

WHISTLEBLOWING: OPPORTUNITY OR THREAT?

UNDERSTANDING CORPORATE GOVERNANCE AND PUBLIC SECTOR REFORMS

**NATIONAL CONFERENCE
MELBOURNE
31 JULY 2003**

A LOCAL GOVERNMENT PERSPECTIVE

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“The powerful laws (Whistleblowers Protection Act 2001) designed to uncover corruption and wrongdoing in public bodies have been exposed as a sham.

....8 (of the 45 organisations contacted) asked for the caller’s name, which is a breach of the law.

....Boroondara asked the caller’s name and then could not help.”

– Sunday Herald-Sun, 15 December 2002.

Investigation of the above newspaper report revealed that the caller from the Sunday Herald-Sun rang and said “I want to make a Whistleblowers complaint”. The Protected Disclosure Co-ordinator within the City of Boroondara was not available at the time and the officer who took the call asked if they could take a name and number and the Co-ordinator would ring them back. The caller then hung up. Council guidelines stipulate all phone calls from Whistleblowers be immediately referred to STOPline, our contracted Protected Disclosure Officer.

The following observations can be made:

- The response was inadequate, but ‘breach of the law’ is very doubtful
- The report does not raise issues of substance about the administration of the Act by the City of Boroondara.
- The report raises questions concerning adequacy of staff training
- Real issues were identified concerning uneven implementation of the Act across the Victorian public sector.

A subsequent Herald-Sun report on 6 April 2003 quoted the Ombudsman as saying that 24 investigations had been launched since the Act came in, a significant number across the public sector but possibly not so significant across the many hundreds of public sector organisations, including schools and various statutory bodies.

Whistleblowers legislation is an important contribution to an extensive framework of public accountability provisions:

- Ombudsman
- FOI
- Corporate Plan
- Annual Reporting
- Declaration of Interests
- Administrative appeals
- Courts
- Audit
- Audit Committee
- Privacy Legislation
- Whistleblowers Act

All of these provisions contribute to public accountability but also depend on culture, training, custom and practice. The statutory demands are considerable and compliance with some requirements challenging. An organisational culture of public accountability and transparency is critical in achieving the underlying objectives of the statutes, but not sufficient to ensure statutory compliance. The Sunday Herald-Sun exercise is in the uninspiring tradition of tabloid journalism, but is instructive.

The Whistleblowers Act has required local governments to put in place an extensive range of provisions. The City of Boroondara has published detailed guidelines in accordance with the Act, based on model guidelines from the Ombudsman. Staff in Customer Service are now provided with a monthly reminder on how to handle potential disclosures.

Our Whistleblowers Guidelines are currently under review in the light of our experience to date. The present guidelines focus on disclosures to the public body, i.e. the City of Boroondara, which is the second option provided under the Act. The Act provides for disclosures regarding public body staff to be made either to the Ombudsman or to the public body itself. All disclosures regarding Councillors must be made to the Ombudsman. Strangely, disclosures regarding the CEO may be made to the public body itself, i.e. the CEO. These differing provisions do not assist administration or understanding of the Act. Whistleblowers need to be informed clearly that they may disclose direct to the Ombudsman.

My personal preference would be to accept responsibility as CEO for the investigation of allegations and to deal with disclosures as we do at present. However, the system could be more effective if all whistleblower disclosures in the first instance were made to the Ombudsman for registration, as a further safeguard for the whistleblower and to provide greater certainty of the most helpful response evenly across the State. It would seem that the standard of response to whistleblower disclosures is very uneven across the public sector and that there is a case for central registration before investigation by the public body concerned.

The City of Boroondara has contracted STOPline Pty Ltd as Protected Disclosure Officer to ensure complete impartiality and confidentiality in the receipt and processing of all disclosures directly to us as a public body. In the light of our first year's experience of very few disclosures and nil official protected disclosures, the STOPline contract was reviewed to ensure greater organisational responsibility for

meeting statutory requirements and to ensure that disclosure and investigations contributed to organisational learning. The breadth of services available from STOPline under the contract offered was also reduced to contain costs to Council given that only two cases had been received and no protected disclosures.

We continue to contract out the role of investigating Whistleblowers disclosures as we believe this approach offers a means of ensuring objective and professional investigation, and of minimising the likelihood of conflicts of personal and official interests. However, the responsibility for ensuring full compliance with the legislation clearly remains with the CEO and this responsibility cannot be delegated or avoided.

Local governments had generally expected the Whistleblowers Act to result in a large number of protected disclosures, possibly influenced by a number of early media beat-ups suggesting the existence of hidden corruption about to be exposed throughout local government. Some also considered it likely that the Whistleblowers Act would be used as a means of protesting adverse decisions, particularly of a regulatory or enforcement nature. It would seem from our experience that the legislation has not been abused in this way. Indeed, some might question whether the legislation has to date been a significant contributor to public accountability, but that would ignore the preventative benefits of legislation of this nature, and the undoubted benefit of legitimising whistleblowing. Although most organisations in Victoria have not experienced a whistleblower investigation, the 24 investigations confirmed by the Ombudsman are evidence of the Act's effectiveness.

Details of the two Boroondara disclosures referred to above are as follows

- Allegation from a builder that a developer had sought to influence a Council building inspector in carrying out his work. Internal investigation revealed that the officer had rejected the alleged improper approach from the developer. This matter was referred to STOPline, however as there was no alleged or suggested improper conduct on behalf of the officer concerned, the matter was not considered to be a protected disclosure or a public interest disclosure
- Allegation from an external party made via a staff member alleging that two technical staff were engaging in outside employment beyond our municipal boundaries for a developer who also undertook development within this City, and that such a relationship might lead to an inability to undertake their official roles impartially. This matter was difficult to investigate, as the external party did not wish to come forward. The allegations were not substantiated. The matter did not proceed any further and discussions were held with the staff members involved who had sought advice from Council's employee services unit prior to engaging in the outside work. (The staff were not Senior Officers of Council, and there was therefore no breach of Local Government Act provisions applying to Senior Officers regarding outside employment). The matter was eventually handled as a management issue.

Both cases indicate some limited understanding of the Whistleblowers Act but both dealt with potentially serious matters. It could be argued that the Whistleblowers Act was a vehicle for appropriate investigations in both matters but in these cases the

Whistleblowers Act was not relevant to their resolution. The second case is a possible example of a matter where management was not helped by its initial treatment as a possible protected disclosure. In hindsight, it could be argued that a decision could have been made almost immediately that this was not a protected disclosure, and the matter handled more effectively by counselling and disciplinary action if found to be warranted. In both cases, the good reputations of the officers concerned were at some risk in the process, a hazard inherent in the Whistleblowers process that requires careful management. Reputations are hard won but easily lost.

With the introduction of the Whistleblowers Act, Council publicised the purpose and provisions of the legislation throughout the municipality. Council continues to draw the public's attention to the Whistleblower provisions and, as required by the Act, reports on Whistleblower matters in its Annual Report (again nil protected disclosures in 2002-03).

The lack of protected disclosures to date provides some comfort regarding the lack of fraudulent or illegal practices within the organisation. Although one cannot rely on this as sufficient evidence, the existence of the Whistleblower provisions and their wide advertisement in the community, along with any other public accountability requirements, certainly reduce the chances of fraudulent or illegal activity going undetected. Yet, even a wide range of statutory requirements for accountability and transparency will be of limited value without a constantly monitored culture of accountability and transparency.

A relatively high level of non-substantiated disclosures should not be a surprise in the administration of Whistleblower legislation. Factors such as the *prima facie* nature of evidence commonly available to a potential whistleblower, provisions for anonymity and immunity which can raise difficulties for investigation and evidence gathering, not to mention the understandable hesitancy amongst potential whistleblowers, may well lead to a low proportion of substantiated cases. That is not to say that the success of, or need for, this legislation should be judged on that basis alone. The ability to make protected disclosures, with even the occasional substantiated disclosure, and the resultant disincentive to illegal and fraudulent public behaviour is sufficient justification for whistleblower provisions. Those provisions contribute to the development of sound cultures, of responsible management, public accountability, transparency and higher standards of governance.

Future Directions

The Whistleblowers Act is expected to continue to contribute to high standards of corporate governance in local governments in Victoria. It is suggested however that the value of that contribution will depend greatly on the level of public knowledge and understanding of the provisions, and the existence and development of ethical organisational cultures. Whistleblowers provisions are a tool needing continuing support, including high visibility and the education of staff. Consideration should be given however to all disclosures being made in the first instance to the Ombudsman as a means of ensuring full and even compliance across the public sector with the careful provisions of the Act.

It is tempting to dismiss the Sunday Herald-Sun report of 15 December 2002 as a beat-up. However without wishing to encourage uninspiring journalism, it is more productive to regard this piece of undoubted typically tabloid reporting as a wake-up call. The article may well have exaggerated the inevitable teething problems for this groundbreaking legislation. Such questioning is however timely if public sector organisations are to ensure effective protection of whistleblowers as part of the public accountability framework.

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