experience with whistleblower laws, and these employees were legally protected under California labour law in case they contacted enforcement agencies with suspicions of violations or noncompliance.[8]

In public consultations by the European Commission leading up to the Directive, many firms and organizations representing employer's interests emphasized the importance of secrecy agreements.[9] References to trade secrets were exactly what Theranos lawyers did in attempts to silence employees. While NDAs and laws protecting trade secrets often serve legitimate purposes, they also have great potential for abuse and muddying the legal waters for potential whistleblowers.[10] Article 24 of the EU Directive states that "Member States shall ensure that the rights and remedies provided for under this Directive cannot be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement." Yet, there have been numerous ways to deter whistleblowing even in the presence of such "no waiver of rights" clauses. One example includes "pre-notification" agreements that require employees to internally notify management before talking to the regulator (Moberly Thomas, and Zuckerman 2014, p. 91. See also Kohn 2020, p.18), a practice that the SEC issued

a $130 000 fine for in 2015 (SEC, 2015). California amended its whistleblower protection law twice in recent years to address similar concerns about agreements used to withhold information.

Another response has been to offer positive incentives for employees to keep quiet. If a potential whistleblower ends up in a bargaining position with his or her wrongdoing employer,[11] then it is perfectly legal for the wrongdoer to offer positive incentives to keep quiet – which, in cases of profitable economic wrongdoing, would often be the correct thing to do under rational choice theory. Since the wrongdoer knows that at most damages are remedied if the employee turns whistleblower, all the wrongdoer must do is to offer incentives that are slightly better than that – not a hard decision if the reputational and economic losses are substantial should the employee blow the whistle. Call, Kedia, and Rajgopal (2016), for example, finds that firms grant more stock options to rank-and-file employee when involved in financial reporting violations, which may act as an incentive to discourage whistleblowing.

Then there are numerous other difficulties with whistleblower protections when it comes to detecting and deterring economic crime. Under many anti-retaliation laws, the prospect of prolonged and costly litigation against a well-financed employer can have a chilling effect on the willingness to report frauds (Kohn, 2020a). Many forms of retaliation cannot be remedied by courts, such as delayed retaliation, blacklisting in the industry, and various forms of ostracism. Prolonged legal battles may not be fully monetarily remedied, and it is sometimes difficult to prove that the whistleblowing "caused" the retaliation. These issues have been widely documented (Moberly 2007, Modesitt 2013), leading some to call protections under SOX a "mirage" (Earl and Madek, 2007).

While protections may not enhance enforcement to a desirable degree, the EU Directive should arguably be seen as a first step to improve the dealings with whistleblowers in the EU. Some countries will be more ambitious and extend protections to areas that are not mandated by the Directive, as Sweden is likely to do. Some will do the absolute minimum, and some will be even more ambitious, like Romania, that introduced whistleblower rewards. Hopefully, countries will have relied on the research and experience-based evidence, outlined in Kohn (2020a) and Lewis (2020), when transposing the Directive. In the first rendition, there will likely be ineffective legislation enacted, yet it is also common for European law to continue to build on previous Directives. There are, for example, six EU Directives relating to money

laundering that amends and builds upon the previous Directives.[12] This presents the opportunity for further reflection and analysis for how we treat whistleblowers in the EU.

Regardless of the outcomes of the Directive in terms of enforcement, it has a range of positive effects. First, the mere signaling of approval of whistleblowers in the public interest, together with protections, is likely to increase reporting to some extent.[13] Second, there are important employment and freedom of speech-related rights that are secured by protections. Third, it puts the topic of whistleblowers in the public conscience and requires that firms and public agencies reflect on their own practices in this regard. Fourth, it creates an infrastructure and know-how in administrations and courts for dealing with whistleblower claims in an organized way.[14] This know-how can then be built upon to sharpen the ability of agencies to utilize whistleblowers in the detection of wrongdoing: perhaps by offering rewards, increasing visibility of the channels, or providing public recognition via honors systems (Lewis, 2020, p.17). Finally, there are many contexts where rewards are unsuitable, such as when the wrongdoing is less severe, or the penalty for the wrongdoing is not a fine so that the reward cannot be sourced from the wrongdoer. In these areas, protections remain the central way to encourage whistleblowers to come forward. When it comes to increasing detection and deterrence of severe economic crime, however, more ambitious tools are needed.

2. The need for enhanced enforcement in the EU

In the last two decades, a range of concerning corporate misconduct by European firms has been uncovered. Dieselgate, Siemens's corruption scandal, and recent anti-money laundering (AML) scandals, reveal that, despite knowledge of extensive wrongdoing for years and decades, employees rarely blow the whistle, or if they did so, they were ineffective at curtailing the wrongdoing (Nyreröd and Spagnolo, 2021c). Recidivism in many white-collar crime categories such as antitrust and AML violations is widespread,[15] and current estimates of the extent of undetected corporate wrongdoing are also likely to be underestimating the problem (Soltes, 2019). Several scandals involving the "Big Four" auditors in recent years (most recently E&Y with respect to Wirecard), has reduced confidence in audits as a fraud detection mechanism, and better incentivizing and protecting whistleblowers may compensate where audits have been inadequate.

The example of AML violations in European banks is particularly illustrative of how broad non-compliance has been in certain areas. Almost every large European bank has been fined

for AML or sanctions violations in the last two decades, most recently and heavily publicized being Danske Bank, where $230 billion of suspicious transactions had flowed through the bank's Estonian branch.[16] Howard Wilkinson, the whistleblower who uncovered this scandal, was paid to sign a non-disclosure agreement that prohibited him from talking about the wrongdoing he had uncovered unless "required by law". Since 2016, the US has issued AML-related fines on eight occasions to banks with headquarters in European countries for an aggregate amount of $1.7 billion (mean $217 million fine, data from Violationtracker.org).

Corruption and fraud against the government is another problematic area in the EU, as it is everywhere in the world. A study by PricewaterhouseCoopers (PwC, 2013) estimates that €58.11 billion is lost annually to corruption alone within the EU. Developed countries spend around 15% of their GDP annually on public procurement, with many bad actors also looking to fraudulently obtain funds. Other sources also suggest that more needs to be done with respect to public spending fraud. A report by the European Court of Auditors entitled "Fighting fraud in EU spending: action needed", highlighted that there is room for improvement with respect to fraud detection in the EU (ECA, 2019).

The "VAT gap" in Europe: the differences between expected VAT revenue and the actual amount collected, amounted to €140 billion in 2018, varying widely between EU countries (EC, 2020a). That number is forecasted to be €164 billion in 2020, which would make the annual tax revenue lost on vat tax fraud approximately equivalent to the annual EU budget that is around €180 billion. Several US states have whistleblower reward programs that cover the evasion of sales tax. In a famous case under New York's False Claims Act, *People of New York v. Sprint Nextel Corp*, Sprint ended up paying a $330 million fine, with $63 million paid to the whistleblower (Ventry, 2014).

The need for enforcement agencies in the EU to have adequate tools at their disposal is also likely to increase. The EU's new Green Deal, entailing ambitious emissions cuts by 55% until the year 2030 compared with 1990 levels, will require compliance with emissions standards to be successful. Dieselgate illustrates just how hard pollution can be to detect: cars were on the road for years until it was discovered that some emitted up to 40 times more than emissions standards allowed. In the US, laws against pollution by ships have been enforced with a whistleblower reward program.[17] The Act to Prevent Pollution from Ships (APPS) is one of the few criminal statutes that authorize whistleblower rewards of up to 50% of the money

collected by prosecutors. In 2021, The National Whistleblower Center reviewed the last 100 cases and found that rewards to whistleblowers were paid in 76 out of those cases, meaning that whistleblowers were the means of detection.[18]

It appears that the current and future need to enhance detection and deterrence of economic crime is significant in the EU, but also that whistleblower protections may not manage to do that to a sufficient degree. In the remainder, we consider the evidence that whistleblower reward programs can do a more adequate job in terms of enhancing enforcement (Section 3), review how these programs are optimally designed (Section 4), consider issues surrounding their implementation in the European context (Section 5), and conclude (Section 6).

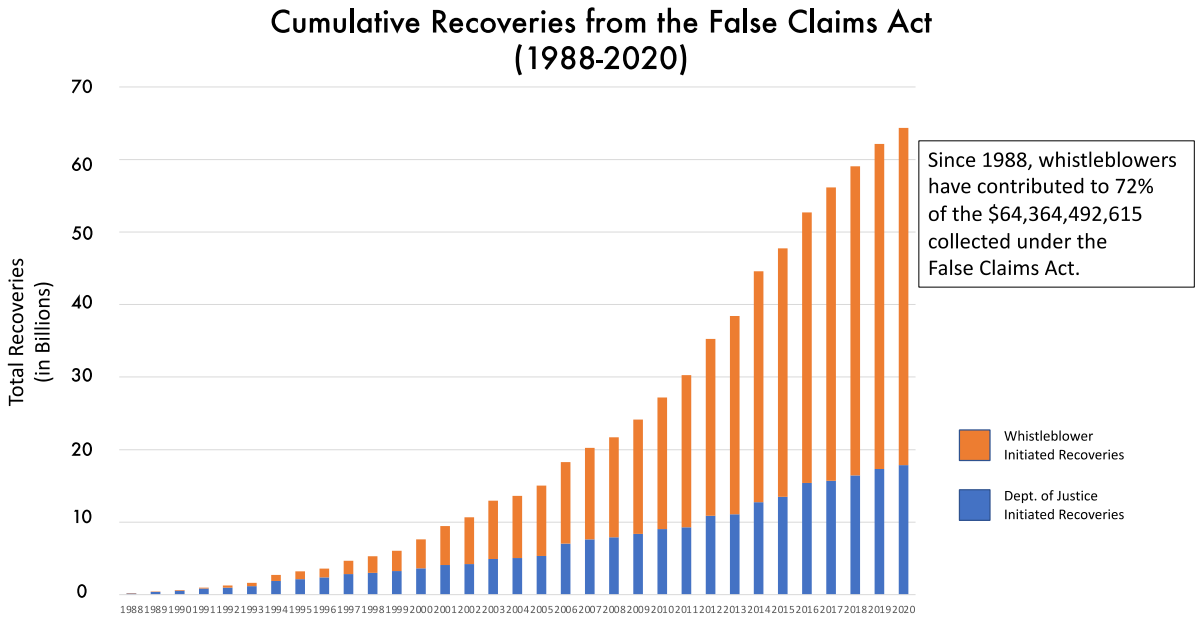
3. Reward programs and enhanced enforcement

The US has gone one step further and not only protects whistleblowers but also pays them substantial monetary rewards in return for information on regulatory infringements. Whistleblowers are frequently paid millions of dollars for providing information on fraud against the government, tax evasion, ocean pollution, securities fraud, foreign corruption, and other forms of wrongdoing. With respect to enforcement, these programs look like a promising complement in particularly problematic regulatory areas, as has been evidenced by mounting evidence of their success the last decades (see Nyreröd and Spagnolo 2021a, 2021b for a review of the evidence). Even though deterrence effects of various kinds of sanctions have been surprisingly hard to document (see e.g., Chalfin and McCrary, 2017), in the whistleblower reward case there is empirical evidence that these programs deter insider trading (Raleigh, 2020), accounting fraud (Berger and Lee, 2019), and fraud against the government (Leder-Luis 2020; Dyck, Morse and Zingales 2010).

Rewards in the US have a long history. The flagship whistleblower reward law that has served as motivation for extending rewards practice to other regulatory areas, is the False Claims Act (FCA) of 1863, and its impressive results since it was fundamentally amended in 1986. Under the FCA, private citizens are entitled to step into the government's shoes and sue "qui tam" (on behalf of the government) and are entitled to up to 30% of the recoveries. The FCA provides a cause of action against those submitting a false claim against the government, and violators of the FCA are liable for treble damages and a mandatory payment for each false claim (up to $21,000 per claim). This often leads to payouts to whistleblowers, or "relators" as they are called, of millions of dollars. The FCA is supported by the leadership of the Justice Department

and leading members of the U.S. Congress,[19] and the numbers from FCA enforcements under the qui tam provision speak for themselves.

Figure 1



Source: Dept. of Justice – Fraud Statistics Overview

Cost-benefit analysis suggests that the FCA is highly beneficial. Meyer (2013) finds that the cost-benefit ratio of the FCA is 20:1 (for every $1 spent, government returns $20) and Carson et al (2008) estimates the benefits to be between 14:1 and 52:1 (for every $1 spent, government returns between $14 and $52). Some government officials have claimed that without whistleblowers "we wouldn't have cases" (Barger et al 2005, p.475), and numerous enforcement agency personnel and high-level prosecutors in the US continuously praise the whistleblower programs at the IRS, SEC, and under the FCA as highly effective (Kohn and Wilmoth, 2020).

The success of the False Claims Act led congress in 2005 in the Deficit Reduction Act to create incentives for states to establish their own False Claims Act. The DRA offers states that enacted FCAs sufficiently similar to the federal law an additional 10% of Medicaid fraud recoveries (Parrish, 2018). Prior to 2005, however, several states had already chosen to enact their own False Claims Acts – beginning with California in 1987. Today, more than thirty US states have their own False Claims Act, some of which cover state tax evasion.[20]

As a result of the FCA's success, reward programs now frequently figure in US regulator's repertoire of tools for enhancing enforcement, and they continue to be expanded to more regulatory areas. It was expanded to tax evasion in 2006 with the Tax Relief and Healthcare Act (managed by the Internal Revenue Service (IRS)), and to securities fraud in 2010 with the Dodd-Frank Act (managed by the Securities and Exchange Commission (SEC)). These programs differ from the FCA in that whistleblowers do not sue on behalf of the government but can anonymously tip off the SEC and IRS, often with the help of an attorney, The rewards to whistleblowers are paid as a percentage of sanctions against the wrongdoing firm (in the SEC case), or as a percentage of unpaid tax that the whistleblower information contributes to the collection of (in the IRS case). The SEC and IRS programs have been called "cash-for-information" regimes, whereas the FCA is a "litigation" regime (Engstrom, 2018).

More recently, a new AML reward program (31 U.S.C. § 5323) was established with respect to Bank Secrecy Act Title II and III violations (AML violations), included as a substantial section in the National Defense Authorization Act of 2020/2021. That act also included the Kleptocracy Asset Recovery Rewards Act, a three-year pilot program aimed at detaining stolen assets, which awards whistleblowers up to $5 million. Whereas the US does not currently have a reward program in antitrust, US Senators recently proposed a reward program in this area as well (SIL21191 6C1).[21]

Although the US has been the pioneer with respect to these programs, they are gaining increasing popularity internationally, and at least seventeen countries in nearly every region have instituted reward programs: Americas (Brazil, Canada, Peru, US); Europe (Hungary, Lithuania, Montenegro, Slovakia, Ukraine, UK); Africa (Kenya, Malaysia); and Asia (Republic of Korea, Pakistan, Philippines, Taiwan,).[22] The leading international environmental organization, the International Union for the Conservation of Nature (IUCN) (whose membership includes representatives from over one hundred governments) recently passed a series of resolutions endorsing whistleblower rewards in the context of protecting the environment and stopping wildlife trafficking. Creating reward laws was approved as part of the IUCN's official four-year work plan (Hajost et al, 2021). In Europe, however, reward programs remain a rarity, and those that exist on the continent are designed in a significantly different way than the US programs. The increased adoption of these programs, their great potential, and their absence in Europe, warrant some reflection on how to effectively design and implement them.

4. Reward sizing and optimal design

Under the US programs, rewards are around 10-30% of the recovered money in the case of tax evasion and fraud against the government or 10-30% of the sanction paid by the wrongdoing corporation. Often, a minimum threshold of at least $1 million in sanctions or recoveries is required for a reward to be considered. This means that theoretically, the minimum reward under many US programs is $100 000. The most salient difference between the US programs and reward programs internationally is that the latter offer significantly smaller rewards – usually capped at a maximum of $100 000. One of the main concerns regarding these programs is whether lower rewards manage to elicit quality information. There is little evidence on the effectiveness of lower rewards, but there are numerous experimental studies that may give us some insights.

Experimental studies are problematic in that they usually study intentions of participants in a lab environment yet are used to make inferences about behaviour in complex real-world situations. In the whistleblower context, these studies may be even more problematic because it is difficult to replicate the social relations, loyalties, and the spectrum of possible forms of retaliation contemplated by the employee. Yet, whistleblowing is relatively uncommon with a lot of people choosing to not come forward, and experimental studies are turned to where empirical data is lacking – they therefore provide some, although limited, insights into the likely behaviour of potential whistleblowers. There are numerous experimental studies relating to the effects of differing reward sizes on the intention of blowing the whistle.

Feldman and Lobel (2010) find that a high reward ($1 million) elicits the highest level of reporting compared to alternative whistleblower regimes (protections, low reward, a duty to report), based on a sample from an online survey of working adults in the US. Andon et al (2018) studied accountants' intention to report wrongdoing in a context with rewards at the $500 000 – $1 500 000 level and find that rewards significantly increase the intention to report compared to when there is no monetary incentive. Farrar, Hausserman and Rennie (2019) find that a $56 000 reward increase American taxpayers' intention to blow the whistle the IRS. An experiment by Iwasaki (2020) find that reward-driven motivation was a significant factor affecting external whistleblowing intention. In this study, the monetary incentive is presented as probabilistic. Participants were presented with a scenario in which they had a 10% chance of obtaining $10 million.

Some are concerned that monetary rewards may crowd out intrinsic moral motivation to report wrongdoing for "the right reasons". There is little evidence that this has been an issue with the US programs, although Feldman and Lobel (2010) find that very small rewards at $1,000 has a crowding out effect. Experiments by Berger, Perreault and Wainberg (2017) find that some rewards may crowd out the motivation to report wrongdoing among those who are ineligible to obtain a reward. Schmolke & Utikal (2018) use a points-based system, with ten points corresponding to a lower reward and fifty points to a higher, and do not find a strong crowding-out effect of low versus high rewards: both increase the likelihood of potential informants blowing the whistle (Schmolke & Utikal 2018, p.28). Similarly, an experiment by Butler, Serra and Spagnolo (2019) considered rewards using a point-based system that corresponds to cash pay-out for study participants, and do not find a moral crowding out effect.

With respect to severe economic crime, larger rewards are likely necessary to elicit high-quality information. Those with the best actionable information are often the higher-ups in the organization with higher wages and with the most to lose in the case of blowing the whistle (Engstrom, 2018). Knowing that high-level employees such as directors, vice presidents, and high-level managers can obtain high rewards in the millions has a major deterrent effect on corporate wrongdoers. Lower rewards are unlikely to incentivize "C-suite" whistleblowing, which is what triggers most of the very large enforcement actions in the US.[23] The SEC also recently considered but rejected a "cap" on rewards that exceeded $30 million in cases where the whistleblower's information aided the SEC in issuing sanctions over $100 million. This proposal was rejected by all five SEC Commissioners (three Republicans and two Democrats) as they recognized large rewards were essential to elicit high-quality information (Kohn and Nelson, 2020).

The experience of other agencies also suggests that lower rewards have not been effective. The Chair of the UK's Competition and Markets Authority, an agency that provides rewards of £100,000 to those reporting cartels, has recently stated that this sum is "far too low" and "very unlikely to compensate either for the resulting damage to the whistleblower's career prospects, or for the distress suffered", and that "the maximum compensation should be set at a much higher level" (CMA, 2019). Another reason to believe that large rewards are important comes South Korea's antitrust reward program. They started with a reward of $19 000 in 2002 but increased it to $94 000 in 2003 (KFTC, 2010). In 2005 the reward was increased to approx. $1 million (Sullivan, Ball and Klebolt, 2011), and finally to $2.8 million in 2012 (Stephan, 2014).

Currently, most reward programs in antitrust have rewards that are capped at or below €100 000 (see Spagnolo and Nyreröd 2021b for an overview). The Bank Secrecy Act also provided for a $150 000 discretionary reward for decades, yet no one to our knowledge received a reward under this provision.

Central to the success of the US programs appears to be the substantial rewards, and there is little to no empirical research on the success of programs with lower rewards. Countries that implement reward programs should ensure that rewards are sufficiently high to motivate those with quality information to come forward. Several other design dimensions are also important. How do we define when a whistleblower is bringing "original information"? Prior to 1943, qui tam relators filed parasitic suits based entirely on public information – as the act placed no limits on the sources from which relators could derive their fraud allegations (Cohen, 2011, p.82). This effectively meant that some relators cashed in substantial rewards while providing no informational value to the government. Amendments in 1943 changed that but severely limited the use of the qui tam provision, such that they fell almost completely out of use until new amendments in 1986 reinvigorated the qui tam provision (Phelps, 2000, p.255). Agency discretion, statute of limitations on claims, prohibiting claimants that submit multiple frivolous claims, are other concerns that should be considered when designing a reward program.

Paying attention to the design of reward programs is important, especially since most of the empirical evidence is on the FCA since its 1986 amendments, and the FCA has some dynamics that are unique to the US legal system. Under the FCA, whistleblowers cannot proceed "pro se", i.e., bring claims without counsel representation.[24] Attorneys under the FCA function as screeners of whistleblower claims and review the potential of a case with the risk that it may be of no value, resulting in pure losses for the attorney, effectively "outsourcing" a part of the claims review process. Removing the need for an attorney and the attendant fees the whistleblower pays, however, should justify lower payouts in terms of percentages. Under a "cash for information" program, such as the one at the IRS, all a whistleblower needs to do to file for a reward is to fill in a one-page form.[25] This likely contributes to the high annual claims (more than 10 000 claims per year) and relatively low percentage of reward payouts (only around 5% of claimants obtain rewards).

The model that could be most easily exported is the "cash-for-information" model of the SEC and IRS, and the task for those who want to enhance enforcement through reward programs is

to identify the design features of the US reward programs that have been central to their success and mirror those features in their own local contexts. Here we emphasized the importance one of those features: substantial rewards.

5. The EU context

Would rewards be suitable in the European context, and if so, how could they be implemented? The level of sanctions, supervisory resources/competence, areas of problematic wrongdoing, historical and cultural perceptions of paying whistleblowers, and labour relations systems varies widely within the EU and internationally. Mandating that all member states implement reward programs in certain areas would be ill-advised without substantial attention and oversight of their implementation – and even then, this may be to use a blunt tool where a sharper one is more appropriate. Yet, there are EU institutions that could experiment with reward programs, such as the European Anti-Fraud Office, and consult with member states on their possible introduction in problematic enforcement areas. There are also trends toward more centralized enforcement at the EU level, removing possible local obstacles to the introduction of reward programs.

After Dieselgate, the Commission wanted to know the level of sanctions imposed by different member states for environmental crimes. The *euobserver* noted that the level of fines for using emissions-cheating software "range from a couple of thousand euros to several million" (Teffer, 2016): an entirely inconsistent sanctions framework. The Commission later introduced Regulation 2018(858), which allows the Commission to carry out checks on cars, issue EU-wide recalls, and impose a fine of €30,000 per non-compliant vehicle. As with pollution, recent AML scandals and inconsistency in the enforcement of AML regulation, among other issues, has led experts and policymakers to suggest centralizing some supervision and enforcement of AML regulation at the EU level (Kirschenbaum and Veron 2019; Unger 2020; JPP 2019; EC, 2020b, p.8).

The Commission, together with national competent authorities, is responsible for enforcing antitrust violations under TFEU Art 101, 102. This is an area where fines in the hundreds of millions of Euros are frequently issued, and where the Commission successfully imported the US method of providing "leniency" to the first reporting cartel participant. Under leniency programs, the first reporting cartel participant does not receive any fines in return for full cooperation (although they may be sued for damages by private parties), while all other cartel

participants pay a full or partially reduced fine. These leniency programs have been effective at reducing trust among participants in collusive agreements, and over the 2010-2017 period, twenty-three out of twenty-five cartel investigations were the result of leniency applications: only two resulted from the Commission's own detection work (ECA 2020, p.18).

The Commission appears to be the institution that deals with the most severe cases of violations of Union law and has the authority, independence, competence, and appropriate sanctions level – features that are important if not necessary to run reward programs effectively. Enforcement of tax evasion, securities fraud, and procurement fraud is, however, predominantly the responsibility of EU member states. Given the diversity in Europe with respect to dominant industries and the prevalence of wrongdoing, competent authorities' resources and competence, sanctions levels, independence of regulators/levels of regulatory capture, it would be difficult and impractical to mandate that member states implement reward programs, without first making sure that the member states had an effective law enforcement office capable of administering the program. With member states' transposition of the Directive, administrative competence will increase, and laws in member states could be amended to provide for rewards. Cash for information programs could, in the future, be implemented by member states in regulatory areas where enhanced detection and deterrence of wrongdoing is urgently needed – environmental crimes being one such area due to the difficulties of detecting environmental violations and the need for widescale compliance to achieve the ambitious emissions cuts entailed by the EU's Green Deal. Until Europe modernizes its whistleblower programs and/or enacts effective reward programs, European whistleblowers can continue to use those U.S. whistleblower laws that have transnational application, most notabley the Foreign Corrupt Practices Act (which has been lauded by the OECD).[26] The FCPA has widespread transnational jurisdiction,[27] and thousands of non-U.S. citizens have filed claims under this law, many of whom have qualified for financial rewards.

6. Conclusions

This paper considered whistleblowing in the EU with a view to enhancing enforcement. While many countries have recently enacted whistleblower protection laws, most saliently the recent EU Directive, these laws are unlikely to enhance enforcement to a desirable degree. Simultaneously, there appears to be an urgent need to curb various forms of wrongdoing within the EU. Programs that also offer substantial monetary rewards to whistleblowers have proven highly effective in a range of regulatory areas in the US. To be effectively adopted elsewhere,

however, substantial attention needs to be paid to their design to obtain comparable enforcement benefits, most importantly these programs need to offer large rewards.

In the EU, the diversity of enforcement agencies, capacities, resources, levels of independence, appears to vary greatly. However, enforcement in some crucial areas such as emissions regulations, antitrust, and possibly other areas in the future, is increasingly being carried out by the European Commission. The Commission could be one institution to experiment with rewards in regulatory areas where detection of wrongdoing is particularly problematic.

Moreover, reward laws can and should be targeted at major economic crimes, such as money laundering, tax evasion, and bribery. The whistleblower program can be housed within the law enforcement agency that has jurisdiction over these specific crimes. This is a practice followed in a number of countries. For example, the tax authorities administer an effective tax-based whistleblower law in South Korea. In Canada, the Toronto Securities agency has jurisdiction over their securities-based whistleblower law. In the United States, the IRS, SEC and DOJ all administer their own reward programs limited to violations within the jurisdiction of these specific law enforcement agencies.

The EU Directive will also improve the administrative capacity within the EU to handle whistleblower claims in an organized way, creating an infrastructure that can be built upon to further improve the capacity of administrations to detect wrongdoing. With this increased know-how, rewards to whistleblowers and other means of enhancing enforcement may seem less foreign and controversial than they currently do in many European countries.

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[4] A policy document commissioned by the European Commission before proposing the WB Directive, with the title "estimating the economic benefits of whistleblower protection in public procurement" looked at the costs and benefits of introducing whistleblower protections, finding that the benefits would vastly exceed its costs. Interestingly, the document states that: "The credibility of the study's findings is supported by a peer-reviewed published study on *whistleblower protection* from the United States." (Milieu 2017: 14, our italics). The study the authors refer to is Carson, Verdu and Wokutch (2008) – a cost-benefit study of the False Claims Act, that

importantly provides large financial incentives and not mere protections.
[5] For PIDA, see Lewis (2008). For SOX, see Earl and Madek (2007).
[6] For PIDA, see APPG (2020). For SOX, see Department of Labor (2017).
[7] The EU Directive does not require any nation-state to implement effective laws. Guidance on minimum standards that need to be implemented on a state-by-state basis were explained in the article by Best and Kohn (2020).
[8] Cal. Lab. Code §§ 1102.5.
[9] https://ec.europa.eu/newsroom/just/items/54254 (Accessed: 16 October 2021).
[10] Restrictive NDAs are not permitted under UK and U.S. laws. These precedents are equally applicable to European countries, if adopted under local law. *See* SEC (201*5) and Kohn (2015).*
[11] We know that even when rewards are available, whistleblowers usually report internally at first, which on many occasions would give rise to a bargaining situation with the wrongdoer. Under Dodd-Frank, 83% of whistleblowers report internally before going to the SEC (Westbrook 2018, p.1165). A review of qui tam cases under the False Claims Act found that 90% (113 out of 126) of those who filed qui tam had first contacted a supervisor before contacting the government (National Whistleblower Center, 2011).
[12] 1991/308/EEC, 2001/97/EC, 2005/60/EC, EU 2015/849, EU 2018/843, EU 2018/1673.
[13] Amir, Lazar, and Levi (2018) shows, for example, that an increase in the perceived probability that an employee blows the whistle may be sufficient to deter some wrongdoing, in the case of their paper tax evasion after the introduction of a whistleblower reward program.
[14] Article 27 of the EU Directive mandates that member states submit statistics on an annual basis on the number of reports received and the number of investigations and proceedings initiated as a result of such reports and their outcomes. Hopefully improving the poor data collection practices of agencies presently managing protection programs (Government Accountability Project, 2021, p.8), which would greatly benefit the research community.
[15] Connor (2010) looked at leading cartel recidivists that were sanctioned between 1990 to 1999 and reviewed if they had been deterred from engaging in future cartels. He finds that in the period 2000-2010, every firm in his sample had reoffended.
[16] *See* Howard Wilkinson Biography, published at https://kkc.com/whistleblower-case-archive/howard-wilkinson/.
[17] https://kkc.com/laws-statutes-and-regulations-2/cases-under-the-act-to-prevent-pollution-from-ships-apps/ (Accessed: 16 October 2021).
[18] A detailed list of the most recent 120 APPS cases is published at https://kkc.com/laws-statutes-and-regulations-2/cases-under-the-act-to-prevent-pollution-from-ships-apps/. This list has links to all of the Justice Department motions requesting the payment of whistleblower rewards to non-U.S. whistleblowers. The Justice Department explains the importance of whistleblower reward laws, especially in the context of countries that do not have a strong "rule of law," or that lack effective whistleblower protections.
[19] *See* Statement of Attorney General on the False Claims Act: Eric Holder, U.S. Department of Justice, "Attorney General Eric Holder Speaks at the 25th Anniversary of the False Claims Act Amendments of 1986" (Jan. 31, 2012); Statement of the Assistant Attorney General on the False Claims Act: Assistant Attorney General, U.S. Department of Justice, "Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement," (June 5, 2014); The testimony of the Senate Judiciary Chair in support of the False Claims Act: "Statement for the Record by Senator Chuck Grassley of Iowa Chairman, Senate Judiciary Committee At a House Judiciary Subcommittee on the constitution and Civil Justice Hearing on 'Oversight of the False Claims Act' April 28, 2016."
[20] See Ventry (2014) for a thorough discussion of whistleblowers in the tax area.
[21] https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf (Accessed: 16 October 2021).
[22] For shorter descriptions of these programs, see: https://www.whistleblower-rewards.eu/rewards-around-the-world (Accessed: 16 October 2021).
[23] Reward size may also be tailored to industry context, national institutional characteristics, and wage levels. When Peru introduced its antitrust reward program, they used the simple average wage of managers of large Peruvian companies as a reference when calculating the reward cap (Indecopi 2019, p.21).
[24] See for example *Jones v. Jindal (D.C. Cir. 2011), Mergent Servs. v. Flaherty (2nd Cir. 2008), Timson v. Sampson (11th Cir. 2008).*
[25] https://www.irs.gov/pub/irs-pdf/f211.pdf (Accessed: 16 October 2021).
[26] See for example Briccetti (2020).
[27] The scope of transnational coverage under the FCPA is discussed at: https://kkc.com/frequently-asked-questions/foreign-corrupt-practices-act/. An example of a decision granting a non-U.S. citizen a whistleblower reward (over $30 million U.S. dollars) under the FCPA is linked here: https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/SEC-Decision-awarding-international-Whistleblower-.pdf.