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Second Supplementary Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia to the inquiry into the management and assurance of integrity by consulting services

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The Justice and International Mission Cluster, Synod of Victoria and Tasmania, Uniting Church in Australia, would like to make the following second supplementary submission to the inquiry into management and assurance of integrity by consulting services.

When appearing before the Committee, the question came up of how to improve business ethics, as they may apply to consulting services. The Synod has recently completed a literature review examining measures governments could undertake to drive more ethical compliance from businesses. Imposing stronger sanctions and penalties can play a role in driving compliance from regulated businesses. However, increased penalties can also cause higher levels of 'tick-box' compliance with the letter of the law without gaining meaningful compliance.

As a recent example, Westpac agreed to a $1.3 billion penalty in response to failures to comply with requirements under the *Anti-Money Laundering Counter-Terrorism Financing Act 2006,* including carrying out appropriate customer due diligence concerning suspicious transactions associated with possible child exploitation.[1] In response, Westpac has made substantial and meaningful efforts to detect and report customers using Westpac payment systems in the facilitation of online child sexual abuse. However, the response of other reporting entities to AUSTRAC's increased enforcement activity since 2016 has been a massive increase in Suspicious Matter Reports (SMRs) to AUSTRAC, with 309,772 SMRs made in the 2020 to 2021 financial year.[2] That is a 318% increase in SMRs in five years[3], but the quality of many of the SMRs is low. It appears many reporting entities have responded to the threat of financial penalties by flooding AUSTRAC with junk SMRs to try and ward off the danger of being subjected to penalties. The desired behavioural response would be that reporting entities put effort into investigating suspicious transactions and providing high-quality SMRs to the regulator, even if that meant fewer SMRs were filed, as more of them would be actionable. AUSTRAC's response has been significant educational

[1] AUSTRAC, 'AUSTRAC and Westpac agree to proposed $1.3 bn penalty', 24 September 2020, https://www.austrac.gov.au/news-and-media/media-release/austrac-and-westpac-agree-penalty
[2] AUSTRAC, '2020-2021 AUSTRAC Annual Report', 6.
[3] Ibid., 6.

activities to encourage reporting entities to provide higher quality SMRs, with some indication of success.[4]

The observation is consistent with the findings of Miller and Kohr, who explored Jones' (1991) six dimensions of moral intensity and how it related to compliance officers' ethical decision-making when detecting suspicious transactions.[5] Officers that were more caught up with following the obligations of anti-money laundering legislation and submitting a suspicious activity report (SAR) lacked empathy for victims in their decision-making.[6] Data from the interviews found only partial evidence that compliance officers reporting a suspicious transaction report high overall moral intensity.[7] Officers that did not recognise the moral aspect of the suspicious activity reporting acted in compliance with the legislative obligation (by submitting a report) rather than with more significant commitment to a high quality report out of empathetic understanding when making decisions.[8]

Similarly, Eren conducted 22 semi-structured interviews with anti-money laundering (AML) compliance professionals operating out of the New York City region.[9] The researchers found that "catching the bad guy" was the most frequently cited reason that gave the AML officers meaning or significance.[10] A subtheme that cropped up in the study was the justice-oriented notion of getting the wealthy bad guy due to holding a strong sense of ethics and legality.[11] Interviewees described "doing the right thing" as an additional motivation besides "getting the bad guy." However, their motivation often clashed with their belief that the bank was not implementing AML systems to reduce money laundering or prevent social harm.[12] In addition, the bank in the study was described by interviewees as being extrinsically motivated to merely avoid penalties.[13] Initially, interviewees were motivated by higher aims, like combating human or child trafficking. However, they realised that their work was more reliant on checking the right compliance boxes on behalf of the bank to regulators rather than stopping illegality.[14]

As Braithwaite argued, the 'trick' to successful regulation is to impose sanctions as needed without undermining a regulator's capacity to persuade.[15]

Professor Arlen argued that sanctions become effective where the entity perceives the benefits of compliance outweigh the risks of getting caught and sanctioned. To that end, she

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[4] Ibid, 54-56.
[5] Thomas Jones (1991), "Ethical Decision Making by Individuals in Organisations: An Issue-Contingent Model." *Academy of Management Review* 16, no. 2 (1991), 366-395.
[6] Brett Coombs-Goodfellow and Mark Lokanan. "Anti-Money Laundering and Moral Intensity in Suspicious Activity Reporting: An Application of Jones' Issue Contingent Model," *Journal of Money Laundering* Control 21, no. 4 (2018): https://doi.org/10.1108/JMLC-09-2017-0048, 530.
[7] Coombs-Goodfellow and Lokanan, "Anti-Money Laundering and Moral Intensity," 530.
[8] Ibid., 530.
[9] Colleen Eren. "Cops, Firefighters, and Scapegoats: Anti-Money Laundering (AML) Professionals in an Era of Regulatory Bulimia," *Journal of White Collar and Corporate Crime 2*, no. 1 (2021): 47-58. https://doi-org.ezproxy.lib.rmit.edu.au/10.1177/2631309X20922153
[10] Ibid., 55.
[11] Ibid., 56.
[12] Ibid., 56.
[13] Ibid., 56.
[14] Ibid., 57.
[15] John Braithwaite, 'To Punish or Persuade: Enforcement of Coal Mine Safety', State University of New York Press, 1985, 117.

argued:[16]

> *During the 1990s, the United States moved away from strict respondeat superior liability toward a more "duty-based" corporate criminal liability regime in which corporations could reduce or eliminate criminal liability by engaging in effective policing, such as adopting effective compliance programs, self-reporting and cooperation with federal authorities.*

Further:[17]

> *Corporate criminal liability can be used to induce corporations to monitor, report and cooperate if it is structured in such a way that a firm that assists the government in the detection of crime faces a lower expected sanction than a firm that does not – where the expected sanction is the actual sanction adjusted by the probability of detection. Given that policing inevitably increases the likelihood that a firm is sanctioned, the only way that the government can induce corporations to police is to ensure that the sanction imposed on them when they do is much lower than the sanction imposed on them when they do not.*
>
> *Federal authorities generally can accomplish this goal through a two-step mitigation regime. Firms should face default civil liability whenever an employee commits a crime in the scope of employment. The firm should face an additional penalty if it did not have an effective compliance program and a second penalty if it failed to report and cooperate.*

Importance of business culture

Campbell and Göritz investigated corrupt organisations based on semi-structured interviews. It was found that employees' moral and ethical concerns were less important than their desire to survive in their role, with the consequence that employees began to perceive corruption as a positive behaviour.[18] Corrupt organisations held an underlying assumption that the end justifies the means. By focusing on end results, employees' moral standards were undermined, enabling them to enact corrupt behaviour without feeling guilt.[19] Employees of corrupt organisations perceived themselves as a "community of fate." Their view was that the community was pressured into being tolerant of corruption. If employees were not tolerant of corruption, they were seen as against the community.[20] There was a focus on results in these corrupt entities, which led to their disconnection from ethical values and their willingness to allow employees to act in a corrupt manner.[21] If corrupt behaviour was the only means to achieve results, corruption became a driver for attaining said results. Rationalisation played a prominent role in reducing the moral and cognitive dissonance of their decisions to justify their behaviour.[22]

Historically, compliance programs in organisations have been based on legal requirements and rules. These programs train staff in these rules and assume this will be enough to drive

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[16] Jennifer Arlen, 'Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms' in Anthony Barkow and Rachel Barkow (eds.), 'Prosecutors in the Boardroom. Using Criminal Law to Regulate Corporate Conduct', New York University Press, New York, 2011, 74.
[17] Ibid., 77.
[18] Jamie-Lee Campbell and Anja Göritz, "Culture Corrupts! A Qualitative Study of Organizational Culture in Corrupt Organizations," *Journal of Business Ethics* 120, no. 3 (2014): https://doi.org/10.1007/s10551-013-1665-7, 301.
[19] Ibid., 302.
[20] Ibid., 303.
[21] Ibid., 308.
[22] Ibid., 306.

compliance.[23,24] The result has often been tick-box compliance, where organisations' actions are motivated by defensibility rather than a connection to the *why* of compliance.[25,26]

Many of the measures identified in the literature review that follows to bring about ethical compliance in a business would still require ethical leadership from the top to put the measures in place. It is tough to obtain ethical compliance from a business where those at the top are amoral or even corrupt, as they will ensure that measures put in place are ineffective.

The need to understand why ethical behaviour is needed

Hayward and Osborn examined policy compliance in small to medium-sized organisations.[27] They found that tick-box compliance can occur when there is a communication disparity between people who have created codes of conduct, policies, and training guides and the staff who need to comply.[28] If the reason behind the policies is not communicated to all staff well, then the values and principles it requires people to act upon will not translate into the organisation's culture.[29]

Compliance education and training

There is a distinction between compliance training and compliance education.[30] Compliance training has the purpose of teaching people how to apply specific actions to a policy to be compliant.[31] Whereas compliance education aims to educate people more broadly on the context of these policies, which guides people to act on their understanding of an issue rather than an understanding of the policies that reference the issue.[32] To successfully do this, leaders and management need to be involved in the training and education sessions, use simulations and real-life dilemmas to engage people in value-driven reflection, and incentivise these sessions to encourage participation and positive engagement.[33]

Associate Professor Soltes has raised the concern that the standard teaching of business ethics may give people the false impression they will make ethical decisions when faced with real world ethical challenges:[34]

> *The differences between discussing decisions in theory and making decisions in practice suggest that individuals may successfully resolve ethical dilemmas during, say, a company-mandated tutorial, yet fail to do so later when facing them in reality. Worse, the confidence created when individuals easily resolve ethical issues "on paper" can give them greater faith in their ability to successfully resolve dilemmas in real life. Perversely over-confident in their capabilities after such training, they may*

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[23] Todd Haugh. "Leading a Healthier Company: Advancing a Public Health Model of Ethics and Compliance," *American Business Law Journal* 58, no. 4 (2021): 811.
[24] Andre Hayward, and Tony Osborn. *The Business Guide to Effective Compliance and Ethics : Why Compliance Isn't Working - and How to Fix It*.(Kogan, London, England, 2019) 8-9.
[25] Haugh. "*Leading a Healthier Company*", 811.
[26] Hayward and Osborn. *Business Guide Effective Compliance Ethics,* 9.
[27] Ibid., 9.
[28] Ibid., 204.
[29] Ibid., 204.
[30] Ibid., 206.
[31] Ibid., 206.
[32] Ibid., 206.
[33] Ibid., 207, 208, 214.
[34] Eugene Soltes,'Why they do it', Public Affairs, USA, 2016, 313.

> *pay even less attention to their decisions out of the mistaken belief that they will be able to successfully resolve them in the future. These "blind spots", as described by psychologists Max Bazerman and Ann Tenbrunsel, often contribute to people's tendency to act far less ethically in practice than they anticipate.*

Hauser identified limitations to current ethics and compliance learning are due to certain attitudes towards the training, such as:

- it being wasted time;
- irrelevant to the workplace context;
- lack of consistency between training and practical application;
- the source of the training often coming from external instructors whose recommendations may be overruled by senior staff; and,
- lack of evaluated impact on workers.[35]

Hauser argued that three learning methods were needed:

- guided learning, which focuses on the theory of knowledge;
- action learning, which targets the transference of knowledge into practical application; and,
- experiential learning, which allows learners to deepen their understanding through experience.[36]

Haugh found that understanding the behavioural motivations of staff is important, for example, why people may make unethical decisions.[37] Bounded ethicality is a concept that explains unethical behaviour. The argument is that ethical decision-making is limited as most people make moral decisions until cognitive obstacles like the behaviour of peers, organisation values, or leadership directives influence them.[38] These influences can cause people to act unethically without being aware of them.[39] Behavioural interventions that target situations where people are more commonly prone to making unethical decisions can reduce the frequency of the behaviour.[40] Suggested approaches included:

- *Giving Voice to Values*, created by Mary Gentile, is a program that makes scripts and implementation plans to provide people explicit behavioural recommendations when responding to an unethical request from a superior.[41] It aims to teach people to speak up for their values in organisations.[42]
- The REVISE framework aims to create visibility and accountability related to ethical decisions[43]. They outline a three-step process involving reminders for people not to justify their actions, prompt peer monitoring, and encourage introspection on the notions

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[35] Mary C Gentile. Giving Voice to Values How to Speak Your Mind When You Know What's Right. New Haven Conn: Yale University Press, 2010 Quoted in Hauser, Christian. "From Preaching to Behavioral Change: Fostering Ethics and Compliance Learning in the Workplace." *Journal of Business Ethics* 162, no. 4 (2020): 837.
[36] Hauser. "From Preaching to Behavioural Change". 838-839.
[37] Haugh. "*Leading a Healthier Company*", 825.
[38] Ibid., 825.
[39] Ibid., 825.
[40] Ibid., 825.
[41] Mary C Gentile. Giving Voice to Values How to Speak Your Mind When You Know What's Right. New Haven Conn: Yale University Press, 2010. Quoted in Haugh. "*Leading a Healthier Company*", 828.
[42] Ibid.
[43] Shahar Ayal, Francesca Gino, Rachel Barkan, and Dan Ariely. "Three Principles to REVISE People's Unethical Behavior." *Perspectives on Psychological Science* 10, no. 6 (2015): 738–741. Quoted in Haugh. "*Leading a Healthier Company*", 828-829.

of moral self-image and actual behaviour.[44]

- Another technique is ethical nudging, which reminds people to think about their choices as they make them.[45]

Haugh's final recommendations for steps for corporate compliance as informed by a public health model were:

1. A change in mindset among corporate leaders to be not just overseeing rule-following but guiding and enabling their employees to make ethical decisions.[46]
2. Change in evaluation and tracking of behavioural ethics risks within organisations.[47] Such a change would shift the focus to prevention rather than defensibility.[48] It includes recognising that ethical behaviour is influenced by others and spreads in social networks.[49]
3. Change in data collection and analysis.[50] A consistent approach to data collection and aggregation on compliance efforts and response will help identify long-term trends and behaviour for a company.[51]

The role of empathy in ethical business behaviour

A body of research suggests that empathy for people being harmed by unethical actions can assist in driving ethical business behaviour. Government can assist with building empathy amongst employees by appropriately highlighting the real harms common types of unethical business behaviour result in.

Soltes corresponded with people convicted of serious white collar crimes in the US. He found that the perceived distance between the criminal behaviour and the harm caused assisted the offenders in ignoring the harms they had caused to others at the time of their offending. Economic harms fundamentally differ from inflicted physical harm on a person in that they often do not trigger a gut reaction of having done harm in the mind of the perpetrator.[52]

Ariely came to the same conclusion from his work. When our actions are more distant from the execution of the dishonest act, when they are suspended, and when we can more easily rationalise them, we find it easier to be dishonest. We also have the ability to be dishonest but at the same time think of ourselves as honest.[53] In a study designed to test whether distance between the act of dishonesty and the reward affected people's behaviour it was found that the number of people willing to lie for tokens was twice that who were willing to lie for cash, even if they turned their tokens into cash a minute or so later.[54]

Matthews and Collin-Vezine found that measures to prevent child sexual abuse within

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[44] Ayal et al. REVISE People's Unethical Behaviour. 738–741. Quoted in Haugh. "*Leading a Healthier Company*", 829.
[45] Haugh. "*Leading a Healthier Company*", 829.
[46] Ibid., 837-839.
[47] Ibid., 839-845.
[48] Ibid., 839-845.
[49] Ibid., 839-845.
[50] Ibid., 845-847.
[51] Ibid., 845-847.
[52] Eugene Soltes,'Why they do it', Public Affairs, USA, 2016, 120.
[53] Dan Ariely, 'The (Honest) Truth about Dishonesty', HarperCollins Publishers, London, 2012, 65.
[54] Ibid., 33.

institutions were more effective when allied with empathy development,[55] a key skill that enables understanding of another person's experience and was linked to higher occurrences of prosocial behaviour,[56] including for clinical professionals.[57] Empathy in this context would require a willingness to imagine the abused child's perspective.[58] Empathetic responses can be taught through education and have been an effective therapy tool for offenders.[59] At the institutional level, empathy may contribute to a willingness to implement effective prevention strategies and improve appropriate responses (as opposed to cover-ups and protection of perpetrators).[60] At the societal level, it can change social norms to recognise children's rights better.[61] Empathy for others may be harnessed to prevent other forms of abuse and unethical conduct inside businesses and institutions.

Ethical Nudging

Haugh has explored how behavioural ethics nudging in a corporate environment can help meet compliance goals. Behavioural ethics nudging is a term used by Haugh to explain the use of traditional choice architecture in businesses, specifically to make employees more ethical.[62] Choice architecture is the technique of influencing people's choices by changing the presentation of options. A common method of nudging involves reminders, warnings, prompts, anchors, frames and default rules at critical decision-making points.[63,64]

In corporate environments, there are three levels of behavioural ethics nudging.[65] The first, least invasive level is through simple information imparted to individuals, often through reminders. These occur at times when ethical decision-making is needed and remind staff of their ethical obligations before taking an action that historically would have created a compliance risk.[66] The second level targets common cognitive processes for decision-making by utilising default choice selection or changing the physical work environment in situations where mental effort is needed.[67] For example, changing the physical environment to encourage socialisation at work leads to higher employee satisfaction and organisational

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[55] Ben Mathews, and Delphine Collin-Vezine. "Child Sexual Abuse: Raising Awareness and Empathy Is Essential to Promote New Public Health Responses." Journal of public health policy 37, no. 3 (2016):
[56] Grit Hein et al. "The Brain's Functional Network Architecture Reveals Human Motives." Science (American Association for the Advancement of Science) 351, no. 6277 (2016): 1074–1078 quoted in Mathews and Collin-Vezine. *Raising Awareness and Empathy*, 309.
[57] Matthew Lebowitz and Ahn Woo-Kyung. "Effects of Biological Explanations for Mental Disorders on Clinicians' Empathy." Proceedings of the National Academy of Sciences - PNAS 111, no. 50 (2014): 17786–17790 quoted in Mathews and Collin-Vezine. *Raising Awareness and Empathy*, 309.
[58] Mathews and Collin-Vezine. *Raising Awareness and Empathy*, 309.
[59] Hein et al. *Brains Architecture Human Motives,* 1074-1078 quoted in Mathews and Collin-Vezine. *Raising Awareness and Empathy*, 309
[60] Mathews and Collin-Vezine. *Raising Awareness and Empathy*, 309.
[61] Ibid., 309.
[62] Todd Haugh. "Nudging Corporate Compliance." *American Business Law Journal* 54, no. 4 (2017): 686.
[63] Richard H. Thaler & Cass R. Sunstein, Nudge: improving decisions about health, wealth, and happiness 3–4, 6 (2008) Quoted in Haugh. "Nudging Corporate Compliance." American business law journal 54, no. 4 (2017): 684.
[64] Cass R. Sunstein, The Ethics of Nudging, 32 Yale j. On reg. 413, 415 (2015) Quoted in Haugh. "Nudging Corporate Compliance." 690.
[65] Haugh. "Nudging Corporate Compliance.", 710.
[66] Ibid., 710.
[67] Ibid., 713.

ethicality.[68] The third level of nudging is the most intrusive, which involves framing a choice by inducing a subconscious response to a visual, emotional trigger. The third level is the level least used in corporate environments currently. However, it could act as a visual prompt when a decision is being made due to an ethical dilemma.[69]

The ethicality of using behavioural ethics nudges is debated. There are ethical issues around people being allowed autonomy in their decision-making process. Despite good intentions, some of these nudge techniques may suppress the autonomy of the person making the decision.[70]

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[68]Hian Chye Koh & El'fred H. Y. Boo, The Link Between Organisational Ethics and Job Satisfaction: A Study of Managers in Singapore, 29 J. BUS. ETHICS (2001) 309, 320 Quoted in Haugh. "Nudging Corporate Compliance." 713.
[69] Haugh. "Nudging Corporate Compliance." 714.
[70] Ibid., 724-33.