

BLOWING THE OFFICIAL WHISTLE

**Address by Ron McLeod AM, Commonwealth Ombudsman, to, Transparency
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When I was young I read a small but very humorous popular history of Britain entitled "1066 and All That". It dealt with the principal events in British history in a rather amusing and idiosyncratic fashion categorising most events as either 'good things' or 'bad things'.

I was reminded of this book in thinking of what I wanted to include in today's address. On the one hand, whistleblowers are unquestionably 'good things', and should be encouraged. They help to bring failures, which might otherwise escape exposure, to attention. On the other hand, experience suggests that they involve decided downsides. Whistleblowers themselves are often exposed to extreme pressures and difficulties, they can create intense antagonisms and they often bring out the worst side of organisations and individuals. Those who are the focus of whistleblowers attention not uncommonly see whistleblowers as 'bad things', or at the very least not necessarily 'good things'.

For my part, lest some of my later comments may infer that I am somewhat sceptical of the value of whistleblower disclosures, at the outset I should declare that I am an advocate of Public Interest Disclosure legislation.

No-one ever truly welcomes being told what he or she would prefer not to hear. It does not matter whether it is the discovery of skeletons in the family cupboard, a disclosure of corruption or inefficiency in a government agency or something which threatens to compromise either a professional or business relationship. The natural tendency is often to seek refuge in denial or not infrequently to shoot the messenger. There is an obvious explanation why this is so, and it is tied up in personal beliefs about the value of loyalty and the avoidance of criticism that might adversely impact, directly or indirectly, on the person or organisation receiving the unwanted or awkward news.

For a person in authority to acknowledge and act on a whistleblower's statements requires them to firstly put away the defensive instinct, and this is sometimes difficult. Organisations, like individuals, are often hostile to those who seem to attack them. Whistleblower disclosures may be seen to be embarrassing to an organisation or an individual even by acknowledging that they warrant investigation, but that potential for embarrassment must be viewed against the consequences of a failure to act on information. We have seen a number of examples in government and in business in the last year or so of attempts to cover up disclosures that are unpalatable or inimical to the interests of political parties or commercial organisations. The survival instinct is strong and often runs counter to the open embrace of uncomfortable disclosures, particularly when, before detailed investigation, they are seen as

speculative or untested, and where the motives of the discloser may at times be considered to be suspect.

Our society relies heavily on a sense of openness and accountability in our decision makers and leaders, and expects that high standards of integrity and honesty will be applied to their daily tasks. If we wish to continue to reinforce and bolster these values there is a strong case to encourage and support whistleblowers.

The Commonwealth has not, at this stage, any general whistleblowing legislation. The *Public Service Act 1999* has a useful structure, but its coverage is narrow – limited to people employed under the Public Service Act, which is less than half the Commonwealth's employment base – and there have been relatively few disclosures. There have been proposals for legislation for at least the last 10 years – and there is a bill currently before the Senate Finance and Public Administration Legislation Committee. I recently appeared before that Committee and strongly supported the introduction of whistleblower legislation extending across the whole Commonwealth employment area. I would like to be able to say that I am confident the Commonwealth will legislate in the near future, but I have seen nothing to suggest that the legislation has yet received the required priority.

The ACT, like some of the States, is ahead of the Commonwealth on this issue. It has a *Public Interest Disclosure Act 1994* which provides a satisfactory scheme for the making of allegations to agency heads, the Auditor-General and my office. That Act provides comprehensive protection from reprisal for whistleblowers. I am ACT Ombudsman as well as being Commonwealth Ombudsman so I have some practical experience with that legislation.

In my Commonwealth role, despite the absence of specific whistleblower legislation I do receive complaints of this nature from time to time. Initially I have to decide whether it is a matter best investigated by my office or should I refer it to the relevant agency for investigation.

Under my Ombudsman legislation I can make inquiries and demand information, and I have the support of the law and a competent and committed staff to help me to do so. While my resources are not unlimited, they are much greater than those of an individual whistleblower; they are usually sufficient to enable matters to be given adequate attention and analysis. Subject to giving procedural fairness, I can issue critical reports and make public disclosures, but I am protected from civil liability and from arbitrary dismissal. I am therefore in a position, as an independent body, to impartially investigate whistleblower allegations when they are made to me.

My involvement ensures that generally the matter will be investigated, one way or the other. If anonymity is sought, I can provide it under my Ombudsman legislation and I am alert to the possibility of reprisals or victimisation of the discloser. My relationship with agencies, both formally and informally, is such that I generally have considerable influence in ensuring that a whistleblower receives protection from any improper treatment by the organisation concerned.

I do not use the formal sanctions available to my office often. My experience has been that most agency heads are more likely to respond favourably to a quiet phone call or a letter than to a media release or a formal report copied to their Minister. It gives them the freedom to correct their agency's errors without seeming to be under pressure to do so. This enables the more formal or public approach to be followed as a last resort, where reasonable argument has not persuaded an agency to admit to error or to provide a remedy, and as a mechanism to facilitate public debate of the issue. The existence of the more formal approach, even if seldom taken, encourages agencies to consider my views seriously. And I can see no point in dragging out an investigation beyond the point where the agency concedes its error and offers some reasonable and achievable remedy.

Let me now turn to some observations based on my own experience with whistleblower disclosures.

A whistleblower in most contexts has to have courage; courage to stand up to people who do not want to hear; courage to set himself or herself apart from an organisation and their work mates and colleagues; courage to persevere in the face of personal cost and with potential risks to career, financial security and personal esteem. A system of management fails to the extent that it depends on a whistleblower's courage and persistence to bring major problems to notice, because it should be open to anyone with a concern to raise that concern in an appropriate way. That there are whistleblowers in some organisations says a lot about the nature of the organisation and the people in it.

Before a whistleblower makes a disclosure they usually spend a lot of time thinking about the issue and the implications of disclosure. Once they decide to proceed they are usually steeled in their resolve to see it through. As a consequence they can often not be easy people to deal with. They have views which are different from the expressed views of most of their colleagues – although colleagues who might not be prepared to come forward themselves may privately agree with them. They express an intent to diminish or remove something they consider unsatisfactory, when most around them would prefer to remain silent. They are generally very single-minded, whereas their supervisors or managers often see the issues in more global and broader based terms.

Whistleblowers can sometimes operate in profound contradiction to or ignorance of the full picture. They see what they believe to be a failure, but there is often a serious question about whether they are right about that. Sometimes, they may be mistaken, and what seems wrong is right or reasonable only when all the facts and competing policy considerations are brought into account. A whistleblower brings this sometimes incomplete or inaccurate information to the attention of people who probably don't want to know what the whistleblower feels obliged to tell them. Unfortunately, whistleblowing is often a dialogue between the hearing impaired and the inarticulate.

Most whistleblowers I have had anything to do with will not be put off by fear, or by threat, or by exhaustion. They may even see threats and delay as symptoms of a more widespread problem than that exemplified by their original concern. That is, their actions, and the fact they are not discouraged by indifference or hostility, can be contrary to what might be expected of many people facing setbacks.

However, they can also be impatient for action. Having often harboured or agonised over a problem for some time before bringing it to notice, they sometimes find it hard to understand why others they share their knowledge with appear not to be seized with the same urgency or sense of importance in responding to the disclosure in a relatively short time frame.

Sometimes this apparent inaction will lead the whistleblower to try to hurry the process of inquiry, by threatening disclosures to politicians or the media. Generally this escalation of an issue will push the parties further apart, it can complicate the handling of an objective investigation and can introduce an antagonistic element which may have been absent.

At times, whistleblowers do not help the process by resorting to personal abuse when a problem may be systemic rather than personal. They may make threats, which unfortunately all too often lead to threats being made in response. They can be protective against any insult or offence to themselves, but make wild and sweepingly offensive statements about others. They demand proof at a higher level than they are prepared to offer. They can seem narrowly focused on a particular issue, or even obsessed by it. But then they expand the field of discussion, whether they're winning or losing on the initial point. They can be impractical and politically or socially naïve; they fail too often to recognise that a small win is a win nonetheless and not just the first concession in what they believe will be a continuing process. Sometimes the issue takes on a life of its own. The persistence of the whistleblower can create hostility from management, which may see the problem as having been addressed satisfactorily or which wants to avoid getting distracted from their main objectives by becoming embroiled in what is seen as a lower order issue.

Whistleblower disclosures can sometimes get mixed up with personal work related issues. While motivation in itself is not of great relevance, the important issue being the substance of the disclosures, if the whistleblower is experiencing difficulties of adjustment in the work place, this can sometimes cloud the issue. Some managers may question whether the whistleblower is ill-suited to his or her work and view the disclosure as simply another way of expressing the person's dissatisfaction. Or is it, as whistleblowing advocates would have it, that any adverse employment related consequences visited upon the person are usually as a direct result of the perceived sin of whistleblowing?

Whistleblowers also need to keep in mind that public administration is the art of the possible. It is rare that there is one, universally accepted single solution to an administrative problem. More commonly there are a variety of approaches that are not the same. The fiscal purists might not be persuaded by arguments for a comprehensive and durable solution; or the lawyers might get in the way of commonsense. Sometimes, there might be a consensus on the best solution, but it is impossible to persuade a Minister or the Government. Sometimes the will of the Government might be vetoed by Parliament. Perfection in public administration is something to be desired, but often not achieved. There should be no scourging when despite all efforts the ideal has not been able to be achieved. In my years of public service, I have always tried to get the best possible result for the public and to exhort others to do the same – but that is not always the same as the best result, and what is the 'best result' is often only in the mind of the beholder.

There are many questions that need to be considered. Would a rational organisation respond so extremely to a single disclosure? Is the organisation in question more or less than robust than others when it comes to accepting criticism? What is the proper benchmark against which to assess the organisation's treatment of the whistleblower? Would a rational whistleblower have persisted to the point of alienating neutral managers and even some of those who supported him or her?

This last point is particularly relevant to investigative bodies like my own. We start from a neutral position, we pride ourselves on being independent and objective. At times though we are seen by some whistleblowers as simply part of a wider conspiracy and in league with the agency concerned in covering up the issue, or in not giving proper credence to the allegations. My own investigators are highly professional, but they are also human. They don't enjoy being abused by complainants who believe we are stalling or too readily siding with agencies.

On that note, and in the interests of providing support to future whistleblowers, let me close by offering some practical suggestions on how they should best go about pursuing a matter, in a way likely to maximise the cooperation of the relevant authorities.

First, think carefully about what you have to say and limit yourself to that subject. Try to separate out the subject of your whistleblowing from interpersonal conflicts or disagreements about policy choices.

Second, try to find out what you can, to protect yourself and others. Seek the advice or involvement of an independent office if one exists, with authority to intervene on your behalf.

Third, think about the consequences of what you are saying for yourself and others. People are more likely to respond positively when they do not feel that they are under personal attack. If the problem is a systemic one, say so without personalising it; if it's a personal issue, keep to the facts and let others draw their conclusions. The last thing you need to be doing is defending a defamation action.

Fourth, unless it is impossible or impracticable, raise your concerns first with the relevant agency head. My experience is that they are usually as keen as anyone else to deal with problems.

Fifth, if the agency head cannot provide a satisfactory result, take the matter up with any independent watchdog organisations that exist to oversight the body in question, such as an Auditor-General, an Ombudsman or an industry complaints body. Remember, however, that these external review bodies are entitled to decide the scope and manner of their investigations.

Sixth, keep your cool. Pursue your concerns by concentrating on the facts and try to keep emotion out of the debate. Don't antagonise those whose support you are seeking and accept that they are entitled to be guarded about your allegations until they have fully investigated them. Don't assume that leading questions by investigators reflect conclusions they have already reached, accept that they are part of the eliciting of supporting information or the testing of the validity of material which has been provided.

Seventh, always keep an eye on the main game. Remember that sometimes a less than perfect solution is the best that can be achieved and never forget that a small win is a win all the same.

Eighth, think very carefully about going to the media. The media is not interested in good public administration (in fact, the reverse is generally the case), or in the protection of the whistleblower. Its interest is in the story and whether it will sell newspapers or produce ratings for a day or two. With rare exceptions, the media does not have the capacity to make the protracted inquiries necessary to establish truth or falsity. The media also thrives on

conflict and controversy, so ask yourself if presentation of your case in this manner is likely to advance the resolution of your concerns. If you have not been able to achieve a result through other means, think about escalation to the relevant Minister.

Ninth, always consider the possibility that you may be wrong. A belief may be genuine, but incorrect or only partially correct. Others may, quite reasonably, not agree with you. You are not the fount of all knowledge and in matters involving judgements about matters which are not black and white, those paid to accept responsibility for decision making have the right to exercise their powers. They will be judged ultimately by their actions.

Finally, whatever the result, when the disclosure is made and dealt with, put the whistleblowing behind you and get on with your life. Close the door, and do not look back. If you have been unsuccessful, don't let the experience sour your attitude to life. Becoming embittered will only hurt you. Embrace the philosophy that you did what you believed to be the right thing at the time, and that you are now older and wiser, and it is time to move on.