

CARIBBEAN OMBUDSMAN ASSOCIATION 5<sup>TH</sup> BIENNIAL CONFERENCE

EMERGING THEMES IN WHISTLE-BLOWING PROTECTIONS

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It would seem to be self evident that a Public Sector employee who finds evidence of wrongdoing and who draws it to the attention of the Public, should be supported and enabled to 'blow the whistle'. Indeed all of the systems, processes, legislation and independent enabling organisations which have been developed for over a decade are dedicated to this. Of course a number of principles and frameworks apply.

I return to the Standards in Public Life Committee who said the following,

'The essence of a whistle-blowing system is that staff should be able to by-pass the direct management line, because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel that the overall management is engaged in an improper course.'

Their advice in 1997 on drawing up whistle-blowing policy was that the following points should be made clear.

1. The organisation takes malpractice seriously, giving examples of the type of concerns to be raised, so distinguishing a whistle-blowing concern from a grievance.
2. Staff have the option to raise concerns outside of line management.
3. Staff are enabled to access confidential advice from an independent body.
4. The organisation will, when requested, respect the confidentiality of a member of staff raising a concern.
5. When and how concerns may properly be raised outside the organisation (e.g. with a regulator).
6. It is a disciplinary matter both to victimise a bona fide whistle-blower and for someone to maliciously make a false allegation.

Why is it then that these people who raise concerns are rarely thanked for their trouble? What is it in the culture of our organisations and our societies which praises individual acts of physical courage yet gives little recognition or encouragement to individual acts of moral courage? The tension between loyalty, a highly regarded principled behaviour and honesty also highly regarded is a very real one for the individual who perceives wrongdoing. Some definitions:-

'Muckrakers' - rarely have ties to the organisation being criticised.

'Stool Pigeons' - often have self interest as their main reason for disclosing information.

'Sneaks' - to act in an underhand or furtive way.

'Whistle-blowers' - usually relates to people who disclose moral wrongdoing for moral reasons.

So Whistle-blowers are people who act in good faith, without malice, to put information in the public domain to serve public interest and serve the wider community.

An article from 'Index on Censorship' some thirteen years ago described reactions to whistle-blowers, it said:-

"Reactions to Whistle-blowers whether they act anonymously or speak out openly are often ambivalent. The person we consider has performed a heroic public service will, in other eyes, be betraying the trust of

colleagues or the institution. So let us acknowledge immediately, that blowing the whistle may sometimes be the *wrong* thing to do. How many of us would accept our own apparent failings being publicly exposed by a colleague who may have misread the evidence, or has made no effort to raise the issue with us first?

But then something is seriously wrong, when the public is put at risk, and when a conscientious employee has tried everything to remedy the matter from the inside, the issues become clearer. The overriding public interest may lie in protecting our right to be told, and the whistle-blower's right not to be punished for telling us."

A whistle-blower then is a witness and not necessarily a complainant, an important fact I think.

### Some Emerging Themes

#### 1. External advice and support.

Those people who witness wrongdoing or feel pressured into actions which they believe to be wrong, for example covering up or remaining silent, may not feel confident enough to use the internal systems and frameworks, always supposing they know about them in the first place. Therefore the existence of external organisations like Public Concern at Work - an organisation in the UK with charitable status so that people can get free advice,

or

The Open Democracy Advice Centre in South Africa

The Public Interest Speak-up Advisors in Japan

The Whistle-blowers Australia

and

Transparency International

are an important part of the whistle-blowing machinery.

They all serve to give confidence to those who wrestle with issues of conscience and speaking out. They also give those of us with a very real interest in probity, the opportunity to learn about emerging themes and patterns and to be strategic in our thinking.

#### 2. Forcing Strategies

Neilsen, as far back as 1989 described what he called forcing strategies. That is some of the people who raise concerns may not have enough information or broad experience to make a judgement about the soundness of their concerns. They may draw conclusions on limited evidence. Forcing someone through a whistle-blowing process can effect:-

- The individual - their well being and career
- The organisation - it's reputation
- Relationships - co-operation and trusting relationships may be badly damaged
- The public - it's perception of a sector

The responsible press has a role to play here in managing the balance between shining a light on poor performance, poor judgements, mistakes, or wrongdoing and sensationalising and exaggerating a story where the main benefit may be to sell papers and little else.

### 3. Unwieldy Mechanisms

I was struck by an article by Stephen Taub and Tim Reason entitled:-

#### Whistle-blowers Never Win - June 2007

They say that in the United States that of the 1,000 employees who have claimed Sarbox whistle-blowing protection, some have settled, many have seen their cases dismissed but not one has made it past company appeals and winning the case.

I ask the question, have we got the systems balanced? Of course we need to ensure all the proper protections are in place to protect individuals and organisations. And of course we need evidence, judgement and appeal systems. But I fear for individuals who are outweighed by organisational and government resources, when an occurrence or behaviour, not of their choosing, comes to their attention and they make a moral choice about their action. They may not have bargained for the length of time, sometimes years, they will have to fight, because often their 'witness' status is altered by those who choose to fight them. They may not have bargained for the hoops they have to go through as the system takes over and they move from one level to another. They may not have bargained for the strength of feelings from some colleagues, family, friends and strangers who somehow blame them for uncovering wrong doing.

Are we in danger of encouraging people to 'look the other way' because the machinery takes on a life of its own? An article in Time magazine entitled 'Integrity and Ruined Lives' demonstrated that those people who put their convictions before personal wellbeing may have, in the long run, brought some advantage to the wider community but cost them dear. Have we moved on? Or are we in danger of adding more complexity to a system which will deter speaking up and speaking out and result in poorer public services rather than better ones?

### The Rise of Good Governance

In the United Kingdom we have seen the emergence of governance first as an issue, then as a body of work which has gained momentum since the publication of the Cadbury Report in 1992. It was swiftly followed by a plethora of reports and codes all ensuring that Boards of Public Bodies paid attention to not only what was done but also how it was done. It is very clear now that Boards have two main roles, under the headings of Conformance and Performance. Declarations of conflicts of interest are required as are Annual statements of personal interests. Boards comprise lay people who are selected, on merit, against published criteria and by open and transparent process - no longer because of whom they might know. This framework can now link up with internal audit and external audit to give a comprehensive governance structure which can encourage and require better behaviour in our organisations and help create a culture of right doing rather than wrongdoing.

There is still a great deal to be done but, to quote the poet Natsha Josefowitz 'We are not yet where we are going, but we are not now where we were.'

Rennie Fritchie

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