

WHISTLEBLOWING: BETRAYAL OR PUBLIC DUTY?

Opening speech - David Landa, Transparency International

Whistleblowing protection whether legislative or in internal codes is not achieving its desired objective.

My aim, as a former regulator, and as a consultant, of holding a conference on such an issue would be to look for proactive solutions to the “unauthorised disclosure”.

The subject of Whistleblowing is dominated by “victims” who are either “disclosees” or “disclosors”. Too little consideration is given to providing realistic protocols that if implemented may provide enduring benefits to one or all of the parties. When someone makes unauthorised disclosures, it is because they do not know or trust in any alternate way to reveal what they perceive as illegal or damaging behavior within an organisation. If adequate protocols existed, such disclosures become authorised and presumably the organisation may benefit from the disclosure, and be able to remedy the problem. Problems subject to whistleblowing range from corruption, to issues damaging to public interest or harmful to private or corporate interests.

Employers, both Government and private, obviously will take steps to avoid harm flowing from within their organisations, but only, it seems, provided that they control the process. Internal control has proved to be a barrier to people with something to disclose, and unauthorised disclosure becomes the only viable option in the mind of the whistleblower. The adoption of suitable protocols, and their observance, may involve the use of outside, independent agencies and therein lies a problem. Few organisations can deal with the concept that there may be less possibility of harm flowing from the involvement of outside agents, than from the possible failure of their own internal processes.

My experience as a consultant has given me insight into some positive aspects that an outside agent can help resolve internal conflict, without creating victims. My experience has indicated how a “protected” disclosure could bring benefits to the organisation.

Experience of independent external assessment. On two occasions I was retained to investigate corruption allegations in a government department. In each instance I announced my presence, by emails and notice board, setting out who I was, and what I was attempting to examine (in a general sense-i.e. not too specific). I advised where and how to contact me, and undertook that all information given to me would be treated as confidential.

I was confronted with an avalanche of confidential information, some of which appeared self serving, or otherwise irrelevant. On the other hand I received a wealth of information relevant to the issue, and beyond. I was able to deal with the issues of corruption while I could see no evidence of corrupt conduct, many issues of serious mismanagement surfaced. They were issues bearing upon my specified brief. With the permission of selected informants, I was able to convey in my report, issues that management should consider, if the perceived issue of corruption was to be rectified.

What impressed me was the wealth of valid information that was offered to me. I was made the recipient of unauthorised disclosures, valuable management information that staff was fearful of conveying directly to management. The process described is commonly referred to as a “hotline”, which some organisations have made available to their employees.

I hope this conference can confront the problems and examine the concept that a safe process can be implemented. The result would remove the fear that leads to unauthorised, as opposed to, authorised disclosure.

What are the possible solutions that will allow employees to speak with impunity on matters of waste, fraud and abuse?

Legislation and codes of conduct have not provided any adequate element of protection. Many reasons are ascribed to the failure, the most being related to "the culture". Why not bad management, poor leadership and failed values?

Currently in the United States, corporate whistleblower rights have received new legislative clout, this being the result of revelations of devastating corporate failure and fraud. Congress is desperate to restore investor confidence, even to the extent of extending whistleblower protection.

The False Claims Act in the US allows a private individual or Whistleblower, with knowledge of past or present fraud on the Federal Government, to sue on behalf of the government to recover heavy penalties and triple damages. If the action is successful, it not only stops the dishonest conduct, but also deters similar conduct by others and may result in the suitor's receipt of as much as 30% of the governments ultimate recovery.

The False Claims Act, also called the "Lincoln Act", "Informers Act", or the "Qui Tam Statute", was enacted during the Civil War. Qui Tam expresses "he who sues for the king as for himself". The law was targeted at stopping dishonest suppliers to the Union Military at a time when the war effort made it almost impossible to investigate and prosecute the fraud itself. Today it serves a similar purpose because of the enormous size of the Federal government and the variety of programs under which it spends its funds.

More than 3600 Qui Tam suits have been filed since 1986, when the Act was strengthened to make it easier and more rewarding for private citizens to sue. The government has recovered almost \$5 billion as a result of the suits, of which over \$808 million has been paid to the Whistleblower.

Needless to say there is a thriving network of lawyers who vie for work of this nature.

I am not suggesting that such a system is likely be advocated for Australia, but Qui Tam demonstrates that serious penalty and heavy damages may help bring an element of restraint.

Penalty by way of damages and public exposure.

It is becoming very common to see published accounts of improper conduct or neglect of proper process, exposed by leaked information or direct accusation by whistleblowers. When unauthorised disclosures result in litigation, clearly serious damage can result. Herein lies the sanction that should sound warning bells for any organisation so involved. The legal costs and damages are sometimes an incentive for organisations to use its might and resources to crush the accuser, but recent awards should call for cautious reassessment of such strategy.

In Australia refuge under Protected Disclosure legislation has not proved effective. On the other hand, serious sanctions do exist at common law. Employers have a common law duty of care to their employees. If an employee is subject to harassment or discrimination the employer may become liable. Whistleblowers who are damaged in such a way may sue. The judgment in Wheadon v State of NSW (District Court Judge Cooper 2/2/01) demonstrates:

The plaintiff, a policeman, made a report to police internal affairs of alleged corrupt conduct on the part of a senior officer. The plaintiff claimed that because of this, over the following decade he was subject to harassment, victimisation, and denied any welfare assistance. The result was claimed to have been the cause of serious stress leading to psychiatric illness. Wheadon claimed damages to compensate him on the grounds that the defendant, as his employer, was in breach of its duty of care towards him as an employee.

The 25 main breaches in the judgment included:

1. Failure to provide the plaintiff with adequate protection from harassment.
2. Failure to properly investigate the allegation made by the whistleblower, and also the failure to investigate properly those allegations made against the whistleblower.
3. Failure to give support and guidance to the plaintiff.
4. Failure to prevent the conduct of colleagues in persecuting the plaintiff for having blown the whistle (which was the plaintiff's sworn duty)
5. Failure to assure the plaintiff that by reporting corruption, he had done the right thing.

Damages awarded exceeded \$650,000. The award together with cost of all parties exceeded \$1 million - a significant sum. The case also restated an employer's duty of care, as applicable to whistleblowers, in unmistakable terms.

There are many similar cases that go unreported, especially concerning police whistleblowers. That is because the cases settle with undisclosed terms. Payouts nevertheless would be commensurate with the damage suffered and would involve significant resources. Once again Lawyer's pursuit of their client's rights may force a reappraisal of attitude to the whistleblower.

But legal action for damages is reactive to the breach of duty. What is needed is a change in cultural attitude. Management has to review its approach to the unauthorised disclosure, whether it is a welcome re evaluation or not.

Solutions will vary according to circumstance because employers in government and non-government organisations have different needs as well as different problems. Universities and hospitals have provided much insight into their internal problems. Their domestic disagreements regularly are aired in the media and in courts of law. The cost in reputation and money, cry out for reappraisal of basic issues of governance, though little evidence of change is apparent in these institutions.

The police, military and quasi-military institutions are seldom out of the public eye or the courts on issues of harassment, victimisation etc, consequent to unauthorised disclosures. These organisations are constantly reviewing methods of dealing with the issue, but somehow it always looks like three steps forward and two steps back. "Culture" is said to be the basis of the problem, but surely management issues are fundamental to the problem.

It can be seen from studies that government agencies are assiduous in adopting codes of conduct to deal with whistleblowing, and while the failure rate is high, an intent is at least demonstrated. This is in contrast to the private sector. Contribution to the debate and the quest for solutions needs to embrace all organisations if better practices are to be adopted. Undoubtedly, there exist sound practices and strong, competent management in organisations so that whistleblowing would never have to become an option. We need to capture and embrace the techniques and the style that brings about such an outcome.