NSW Ombudsman

Making the disclosure process work

PSIC Senior Officers Workshop (Canada)

The complexities and challenges of internal and external disclosure: building confidence through good practices

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Chris Wheeler
NSW Deputy Ombudsman

Part A

1. Introduction

During the course of this morning I want to talk about two related topics that are both close to my heart. One is the protection of whistleblowers and the management of their disclosures. The other is about the management of unreasonable conduct by certain complainants, including certain whistleblowers. During the course of this discussion I hope to dispel certain myths or misconceptions that appear to have grown up over time about people who have made disclosures about wrong conduct, ie about whistleblowers. These myths or misconceptions include:

- that whistleblowers are generally troublemakers – disaffected members of staff who are more trouble then they are worth
- 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
- that whistleblowers should merely be seen as a source of information who should then be kept at arms length
- that there is little an agency can do in practice to prevent or limit detrimental impact on the agency and its staff caused by the unreasonable conduct of some whistleblowers
- that the cause of unreasonable conduct by whistleblowers is the particular personality or motives of the whistleblower, and the agency shares no responsibility for the problem
- that little or no information about an investigation should be disclosed to a whistleblower as this could prejudice the investigation
- that confidentiality is of paramount importance as it is an essential requirement for the protection of the whistleblower.

2. Why public servants do or don't disclose wrongdoing

2.1 Characteristics of 'whistleblowers'

It is not uncommon to hear the view expressed that the whistleblowers are trouble makers or disaffected members of staff. In fact, there can be a wide range of possible motivations. In practice, research in this area indicates that the motivations of most whistleblowers might well be based on ethical considerations such as the public interest or the welfare of their organisation. It appears likely that only a small minority of whistleblowers are motivated by sheer malice.

One of the largest research projects ever conducted into whistleblowing, the *Whistling While They Work* research, was undertaken in Australia in 2005 – 2008 by researchers from five Australian universities, five Ombudsman offices, three corruption commissions and five public service type commissioners, amongst others.[1] The research included, amongst other things, surveying hundreds of agencies and thousands of public officials across Australia. It also included a survey of hundreds of public officials who identified as having blown the whistle, and hundreds of case handlers and managers.

This research found that while the difference is small, on the whole employees who report wrong conduct see themselves as more dedicated corporate citizens then employees who do not report. This suggests that at least some of the motivation to report wrong-doing comes from a greater sense of personal altruism and a belief that reporting is good for the organisation.

The WWTW research did 'not support the idea that whistleblowers are malcontents who can be distinguished from non-whistleblowers by having a particular constellation of anti-organisational perceptions and attitudes'. (p. 76)

The people who reported 'viewed themselves as organisational citizens of good standing, and showed signs of being more helpful and exercising more initiative than non-reporters, while being just as loyal and industrious.' (p.76)

'Certainly the idea of a whistleblower as a 'crackpot' (Miceli & Near 1996) or someone with a generally troublesome work attitude is not supported. At the same time, there is also not necessarily support for opposite stereotypes of whistleblowers as always inherently altruistic and trusting. It is notable that neither non-role reporters [ie, people whose role did not oblige them to report] nor non-reporters felt management to be particularly trustworthy.' (p.77)

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 [WWTW 2008 Report, p.77]. For example, the results of the research 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 increases 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

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[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.

- '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 always bad, 'malicious' can be very good. That said, indications of malice does diminish the reliability of the evidence of the whistleblower and means that other 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.

2.2 Incidence and significance of whistleblowing

The *Whistling While They Work* research found that:

- just over 70 % of respondents had directly observed at least one of a wide range of nominated examples of wrongdoing in their organisation in the previous two years
- 28% of all respondents formally reported the wrongdoing – an equal percent who observed wrongdoing they considered 'very' or 'extremely serious' did not report or otherwise act on it, and
- 12% of all respondents reported 'public interest' wrongdoing, such as corruption, defective administrative or waste, with no element of personal workplace grievance.

2.3 Why some public servants disclose wrongdoing

The *Whistling While They Work* research found that the main reasons given as to why people disclosed wrongdoing or incompetence were primarily:

- the perceived seriousness and frequency of the wrongdoing - in relation to personnel and grievance type issues, the degree to which the discloser was personally involved (on the receiving end) is likely to contribute to the perceived seriousness of the matter.
- a belief that reporting would serve some good purpose – that action would be taken.

Other factors that influenced the decision included:

- a belief that reporting was an ethical responsibility, and
- knowledge about and/or confidence in the process to be followed, and the degree to which the discloser was personally involved , on the receiving end.

2.4 Why some public servants don't disclose wrongdoing

The WWTW research found that the most common reasons given for not reporting were to do with the expected management response to the disclosure, for example:

- a belief that nothing would be done – no action would be taken in response to the disclosure [a view expressed by 37% of respondents], and
- a belief that they would not be protected, including: a lack of confidence that they would be supported or protected; lack of trust in the person they had to report to; and/or doubt as to whether their identity would be kept secret.

Other reasons given for not reporting included:

- fear of reprisal from the wrongdoer, colleagues and/or the organisation itself [a view expressed by 24.4% of responders], and
- lack of evidence to support the disclosure.

Interestingly, the issue of whether the person would be protected was not very significant as a reason for deciding to report wrongdoing, but was very significant in decisions not to.

3. Fostering a culture that supports internal disclosures of wrongdoing

3.1 How

I think it is fair to say that all public sectors can do better at fostering a more ethical culture, including one that recognises the value of disclosure. The issues of ethics and disclosure cannot be looked at in isolation. A culture shift in favour of disclosure is not possible unless it is an aspect of a shift towards a more ethical culture generally.

The not uncommon approach of government and agencies is to focus most effort and attention on setting standards and expectations. However, merely focussing on such things as codes of conduct, statements of values, etc, will primarily only impact on those who wish to act ethically and those who don't wish to get into trouble. It and may also serve to reduce opportunities for people to rationalise that they are not doing anything wrong. Such an approach is unlikely to address *unintentional unethical conduct*, and definitely will not address *intentionally unethical conduct* (whether due to moral failings, or due to pressure brought to bear by group dynamics or the culture of the organisation).

To achieve such a cultural shift, governments, agencies and senior public officials need to introduce a package of mechanisms, structures and approaches that are both proactive and reactive, to comprehensively address culture and behaviour, guidance and enforcement and means and ends. In my view such a package needs to include:

1) *standard setting* – eg, offence provisions, legal obligations, legislated statements of values and standards of behaviour, jurisdiction wide codes of conduct, agency codes of conduct, ethics training, etc
2) *expectation setting* – eg, establishing and maintaining an organisational culture that articulates the norms and values of the organisation and the standards of behaviour expected of staff, including agency statements of values, demonstrated ethical leadership ('tone at the top'), disclosure policies, ethics training, etc
3) *prevention strategies* – eg, removal of opportunities through fraud prevention measures, disclosure of interests registers and the like, records management legislation and practices, internal and external audit, proper supervision, ethics training, etc
4) *enforcement mechanisms* – eg, whistleblowing legislation, disclosure policies, complaint handling policies, investigative capacity, records management legislation and policies
5) *deterrence mechanisms* – eg, watchdog/integrity bodies, internal and external audit, disciplinary action and/or prosecution for identified serious wrongdoing, etc.

If the aim is to ensure appropriate standards of conduct, including a recognition of the value of disclosure in the public sector, each of these mechanisms, strategies and approaches will need to be put in place as a comprehensive package.

However, these mechanisms, strategies and approaches will be ineffective without the 6th and most important requirement – *commitment*. By this I am referring to commitment by government and commitment by the management of individual agencies. The essential elements of the required level of commitment include, but are not limited to:

- an awareness of the importance of an ethical culture, including a culture that supports disclosure
- the allocation of sufficient resources and priority to addressing these issues
- the implementation of effective governance mechanisms, and

- the establishment of an appropriate ethical culture in the public sector as a whole, as well as in each individual workplace.

3.2 Why

The reasons why some public servants report wrongdoing and why far too many public servants don't, reinforces the need for government agencies to demonstrate a strong commitment to whistleblowing. Such a commitment is demonstrated by how an agency responds to disclosures, and the steps it takes to facilitate the making of disclosures.

The starting point, of course, is to ensure that there is a culture in agencies that is supportive of whistleblowing.

Whistleblowers perform an essential service in our society – they can bring to light serious problems with the management or operations of agencies. This includes matters relating to systems, competence and resources, as well as to the integrity of an organisation.

The results of the *Whistling While They Work* research and the experience of the NSW Police Force in relation to internal disclosures by police officers make it clear that the information obtained from whistleblowers is valuable (in the case of the NSW Police Force, allegations contained in the more than 1,000 internal disclosures made each year are likely to be substantiated in a significant proportion of the cases that are investigated).

Ideally, reporting these kinds of concerns would be considered to be part of doing a good job; being a responsible and effective employee. The results of the *Whistling While They Work* research show employee reporting of wrongdoing is in practice not a rare activity but what can be better categorised as a natural feature of organisational life. There are also a number of employees who routinely report wrongdoing as part of their supervisory, audit or other role or responsibilities.

Responding to disclosures and properly dealing with and protecting whistleblowers is a management issue and a management obligation. Internal disclosures, like complaints and suggestions from the public, should be treated as a management tool to assist management to identify and address organisational problems.

There are several very good reasons why the management of public sector agencies should support whistleblowing.

Firstly, the preamble to the *Public Servants Disclosure Protection Act* makes it very clear that the Parliament wishes to encourage and facilitate the disclosure of wrongdoing in the public sector. Further, various provisions of that Act place obligations on the Minister and Chief Executives (eg, ss.4, 10 & 11).

Secondly, there are OH&S and common law duty of care obligations on agencies to protect staff from victimisation and harassment in the workplace. For example, this issue was looked at in the New South Wales District Court in 2001 (in *Wheadon v State of NSW*, No. 7322 of 1998, 2nd February 2001) where a police officer was awarded $664,270.00 in damages. The officer had made a statement to Police Internal Affairs some years before alleging corruption on the part of a senior officer. The officer alleged that the police hierarchy had mismanaged the situation, not protected him from persecution, and eventually he was forced to leave the service. The Court found for the officer, holding that the defendant's duty of care to the plaintiff had been breached in a number of ways, including:

- failing to conduct a proper and adequate investigation or allegations made by the plaintiff as well as of allegations made against the plaintiff
- failing to provide the plaintiff with a system of pro-active protection (ie, to take active steps to prevent or stop, victimisation and harassment)
- failing to give support and guidance to the plaintiff

- failing to appreciate that officers who are in need of welfare assistance very often do not realise that they need it, or they feel embarrassed about asking for it and, consequently, failing to provide a form of pro-active assistance for officers, and
- failing to assure the plaintiff that he had done the right thing - whistleblowers are often desperate for reassurance that the organisation will stand by them and that the organisation will appreciate their courage. They want to be told they *did the right thing* in coming forward – and thanked for doing so.

Thirdly, whistleblowing provides an agency with an **early warning system** for problems – it is far better to hear about problems from staff then to read about them on the front page of the daily paper. Whistleblowers are often best placed to bring to light serious problems of the management and operations in an organisation which, if left unaddressed, can sometimes reach catastrophic proportions

Fifthly, most organisations would prefer to have the opportunity to **deal with problems in-house** rather than go through the joys of an investigation by some external integrity body. The results coming out of the *Whistling While They Work* research project show that the vast majority of staff who report wrongdoing would prefer to do so internally, provided they felt they could trust management to deal with it properly and to protect them from reprisals.

Finally, appropriately dealing with a whistleblower and the whistleblower's disclosure reduces the chances and severity of **detrimental impact** occurring for the organisation. Failure to deal appropriately with a whistleblower can lead to conduct both by the whistleblower and colleagues that are seriously detrimental to the operations of the organisation concerned, and to the morale of its staff, often over an extended period of time.

4. Better management of disclosures - avoiding common mistakes

I have been talking so far about some reasons why fostering an environment where disclosures are encouraged is a good thing. But it's not enough to encourage the making of disclosures – agencies have to make sure they manage the disclosures that are made in a way that:

- tries to minimise the possibility of unreasonable/over-optimistic expectations on the part of the whistleblower
- helps keep the whistleblower on an even keel and his or her conduct reasonable, and
- ensures the agency 'owns' the problem and controls the process and resources it allocates to it.

Agencies that do not proactively manage disclosures in this way risk creating a separate, and often even bigger, problem than the problem disclosed by the whistleblower – unreasonable complainant conduct by the whistleblower brought on by frustration, indignation and the like.

Whistleblowers can sometimes behave in the most unmanageable ways. From our experience, we think this is because the indignation and betrayal they feel when they don't get the outcome they desire is much greater than similar feelings that might be experienced by other complainants.

In our experience there are a range of problems in the ways in which organisations commonly handle complaints which encourage unreasonable conduct by complainants, including whistleblowers. It is not uncommon that complaint handlers throw fuel on the fire when they fail to deal with complainants appropriately - sometimes turning what could have been a straight forward matter into what can only be described as a nightmare for all concerned. I will talk today about what I see as the top 10 most common mistakes:

4.1 The issue of 'ownership'

In our experience the primary 'trigger' for most unreasonable complainant conduct is a struggle for control over how a complaint is dealt with. This struggle for control is primarily due to ignorance, a misunderstanding, a failure to recognise, or a refusal to accept who effectively 'owns' the complaint. We have found that many organisations and their complaint handlers misunderstand their role and the nature of their relationship with the complainant. They allow complainants to believe that they are in control of the process, and in fact often allow complainants far too much control over the process.

For the proper management of complaints it is vital that both complainants and complaint handlers understand from the outset that once a complaint has been made, the complaint handler effectively 'owns' that complaint and decides how it will be dealt with [for more detail see page 5 of the UCC Practice Manual published by the NSW Ombudsman, under the heading '*Ensure Ownership and Control'*].

Complainants 'own' their issue, and are free to raise it through other available avenues such as other organisations that can address the complaint, courts and tribunals, the media and politicians. Of course, this is subject to the seriousness of the issue. For example, serious public interest issues would also be effectively 'owned' by the agency to which they are made or disclosed. It may also be that in some circumstances there are legislative restrictions on further disclosure by a whistleblower or complainant.

4.2 The priority and resourcing issue

It is not uncommon that complaint handlers perceive complainants who engage in unreasonable conduct as being ‘difficult’ people who are a nuisance, an irritant and an unwarranted interference with the performance of their core work.

There are certain facts of life about the conduct of some complainants:

- Fact 1: Some complainants can be difficult and can act unreasonably.
- Fact 2 (or at least a widely held perception): Complaint handlers from across Australia, New Zealand and Canada confirm our experience that the problem is growing, both in terms of numbers of complainants who act unreasonably and the seriousness of their unreasonable behaviour.
- Fact 3: Most people would prefer not to deal with people they see as being difficult.
- Fact 4: From our experience, this attitude is reflected in the culture or general approach of many complaint handling organisations.

The trap that agencies sometimes fall into is that by trying to ignore or avoid dealing with a difficult person, they end up having to spend a lot of time and resources on responding to the person’s conduct in a reactive rather than a proactive way.

Agencies should recognise that the management of unreasonable complainant conduct is an integral part of their core complaint handling work. The people within an organisation dealing with unreasonable complainant conduct therefore need to be properly trained, given the necessary resources and supported by management. By tackling the issue head on agencies retain more control over the allocation of resources.

4.3 The ‘squeaky wheel’ issue

Squeaky wheel – the most persistent complainants – tend to be given more attention. This essentially hands control to the complainant and encourages poor behaviour.

Complaint handlers and their employing organisations will often allow the conduct of the complainant to dictate the level of resources that are devoted to the handling of the complaint. Quite clearly it should be the merits that dictate resources allocated, not the complainant’s conduct.

4.4 The ‘forum shopping’ issue

It is certainly not uncommon that complainants who are unhappy with the way their complaint is being dealt with will shop around for a better deal. As a matter of fact, this is standard practice for many dissatisfied complainants. This can have significant consistency and resource implications.

Where agencies commonly go wrong is by failing to design systems and introduce practices to address this phenomenon. As shown in the handout on *Forum Shopping*, there are often a whole range of possible alternative avenues for a dissatisfied complainant to explore, which are either:

- horizontal, where they explore alternatives; or
- vertical, where they escalate their concerns.

Some of the avenues are of course outside the control of the agency, for example the option to complain to a Minister, or where there is a plethora of watchdog bodies with overlapping jurisdictions. However, other avenues for forum shopping are within the control of the agency. For example:

- agencies can implement systems (for example case management systems) to help ensure that complainants cannot shop around for a more sympathetic ear within the agency, or within the particular complaint handling avenue/process
- agencies can institute practices to discourage complainants from going above the heads of case officers to get access to supervisors, managers or CEOs merely because they demand such access
- agencies can enter into arrangements with Ministers as to how complaint related 'Ministerials' are dealt with.

4.5 The consistency issue

Related to the 'forum shopping' issue is the consistency issue. It is not uncommon for organisations to respond inconsistently to either the same complainant or to different complainants raising similar issues. This might be because a complainant has shopped around within the organisation to find a more sympathetic ear, or it may be that the complainant has raised a series of similar issues over time and received different responses. This can give the complainant false hope or impetus to persist because the agency is giving the impression that it is vacillating and has not made up its mind.

Because intermittent reinforcement is reinforcement of the most powerful kind, it is vital that complaint handlers adopt appropriate practices and procedures to ensure consistency in responses to complainants about similar matters, and to individual complainants about their matters.

4.6 The focus and terminology issue

A common mistake made by complaint handlers is to focus on the person instead of the problem. Too often there is an attempt at some sort of amateur psychoanalysis of the complainant or to try to divine or impute particular motives to a complainant, instead of focussing on the issues. Some training available to complaint handlers, particularly training provided by mental health professionals, focuses on the identification of various types of mental health problems. While we have been equally guilty of this in the past, our approach does not advocate that at all.

Our original guideline that we published in the late 1990s that addressed this problem was entitled *Dealing with Difficult Complainants*! Over time we came to realise that such an approach focuses on the person, not the problem. It results in 'one-size-fits-all' responses, even though the problem can manifest itself in a range of different behaviours that need to be managed differently.

That is why we have changed our terminology to focus on the 'problem' – referring to '*unreasonable complainant conduct*', ie, to focus on the conduct not the person – on an objective assessment of observable behaviour, not on a subjective assessment of the mental state or motives of the complainant. This approach allows for implementation of appropriate responses and management strategies by people who are not mental health professionals.

Complaint handlers need to recognise that:

- they are professional and impartial complaint handlers, and generally not psychologists, social workers, and certainly not advocates – they can't be impartial and be an advocate for one side at the same time
- even if they are social workers or mental health professionals, they seldom have enough face to face contact with a complainant to make a valid assessment as to mental state, and unlikely to have enough information to be able to make a valid assessment as to the real motives or intentions of a complainant.

So complaint handlers shouldn't spend time making this type of assessment; instead they should focus or control how they manage their interactions with complainants – how they respond to any observable unreasonable conduct.

4.7 The expectation issue

As I will talk about in more detail later, it is very common for complaint handlers to make the mistake of assuming a complainant's expectations are realistic – at least until they are confronted by the complainant's actual expectations which may be quite unrealistic, impractical or even fanciful. At this point it is often too late to change the complainant's expectations or to avoid frustration and anger that can be caused by those unmet expectations.

I will talk more about the management of expectations later.

4.8 The satisfaction issue

Too often we find that case officers have misconstrued their role and inappropriately take responsibility for a complainant's dissatisfaction with the outcome of a complaint.

Provided that the case officer has done their job properly and is confident that the decision or advice is correct, it is not the case officer's responsibility if the complainant is unable to accept the decision or advice. In these circumstances, a case officer does not have to persist in the hope that they may be able to convince a complainant of the correctness of their thinking. Once they have outlined their reasoning once or twice – and it is clear that the interaction with the complainant is becoming unproductive – it can be ended at this point.

Staff need to be secure in the knowledge that their job is well done when they have properly considered all issues, made sound decisions, and conveyed their decisions with adequate reasons to the complainant. In the end, the agency has to be satisfied that the job was done properly, not the complainant.

Based on these considerations, a complainant's inability to agree with – or at the very least to accept the validity of advice or a decision – should be one of the more straightforward unreasonable conduct types to handle rather than one of the more difficult.

The management strategies set out in the UCC Practice Manual are about exercising ownership and control over the handling of complaints, about pursuing what the complaint handler believes to be an appropriate approach, whether or not the complainant agrees and no matter how the complainant reacts. In other words, conducting and finalising a matter to the organisation's satisfaction, not the complainant's.

4.9 The facilitation issue

On occasion we run across examples of agency complaint handling systems that almost appear to be designed to create and facilitate unreasonable complainant conduct, ie, systems effectively designed to fail. They do this because they:

- allow multiple points of entry – multiple almost alternative avenues of complaint, particularly for staff wishing to complain
- are unable to track contacts quickly enough (or at all) to minimise forum shopping and inconsistent responses
- fail to support staff who have done the right thing.

4.10 The delay issue

Organisations allow matters, particularly matters seen as being difficult, to drag on, often interminably. Letting something simmer for a long time may be a good move when cooking, but it has the opposite effect as an approach to dealing with complaints and complainants.

Delay, particularly where there are long periods of time where there is no contact with the complainant, can lead the complainant to perceive that the agency is deliberately obfuscating because it has something to hide. This kernel of a suspected cover-up, or a conspiracy theory, can be very hard to shake and influences the way the complainant perceives every subsequent interaction with the agency.

5. Better management of whistleblowers and their disclosures

5.1 The applicability of 'justice theory' to whistleblowing

Justice theory

Organisational scientists have put forward justice theory (also known as 'organisational justice theory') as a way to describe and explain how individuals react to decisions and the way they are made.

They argue that there are three dimensions of any decision-making process:

1) the decisions or outcomes of the process, referred to as '*distributive justice*' – focussing on the perceived fairness of decisions or outcomes of the process

2) the processes and procedures used, referred to as '*procedural justice*' – focussing on the perceived fairness of processes/procedures used to make decisions/resolve conflicts/reach outcomes – the means by which decisions are made

3) the treatment of the individual involved, referred to as '*interactional justice*' – focussing on the perceived fairness of the treatment of the individual concerned, comprising two elements:

   - treatment, referred to as '*interpersonal justice*' – relating to the perceived fairness of the manner in which the person is treated, including the level of respect shown to the person

   - information/explanation, referred to as '*informational justice*' – relating to the perceived fairness of the provision to the person of information about or explanations of decisions/outcomes.

Justice theory looks at what is important for outcomes to be perceived to be acceptable and/or for the people involved in the process to be satisfied with the fairness of the process and how they were treated.

There is a big difference between a person's perception that an outcome is *favourable/ unfavourable* on the one hand or *fair/unfair* on the other. The first perception focuses on the merits of the decision or outcome, the second focuses on how the decision was made or outcome achieved and on the people or organisation responsible.

Justice theory argues that where the procedures are followed and the interactions with the person concerned are perceived to be fair, reasonable and appropriate, then a negative outcome will not necessarily mean that the person concerned has a negative perception of the decision-maker.

The literature on justice theory includes the observation, which my experience tells me is very true, that between an original issue or problem and a very negative response there is usually some intervening event or conduct. In justice theory terms, such an intervening event, referred to as a '*double deviation*', will usually involve a failure of '*procedural justice*' or '*interactional justice'*, ie, how the problem or issue was dealt with, how the person was treated and/or how the person's initial expression of concern was handled.

It is therefore in the interests of complaint handlers and complainant handling organisations that the procedures and processes involved in making a decision that may be against the interests or desires of a complainant are, and are clearly seen to be, fair and reasonable.

Part B

Applying justice theory to public administration

Justice theory was developed primarily in the context of workplace relations and later by businesses operating in a competitive marketplace, but in my view it is equally applicable to the public sector.

Public sector agencies are likely to have a different perspective to private sector organisations as to the importance of customer/client satisfaction given that most are not driven by the need to maximise repeat custom or to make a profit.

The major driver for public sector agencies and public officials is the expectations of the public, media, Parliament and government of the day who expect public sector agencies to act ethically and in the public interest, and to provide an acceptable standard of service.

Government agencies themselves are likely to have different primary objectives (or minimum acceptable responses) in relation to customer/client satisfaction, depending on whether their role is that of:

- a government business operating in the open market,
- a service provider,
- a policy agency, or
- a regulator.

The nature of the role performed will significantly impact on whether their primary objective is:

- to maximise repeat custom, (eg a government business operating in a competitive market needing a positive response)
- to minimise dissatisfaction, (eg a service provider, needing at least a neutral response), or
- to perform a function to an acceptable standard (eg regulator, where a negative response does not necessarily equate to problems in the performance of the organisation's functions).

Government agencies are likely to have relevant secondary objectives, for example to minimise detrimental impacts on efficiency and effectiveness. In relation to complaint handling, for example, this would include minimising levels of dissatisfaction that could lead to a significant impact on resources arising from unreasonable complainant conduct.

Looking at justice theory in relation to whistleblowers, 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. This is the point at which the potential for conflict between the agency and the whistleblower begins, and the experience of some whistleblowers starts to unravel.

If the investigation outcome does not lead to vindication or positive action, there is a high likelihood of a whistleblowers reporting a bad experience, especially in relation to management. A possible explanation is that whistleblowers whose reports do not lead to positive action (ie a failure of 'distributive justice') may be inclined to regard that result as itself evidence of bad treatment of them by management (ie a failure of 'interactional justice'), or the whistleblower may push the matter and enter into further conflict which is then perceived as mistreatment.

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! [p116]. 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 being taken still pursued the matter further!

It takes finding the wrongdoing 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 in the WWTW research, 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. [Get the UNE plagiarism example from Selena.]

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.

I think that it can be very useful to consider the management of disclosers and their disclosures in the context of '*justice theory*'. The key lessons we can learn from justice theory is that it is very important for complaint handlers to take appropriate steps to try to ensure that:

- the expectations held by a discloser about the handling and likely outcome of the disclosure are not unrealistic
- the procedures used by the complaint handler are seen by the discloser to be fair and reasonable by this discloser, and
- their interactions between the complaint handler and the discloser are perceived by the discloser to be fair and respectful.

It is of course important to recognise that while the achievement of these objectives will not guarantee a happy whistleblower, a failure to achieve any one of them can almost guarantee the opposite.

5.2 Managing expectations

Expectations of complainants

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

Looking at the expectations of complainants in terms of '*justice theory*':

- in relation to '*distributive justice*', whether or not a complainant's expectations are realistic can have a significant impact on whether a discloser perceives the outcome of the disclosure to be reasonable
- in relation to '*procedural justice*', expectations can have a significant impact on whether a discloser perceives the complaint handler's procedures to be fair and reasonable (for example expectations as to the nature and level of involvement they would have in the process), and
- in relation to part of the third dimension of '*justice theory*' – '*informational justice*' – expectations can also impact on perceptions as to whether adequate information has been provided to a discloser (eg, as to the progress and outcome of the handling of the disclosure).

Looking 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 disclosures.

The reasonableness of this 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 the expectation of good treatment is low, this is more likely to be easily met and the outcome regarded as relatively good. If the expectation is high, meeting it may be more complex and identical outcomes may be seen as relatively bad.

The responses to the survey of people who identified as having previously made an internal disclosure (the Internal Witness Survey) indicate that this group went into their whistleblowing experience with higher expectations of support and lower 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 higher rates of dissatisfaction in regards to managing expectations. Where these expectations are not met, this has serious impacts on the future attitudes and behaviours of the people involved.

In dealing with any complaint (including an internal disclosure) there are of course at least two players – the complainant and the complaint handler. One of the fundamental causes of problems in the interactions between complainants and complaint handlers is unmet expectations – on both sides!

As the handout entitled *Comparison of Interests and Standpoints* emphasises, complainants and complaint handlers are likely to have different and often contradictory objectives, perspectives, knowledge and information in relation to the same complaint. Both are also likely to have very different expectations about how a matter will be dealt with and the likely outcomes.

It is said that usually when people are angry with a decision it is because their expectations are not met. As the Roman philosopher Seneca argued almost 2,000 years ago at the time of the mad emperor Nero, anger is caused by frustration which is in turn caused by unmet expectations or 'dangerously optimistic notions'.

In his very interesting book entitled *The Consolations of Philosophy*, Alain de Botton looks at Seneca's work and argues that:

> *'…at the heart of every frustration lies a basic structure: the collision of a wish with an unyielding reality'.*
>
> *'A single idea reoccurs throughout [Seneca's] work: that we best endure those frustrations which we have prepared ourselves for and understand, and are hurt most by those we least expect and cannot fathom.'*
>
> *'…anger does not belong in the category of involuntary physical movement, it can only break out on the back of certain rationally held ideas; if we can only change the ideas, we will change our propensity to anger.*
>
> *'…in the Senecan view what makes us angry are dangerously optimistic notions about what the world and other people are like.'*
>
> *'We aren't overwhelmed by anger whenever we are denied an objective we desire, only when we believe ourselves entitled to obtain it.'*

To help complainants avoid frustration, and the possibility of their conduct escalating into behaviour we categorise as being unreasonable, it is therefore vitally important to take appropriate steps to ensure that their expectations are realistic. It is therefore vital to manage complainant expectations from the outset – tell them at the very start:

- what you **can** do
- what you **can't** do

Next it is important to try to identify what the complainant's expectations are. Based on this information complainants should be told:

- what you **will** do
- what you **won't** do.

It is then very important to address **when** you will do whatever it is you have agreed to do. This might be a specific date, after a specified period of time, within a certain period, etc.

Research carried out in Canada as part of the *Citizens First* project has found that timeliness is the single most important driver of citizen satisfaction with government services across all services and all levels of government.

Perceptions of timeliness can be significantly influenced by expectations as to what are reasonable periods of time for various actions, decisions, etc. This reinforces the need to explain what are realistic expectations about how long the process, and various stages of the process, will take.

When a matter is to be investigated, one of the matters that needs to be addressed is the timing and general content of the information that will be provided to the complainant about the progress and outcome of the investigation.

Expectations of complaint handlers

It is not just the expectations of complainants that can be unreasonable, the expectations of complaint handlers can be just as unreasonable and also lead to frustration and even anger.

Unreasonable expectations commonly held by complaint handlers include:

- firstly, that complainants will have reasonable expectations – in practice some complainants will be looking for vindication, retribution and revenge, for certain people to be punished for the wrongdoing; things that the complaint handling system is not designed to deliver
- secondly, that the complaint handler should be able to bring all complainants around to their way of thinking through the application of logical arguments and clear explanations – in practice explaining and reasoning often doesn't work; you cannot reason a person out of a position they didn't arrive at through reason
- thirdly, complaint handlers often strive to maintain a good relationship with all complainants and to resolve all complaints to the complainant's satisfaction – as already stated, in practice some complainants will be difficult no matter what the complaint handler does, some problems can never be fixed and the outcomes some complainants insist upon can be quite unreasonable and/or unattainable. The fact that complainants are not satisfied does not mean complaint handlers have 'failed' or are 'ineffectual'. Provided complaint handlers have provided 'procedural justice' and 'interactional justice' to the best of their ability, complainants' satisfaction with the outcome is not an accurate indicator of the standard of their performance.

5.3 Addressing the rights and responsibilities of the parties to a disclosure

Looking now in more detail at '*procedural justice*' – at making sure procedures used by complaint handlers are perceived to be fair and reasonable, a key requirement is that the processes used adequately address the rights and responsibilities of all parties to the disclosure.

The NSW Ombudsman is the lead agency for a project looking at better ways to manage unreasonable complainant conduct. The Unreasonable Complainant Conduct (UCC) Project, a joint project involving all Australasian Parliamentary Ombudsman, is looking at improving the way we, and organisations within our jurisdictions, manage the conduct of complainants that we view as unreasonable. From the outset of the UCC Project, one of our aims has been to develop a set of ground rules or rules of behaviour of general application to complaint handling. I think it is very likely that it would benefit the work of each Ombudsman, and the complaint handlers within their jurisdictions, if they all were able to reach general agreement on a set of ground rules that clarify the various rights and responsibilities of each party to a complaint.

Part of Stage 2 of the UCC Project included a series of 9 sessions across Australia involving 27 separate focus groups of representatives of over 80 separate agencies. One of the issues that came up in one way or another during discussions in most of those focus groups concerned the lack of clarity about the ‘ground rules’ for the complaint process, and in particular the responsibilities of complainants. We have now developed a document setting out what we believe is a comprehensive statement of the rights and responsibilities of all parties to a complaint, including complainants, people the subject of complaint and complaint handlers.

We have also developed a more ‘user friendly’ document we call ‘Making the complaint process work’, for general distribution by Ombudsman and other complaint handlers to current and potential complainants through brochures, acknowledgements, etc.

The more detailed ‘Rights and Responsibilities’ document is intended for a range of uses, among other things including:

- by Ombudsman and agencies within their jurisdictions as a guide that sets to the issues that need to be addressed in their complaint handling policies and procedures [helping to ensure best practice and consistency in the design of such policies and procedures]
- facilitating consistency in the relevant principles applied by complaint handlers in our various jurisdictions
- being incorporated into training provided to Ombudsman and other complaint handlers and investigators as to important matters they need to take into consideration in the handling/investigation of complaints
- providing comfort and support to complaint handlers who need to impose limitations and/or conditions on the provision of service to certain complainants who are engaging in unreasonable conduct
- demonstrate to complainants that there is a valid justification for the rules Ombudsman and other complaint handlers seek to apply, not just ‘because we say so’ or merely for the convenience of complaint handlers.

These two documents are available as **handouts** for anybody who is interested.

5.4 Managing confidentiality

Another issue that influences perceptions of ‘*procedural justice’* is confidentiality.

The confidentiality issue is in practice one of the most problematic aspects of the whistleblowing process. Attempts to maintain confidentiality in relation to the identity of people who make disclosures can have a huge impact on how disclosures are dealt with.

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 have told on someone, you cannot suffer reprisals.

If practical and appropriate it is certainly best practice that the identity of the person who made a disclosure is kept confidential by the agency, all responsible staff and the whistleblower. From an operational perspective when a disclosure is made it may be important to keep three things confidential:

- the fact of the disclosure
- the details of the allegations contained in the disclosure, and
- the identity of the person who made the disclosure.

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

The *Public Servants Disclosure Protection Act* obliges Chief Executives to protect the identity of persons involved in the disclosure process, including the identity of persons making disclosures. Unfortunately, from our experience at the NSW Ombudsman over more than 15 years in implementing our *Protected Disclosures Act*, in most cases confidentiality is not a practical option. For example the whistleblower may have already raised the issue with management in the workplace or over a drink with colleagues; or the whistleblower is seen as the logical person to have '*blown the whistle*'.

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, which often requires disclosure of information that identifies or tends to identify the discloser, and
- sometimes the whistleblower has made confidentiality even more difficult by previously voicing their concerns about an issue, or their intention to complaint, 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.

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.

Once it is known that an internal disclosure has been made, it is human nature for people to speculate about who made it. In our experience they will generally have a fair idea of who did make the disclosure, but it is actually worse if they get it wrong 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 it denies that this person is the whistleblower, and the denial is believed, this would just narrow the field as to who actually made the disclosure. From a legal perspective, for the purposes of both my Act and your *Public Servants Disclosure Act*, a 'reprisal' can only be taken against a person who actually made the disclosure. If they didn't do it, yet they suffer detrimental action because people think they did, by my reading it is not a 'reprisal' for the purposes of your Act.

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 person the subject of a disclosure or work colleagues 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 using an argument that they did not know the identity of the whistleblower.

A realistic appraisal of the likelihood of the identity of the source of a disclosure or remaining confidential should determine the approach adopted by the Chief Executive and relevant managers to protect that person. In my view, and at the risk of oversimplification, in practice there are three options available to an agency where confidentiality is not a realistic alternative:

1) ignore the whole thing – being in denial, which may possibly have short term benefits but is almost guaranteed to cause long term pain
2) re-active management – ignore reality and proceed as if it is possible to keep the identity of the discloser confidential and blindly comply with s.11(1) of the Act. This could also be called the 'head in the sand' or 'hope for the best' approach where the agency assumes all will be well or does not want to act until forced to respond to problems
3) pro-active management – where the agency is prepared to recognise reality and act accordingly.

There have been cases in NSW where the courts have found against agencies that adopted a re-active and more 'hands-off' approach to the protection and welfare of their staff.[2]

Proactive management of the confidentiality issue means that where confidentiality is not a realistic and appropriate option, consideration is given to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.

In some cases the best approach may be to talk completely openly about the disclosure and the whistleblower, emphasising the importance of supporting the whistleblower for their actions and that disciplinary action will be instituted should any reprisals be taken against the whistleblower.

Guidance on the steps to be taken by management and persons responsible for dealing with disclosures when a person makes an internal disclosure are set out in the handout entitled: '*Confidentiality – Practical alternatives for the protection of whistleblowers'*.

5.5 Managing workplace conflict

How an organisation addresses workplace conflict arising out of a disclosure is another factor that can impact on perceptions of '*procedural justice*', and will certainly impact on perceptions of 'distributive justice' in relation to complaints about retribution.

On occasion an internal disclosure can lead to workplace conflict, particularly where the identity of the whistleblower is known or is assumed. Such conflicts can be between the whistleblower and any person or persons the subject of the disclosure or between the whistleblower and co-workers (including supervisors/managers) who believe that the whistleblower has done the wrong thing or

[2] Eg *Wheadon 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.

adversely affected them by making the disclosure. Conflict can arise both prior to or after completion of action stemming from a disclosure.

In our experience, such conflicts can lead to a total and irreparable breakdown in the workplace relationships.

Options available to address workplace conflict

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. This situation should also not be ignored in the hope it will resolve itself and go away.

Looked at in terms of who initiates or imposes a response to workplace conflict, there are a range of options that could be available to agencies to address such conflict can be categorised as follows:

- Self initiated resolution, eg, discussions with other party, using a grievance process, complaints to management.
- Management initiated self-resolution, eg, mediation, facilitation (eg, workplace conferencing), conflict coaching (to assist parties to a conflict to better understand their situation and to help them to develop their skills to better manage the conflict).
- Management initiated resolution, eg redesign of workplace (where practical), reorganisation of reporting structures, changes to supervision, instructions to individual staff or staff generally to stop certain behaviour, or as to expected standards of conduct, formal counselling, arbitration, transfer/relocation – 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.
- Management initiated responses, eg, investigation of allegations of bullying, harassment, victimisation, reprisals against whistleblowers, etc, and/or disciplinary action.
- Management imposed outcomes, eg, transfer/relocation of the whistleblower (or possibly any person the subject of a disclosure) to another position within the organisation, redundancy, suspension, and/or dismissal.
- Court imposed sanctions, eg, for any breach of a duty of care, for a breach of OH&S requirements, or the imposition of a criminal penalty.

Agencies need to bear carefully in mind that whatever action is taken in relation to a person who has made a disclosure must not constitute what could be seen as detrimental action in reprisal for the disclosure.

5.6 Provision of information to the parties to a disclosure

The disclosure of information about and arising out of a disclosure is another particularly contentious issue.

The situation is generally clear in relation to the disclosure of information to third parties who may apply under access to information legislation - in most jurisdictions I am aware of, information relating to a disclosure is exempt (to one degree or another) from release under such legislation.

An issue that often arises in the context of investigations into disclosures made under whistleblowing legislation is whether, and if so what (and when), information can and should be given to parties directly involved about the progress and results of the investigation.

I think there has been a widely held view that people who make disclosures should be told as little as possible as this could prejudice the investigation. However, a crucial element of '*interactional justice*' is, as I mentioned earlier, '*informational justice'* – the perceived fairness of the provision of information to the persons concerned. In the context of an investigation, the persons concerned include any complainant or whistleblower, and any person the subject of complaint or allegation.

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]*

While it is not possible to give a definitive answer that applies in all circumstances to the question of what information about an investigation can and should be given to interested parties, it is possible to give some general guidance.

The first issue to consider is the legislative environment – what limitations and conditions must be complied with, for example prohibitions against disclosing certain types of information (eg, information that identifies any of the parties to a disclosure) or against disclosing information other than in particular circumstances (eg, in notices of investigation, for procedural fairness, for the purposes of the investigation, in reports, etc).

Another key issue to consider is whether the investigation is 'evidence focussed' or 'outcome focussed':

- '*evidence focussed*' investigations 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*' investigations 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 (at an appropriate time and subject to any applicable legislative requirements) might include:

- complainants/disclosers [who have a legitimate expectation that they will be kept informed about what is happening to their complaint/disclosure and its outcome]
- subjects of complaints/disclosures [who have the right to procedural fairness].

Witnesses whose evidence is obtained during the course of an investigation may also have a legitimate interest in finding out about the progress of an investigation and its outcome, at least in general terms.

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

It appears to me that people involved in dealing with disclosures need to navigate a virtual maze of legislative requirements in the PSDP Act, the *Access to Information Act*, *Personal Information Protection and Electronic Documents Act*, *Privacy Act*, *Security of Information Act*, and *Canada Evidence Act*. From a quick reading of the PSP Act, the limitations and restrictions on the disclosure

of information appear to relate primarily to information that identifies any party to a disclosure and to information collected in the course of dealing with a disclosure, but not to procedural type information that might include:

- how a disclosure is to be dealt with
- if it is to be investigated, who will be the investigator
- how long the investigation is likely to take
- what involvement the discloser can expect to have in the investigation, eg, whether they are likely to be questioned and if so when this is likely to occur
- whether they will be given an opportunity to comment on any arguments put forward to counter their allegations.

There are various stages in an investigation when it might be relevant to provide certain information to relevant parties, including: at the outset; after a decision is made as to whether, and if so 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.

The handout about *Reporting on progress and results of investigations* gives some guidance as to the information that could be provided to the various parties to an investigation, and when.

6. Conclusions

Public servants are the best source of information about management and conduct problems occurring within the public sector.

Apart from the perceived seriousness and frequency of the wrongdoing and the sufficiency of supporting evidence, the *Whistling While They Work* research found that the main factors that impact on the likelihood that public servants will disclose wrongdoing were their perceptions about such things as:

- whether disclosure would serve some good purpose – that action would be taken
- whether the person would be protected
- whether disclosure was their ethical responsibility
- whether the person knew about how to make a disclosure and/or had confidence in the process to be followed to do so.

Each of these matters comes back to the culture of the organisation and people concerned. For example, has the organisation demonstrated that it will respond appropriately to disclosures and will take adequate steps to protect the discloser, has the organisation adopted clear and well publicised procedures for making disclosures, does the organisation foster an ethical culture among its staff.

Apart from the need to address common pitfalls in structure and approach that I outlined earlier, justice theory highlights the importance of various approaches being adopted by agencies as preconditions to the creation of an environment that is supportive of disclosure.

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