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Presentation by Glenn Sullivan, Director Investigations, Ombudsman Victoria

Public sector whistleblowing: Ombudsman Victoria's experience

In Victoria, the *Whistleblowers Protection Act 2001* entrusts the Victorian Ombudsman with the responsibility for assessing, managing and investigating allegations of improper conduct, including corrupt conduct, by public officers and public sector agencies. I have drawn on the Ombudsman's experience in managing disclosures and investigations under the Whistleblowers Protection Act over the past eight years.

It is in this context that the Ombudsman has identified concerns with some public sector agencies failing to meet their statutory responsibilities under the Whistleblowers Protection Act.

I intend to discuss these issues by looking at several case studies and highlighting areas of improvement for public sector agencies in dealing with whistleblowers. In doing so, it would be remiss of me not mention the excellent research work conducted into public sector whistleblowing by the Griffith University under the project of leadership of Dr AJ Brown. The '*Whistle While They Work*' project, which included partner integrity agencies from around Australia, including Ombudsman Victoria, provides one of the most comprehensive studies of public whistleblowing ever undertaken in Australia and world wide¹. The project collected data from 304 federal, state and local government agencies, surveying some 7,600 public officers across 118 agencies. This research underpins Ombudsman Victoria's approach to whistleblowing.

Background

Despite long held negative views about whistleblowing, in my view whistleblowers perform an extremely important role within public sector agencies by ensuring that allegations of serious wrongdoing by public officials are reported and brought to light.

¹ '*Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*'. Griffith University, the Australian and New Zealand School of Government, ANU E Press, 2008.

I believe that whistleblowing should be encouraged by all public sector agencies and seen as a means of demonstrating an agency's commitment to accountability, integrity and good public administration. This responsibility extends to the culture of the workplace which should support whistleblower disclosures being made. Sadly, in my experience, this is seldom the reality.

Some public sector bodies are still yet to recognise the value of whistleblowing and discourage its reporting. Negative and prejudicial perceptions about whistleblowers often prevail. I consider these attitudes to be inappropriate and believe that public sector agencies should accept whistleblowing as a necessary and integral part of a good complaint handling system. To this end, senior management has a critical role to play in promoting a culture which actively encourages and supports whistleblowing. This should include a clear statement by senior management informing staff that if they see improper conduct, 'it is the right thing to do to blow the whistle'. Senior management also have a responsibility to establish systems which allow for the effective investigation of whistleblowing reports, followed by decisive action.

The Whistleblowers Protection Act in Victoria provides a mechanism that enables allegations of improper conduct of public officials and agencies to be reported and, where appropriate, investigated. Importantly, it provides whistleblowers that make protected disclosures with a range of protections including protection from reprisals and defamation, immunity from liability and prohibition from identification in reports. It also provides whistleblowers with an avenue to sue for damages for detrimental action taken against them and to apply to a court for an order or injunction to stop reprisal action.

Ombudsman Victoria provides a safe and effective mechanism for individuals who witness or experience improper practices to come forward and report serious wrongdoing. The Whistleblowers Protection Act requires the Ombudsman to perform a central oversight role for dealing with allegations of improper conduct. This role includes:

- receiving disclosures
- determining whether a disclosure warrants investigation
- investigating disclosures of improper conduct
- monitoring investigations where they have been referred to public bodies for investigation
- monitoring the action taken by public bodies where the findings of an investigation reveal that improper conduct has occurred

- reporting to Parliament where public bodies fail to implement recommendations made by the Ombudsman at the conclusion of an investigation
- preparing and publishing guidelines to assist public bodies in interpreting and complying with the Whistleblowers Protection Act
- reviewing written procedures established by public bodies and making recommendations in relation to those procedures
- collating and publishing statistics about disclosures handled by the Ombudsman; and
- providing education and training.

Unlike, other states of Australia such as New South Wales, Queensland and Western Australia, and with the exception of the Office the Police Integrity in Victoria which has responsibility for handling complaints about police officers and investigating and preventing corruption and serious misconduct within the police force, Victoria has not had an equivalent anti-corruption commission. As you may be aware, following a recent review of Victoria's integrity bodies and corruption system, the Victorian Government has recently announced its intention to establish the Victorian Integrity and Anti-Corruption Commission to investigate allegations of serious misconduct and corruption in the public sector and local government.

However, the Whistleblowers Protection Act continues to provide an important mechanism for investigating allegations of improper conduct against public officers and agencies in Victoria.

Last financial year, Ombudsman Victoria received 96 disclosures of improper conduct, of which 28 were investigated under the Whistleblowers Protection Act. However, in the last 12 months, Ombudsman Victoria has seen a 60% increase in the reporting of whistleblower matters to our office. We attribute this increase, to a greater awareness of our office as a result of several high profile whistleblower investigations. For example, the Ombudsman's investigation into allegations of improper conduct by councillors at the Brimbank City Council in May 2009² sparked a number of whistleblower reports about other councils and councillors. The Ombudsman's investigation into Brimbank City Council's elected councillors identified a flawed corporate culture and compromised governance practices resulting in bullying and intimidation, improper use of powers and position, and misappropriation of funds, resources and information.

² Investigation into the alleged improper conduct of councillors at Brimbank City Council, May 2009

This investigation was the catalyst for the Victorian Government suspending the council and replacing the elected councillors with administrators.

Ombudsman Victoria has also been active in providing education, training and support to public sector agencies about the Whistleblowers Protection Act and handling whistleblower reports. As a result, we believe that some agencies are getting better at identifying whistleblower matters and offering this a means of dealing with complaints. Hence, the increase in whistleblower reporting to our office.

In recent years, Ombudsman Victoria has identified several instances where public sector agencies have failed to meet their statutory obligations under the Whistleblowers Protection Act. This has included:

- Poor knowledge of the Whistleblowers Protection Act
- Failing to protect the whistleblower from reprisals
- Poor whistleblower investigations.

Poor knowledge of the Whistleblowers Protection Act

Despite the Whistleblowers Protection Act operating in Victoria for approximately eight years, it appears that some public sector agencies still do not have a satisfactory awareness of the Act or their obligations regarding the handling of whistleblower disclosures. This has resulted in some agencies treating whistleblower reporting in a similar manner to other complaints.

In Victoria, all public sector agencies are required to have in place policies and procedures about whistleblowing, with the Ombudsman also publishing guidelines to assist agencies in meeting their obligations under the Whistleblowers Protection Act.

In a recent survey undertaken by Ombudsman Victoria, 20 of the 79 municipal councils throughout Victoria were randomly surveyed to check their understanding of the Whistleblowers Protection Act and the information they make available about whistleblowing. Approximately two-thirds of the councils surveyed failed to meet their obligations under the Whistleblowers Protection Act. It was also concerning to find that some council officers had never heard of the Whistleblowers Protection Act, while other councils simply misunderstood its provisions. Several councils advised that they did not train their staff in receiving whistleblower disclosures and conducting investigations, and did not have adequate references to the Whistleblowers Protection Act on their websites or in their annual reports.

In other cases, it was not clear who a person should make a whistleblower report to within the agency. At one council, an officer responded to our office by saying that 'we don't do whistleblowing here'.

The following case highlights Ombudsman Victoria's concerns about awareness of the Whistleblowers legislation by some agencies in Victoria.

Case Study 1

A whistleblower alleged improper conduct by two teachers at a TAFE institute by disclosing that the teachers accepted money from a student during their assessment of the student's applications for recognition of prior learning. The whistleblower initially reported the matter to the TAFE institute and said that management had investigated the complaint but took no further action.

It appeared that the TAFE viewed the payment as a gift that was duly reported to management and returned to the student.

The Ombudsman's investigation established that the manager:

- did not assess the complaint under the Whistleblowers Protection Act
- conducted the investigation without appropriate investigation experience
- accepted the version of the two teachers without testing their evidence
- failed to interview the student at the centre of the allegations
- did not appropriately document the investigation process or produce a final report on the outcome.

The Ombudsman was satisfied that the money was intended as a bribe by the student to gain a qualification to which he was not entitled. We also identified that one of the teachers had considered keeping the money. In addition to this misconduct, we identified poor record-keeping practices within the TAFE institute. For example, one of the teachers failed to complete the assessment report and took five months to enter the student's test results into the TAFE database.

Outcome

The Ombudsman made several recommendations to improve the TAFE's recognition of prior learning process. The Ombudsman also recommended that the TAFE:

- revise its whistleblower and complaint-handling procedures
- ensure that complaints are investigated by experienced and trained officers
- consider disciplining the teacher who considered keeping the money
- create a workplace-specific gifting policy
- train all staff on conflict of interest and gift policies.

The TAFE accepted all of these recommendations.

During several other whistleblower investigations, it has become apparent that some senior public officers do not fully understand the Whistleblowers Protection Act. For example, one senior officer felt it was his duty to share the details of a whistleblower investigation with all members of the agency's board of management. In this case, Ombudsman Victoria pointed out the strict confidentiality obligations under the Whistleblowers Protection Act and explained that the purpose of the Act is to protect the identity of the whistleblower.

The next case study highlights the Ombudsman's concerns in this regard.

Case study 2

A small agency received a whistleblower disclosure regarding allegations that the Chief Executive Officer of the agency had misused public resources for his own private benefit. This included the inappropriate occupancy of a residence owned by the agency during a time in which his house was being renovated, as well as the misuse of luxury car services and cabs.

Following the whistleblower making the disclosure, the Chair of the agency immediately embarked upon a full scale investigation of the matter, rather than assessing whether the disclosure meets the provisions of the Whistleblowers Protection Act, as required by the legislation. This not only increased the possibility that the identity of the whistleblower would be revealed, it also meant that the Chief Executive Officer was immediately informed about the specific details of the allegations.

The Ombudsman determined the matter to be a public interest disclosure and proceeded to investigate. The Ombudsman substantiated the allegations and established that the Chief Executive Officer's actions were inconsistent with current public sector values and standards of behaviour, particularly for an officer of his seniority.

The Ombudsman's report was critical of the Chair of the agency for not following the requirements of the Whistleblowers Protection Act or the Ombudsman's guidelines for dealing with whistleblower disclosures. The Chair admitted that he was not aware of the Whistleblowers Protection Act or how to deal with a whistleblower, as this was the first time that he had ever dealt with a complaint made under the Act. The actions of the Chair could have easily compromised the whistleblower and resulted in adverse consequences for them.

Outcome

As a result of the Ombudsman's investigation, the agency has since implemented new procedures for handling whistleblower disclosures and staff have received whistleblower training.

The Chief Executive Officer of the agency resigned in the wake of the Ombudsman's investigation.

In other cases, the Ombudsman has identified that agencies are actually spending more time and resources seeking to identify the whistleblower and take action against them, rather than protecting them. This is contrary to the spirit and intention of the Whistleblowers Protection Act.

The next case study illustrates the Ombudsman's concerns.

Case study 3

The Ombudsman received a disclosure alleging that a municipal council officer had been pressured by a senior manager to fabricate documents relating to an insurance audit that was required to validate works undertaken by the council. The documentation did not exist and was required for the audit.

The whistleblower initially reported the matter to a manager at the council. In response, a senior manager attempted to identify the whistleblower by sending an email demanding that the whistleblower face the people he accused of improper conduct and to explain his actions direct to them. This confrontational approach left the whistleblower open to the risk of reprisals being taken, as well as causing them considerable stress at the risk of being exposed.

Outcome

Following the Ombudsman's investigation, the council agreed to provide training to its entire management staff about the Whistleblowers Protection Act. The council also agreed to update its whistleblower policies and procedures.

So far I have highlighted some examples of poor awareness of the Whistleblowers Protection Act and understanding of an agency's obligations. However, there are some agencies which are managing whistleblower matters extremely well. As the research undertaken by the Griffith University shows, at least 70 per cent of all whistleblowers are either treated well or the same by management and co-workers as a result of making a whistleblower disclosure.

The following case is a positive reminder of how things can work if an agency commits to meeting its statutory obligations to whistleblowers.

Case study 4

A whistleblower made a report to a municipal council that staff at the council operated tip were stealing entry fees; receiving alcohol in exchange for persons entering the tip with loads of rubbish; and drinking alcohol during work hours.

On receiving the whistleblower report the council took immediate steps to ensure the welfare of the whistleblower by setting in place appropriate support mechanisms. The council was aware of its obligations under the Whistleblowers Protection Act and immediately consulted with Ombudsman Victoria regarding how to deal with this matter.

The Ombudsman referred this matter to the council to investigate with the recommendation that the council engage a suitably experienced external investigator to investigate this matter on its behalf. The Ombudsman monitored the progress of the investigation throughout, received regular updates from the investigator and consulted with the investigator when any issues arose.

Outcome

The investigation substantiated several of the allegations and the council took disciplinary against some of its staff.

As an outcome of the investigation, the council implemented new procedures and controls at the tip designed to improve and strengthen security, as well as addressing the culture of the workplace.

Overall, the investigation was conducted in a professional and timely manner and the whistleblower felt supported throughout the investigation. The whistleblower's confidentiality was maintained and the whistleblower did not experience any reprisals.

Failure to protect the whistleblower

The Whistleblowers Protection Act provides that whistleblowers can make disclosures about detrimental action taken against them in reprisal for making a protected disclosure, and have them investigated. Detrimental action can involve allegations of disadvantage, intimidation, harassment, injury, or loss of employment opportunities.

Encouraging whistleblowers to report serious wrongdoing and protecting them against reprisals is essential to ensuring the effective operation of the Whistleblowers Protection Act. While it is a serious offence under the Whistleblowers Protection Act to take detrimental action against a whistleblower, it appears that some agencies are still not taking adequate measures to protect whistleblowers against reprisals.

The following case study is a reminder of what can happen to a whistleblower if not provided with adequate protection.

Case study 5

A whistleblower raised concerns with their manager about the improper conduct of two department staff in dealing with child welfare issues.

It was alleged that senior management had failed to investigate these allegations, instead inappropriately investigating the whistleblower's conduct and then disciplining the whistleblower.

The Ombudsman's investigation identified concerns in relation to how the department dealt with other complaints similar to those raised by the whistleblower. As a result, the Ombudsman recommended that the department:

- review its handling of all complaints received in the preceding three years in relation to allegations of misconduct by departmental officers
- compensate the whistleblower for the action taken against them in the workplace and for further acts of detrimental action by departmental officers.

Outcome

The investigation identified that senior management was biased against the whistleblower and had failed to properly investigate their initial whistleblower report. The Ombudsman concluded that the allegations raised by the whistleblower were proven. The department agreed to implement all the Ombudsman's recommendations. The department also provided the whistleblower with a formal letter of apology and paid the whistleblower compensation.

In my experience, welfare support to a whistleblower is often only provided by an agency when a whistleblower asks for it. To compound the problem, the level of support is often insufficient. Public sector agencies need to be more active in supporting whistleblowers and addressing issues early before they culminate in stress-related health problems for the whistleblower.

In another case of adverse consequences for a whistleblower as a result of reporting improper conduct -

Case study 6

The Ombudsman investigated allegations of detrimental action against a whistleblower in a major government department when it was disclosed that:

- two employees were alleged to have been involved in unethical and unprofessional conduct involving the provision of professional services to family members and altering official records to cover it up
- the line manager was possibly biased in failing to document, report and investigate critical incidents which involved the two employees.

It was also alleged that a manager had distributed material which identified the whistleblower. In response to the whistleblower's allegations, the two employees complained that the whistleblower had in turn breached their privacy, bullied and harassed them.

The investigation identified deficiencies and procedural flaws in the department's grievance processes as well as significant problems with the way allegations were managed and investigated by senior managers.

The Ombudsman concluded that three senior departmental officers did not act with the integrity, impartiality or respect as prescribed by the Public Administration Act 2004, Code of Conduct for Victorian Public Sector Employees, and the department's own disciplinary policies. The Ombudsman recommended that the department:

- review the conduct of the senior officers involved in the investigation
- ensure conflict of interest issues are resolved before starting any investigation
- review the way disciplinary matters are managed and delegated to ensure officers are accountable and processes are transparent
- apologise to the whistleblower
- consider taking disciplinary action against the manager for circulating material which identified the whistleblower
- consider paying the whistleblower compensation for the unfair treatment.

Outcome

The department accepted all the Ombudsman's recommendations.

Poor whistleblower investigations

Under the Whistleblowers Protection Act, the Ombudsman can refer a public interest disclosure to a public sector agency to investigate. This is a necessary process as the Ombudsman does not have sufficient resources to investigate all public interest disclosures. In these circumstances, the Ombudsman then monitors the investigation undertaken by the public body to ensure that the investigation is conducted in accordance with the Whistleblowers Protection Act and the Ombudsman's guidelines for conducting investigations.

However, the Ombudsman has identified several shortcomings with the standard of whistleblower investigations undertaken by some public sector agencies. This has included:

Delay in finalising investigations

Lengthy delays in finalising investigations into public interest disclosures and providing the Ombudsman with a completed investigation report. For example, some investigations have taken agencies in excess of twelve months to complete and in doing so have failed to consider the affect on the whistleblowers well-being while awaiting the outcome of an investigation spanning many months.

Failure to consult the Ombudsman's guidelines

Despite the Ombudsman publishing procedures to be followed by public agencies in relation to dealing with whistleblower disclosures and investigations, some agencies overlook advice contained in the Ombudsman's guidelines, which are available at our website www.ombudsman.vic.gov.au. For example, the guidelines state that public bodies should keep the Ombudsman regularly informed about the progress of the investigation. However, there have been a number of instances where agencies have failed to comply with this requirement.

Also, investigators entrusted with the task of investigating whistleblower matters often lack the necessary knowledge or experience in conducting whistleblower investigations. As a result, conclusions may be reached without adequate evidence to support them; key witnesses are not interviewed; and avenues of enquiry may not be fully explored or pursued at all.

Confidentiality breaches

There appears to be a general lack of understanding by investigators about confidentiality and the protections afforded to whistleblowers under the Whistleblowers Protection Act. For example, our office has identified instances where witnesses have been provided with confidential information which may lead to the identify of the whistleblower being disclosed.

Conflicts of interests

The Ombudsman has identified cases where the investigation of whistleblower matters has been compromised by the failure of investigators to adequately manage conflicts of interest. For example, in some smaller agencies the person conducting the investigation may also be the same person responsible for providing the whistleblower's welfare and support. This can create tensions where the investigator is reaching conclusions which may have a bearing on the whistleblower's welfare.

In another example, the integrity of an investigation was compromised as a result of a conflict of interest that arose during the investigation. The contracted investigator had prior involvement with two witnesses yet the investigation continued. This resulted in the investigation being recalled by the Ombudsman and the matter having to be re-investigated.

Witnesses colluding

The Ombudsman has identified examples where the confidentiality provisions of the Whistleblower Protections Act have not been adequately explained to witnesses being interviewed as part of an investigation. This is of concern to the Ombudsman as witnesses may have the opportunity to collude prior to being interviewed and in turn affect the reliability of evidence provided.

For example, the Ombudsman reviewed an investigation in which a government department forwarded correspondence to prospective witnesses during the course of its investigation. The correspondence alerted prospective witnesses to the investigation and informed them that they may be contacted by the investigators. Such a practice has the potential to encourage collusion between witnesses and undermine the integrity of the investigation. The Ombudsman recommended that a more appropriate approach would be for investigators to contact witnesses shortly prior to them being required to attend an interview to reduce the possibility of collusion.

Delay and other failures to adhere to the procedural requirements of the Whistleblowers Protection Act by agencies are a concern as this erodes confidence in the legislation and may deter a whistleblower from raising allegations.

Suggested improvements to public sector whistleblowing

In order to address some of the issues I have discussed today, I make the following suggestions to public sector agencies for improving the management of whistleblowing.

Whistleblower policies and procedures

Ensure that your agency has clear and up-to-date policies and procedures about whistleblowing; how to go about making a whistleblower disclosure and who to make a report to. Your policy should commit to the value of whistleblowing and encourage whistleblowers to report improper conduct wherever it is seen. For example, it should be easy for a visitor to an agency's website find out all they need to know about whistleblowing and making a report in the one location.

As our survey of municipal councils indicates, this is generally not the case. Make it a priority when you get back to work check whether your agency has readily accessible information on your website about whistleblowing and whether this information is up-to-date.

Whistleblower training and resources

Generally, there should be a level of awareness amongst all staff within an agency about whistleblowing. This information should form part of the agency's induction training program for all new staff and there should be whistleblower refresher training and information updates provided to existing staff at regular intervals. Generally speaking, the level of awareness about whistleblowing in an agency should be the same as the awareness that staff have about the process for making a complaint within an agency.

It is essential that staff responsible for the receipt of whistleblower disclosures, investigating whistleblower matters, or providing welfare support to whistleblowers, are provided with adequate training.

In my experience, the first time that some officers find out that they are the designated officer within an agency with responsibility for managing whistleblower matters, is when they receive a whistleblower disclosure. In my opinion, this is simply too late and the risks to the whistleblower and the agency of making a mistake, are too great.

If an agency is unsure of how to deal with a matter, they should be seeking advice from the Ombudsman or alternatively seeking the advice or services of an external investigation company with experience in dealing with whistleblower matters. As some of the examples I have highlighted today show, not only is there is serious risk of harm to a whistleblower if an agency gets it wrong and matters are not dealt with appropriately in the first instance, there are many other potential adverse consequences for the agency including:

- Financial cost of unreported improper conduct (eg theft)
- Productivity losses
- Poor staff morale and agency culture
- Loss of valuable staff
- Staff grievances
- Compensation for detrimental action.

Whistleblower welfare

The protection of whistleblowers against detrimental action is essential for the effective operation of any whistleblower scheme. Senior management of a public body must take responsibility for ensuring that whistleblowers are protected from direct and indirect detrimental action.

The role of the welfare manager is critical in evaluating the immediate welfare and protection needs of a whistleblower and responding to any concerns of harassment, intimidation or victimisation in reprisal which may arise. In most cases, a whistleblower welfare manager will only be required where a matter proceeds to investigation.

In my experience, whistleblower welfare is often only provided on a re-active rather than pro-active basis. From a best practice perspective, welfare managers appointed to support whistleblowers should undertake a risk assessment to determine the likelihood of any reprisals being taken the whistleblower. It may be appropriate in some cases for a welfare manager to take the step of moving the whistleblower to another work unit to mitigate the chances of reprisal action being taken during an investigation. The welfare manager should schedule regular meetings with the whistleblower and have the ability to respond to any urgent issues which may arise.

Summary

As I have discussed today, while public sector whistleblowing can be extremely difficult to manage, in the right hands it can lead to cost savings to an agency, reinforce good corporate governance and promote an ethical culture.

Glenn Sullivan
Director, Investigations
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