Whistleblowers

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She worked as a researcher for the Legal and Constitutional Committee of the Victorian Parliament. She was later appointed solicitor to the NSW Independent Commission against Corruption and as Head of its Legal Department. She subsequently held the position of Deputy Commissioner of the NSW Health Care Complaints Commission.

As a barrister, she has been engaged as counsel assisting a number of inquiries, including the Special Commission of Inquiry into Campbelltown and Camden Hospitals, the Judicial Commission Inquiry into Judge Dodd and various statutory inquiries under the Casino Control Act 1992. She has conducted several inquiries for the Department of Health and for Area Health Services. She works predominantly in administrative law, including appearing before health disciplinary tribunals and coronial inquests.

It seems that whistleblowers are either endured or adored. One academic commentator recently described them in the following terms:

> Whistleblowers perform the absolutely crucial task of exposing secrecy. In their separate struggles to confront the hydra-headed configuration of official misconduct, whistleblowers peer between the venetian blinds into a secret world where power transcends principles; easily, quietly, confidently. This is not the action of voyeurs. This is *vox populi*, forced off the main table of democracy, to pick up the scraps of information strewn on the floor.[1]

I, on the other hand, as an investigator of their claims, take a decidedly less flamboyant and, indeed, more cautious approach. I urge that there be an objective and dispassionate evaluation of their allegations. This is as important as the claims themselves and the positive changes they might ultimately bring.

The need for complaints procedures

There is no controversy in the proposition that those who deliver health services should have procedures whereby clinicians, other staff, and patients and their family and friends can raise concerns about the care or treatment given, and that those concerns can be properly responded to, fairly dealt with, all the relevant information be recorded and, as a result and where warranted, improvements made.

It should equally be accepted that the disclosure of information about adverse events should be formally encouraged, and indeed, in specified circumstances, be required—without undue obstacles being placed in the path of the discloser. The events brought to light should be subjected to objective and dispassionate scrutiny.

Reporting adverse events

Much has been written and spoken over the past few years concerning the reporting of adverse events. The Open Disclosure Standard was released by the Australian Council for Safety and Quality in Health Care in July 2003. The Council also produced draft Better Practice Guidelines on Complaints Management for Health Care Services in July 2004.

Various guidelines have also been issued by the NSW Health Department. In addition, and perhaps most significantly, the electronic Information Management System has been implemented in NSW. This permits all adverse incidents to be reported to managers and, depending on their severity, passed on to the Area Health Service and the Department of Health. Reports on the data collected by that system are available annually.[2]

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[1] *WHISTLEBLOWERS AND SECRECY, Ethical Emissaries from the Public Sect[or],* **Dr William De Maria Department of Social Work & Social Policy The University of Queensland Paper presented to: Freedom of the Press Conference) Bond University, 11 November 1995.**

2 see Patient Safety and Clinical Quality Program annual reports

Investigating agencies

In addition to the various publications encouraging and requiring the reporting of adverse events, there is a number of agencies with the regulatory power to investigate such events, depending, of course, on their nature, source and the way in which they have been brought to light—namely the Health Care Complaints Commission, the Independent Commission Against Corruption, the Ombudsman, the Coroner and the police.

Whistleblowers

Inevitably, however, there will be those for whom such avenues just don't work. That might be because of personality, it might be the nature of the information being disclosed, it might be because of politics, culture or resources.

We are likely therefore, from time to time, to experience the phenomenon of whistleblowing, which for my purposes tonight, I define as the public exposure of a concern about the way in which the health care system is working.

Legal mechanisms in NSW

I want to deal briefly with the main legal mechanism in New South Wales for protecting those who make such disclosures and to ruminate on some of the procedural aspects occupying the minds of those charged with investigating whistleblowers' claims.

The object of the *Protected Disclosures Act 1994(NSW)* is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration or serious and substantial waste in the public sector by three main means:

(a) enhancing and augmenting established procedures for making disclosures concerning such matters;

(b) protecting persons from reprisals which might otherwise be inflicted on them because of those disclosures; and

(c) providing for those disclosures to be properly investigated and dealt with.[3]

Preconditions

There are, however, a number of pre-conditions to be satisfied before one comes under the protective umbrella of the Act.

First, the disclosure must be made by a public official, which means those in the private sector are automatically excluded.[4]

Second, it must be made to an investigating authority, which, for current purposes, will usually mean the Independent Commission Against Corruption or the Ombudsman, or to a public authority, which includes the Area Health Services and the Department of Health, or, interestingly, to a Member of Parliament or to a journalist.[5]

Third, if made to one of the authorities, it must be a disclosure of information that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by a public authority or any of its officers.[6]

Corrupt conduct is broadly described and defined in the *Independent Commission Against Corruption Act* and includes any conduct of any person that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, that may give rise to a criminal offence or a disciplinary offence, or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.[7]

In addition, the disclosure must be made in accordance with any procedure, established by the authority concerned, for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money.[8]

Thus, to achieve protection, the nature of the information disclosed is confined, as indeed is the means by which it is disclosed.

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[3] s.3
[4] ss.4 and 8
[5] ss.4 and 8
[6] ss.4 and 14
[7] s.8
[8] s.8 and 14

Disclosing to MPs and journalists

If the disclosure is made to an Member of Parliament or journalist, substantially the same disclosure has to already have been made through the channels I have just described: to an investigating authority or a public authority.

So one cannot go directly to one's Member of Parliament or journalist; one must first go through the authority mechanism in order to come under the terms of the Act. But that is not enough. In order to disclose to a Member of Parliament or journalist, one must not only have been through the original channels, but that authority must have:

(a) decided not to investigate the matter; or

(b) decided to investigate the matter, but not completed the investigation within six months of the original disclosure being made; or

(c) investigated the matter, but not recommended taking any action in respect of the matter; or

(d) failed to notify the person making the disclosure, within six months of the disclosure being made, whether or not the matter is to be investigated.

So in addition to the general preconditions, there are further limitations in relation to disclosures to Members of Parliament and journalists. In addition, the disclosure must be substantially true.[9]

Fourth, the disclosure must be made voluntarily. It cannot be made by a public official in the exercise of some duty imposed on that person by or under an Act. If a Chief Executive Officer is required to, for example disclose suspicions of corrupt conduct that disclosure is then protected under the Act because they are *required* to make such disclosures. Furthermore, if it is made in accordance with a code of conduct (however described) adopted by the authority and setting out rules or guidelines to be observed by public officials for reporting corrupt conduct, maladministration or serious and substantial waste of public money by investigating authorities, public authorities or public officials, that disclosure can, indeed, be protected under the legislation.[10]

Finally, the disclosure to an investigating body has to be made in accordance with the legislation governing that investigating body, for example, the Independent Commission Against Corruption or the Ombudsman.[11]

Exceptions

However, even if one passed all those hurdles, not all disclosures will be covered by the Act. For example, disclosures concerning the merits of government policy are not protected,[12] nor are those, not surprisingly, motivated by a wish to avoid disciplinary action.[13]

In recognition of the frequent cry by whistleblowers that they are left in the dark after telling all, the person to whom the disclosure has been made must notify them within six months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.[14]

The protection afforded

So if one achieves the status of having made a protected disclosure, the protection given is that a person who takes detrimental action against another person substantially in reprisal for the other person's making a protected disclosure is guilty of an offence.[15]

"Detrimental action" is very broadly defined and means action causing, comprising or involving any of the following:

(a) injury, damage or loss,

(b) intimidation or harassment,

(c) discrimination, disadvantage or adverse treatment in relation to employment,

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[9] s.19
[10] s.9
[11] ss10, 11, 12, 12A
[12] s.17
[13] s.18
[14] s.27
[15] s.20

(d) dismissal from, or prejudice in, employment,

(e) disciplinary proceeding.[16]

In addition, the person disclosing is protected from liability for matters such as defamation and breach of confidentiality and is not, because of the disclosure, liable to disciplinary action.

The Act does not, however, assume purity in the heart of all whistleblowers. The investigator may decline to investigate or may discontinue an investigation into disclosures made on frivolous or other grounds—and then the disclosure is not protected.[17] Similarly, a public official must not, in making a disclosure, wilfully make any false statement to an investigator during the course of an investigation, or mislead or attempt to mislead the investigator.[18]

Assistance by whistleblowers

One matter of interest which is not covered by the NSW legislation, but which is dealt with in South Australia, is the obligation imposed on public interest whistleblowers to assist with any investigation of the matters to which the information relates, unless the investigation is being conducted by the subject of the complaint. A person who has no reasonable excuse for failing to fulfil this requirement forfeits the protection of the legislation.[19] While in my experience, whistleblowers have generally been only too willing to assist, this might not always be the case.

It can be seen that the *vox populi*, or the voice of the people referred to in the quote given earlier, needs to be very carefully channeled if the protection provided by the Act is to be afforded.

Prompt, objective and dispassionate investigation

Turning then to a couple of issues affecting those entrusted with the task of investigating the claims of whistleblowers, a matter with which I have been more closely concerned.

It is self-evident that the maintenance of confidence in the public health system requires that public disclosures of adverse events be, and be seen to be, investigated quickly, objectively and dispassionately. This is similar to the NSW Chief Justice's oft-repeated mantra that justice should be just, cheap and quick, with the emphasis on that comma.

While dispassionate and objective investigations can be, and often are, done well internally within the organisation the subject of complaint, on occasions an inquiry set up for the sole purpose of investigating a particular claim might be called for.

Procedural fairness

Generally, these inquiries will be required to afford procedural fairness to those affected by the allegations. Precisely what that will entail will depend on the nature of the inquiry, the terms of reference, and the statute, if any, under which the inquiry is set up. Broadly, however, it means that people should receive a fair and unbiased hearing before decisions are taken which affect them.

This means that relevant, adverse and damaging allegations should be drawn to their attention so that they can, if desired, respond to them; proposed criticisms should be drawn to their attention so that they can, if desired, make representations in response; and they should be given an opportunity to adduce additional material of probative value[20]. Each of those is fundamental to the operation of inquiries in the common law system generally and is particularly important in relation to whistleblower claims. Finally, the hearing should be conducted by an independent person with an open mind. One must be wary, however, not to confuse an open mind with one which is empty.[21] That an inquirer should be without bias is a significant factor.

Ostensible bias

There is a recent, somewhat spectacular, illustration of the effects of an inquirer not acting fairly. The Bundaberg Hospital Inquiry was halted in September 2005 when a

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[16] s.20

[17] s.18

[18] s.28

[19] *Whistleblower Protection Act 1993* (SA) s 6.

[20] *Shaw v Police Integrity Commission Shaw v Police Integrity Commission* [2005] NSWSC 782

[21] Bertrand Russell

Queensland Supreme Court judge found that a case of ostensible bias was made out against its then Commissioner, Tony Morris QC.[22] Not unusually or surprisingly, Mr Morris had been appointed to make "*full and careful inquiry in an open and independent manner*" with respect to a number of specified matters and to report on them.[23]

The following are some of comments which fell from the Commissioner during the course of the public hearings and which were found by the Judge to be evidence of bias. Their accuracy is, I understand, not disputed, coming as they do from that essential tool of an inquirer, the transcript of the recorded proceedings.

When questioning the Director of Medical Services, Dr Leck, the Commissioner made the following comments, neatly disguised as questions:

> *'You're just far too busy, are you, to trouble yourself with whether or not people being held out as surgeons at your hospital are actually qualified?';*[24]

This was found to indicate bias.

> *'It doesn't worry you that patients might be dying or 15-year-old boys might be losing their legs?'*[25]

The Court found that the approach manifest in these statements was not one of gaining information or clarification of evidence, but instead that they were put aggressively and were sarcastic and belittling of the witness.[26]

Two further exchanges were:

> *'Do you write gushy letters saying how good someone is whilst they're under investigation?'*[27]

and the following:

> *'I am just wondering whether the people of Bundaberg might not have been better off with three more clinicians actually working in the hospital rather than three people in offices sending memos back and forth to one another.*

And then the question:

> *Do you think that's a fair comment? - No, I don't.*

The Commissioner:

> *Why not, what have you done, since you were first told about this problem in October, to achieve anything to save the lives of the patients who are being killed by Dr Patel?'*[28]

It was found that these references were illustrative of a pervasive disdain for, or contempt towards, "bureaucrats", and doctors in administration who do not treat patients.[29]

In addition to his manner of questioning those who were the subject of allegations, Mr Morris's conduct towards the whistleblowers also indicated bias.

The first three witnesses called were the key whistleblower, Nurse Hoffman, and two others. Each gave evidence which, if accepted, was fraught with potential adverse consequences for the two doctors and which was likely to be challenged by them in the Inquiry. They were the first witnesses to be called. No other evidence had yet been heard in public.

The Judge found that the "*Commissioner's effusive endorsement of their untested evidence early in the proceedings is of particular concern*".[30]

When Ms Hoffman completed giving her evidence on her first appearance before the Commissioner, prior, of course, to the doctors being called, the Commissioner thanked her for "*the thoughtful and careful and helpful way*" she gave her evidence.

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[22] *Keating v Morris & Ors; Leck v Morris & Ors* [2005] QSC 243
[23] Ibid para 3
[24] Ibid para 89
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid para 90
[30] Ibid para 99

As he was leaving the bench he diverted, went down and shook Hoffman's hand before leaving the room.[31]

The Commissioner, although ultimately acknowledging that Hoffman's evidence was based on second or third-hand information, endorsed her as a witness on other occasions.[32] The inquiry, constituted as it then was, was, not surprisingly disbanded.

The dangers of pre-judging

The conduct of this Inquiry and the findings of the Court provide a somewhat chilling reminder to those with an interest in the disclosure of adverse events and in their proper investigation, of the need for objective, dispassionate inquiries which can, ultimately, only help those who blow the whistle and those who work within the system.

An integral component of conducting an inquiry, particular one where there is considerable public interest and comment, is to not pre-judge the evidence. The "scraps" of information available to whistleblowers will invariably need to be supplemented and, on occasions, supplanted by the evidence of others. So it is a careful inquirer who awaits the conclusion of evidence before publicly commenting on it.

Public or private hearings?

The Bundaberg Inquiry was held largely in public. One of the key issues for an inquiry is whether or not to hold hearings and if so, whether those hearings should be conducted in public or in private. Hearings are one method of gathering facts, but not by any means the only or, in all circumstances, the best way.

In the absence of a requirement, in a statute or other instrument establishing an inquiry, that hearings must be held and be in public or in private, it is generally a matter for the inquirer. While the way in which public hearings are held can differ, it generally involves granting leave to affected persons to be legally represented and permitting them limited or unlimited cross-examination of witnesses. The media are usually admitted, although the presence of cameras varies according to the inquirer. Private hearings can be conducted in a similar way, although there tends to be less formality.

There is no doubt that public hearings can assist in promoting the accountability and independence of those conducting an inquiry and in ensuring that justice is seen to be done. They are also time-consuming and costly, with a large part of the bill inevitably being paid by the public.

There may be good reasons to hold a private hearing, including privacy concerns, particularly where confidential and sensitive health material is concerned, or to protect the reputation of individuals caught up in the inquiry.

Private hearings not necessarily unfair

The question of whether procedural fairness can require an inquirer to conduct a private rather than a public hearing was considered in the New South Wales Court of Appeal in *Independent Commission Against Corruption v Chaffey*.[33] The *Independent Commission Against Corruption Act* a discretion to the Commissioner as to whether to hold a public or private hearing.

Sergeant Lance Chaffey was caught up in the investigation of the claims by Neddy Smith and claimed that the hearing in respect of himself should be held in private. The majority of the Court of Appeal concluded that a public hearing would not breach procedural fairness, as fairness did not require that proceedings be conducted in all respects in such a way as to minimise damage to reputation.

Two recent English cases concerned investigations into the conduct of medical staff who continued to practise despite mounting concerns about their behaviour. The decision was made to conduct each investigation in private—not to protect the reputations of the practitioners, who had already been the subject of significant adverse publicity, but rather to ensure that hearings were conducted promptly.

In the first case, the Court quashed the decision to conduct the hearing in private because

[31] Ibid para 100

[32] Ibid para 101

[33] (1992) 30 NSWLR 21at 27-29

(a) there was a presumption that a disaster or loss of life would be investigated publicly;

(b) there can be evidentiary benefit in a public hearing (witnesses might come forward and the exaggeration of evidence was less likely);

(c) there was strong support for a public hearing from families of the victims;

(d) the head of the inquiry supported an open hearing; and

(e) there was wide acceptance that public hearings would increase confidence in the final report.[34]

In the second case, decided a year later, the Court concluded that there was no general rule that such inquiries be public and suggested that considerations of cost and efficiency would normally weigh against public hearings.[35]

The Camden and Campbelltown Hospitals Inquiry

The most recent NSW example of a similar Commission of Inquiry was the Camden and Campbelltown Hospital Special Commission of Inquiry, which reported in July 2004.

Following the public disclosure by two nurses working at both hospitals of their concerns about patient care and poor administration in those hospitals in the then Macarthur Health Service, Bret Walker SC was appointed to inquire into and report on the allegations and into the operation of the Health Care Complaints Commission.

In that Inquiry, we decided not to hold public hearings in respect of each of the 140 allegations of inadequate patient care or poor administration. We did that for a number of reasons:

(a) the Inquiry was somewhat unusual in that we were also asked to look at the operation of the Health Care Complaints Commission, the body responsible for investigating registered health practitioners;

(b) the terms of reference allowed the Inquiry to determine which allegations would be likely to result in disciplinary action against one or more health practitioner and then to refer them to the Health Care Complaints Commission. Hence, it was not necessary to make specific findings of fact concerning each allegation and any disciplinary action which resulted would occur after the statutory procedural fairness requirements had been met;

(c) the very personal nature of much of the evidence; and

(d) the time and resources which would have been spent in a public hearing supported the gathering of information through other means.

Ultimately, the Inquiry found that the claims of the whistleblowers, whom we conservatively described as the nurse informants in the report, were supported only in part. Some allegations were made by those who had witnessed the events complained of, some were based on events told to our informers by those who had witnessed them and some fell within neither category. In about half of the allegations made, the Inquiry's informer was not involved in the treatment of the patient..

Of the 140 allegations, fewer than 40 were considered to warrant further investigation by the Health Care Complaints Commission. Further, and importantly, the nurses' claims that administrators had deliberately set out to cover up the adverse events or to stifle investigation of the allegations were rejected.

However, the nurses' misgivings about the Health Care Complaints Commission were broadly vindicated. It was also found that many of the adverse events or clinical incidents could have been better handled by improved internal hospital procedures, by more open discussions between professional colleagues and by fuller disclosure to patients and families.

With the benefit of hindsight, it can be seen that, were each of the allegations investigated by way of public hearing, involving examination and cross-examination of each witness to each event by a number of parties, the cost to the public purse would have been considerable. Inevitably, and undeservedly, damage to some

[34] *R (Wagsaff) v Secretary of State for the Health* [2001] 1 WLR 292.

[35] *R (Howard) v Secretary of State for the Health* [2002] 3 WLR 738. (see *Judicial Review of Administrative Action* Aronson, Dyer and Groves 3rd Ed, Law Book Company, Chapter 8)

reputations would have occurred. Furthermore, I would, today, still be investigating those 140 claims.

While much of that inquiry did not occur in public—there were, I think. about six days of public hearings in all, the publication of interim and final reports enabled others to understand the processes followed, the people spoken to, the information gathered and the reasons for the findings and recommendations. Thus, public hearings are not the only method by which those who conduct inquiries into the claims of whistleblowers are held accountable.

Conclusion

Returning to the academic commentator quoted earlier, the angle of the venetian blinds through which whistleblowers peer is usually such that a full and unimpeded view of all the relevant information may not be available. Investigators with sufficient power to gather that material and assess it, and with open, although not empty minds, are a crucial part of the process of improving the health care system through encouraging disclosures and the proper investigation of those disclosures once they are made.