

Protecting Whistleblowers

The Management of Disclosures and their Challenges

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1. Common misunderstandings about whistleblowing

From the feedback when presenting regular training workshops on the NSW Protected Disclosures Act, from experience advising public officials seeking help in dealing with whistleblowers and from my general reading on the topic, there appear to be a number of misconceptions commonly associated with whistleblowing.

Among these misconceptions are:

- 1) that whistleblowers are generally troublemakers – disaffected members of staff who are more trouble than they are worth
- 2) alternatively, that whistleblowers make their disclosures out of a sense of disinterested public duty and should have little or no emotional investment in or expectations about the outcome
- 3) that little or no information about an investigation should be disclosed to a whistleblower as this could prejudice the investigation
- 4) that confidentiality is of paramount importance as it is an essential requirement for the protection of the whistleblower
- 5) that once a person has ‘blown the whistle’ they are untouchable within the workplace, even if they are consistently under performing or were actually implicated in the misconduct, maladministration, etc
- 6) that where workplace conflict arises out of a disclosure, it is the whistleblower who in each case should be relocated, or alternatively it is the subject(s) of the disclosure that should always be relocated.

Over the next 20 minutes or so I will discuss each of these misconceptions in turn.

2. Relevance of whistleblower motives

Looking firstly at the not uncommon view that the whistleblowers are troublemakers or disaffected members of staff, the motivations of whistleblowers might well range from ethical considerations or the welfare of their organisation, to sheer malice.

From the *Whistling While They Work* research¹, while the difference is small, on the whole employees who report outside their role see themselves as more dedicated corporate citizens than employees who do not report. This suggests that at least some of the motivation to report wrongdoing comes from a greater sense of personal altruism and a belief that reporting is good for the organisation.

¹ Reported in: *Whistleblowing in the Australian Public Sector, Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, edited by AJ Brown, 2008, ANU E Press.

The results point to a picture of whistleblowers professing stronger personal motivations to report wrong-doing, with little support for the view that whistleblowers are ‘disgruntled’ and ‘embittered employees’ driven to report by perverse personal characteristics.

The results of the research indicate that almost anyone could become a whistleblower, depending on the wrong-doing they observe and the prevailing organisational context in which they find themselves. For example, the results of the research seem to indicate that perceived seriousness and frequency of the wrong-doing was a primary motivation for reporting behaviour, and as can be expected the motivation to report is increased when the observer is the object of the wrong-doing.

Some whistleblower legislation refers to issues about whether the ‘motivation’ of a whistleblower is frivolous or vexatious (this is generally not a ‘content’ issue because in nearly all jurisdictions the scope of such legislation is limited to serious matters). Leaving aside the overwhelming practical difficulty of determining a person’s motive, it is important to distinguish between disclosures that might be ‘vexatious’ and those that might be ‘malicious’. In this context:

- ‘vexatious’ would be where the motive of the person is to cause harm, and there is no substance to the disclosure or it is actually false
- ‘malicious’ would be where the motive of the person is to cause harm, but there is substance to the disclosure.

From the perspective of the agencies and watchdog bodies that receive disclosures, while ‘vexatious’ is bad, ‘malicious’ is good. That said, malice does diminish the reliability of the evidence of the whistleblower and means that more reliable evidence needs to be found to substantiate the allegations.

In summary, it is the content of the disclosure that is of primary importance, not the motive of the whistleblower.

Looking secondly at whether whistleblowers are more trouble than they are worth, based on both the results of the *Whistling While They Work* research and the experience of the NSW Police in relation to internal disclosures by police officers, it is clear that the information obtained from whistleblowers is valuable – it is likely to be substantiated in a significant proportion of cases that are investigated.

3. Management of whistleblower expectations.

Looking next at why whistleblowers make disclosures and how they expect to be dealt with, the analysis of the data from the *Whistling While They Work* research confirms that employees have a generally high expectation of positive treatment – an expectation understandably reinforced by official efforts to encourage internal whistleblowing.

The reasonableness of the expectation, and its level can have a direct impact on the perceived outcome of the experience for whistleblowers, and therefore on their subsequent attitudes and conduct.

If expectations of good treatment are low, these are more likely to be easily met and outcomes to be regarded as relatively good. If expectations are high, meeting them may be more complex and identical outcomes may be seen as relatively bad.

The responses to the internal witness survey indicate that this group went into their whistleblowing experience with some higher expectations of support and low expectations that they would suffer direct reprisals. The results of the internal witness survey were extremely negative compared to the random employee sample – particularly in relation to high rates of dissatisfaction in regards to managing expectations. Where these expectations are not met, this has serious impacts of the future attitudes and behaviours of the people involved.

The research suggests that the point of initial unexpected adverse or unsupportive reaction by management towards the disclosure may actually be the first tipping point at which the potential for conflict begins, and the experience of some whistleblowers starts to unravel.

Our experience at the NSW Ombudsman has long been that one of the most important aspects of complainant management is to ensure that expectations are realistic from the outset. In the whistleblowing context, the research indicates that managing the expectations of employees is clearly as important to ensuring good outcomes as controlling the risk of reprisals.

In many cases vindication plays a decisive role in many whistleblowers' perceptions of the overall outcome of their disclosure. If the investigation outcome does not lead to positive action, there is a high likelihood of a reported bad experience, especially in relation to management. One possible explanation is that whistleblowers whose reports do not lead to positive action (either objectively or subjectively) may be inclined to regard that result as itself evidence of bad treatment of them by management, or may push the matter and enter into further conflict which is then perceived as mistreatment.

Further, if a disclosure is not substantiated, and it was well known that it was made, particularly if it concerned people with more power within the organisation, the whistleblower is more likely to become "fair game" for a range of negative repercussions. This realisation is likely to drive the high priority that many whistleblowers place on substantiation of the report as itself a means of protection.

It is important to note here that only one quarter of whistleblowers who believed that the initial investigation had been completely fruitless let the matter drop. Mind you, only one third of those who at least got the satisfaction of having wrong-doing acknowledged let the matter drop!! And, one half of those whose initial report resulted in wrong-doing being shown and effective action taken still pursued the matter!

It takes finding the wrong-doing accompanied by effective action to reduce the proportion of the totally dissatisfied whistleblowers to one quarter, and raise a bare majority of whistleblowers into the group of somewhat to extremely satisfied.

In relation to the internal witness survey respondents, the vast majority were not remotely satisfied by outcomes unless those outcomes confirmed their belief that wrong-doing had taken place, and the outcome involved action commensurate with that confirmation.

Case handlers and managers need to see whistleblowers as people with a deep commitment to achieve a particular result, not as public officials with a detached interest focussing on process issues such as fair treatment of subjects of disclosure, appropriate investigation, balance of proof, etc).

4. Information that should be disclosed to relevant parties

An issue that often arises in the context of a investigations into disclosures made under whistleblowing legislation (for example FOI applications to agencies seeking access to documents concerning such disclosures) is whether and if so what information can be given to interested parties about the progress and results of an investigation. While it is not possible to give a definitive answer to this question that applies in all circumstances, it is possible to give some general guidance.

Why

The reasons why information should be given to interested parties about the progress and results of an investigation would of course include providing procedural fairness to the subjects of a disclosure. However, another reason is the importance of addressing the legitimate expectations of whistleblowers that they will be kept informed about what is happening to their disclosure. After all, when people are not kept informed about what government is doing to address their concerns, they are more than likely to assume the worst. The *Whistling While They Work* research found that:

“When whistleblowers feel they are being kept in the dark, they are unlikely to jump to the conclusion that the outcome of their report is satisfactory, or remain confident that the disclosure has been valued by the organisation...the whistleblowers who are kept best informed about the outcomes of investigations are the most likely to think these outcomes are satisfactory.” (at p.118)

Who

When considering that information should be provided to the parties involved in an investigation, consideration needs to be given to whether the investigation is either ‘evidence focussed’ or ‘outcome focussed’:

- ‘evidence focussed’ inquiries seek to pursue all lines of inquiry in a way that will meet all legal and procedural requirements, particularly where a person is the subject of the complaint/disclosure and there is the possibility of a serious outcome
- ‘outcome focussed’ inquiries are primarily directed at quickly identifying and remedying problems. They therefore only seek to obtain sufficient information for a fair and informed judgement to be made about the issues in question, particularly where those issues relate to policies, procedures and/or practices. An outcome focussed investigation may require no more than consideration of the terms of the complaint/disclosure and a study of any relevant documents.

Where an investigation is ‘evidence focussed’, the parties with a legitimate interest in receiving information about the progress and outcome of the investigation might include:

- complainant/whistleblowers
- subjects of complaints/disclosures
- witnesses whose evidence is obtained during the course of an investigation.

Where an investigation is ‘outcome focussed’, the party with the legitimate interest in receiving such information may only be the complainant/whistleblower.

When

There are various stages in an investigation when it might be relevant to provide information to relevant parties, including: at the outset; after a decision is made as to how a matter will proceed; during the course of an investigation; prior to the completion of an investigation; and at the completion of an investigation.

What

The information that could be provided to interested parties at various stages of an investigation is discussed in more detail than time allows here in the 6th edition of the Ombudsman's *Protected Disclosures Guidelines* (copies can be downloaded from the web).

5. Relevance of confidentiality²

Looking at the issue of confidentiality, the long held and widespread view has been that the best protection that can be provided for a whistleblower is confidentiality. This is often the first thing whistleblowers themselves will ask for. The reason is obvious: if no one knows you 'dobbed', you cannot suffer reprisals.

Where a member of staff has 'blown the whistle', if practical and appropriate, it is certainly best practice that confidentiality be maintained by the agency, all responsible staff and the whistleblower. There are three main things to keep confidential:

- the fact of the disclosure
- the identity of the whistleblower, and
- the allegations themselves (including individual's names).

In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. Certainly this would provide the most effective protection for a whistleblower.

The issue of confidentiality for whistleblowers is a particularly vexed question. In practice there are two main problems with an expectation that confidentiality will protect whistleblowers from retribution. Firstly, an organisation may not be able to realistically guarantee confidentiality:

- it is often difficult to make even preliminary enquiries into allegations without alerting someone in the organisation to the fact that allegations have been made
- to ensure procedural fairness, anyone who is the subject of allegations should be given an opportunity to answer them
- once it is known that an internal disclosure has been made, it is often not difficult to surmise who has blown the whistle
- sometimes the whistleblower has made confidentiality even more difficult by previously voicing their concerns about an issue, or their intention to complain, before making a formal disclosure.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can be certain those measures have succeeded. Human error and indiscretion cannot be discounted.

² The material in this section is taken from an Information Sheet published by the NSW Ombudsman in September 2005 entitled *Protection of Whistleblowers: Practical Alternatives to Confidentiality*, which is largely reproduced in *Protected Disclosures Guidelines*, NSW Ombudsman, 6th edition, April 2009 (Part C, Section 1.5).

The agency may not be aware or be able to predict that certain information they think can be revealed (eg allegations that certain systems are failing) is sufficient to identify the whistleblower. Someone may have simply seen the whistleblower approaching management to report his/her concerns.

A further complication arises in those cases where people find out that a disclosure has been made and take retribution against the wrong person; a person who did not actually make the disclosure. The agency concerned will find itself with a problem – if believed, any denial that this person is the whistleblower just narrows the field as to who actually was the whistleblower.

The likelihood of the identity of the whistleblower being disclosed or remaining confidential should determine the approach to be adopted by CEOs and relevant managers to protect whistleblowers. Experience indicates that pro-active management action is often the only practical option available to protect whistleblowers.

Where confidentiality is not a realistic possibility, there are two options available to an agency:

- *re-active management* – the ‘head in the sand’, ‘hope for the best’, ‘don’t admit we have a disclosure’ approach – only react after the occurrence of detrimental action, or
- *pro-active management* – take control of the situation and take steps to prevent detrimental action.

There have been cases in NSW where the courts have found against agencies that adopted a re-active and/or more ‘hands-off’ approach to the protection and/or welfare of their staff.³

As in practice an expectation of confidentiality for a whistleblower is often not realistic, it is important that agencies determine at the outset whether or not:

- the whistleblower has telegraphed an intention to make the disclosure or has already complained to colleagues about the issue
- the information contained, or issues raised, in the disclosure can readily be sourced to the whistleblower
- the issues raised in the disclosure can be investigated without disclosing information that would or would tend to identify the whistleblower
- there is a high risk of any subject of a disclosure surmising who made the disclosure and taking detrimental action and, if so, whether publicly disclosing the whistleblower’s identity would not expose them to any more harm than they were already at risk of, and prevent any person who subsequently took retribution from sustaining an argument that they did not know the identity of the whistleblower.

If confidentiality is not a realistic and appropriate option, then consideration must be given to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action. While certain minimum steps should be taken by management and persons responsible for dealing with disclosures in all cases when a person makes an initial disclosure, additional approach must be adopted depending on whether:

³ Eg *Wheaton v State of New South Wales*, No 7322 of 1998, 2nd Feb 2001, District Court; *State of NSW v Coffey* [2002] NSW CA 361, 28/10/02; *Bankstown Foundry Pty Ltd, Braistina (1986)* 160 CLR 301.

- the identity of the whistleblower is and is likely to remain confidential, or
- the identity of the whistleblower is known or is likely to become known as the disclosure is dealt with.

Whether or not the identity of the whistleblower has or will become known, the minimum steps to be taken in all cases would include:

- providing active support, information and guidance to the whistleblower
- designating a senior member of staff to take responsibility for the welfare of the whistleblower
- conducting a prompt investigation
- responding appropriately to any detrimental action.

Where the identity of the whistleblower is likely to remain confidential, the approaches available would include:

- taking necessary steps to ensure appropriate secrecy about the disclosure and putting in place procedures for maintaining secrecy during the course of any investigation
- considering the use of appropriate investigation techniques to help maintain confidentiality.

Where the identity of the whistleblower is known or is likely to become known as the issues are dealt with, the approaches available would include:

- ensuring proactive management intervention
- making direct supervisors and line managers responsible for supporting and protecting the whistleblower
- providing advice and training to relevant staff, particularly those involved and relevant colleagues
- considering relocation or transfer, if necessary and appropriate.

6. Managing whistleblowers with performance issues⁴

An issue that consistently arises concerns whether whistleblowers are effectively ‘untouchable’ once they have blown the whistle, even if there are serious performance issues, and what are the obligations and responsibility of agencies, their CEOs and staff in relation to ‘compromised’ whistleblowers.

Making a protected disclosure should not shield whistleblowers from the reasonable consequences arising from any incompetence, negligence or involvement in misconduct or acts of dishonesty.

Disciplinary action against a whistleblower inevitably creates the perception – almost an automatic presumption in some cases – that it is being taken in retaliation for the disclosure. In all cases where disciplinary action is contemplated, CEOs or other responsible public officials must ensure that they are able to clearly demonstrate that:

- their intention to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information)

⁴ The material in this section is taken from the *Protected Disclosure Guidelines*, NSW Ombudsman, 6th edition, April 2009 (Part B, Section 2).

- there are good and sufficient grounds that would fully justify action against any non-whistleblowers in the same circumstances, and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

Agencies, CEOs or other responsible public officials who are unable to demonstrate that these preconditions have been met leave themselves open to claims that they have engaged in maladministration or corrupt conduct, and possibly to charges that they have committed the criminal offence of detrimental action.

Disciplinary action against a whistleblower could result in complaints to an Ombudsman or an anti-corruption agency, or criminal proceedings against those involved. Therefore, where disciplinary action against a whistleblower is contemplated, it should only be taken where the agency or public official responsible is able to clearly prove, to an appropriate standard (depending on the seriousness of the conduct), that the whistleblower has been involved in misconduct or has acted dishonestly, incompetently or negligently. Further, the agency or public official responsible should also be able to clearly prove that any disciplinary action taken against the whistleblower was:

- reasonable
- proportional (between the ends to be achieved and the means used to achieve them), and
- consistent with similar cases involving non-whistleblowers.

Just as formal disciplinary action can be detrimental action, so can other employment-related action, including:

- harshly imposing human resource procedures
- rewriting job descriptions
- making harmful changes to duties or projects (eg shifting the whistleblower into a ‘special project’)
- redeployment
- redundancy, or
- dismissal.

White clearly it is essential that the responsible agency or public official can demonstrate the appropriateness of their actions, including (for redundancies in particular) the existence of a relevant plan prior to the person making a protected disclosure.

Further, and in general, where disciplinary action relates to conduct the subject of the whistleblower’s disclosure, the agency or public official responsible should be able to show that disciplinary action only commenced after the disclosure had been appropriately dealt with and consideration had been given to the above matters.

If, after having considered all of these matters, disciplinary or other action against a whistleblower is warranted, great care should be taken to properly and thoroughly document the process. All contacts with whistleblowers, witnesses, investigators and managers and the reasons for any decisions should be recorded. In addition, where any of the investigating authorities are involved in a matter and action is intended against a whistleblower, they should be notified of this fact.

7. Managing workplace conflict⁵

On occasion an internal disclosure can lead to workplace conflict, particularly where the identity of the whistleblower is known or can reasonably be assumed. Such conflicts can:

- be between the whistleblower and any person or persons the subject of the disclosure
- be between the whistleblower and other co-workers who believe that the whistleblower has done the wrong thing or adversely affected them by making the disclosure, or
- arise both prior to completion of action stemming from a disclosure or afterwards.

On occasion, such conflicts have led to a total and irreparable breakdown in the workplace relationships between whistleblowers and co-workers.

It is argued by some that where workplace conflict arises out of a disclosure, the whistleblower should be transferred to another workplace or agency. It is argued by others that it is the subject(s) of the disclosure who should be transferred.

When workplace conflict occurs there should not be a presumption as to whether the whistleblower, the subject(s) of a disclosure, both or either, should be moved. In such circumstances a range of, albeit limited, options available to management. These include, depending on the circumstances:

- counselling of/warnings to people alleged to have acted inappropriately
- reorganising the workplace to change seating arrangements to separate the people involved
- changing supervisory and reporting arrangements
- re-locating the whistleblower, the persons(s) the subject of the disclosure and/or co-workers:
 - within the work location (eg to different floors)
 - to different work locations (if the agency has more than one premises)
- transferring the whistleblower to an equivalent position in another agency
- suspension of officers where there is information indicating they have engaged in detrimental action/serious misconduct
- dismissal of officers found to have engaged in detrimental action/serious misconduct.

In considering how to address such conflicts, agencies need to bear carefully in mind that whatever action is taken in relation to a person who has made a protected disclosure:

- cannot constitute detrimental action as defined in the relevant whistleblower legislation, or
- cannot constitute beneficial treatment, if this is prohibited by the relevant whistleblower legislation (ie, to influence the person to make, to refrain from making, or to withdraw a disclosure).

⁵ The material in this section is based on the *Protected Disclosures Guidelines*, NSW Ombudsman, 6th edition, April 2009 (Part A, Section 6).

With reference to where the conflict situation is between the whistleblower and any person the subject of the disclosure, the simplest situations are:

- where it is established that misconduct has occurred which is sufficiently serious to warrant dismissal of the person concerned, or
- where the allegations are so serious, and the risks associated with the alleged conduct so great, that any person the subject of the allegations must be suspended or moved to a less sensitive work location.

It is a far more difficult situation where an investigation into the allegations has not been completed and there are no grounds justifying suspension or re-location of any person the subject of the allegations to a less serious/sensitive workplace.

In such circumstances, the primary options available to the agency are likely to be:

- if feasible, to re-organise the workplace or reporting/supervisory arrangements to separate the relevant persons
- to facilitate a voluntary re-location of the whistleblower, or any person the subject of the disclosure, to another position or location acceptable to the relevant person
- to require re-location of the whistleblower, or possibly in special circumstances, any person the subject of a disclosure, to another position within the organisation, provided the new position is on the same pay and conditions, including at least equal seniority, responsibilities, prospects for advancement and accessibility between their home and place of work, or
- to negotiate a voluntary redundancy package with the whistleblower (subject of course to the appropriateness of the necessary restructure or abolition of the position if the offer is accepted).

It is important to emphasise that if it is necessary that a person be moved, there can be no presumption that this should be the whistleblower or any person the subject of their disclosure. The answer to this question will depend on the circumstances of each case.

8. Conclusions

In my experience there are a number of misconceptions commonly associated with whistleblowing.

From what I have seen, most of these misconceptions appear to arise out of a negative perception of whistleblowing and whistleblowers, not from any actual negative experiences of the majority of people that hold such views.

The best way to comprehensively address these misconceptions will therefore be to improve the overall perception of whistleblowing and whistleblowers.

Hopefully, the results of the *Whistling While They Work* project will help improve such perceptions.