Essay:

When the whistle is blown

Author:

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t was early 1996, and getting late in the evening. Somewhere in a nondescript building in central Canberra, I was prowling a largely empty open-plan office, killing time while an Australian Federal Police investigator and I waited for yet another police officer to come off the late shift, somewhere across town, and make his way to us for a confidential interview.

My job, as a young lawyer in the Commonwealth Ombudsman's office, was simply to 'sit in' on the interviews as the police tried to resolve some complex allegations. A junior police whistleblower – let's call him Constable Tim – was claiming he had been harassed by colleagues after he told AFP Internal Security about serious misconduct in another part of the force. The misconduct was proven, and action taken. But since then, life for the constable had not gone smoothly.

Our office was involved because Tim himself had come to us that morning, concerned about the police investigation into the alleged harassment. After due consideration, someone decided we had better take a look at the AFP's internal inquiry. So there I was, that same night, observing silently while more young police were hauled in to tell internal investigators whether they knew of any bad treatment being dished out to the stressed constable. Of course, none did. Why would they? But the process of interviewing them was certainly helping alienate Tim from the rest of the organisation.

One of Tim's concerns was even stranger. The previous week, AFP staff had arranged what he thought was a meeting with an outside psychologist, to help manage the stress of the various investigations. But at the end of the session, his 'counsellor' revealed he was actually a psychiatrist, and that AFP staff had asked him for a report on whether Tim's feelings of persecution were simply paranoid delusions. The doctor's conclusion: no, he was perfectly sane and rational. As the Ombudsman later reported publicly, the doctor also found it 'extraordinary' that no one at the AFP had not told Tim the true purpose of the consultation.

When he came to us, Constable Tim was in obvious distress – with good reason. Was he, as one AFP employee later suggested to us, being 'bricked up as a nutter'? Surely not, I thought; such a thing could not happen in modern-day Australia. But later that night, as I moped hungry and tired in a building whose air-conditioning had gone off some hours before, I noticed a letter in the investigators' 'out' tray. It was to a

consultant forensic psychiatrist in Sydney, asking for an opinion on Tim's state of mind. We later established that the letter was sent with tapes and transcripts of interviews. There was no plan for this doctor to actually meet Tim in person.

At the time, I simply turned to my AFP host, a burly but fatherly plain-clothes federal agent, and asked: 'I see you've written to Dr So-and-so; what's that about?'

'Oh, we're a bit worried about Tim. We think he needs some support to help manage this thing. This doctor's very good, we think he can help Tim with some stress management strategies and counselling.'

The interviews were finished, but instead of going home, I went back to my office and wrote up a detailed file-note of what the agent had said. As it turned out, it was a long way from the truth. As the Ombudsman reported, in the end 'no adequate explanation was given' for why the investigators felt it necessary to seek this second psychiatric opinion. Especially given the results of the first, and as there was no plan for Tim to ever meet the man supposedly enlisted to 'help' him.

The consultant was actually a 'profiler', a specialist in diagnosing the mental state of people he never met, usually criminal suspects and besieged hostage-takers. Another AFP investigator admitted they were really just seeking a professional opinion on the veracity of Tim's evidence about being harassed. Under the pressure of stress, perhaps he was making it all up – the mystery harassing phone calls in the middle of the night; the dog faeces in his locker; the fellow officers who refused to work with him on the basis they no longer trusted him. There was no effort to help Tim. Instead, as the Ombudsman reported, it appeared the AFP investigators were simply 'shopping around' for psychiatric opinions until they obtained one that excused them from completing an investigation on its merits.

The Ombudsman's office oversaw the rest of the investigation. The attempt to get further psychiatric opinions was terminated. There was, in fact, no reason to disbelieve Tim, and every reason to conclude that he had not been adequately supported and had indeed suffered harassment. It was fortunate he came to us when he did, and that, by luck more than design, we were able to intervene at a point where it was possible to save his career. Because it was one thing that a few fellow police had started turning against Constable Tim, aligning themselves with the officers who had been disciplined or sacked for misconduct – that kind of adverse workplace reaction can be anticipated and managed. The real damage started when the police managers responsible for his welfare, and for the good functioning of the force generally, failed to anticipate this behaviour. It got worse when they failed to stomp on it, instead throwing up their hands and letting the workplace be paralysed by conflict.

The damage got worst of all, however, when the internal investigators faced the task of recognising the evidence that the police managers had dropped the ball. Instead of facing up however, the investigators took the easy way out and were positioning to discredit the poor suffering whistleblower. Tagging Tim as 'paranoid'

and 'delusional' would have meant the end of his career; he would have been a sad case of collateral damage. As a messenger he had been heard, and even congratulated for revealing real wrongdoing. But as in many organisations, this was still not sufficient to prevent him from becoming the messenger who almost got shot.

onstable Tim's lucky escape was also lucky for the Australian Federal Police, which learned a great deal from his case. As in many organisations, there was a battle going on. Welfare professionals and senior managers in the organisation, simultaneously trying to support him, were horrified at the actions of those who almost succeeded in ending his career. In the final wash-up, a number of heads rolled. But the case proved it did not have to be that way. The AFP went on to develop and introduce its own, unique strategy for monitoring and managing the welfare of officers who speak up about possible wrongdoing, and began preventing further such disasters.

A decade later, over \$1 million in Australian Research Council and integrity agency funding has been spent researching how scores of federal, state and local government agencies manage these types of 'whistleblowing' incidents – what happens when insiders try to report things that are going wrong within their own organisation. In September 2008, the first report from the *Whistling While They Work* project was launched by the Special Minister of State, Senator John Faulkner.

While individual organisations are not named in the research, the AFP is among those studied. Effective management of public interest whistleblowing remains a complex problem, even for agencies which make an effort – whistleblowing is only one way of flushing out wrongdoing, and it only takes one major mistake to send the message that it is not safe for staff to speak up. But the evidence shows that not all whistleblowing has to end in trauma. Indeed by 2006, when the data was collected, the AFP had become one of the best agencies in the country at managing this difficult job.

The big problem for Australian governments is that recognition of the importance of public-interest whistleblowing – and of the need for systems to manage the welfare of public officials who speak up – is still left too much to chance. Everyone knows how important whistleblowing can be. Employees are usually best placed to accurately identify when things are going wrong, in any organisation. When there is fraud, corruption, mismanagement or failures in administration, it is widely recognised that it is a public servant's duty and responsibility to speak up.

On the other hand, whistleblowing is also fraught with risks and conflicts. It is easily confused with disgruntled employees simply having a grizzle – something few managers want to encourage. But we know from experience it is often much more than that.

The Whistling While They Work project team hoped to find many public agencies putting a concerted effort into responding constructively to employee concerns, and looking after the welfare of public servants who spoke up about wrongdoing. Our aim was to collect data about cases where wrongdoing was being identified and rectified, and whistleblowers were quietly getting on with their careers, without their case becoming a drama of mutual destruction played out on the front page.

Unfortunately we found that the agencies who were making the effort were more the exception than the rule. Of the 304 federal, state and local agencies that answered our first survey about systems for managing whistleblowing, close to half said they had no procedures for identifying whistleblowers who needed management support. By their own account, nearly three-quarters of agencies had no procedures for ensuring that when an employee reports wrongdoing, there was any assessment of the risk that they could suffer reprisals. Since risk management must start with risk assessment, it is not surprising that many agencies continue to struggle with the fallout and conflicts that reporting by insiders easily provokes.

The research also shows, however, how vital it is that agencies and governments grasp this challenge. The importance of whistleblowing is well-recognised in the media – but only a fraction of whistleblowing reaches the public domain. Only in New South Wales does legislation provide protection for whistleblowers who go to the media when other remedies have failed.

When we surveyed over 7,600 individual public servants in the agencies, we found that over a quarter had reported at least one incident of wrongdoing within their agency over the previous two years. A fifth of all respondents had reported outside their normal organisational role – as a potential act of whistleblowing. The types of wrongdoing tell us that over half of these were public-interest whistleblowers. This is a very substantial proportion of the public sector workforce. Extrapolated nationally, it would equate to at least 179,000 public officials blowing the whistle on a problem of potential public interest over a two-year period.

However, very few of these employees are seeking fame or glory, or rushing to see the issue plastered across the nightly news. In 97 per cent of the cases, the whistleblower first reported the matter internally, within the organisation; and in 88 per cent of cases that was where the matter stayed. Only 3 per cent of initial reports, and 10 per cent of further reports, were to anyone outside the organisation – and then most were to regulatory or integrity agencies such as the Ombudsman, not to the media.

Most public servants who see problems, just want them fixed. They see reporting these problems as part of their obligation as diligent employees, or upset employees, or both – in any event, as a way of fully participating at work. Many find they are listened to, and carry on their careers as normal. A few are prepared to go to the

media as a last resort, especially if they have been mistreated and begin to feel they have nothing left to lose. But most conscientious public servants will give up long before that point, even if the problems they perceive have not been rectified. They will simply quit before the matter takes too high a toll, or become silent victims of a process they would have preferred never to start.

How organisations manage this vast amount of 'unseen' whistleblowing is crucial for the wellbeing of every organisation, and the whole of society. We now know that some organisations are doing it relatively well. We also know that many are not.

On one hand, the averages across the totality of whistleblower experience are not as negative as feared. About two-thirds of all public-interest whistleblowers in the public sector are likely to have suffered at least some stress in the experience, with just under half experiencing high levels of stress. But less than a third of public interest whistleblowers in our survey felt they had actually been treated badly by co-workers or their organisation for speaking up.

However, even if not all whistleblowers are suffering, the outcomes for those who do can be bad – and in any organisation, it only takes a few cases of bad treatment to freeze the willingness of other employees to speak in a timely fashion. The research shows that most mistreatment falls at the 'hard' end of the problem – cases where the suspected wrongdoing is more serious, more systemic, or implicates more senior people. It may be widely recognised that employee reporting is the single most important avenue by which wrongdoing comes to light. But there is still policy disarray over how employee reporting should be managed, with organisations generally left to themselves, showing wildly differing levels of management understanding and commitment, and vastly differing results.

Nowhere is the range of experience broader than among Commonwealth government agencies – the only Australian jurisdiction still with no comprehensive public sector whistleblowing legislation. Our research surveyed employees in twenty-seven Commonwealth agencies, and in seventeen of them, the responses permitted a reliable estimate of the proportion of public interest whistleblowers who claimed bad treatment by their management. In three agencies, the proportion claiming mistreatment was rewardingly low – below 15 per cent. But in twelve of the seventeen Commonwealth agencies studied, the proportion of mistreated whistleblowers was above the national average, and in one case was more than double.

In each of the state governments studied, similar challenges apply, but the results provide no reassurance that the Commonwealth government is somehow naturally immune to these pressures. When the comprehensiveness of agencies' whistleblowing procedures was assessed, nationwide, the Commonwealth agencies also showed the greatest variation. Some federal agencies provided examples of the best approaches, but twenty-one out of fifty-six federal agencies assessed fell significantly below the national average. The research team's benchmarks were not

massively onerous – for example, whether procedures made convincing statements about the 'benefits and importance' to the agency of having whistleblowing mechanisms. Across the entire study, fewer than 3 per cent of agencies supplied procedures that reasonably satisfied the requirements of the Australian Standard for Whistleblower Protection Programs (AS 8004-2003).

hat can and should be done to ensure that governments are properly valuing and managing whistleblowing? Australia boasts a long history of high integrity in standards of public accountability, but we can be slow to notice when standards are slipping, and when the rest of the world might be starting to pass us by.

In the early 1990s, a range of Australian states began passing quite innovative 'public-interest disclosure' legislation, trying to address this issue at least in respect of the public sector. But much of this effort was flying blind, without a clear idea of the practical options for managing whistleblowing in the workplace.

Further, public sector reform in that decade was dominated by the ideal of 'letting the managers manage'. There was low recognition that when it comes to dealing with whistleblowing, no organisation is likely to escape the need for external support or an outside watching eye. Even for agencies that make a good effort, the need for independent oversight will arise at least occasionally – in fact, this is most needed just when the internal pressures to quietly shoot the messenger are likely to be strongest. Just ask Constable Tim, or the AFP.

The legislative responses have also been blind to other fundamentals. It was assumed that if it was a criminal offence to undertake a reprisal against a whistleblower, detrimental actions would be deterred. But the *Whistling While They Work* research reveals that specific, deliberate, harmful actions for which individuals can be held criminally liable are rarely the major problem. The more common problems are the kind suffered by Tim – a downward spiral of stress, harassment, underperformance and conflict, leading to management actions to extricate the organisation from a mismanaged situation. The most commonly neglected duty is the duty of organisations to provide employees who speak up with a safe and supportive work environment. It is this duty that needs to be supported and enforced much more systematically – not just the rare instance where anyone sets out to cause criminal harm.

Even when whistleblowers do persist and seek compensation for mistreatment, the avenues are inappropriate. How many whistleblowers, having been mistreated, are prepared to face all the costs and risks of a Supreme Court civil action? The statistics show the answer to be precious few. More public employees are inclined to fight for redress in an industrial tribunal, under general employment law, where the cases are more difficult to track because they are not recorded as such. But most who are currently coming off second-best are more inclined to cut their losses, and try to rebuild a career elsewhere without a further fight.

Yet others persist with their careers, having had their organisation act on their disclosure, without the indirect costs being adequately recognised or compensated. One whistleblower told us they remained 'proud to have had the courage' to report a substantial internal fraud, on which the organisation took action – but that at the same time, 'part of me doesn't want to know about it': 'This incident has done nothing for my career in this organisation as I have tended to just stay in low-key positions and away from the stress of finding fraud again.'

Another conspicuous silence in Australian legislation so far has been limited recognition of the legitimacy of the last resort – public whistleblowing – even in exceptional circumstances. Only in New South Wales does the *Protected Disclosure Act* 1994, in an inadequate way, recognise the principle that a public official might in some cases be justified in taking a disclosure to a journalist. In 2004, the Liberal and National Parties moved for Queensland legislation to be extended to include the same principle – but were unsuccessful. In all other cases, governments have seen the question as so hard that they prefer to pretend it does not exist.

The reality, of course, is that in a democracy we know that some public-interest disclosures may only be heeded when they hit the media. Governments can and should try to provide every avenue for public employees to first make their disclosures internally, or to regulatory or integrity bodies. But in a democracy, there may always be situations where this cannot reasonably be expected or where these agencies turn out to be wrong. We know that in some such cases, as a society, we will continue to be grateful that a diligent public servant was prepared to go outside. Such a public servant should have at least some chance of protection from defamation action or criminal prosecution.

Nothing is likely to be more successful in making public sector managers realise they need to manage whistleblowing better for themselves than the dual risks of seeing their problems splashed on the front page, or of being forced to fork out compensation to the employees they have allowed to become damaged.

Legislative practice in places as diverse as Whitehall – the home of official secrets – South Africa and Japan now seeks to maximise these 'drivers' of changed organisational behaviour. They form just two of the thirteen principles for best-practice legislation, which as yet do not come together in any Australian jurisdiction. The time is now ripe to make these changes across the board.

Fortunately, federally, there has been a big shift in approach. In the lead-up to the 2007 federal election, the incoming Rudd government's policy statement on 'Government Information: Restoring Trust and Integrity' promised 'best-practice legislation to encourage and protect public interest disclosure within government to an integrity agency', with the added commitment that, 'where a person has exhausted all legitimate mechanisms and avenues of complaint, and still finds that through the

force of extreme circumstances they are obliged to disclose information to third parties such as journalists, protection by a court may still be provided dependent upon the circumstances'.

In July 2008, the Rudd government referred a range of key questions on the design of its public-interest disclosure legislation to the House of Representatives Standing Committee on Legal and Constitutional Affairs, chaired by Melbourne QC Mark Dreyfus. Its report in February 2009 showed a lot of the way forward. There is still much to be finalised in the drafting of the legislation. What is going to be the most effective way to ensure the workplace rights of whistleblowers are enforced? What threshold of 'seriousness' will be set for the types of whistleblowing that will be covered? Is the threat of 'immediate serious harm to public health and safety' the only time that whistleblowing to the media should be recognised as justified? (The short answer is 'no', confirming the Commonwealth still has a way to go.)

However, on many of the major issues needed to put in place a new legislative approach, Australians have good reason to be optimistic. The challenge lies squarely on the federal government, opposition parties, Green Senators and independents as to whether these reforms will move public accountability forward. Best-practice legislation that drives new organisational commitment to the management of whistleblowing, and sets up realistic mechanisms for oversight and compensation, will have many positive effects. Most state governments are watching to see what the Commonwealth does before implementing their own legislative reform. The next steps will be important for determining when, and how, more comprehensive whistleblowing regimes are extended to the private and civil society sectors.

But if it is achieved, best-practice Commonwealth legislation will also send much wider signals. Australia is a society where citizenship and the quality of democracy matters. Australians know they can participate in affairs of government in many ways but, ultimately, their control over the quality of the government that serves them is reduced to a trip every three or four years to the ballot box.

In between those events, the guardians of the public interest, in the way our governments go about their daily affairs, are each and every holder of public office. How the rights and duties of any employee are recognised and protected is a vital issue. But nowhere is it so vital as in the rights and duties of public employees to speak up about the things they suspect might be going wrong. Every public official, or public contractor, or employee of a public contractor is the ordinary, day-to-day custodian of every Australian citizen's interest in seeing government work effectively, honestly and responsively for our society. When they speak up, they do so for all of us. The least we can do is support them in the process.

REFERENCES

From 1993 to 1997 AJ Brown was an investigations officer with the Office of the Commonwealth Ombudsman. References to the 1996 case are from the public report, 'Professional reporting and internal witness protection in the Australian Federal Police – a review of practices and procedures' (Commonwealth Ombudsman, November 1997).

Research results are taken from A J Brown (ed), Whistleblowing in the Australian Public Sector (ANU E-Press, 2008) – see http://epress.anu.edu.au/anzsog/whistleblowing/

The report of the House of Representatives Legal and Constitutional Affairs Committee on Commonwealth public sector whistleblowing legislation can be found at http://www.aph.gov.au/house/committee/laca/whistleblowing/report.htm

For an up-to-date response to the report, see www.griffith.edu.au/whistleblowing.