

WHISTLEBLOWING: THE QUEENSLAND EXPERIENCE

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Not long after my daughter first started attending primary school, she was playing at home with another little girl. When her friend threatened to tell my wife about something my daughter was doing which she shouldn't have been, my daughter admonished her with the words "dobbers kiss robbers".

This silly, seemingly harmless expression, that on any logical analysis is a complete *non sequitur*, in fact demonstrates one enormous problem we face in trying to encourage public officers to report misconduct in the public sector. The expression, clearly derived from school yard parlance, was used by pupils to discourage others from reporting misconduct of fellow students to teachers or to ridicule and isolate those who had.

If that attitude is inculcated into our children from their earliest school life, how can we hope to displace it in the workplace?

There are other expressions which mean the same thing and with which you are probably more familiar. For example, "he's a dog" and "you don't rat on your mates". The latter expression is quite insidious because it draws justification from the legitimate Aussie value - mateship; mateship in battle, mateship on the footy field, mateship at the pub on Saturday night or at the Sunday barbie.

Some have also argued that the reluctance of Australians to report criminal conduct or misconduct to persons in authority is intertwined with our historical distrust of authority.

Why encourage whistleblowing?

Whistleblowing benefits both the public and the public agency in which the reported improper conduct occurred.

The public benefits from whistleblowing include:

- action will be taken to stop the wrongdoing;

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- if someone is being unfairly advantaged, someone else is being unfairly disadvantaged - whistleblowing can stop this unfair treatment and help create a level playing field;
- preventing danger to the health and safety of people;
- preventing serious damage to the environment; and
- bringing the perpetrators of wrongdoing to justice.

The benefits to an agency from encouraging and protecting whistleblowers include:

- early identification of conduct needing correction;
- early identification of systemic weaknesses that make the organisation vulnerable to loss, criticism or legal action;
- creating an opportunity to put better work practices in place to prevent wrongdoing in the future;
- maintenance of a positive corporate reputation; and
- improving accountability in the agency.

Why people don't blow the whistle

I've already mentioned feelings of disloyalty to work colleagues. These are some other reasons:

- belief that nothing useful will be done;
- belief they do not have enough evidence of the wrongdoing;
- not wanting to become the subject of public attention; and
- fear of reprisals and disapproval from work colleagues and others.

How to encourage whistleblowing

How, then, do we encourage public sector officers to report significant wrongdoing in the workplace? The first step is obviously whistleblower legislation of the kind enacted in various jurisdictions in Australia and now enacted in Victoria, that does the following:

- recognises that it is in the public interest to report significant wrongdoing;
- provides avenues for reporting;
- provides specific protection for those who report; and
- provides avenues of redress in the event that a discloser is the subject of detrimental treatment.

Avenues of disclosure

I note that under the Victorian Act the Ombudsman has the primary role. Under the Queensland *Whistleblowers Protection Act 1994*, various agencies have a role:

1. Each public sector entity has responsibility for receiving and dealing with disclosures of wrongdoing about its own operations or officers.
2. The Crime and Misconduct Commission (CMC) (formerly the Criminal Justice Commission (CJC)) can receive disclosures from public officers about conduct that is official misconduct. Essentially, official misconduct is corrupt or other serious misconduct by a public officer. It must involve conduct that:
 - is not honest or impartial;
 - is a breach of trust;
 - is a misuse of official information.

The conduct must also be sufficiently serious to be a criminal offence or to provide reasonable grounds for terminating the officer's employment. Therefore it is very similar to the Victorian Act's definition of "improper conduct".

3. The Ombudsman's Office also has power to investigate complaints by whistleblowers of maladministration. Maladministration was only included in the Queensland Whistleblower's Protection Act at the request of the former Ombudsman. It is defined as "administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory, or taken for an improper purpose". Therefore, it covers an extremely broad range of conduct and in this respect the Queensland Act is wider than its Victorian counterpart.

It needs to be understood that in Queensland, the Ombudsman does not have jurisdiction to investigate operational actions of police officers. That is the role of the CMC.

Protections provided by the Queensland Whistleblower's Protection Act

I note that some of the protections in the Queensland Act also appear in the Victorian Act. For example:

- It is an offence to take action against a person in reprisal for a whistleblower making a disclosure. In Queensland it is an indictable offence punishable by two years imprisonment or a fine of 167 penalty units (\$12,525). The equivalent offence in the Victorian Act attracts the same maximum term of imprisonment.
- A reprisal is also a tort and a person who takes a reprisal is therefore liable in damages to anyone who suffers detriment.
- There is a right to apply to the Industrial Commission or to the Supreme Court for an injunction where a reprisal has caused or may cause detriment to an employee.
- In proceedings for defamation there is a defence of absolute privilege for making a public interest disclosure.

- Public interest disclosures do not contravene any confidentiality requirement.

There are also obligations on public sector entities that extend the protection to whistleblowers.

- The most important one is that public sector entities must establish reasonable procedures to protect their officers from reprisals.
- It is an offence for any officer involved in the Act's administration to disclose information intentionally or recklessly about a public interest disclosure to unauthorised persons.
- A public sector entity must not refer a disclosure to another entity unless it first considers whether there is an unacceptable risk that a reprisal would be taken against any person because of the referral. The agency must consult with the person who made the disclosure if this is practicable.
- An entity that receives a public interest disclosure must provide reasonable information about action taken and the results to the discloser.
- Public sector entities must keep records of disclosures and report annually on the number of disclosures received and whether they have been substantiated.

Crime and Misconduct Act 2001

The Crime and Misconduct Act 2001 provides further protections to whistleblowers who assist the CMC in the performance of its functions. The CMC's functions include:

- receiving complaints of official misconduct against public sector officers; and
- receiving complaints of misconduct by police officers.

Therefore, any public sector officer who makes such a complaint is considered to be assisting the CMC in the performance of functions and may have the benefit of the protections afforded. The protections include:

- it is an offence to engage in prejudicial conduct because a person has assisted the CMC;
- the CMC may apply to the Supreme Court for an injunction where a person or organisation has engaged, or is proposing to engage, in such prejudicial conduct; and
- the CMC can also offer witness protection to persons who assist it in the performance of its functions.

How to make a public interest disclosure

So is there a best way to make a public interest disclosure? Here are some suggestions:

- Wherever possible, a person who makes a public interest disclosure should do so in such a way as to maximise legal protections available.
- Consider which entity is the most appropriate to receive the disclosure and in the best position to deal with it.

- Public interest disclosures only apply to information that a person honestly believes on reasonable grounds tends to show wrongdoing or a specified danger. Therefore, potential disclosers need to consider whether their information meets this test.
- It is also important to identify sources of support from inside and outside the organisation, including family members, without disclosing confidential information.
- If blowing the whistle internally, it is important for whistleblowers to consider who is best placed in the organisation to receive the disclosure. In some cases it may be preferable to report directly to the CEO rather than to the immediate supervisor. In Queensland, CEOs are obliged to report suspected official misconduct to the CMC.
- Whistleblowers should also specify to the recipient of their disclosure how they want to be contacted and how best to keep their identity confidential.

Common errors made by agencies in managing whistleblower disclosures

Agencies have a responsibility to deal with disclosures from whistleblowers in such a way that they are not unnecessarily exposed to adverse treatment. Agencies must avoid the following:

- failing to observe the confidentiality of a disclosure by passing the information through various hands, eg forwarding the disclosure through the chain of command;
- interpreting natural justice to mean that persons about whom a disclosure is made have an immediate right to details of it;
- allowing personal biases about the personality of the whistleblower to influence the assessment of the disclosure;
- not taking seriously concerns expressed by whistleblowers about the possibility of reprisal;
- ignoring potential conflicts of interest when deciding who should assess or investigate the disclosure;
- unreasonably delaying the investigation of the matter as a result of which evidence of wrongdoing is altered or destroyed.

Reprisals

For conduct to amount to a reprisal the conduct need only be a substantial ground for the detrimental act or omission even if there is another ground. I understand this is also the case in the Victorian Act.

However, reprisals can be camouflaged in subtle ways that make it difficult to establish that a detriment to a whistleblower resulted from making a disclosure and not from some other legitimate action or decision. Here are some examples:

- the whistleblower's position is made redundant or the office is restructured so that the independence of the whistleblower's position and responsibilities are reduced;
- the whistleblower is transferred for some seemingly legitimate work-related reason;
- the whistleblower's reputation in the workplace is undermined;

- the motives for making the disclosure are challenged;
- disciplinary action is taken against the whistleblower because of alleged indiscretions in the workplace or poor work performance; or
- the whistleblower is inundated with work and then branded incompetent when it is not completed.

In my experience, the difficulty in investigating these matters is to establish that the making of the public interest disclosure is a substantial ground for the detriment suffered.

Case study

The following case study shows the limitations of whistleblower protections in some work situations. The then CJC investigated an alleged reprisal against the CEO of a local government body. The CEO had given information to the CJC of suspected official misconduct of councillors. The CJC sought an injunction to restrain the Council from terminating the CEO's employment. The Council argued that the provisions of the *Criminal Justice Act* under which the injunction was sought did not have any valid operation because of inconsistency with the *Commonwealth Industrial Relations Act 1988*. The judge at first instance agreed but the Court of Appeal held that the provisions of the *Criminal Justice Act* were supplementary entitlements which were not expressly or implicitly prohibited by the *Industrial Relations Act*.

However, that was not the end of the matter. Whether an injunction could or should have been granted, the relationship between the CEO and the majority of the councillors had deteriorated to such an extent that it would have been dysfunctional for the Council if the CEO had remained in office. The parties eventually reached an agreement for terminating the CEO's contract.

That was an unusual case but the limitations on external agencies such as the Ombudsman's Office to prevent whistleblowers from suffering some detriment reinforces the need for each public sector agency to take primary responsibility for protecting its own officers from reprisals.

I have searched for other cases on reprisals in preparing for this address but the only others involved civil actions for the tort of reprisal in which the plaintiff unsuccessfully claimed that the public sector employer was vicariously liable for the reprisals taken by its employees. In *Howard v State of Qld* [2000] QCA 223, the Court of Appeal held that "the nature of the tort identified in s 43 [of the *Queensland Whistleblowers Protection Act 1994*] is such that it may be committed only by the direct acts of a person or corporation and that vicarious liability for the acts of others is excluded."

The exception to this is where the officer of the public sector agency who takes the reprisal has sufficient control over the agency's governing mind that the agency becomes directly liable for the reprisal.

The Queensland Experience

I have held the position of Queensland Ombudsman for only six months. However, I am advised by my officers that the Office has dealt with relatively few cases categorised as whistleblowing. One of the principal reasons for this is that "improper conduct", as

defined in the Victorian Act, would be official misconduct and therefore within the CMC's jurisdiction rather than the Ombudsman's.

My officers could only recall a few cases where complainants were treated as whistleblowers. They advised that in some of those cases, although care was taken not to reveal the complainant's identity during the investigation, other officers guessed who had reported the matter because the complainant had made his or her concerns known within the workplace before lodging the complaint.

Under the new *Ombudsman Act 2001* in Queensland, which commenced in December 2001, persons who cause or threaten to cause detriment to a person because the person has given information to the Ombudsman commit an offence, whether or not the person's assistance amounts to a public interest disclosure under the Whistleblowers Protection Act. Therefore, an allegation that such conduct has occurred would be investigated by my Office or referred to the CMC.

As mentioned earlier, the CMC also has a special role under the Whistleblower's Protection Act to receive disclosures involving official misconduct. The CMC also provides an advisory service to persons by explaining what is involved in making a public interest disclosure and the possible consequences.

Agencies in Queensland are required to report on public interest disclosures received in each financial year. The CMC's analysis of public interest disclosures for 2000/2001 shows that 17 complaints (involving 64 allegations) were received. Of these, 58 allegations were made by public officers complaining of official misconduct and five were complaints of reprisal. None of the allegations of reprisal was substantiated but 10 of the 58 allegations of official misconduct were substantiated. In considering these figures it needs to be understood that more than two-thirds of the complaints the CMC received were complaints of police misconduct and 75 per cent of those were made by the public. 16 per cent were made by police officers but most of those were senior officers acting under their statutory duty to report misconduct of fellow officers. Such reports are not classified as reports by whistleblowers.

Role of senior officers

Chief Executive Officers, Senior Executive Service officers and other senior officers are highly influential on the culture of the organisation and standards of ethical behaviour. It is vital that these officers set high standards of behaviour and are seen to encourage and support officers who disclose wrongdoing in the workplace. They should highlight the positives of such behaviour in terms of productivity, accountability and opportunities for improvements to administrative processes.

Impact of Whistleblower legislation on ethical standards

It is difficult to measure the impact whistleblower legislation has had on standards of ethical behaviour in the public sector. However, I would strongly argue that it is a necessary component of any effective accountability framework.

It is possible to measure whether standards of ethical behaviour have improved in an organisation. The CJC undertook such an exercise in relation to ethical standards of police behaviour 10 years after the implementation of the recommendations of the

Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report) which resulted in the establishment of the CJC.

In its report titled *Integrity in the Queensland Police Service - QPS reform update - March 2001*, the CJC concluded that overall standards of police behaviour in Queensland had improved over that period. The report also concluded that younger police are increasingly more aware of their legal and ethical obligation to report misconduct by fellow officers and are more likely to do so. However, many police are still reluctant to report their peers because of concern about the consequences, particularly the reaction of fellow officers.

The CJC's research indicated that police are most likely to report a fellow officer where criminal or corrupt acts are alleged and are least likely to initiate complaints about alleged excessive force or arrest-related matters.

Moving on

If you are giving advice to a whistleblower or potential whistleblower, you need to keep this in mind. In some cases, although the whistleblower may have reasonable grounds to honestly believe that wrongdoing has taken place, the subsequent investigation does not substantiate that belief to the point where action is taken of the kind the whistleblower considers appropriate and just. This may not be because the investigation was shoddy or the information was not taken seriously but because of the standard of proof required to substantiate such wrongdoing before a court or tribunal.

Whistleblowers who strongly believe that the wrongdoing has not been properly addressed can find it difficult to accept the outcome. Some have such a strong commitment to their complaint, that they can act in an obsessive manner creating further disadvantage for themselves. They know they are in the right and yet they are the ones being victimised.

Sometimes the whistleblower has to accept that the matter will not be resolved in the manner he or she considers just and fair and to adopt the attitude that what's happened has happened and it's time to move on. Accepting that this point has been reached is not the same as condoning the wrongdoing.

Conclusion

The sorts of problems I have highlighted in this address can manifest themselves regardless of the precision of the legislative framework underpinning whistleblower disclosure and protection.

I reiterate the following points:

1. Agencies must take primary responsibility for protecting their own officers who act in the public interest by reporting wrongdoing.
2. CEOs and other senior officers must support and be seen to support responsible reporting.

3. Potential whistleblowers, in considering how best to blow the whistle to protect their own interests, should ask themselves these questions:
- Do I have reasonable grounds for my proposed disclosure?
 - Am I making my disclosure in the public interest or solely for revenge or personal or political gain?
 - Will the way in which I intend making the disclosure maximise the legal protections available to me?
 - Do I have sufficient evidence to support my suspicions without needing to gather further evidence from my workplace after the disclosure?
 - Am I prepared for possible disapproval of my actions from fellow workers and friends?
 - What sources of support are available to help me after I blow the whistle?

Reporting wrongdoing within one's own organisation is rarely an easy business. It takes courage. However, whistleblowers who work within the legislative framework so as to take advantage of the protections available, can do the right thing without jeopardising their careers or their health.

Further references:

"Exposing Corruption: A CJC Guide to Whistleblowing in Queensland", 1999 (available on the Crime and Misconduct Commission's website - www.cmc.qld.gov.au).

"Protected Disclosures Guidelines", NSW Ombudsman, 4th ed, 2002.