

7 November 2006

Whistleblowers and the law

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However, the state opposition says the proposed change doesn't go far enough and people like Toni should be protected even if they tell all to the media.

Also last week the Commonwealth, Queensland and New South Wales Ombudsmen launched a report which spells out the many inconsistencies and gaps in the various state and territory laws governing whistleblowers.

Transcript

This transcript was typed from a recording of the program. The ABC cannot guarantee its complete accuracy because of the possibility of mishearing and occasional difficulty in identifying speakers.

Damien Carrick: Welcome to this Cup Day edition of The Law Report.

While the punters are considering the odds and the boom gates are quivering, we'll be turning our attention to those in the work field, who take the biggest punt of their professional lives; whistleblowers in the workplace.

Man: To be called a whistleblower meant that you had lost your job, your spouse had divorced you, your children didn't speak to you, and your home had been repossessed. That culture has changed now.

Damien Carrick: It may have changed in the UK, but how about here in Australia?

Right now, Queensland is grappling with the issue as it tries to learn what lessons it can from the so-called Doctor Death scandal at Bundaberg Hospital.

Toni Hoffman: We tried so many different ways and I became the problem, and they tried to discredit me and they wanted to send me for counselling and the director of nursing gave me a book to read on how to deal with difficult people and said that I lacked conflict resolution skills.

Damien Carrick: Toni Hoffman, the nurse who lifted the lid on Dr Jayan Patel.

Just last week the Queensland government proposed legislation that would protect whistleblowers like Toni Hoffman who in desperation spilled the beans to a local MP. However the state Opposition says the proposed changes don't go far enough, and people like Toni should be protected, even if they tell all to the media.

Also last week the Commonwealth, Queensland and New South Wales Ombudsmen launched a report which spells out the many inconsistencies and gaps in the various state and territory laws which govern whistleblowers. The author is Dr A.J. Brown from Griffith University. He says as the legislation stands now, Toni Hoffman may well be regarded as a hero, but she's sitting on the wrong side of the law.

AJ Brown: Well there are actually two aspects to that. She did disclose the problems in Bundaberg internally in her organisation, that was a public interest disclosure, but nobody recognised it, neither she nor the agency treated it like one, didn't realise it was under the legislation, and she was protected in relation to that, but nobody knew. Then what eventually happened when she went to her local member and it became public, when she went to her local member, that particular disclosure is not protected at all under the legislation, even though it's the one that went to the remedial action and the inquiry and everything getting sorted. So those two sides of the equation show when you've got systems which aren't working too well, and legislation which isn't hitting the mark.

Damien Carrick: So let's get this straight: you're talking about somebody who's been celebrated as a hero for having exposed Dr Death, by going to the MP was not protected under the current legislative framework in Queensland.

AJ Brown: That's right. Simply because was a politician, not a listed entity under the Act, then it's the same as a disclosure to any other person. She didn't make the whole thing public, whether or not she could be prosecuted for defamation by Dr Patel for example is still a bit of an issue potentially. The only thing we can be grateful for is that he isn't in the country to try and pursue that sort of action.

Damien Carrick: And just last week in Queensland there's been discussion about amending the legislation. I think the government and the opposition have put up two different proposals. The Beattie government has said you will be protected if you go to your local MP, and the opposition have said that's not good enough, you need to be able to go to the media and also be protected. What do you make of those two proposals.

AJ Brown: They've both alternatively attempted small steps in the right direction, but they're both symptomatic of the fact that most of the legislation in the country has got all sorts of technical defects, which really need a much bigger rethink. The government proposal to recognise that whistleblowers should be able to go to politicians if necessary of course, I mean it's logical, and it's the absolute minimum that should be able to be done, but we really need to look beyond the absolute minimum here. It's really not credible to have any legislation like this that doesn't deal with disclosures to the media in reasonable circumstances. There's only one piece of legislation in the country which even contemplates that at the moment, which is the New South Wales legislation, otherwise it

doesn't even get a look in, legislatively. And in Queensland, it still doesn't. So it's just simply not credible to really be able to call any of this legislation viable when it doesn't deal with the ultimate and most damaging forms of whistleblowing, as in potentially damaging to the whistleblower.

Damien Carrick: So around the country we have what, a patchwork of laws in the different jurisdictions?

AJ Brown: I try and call it a tapestry, because it's got some rich threads. The problem is that there's no single law which even approaches what would be reasonable best practice. Everybody's experimented, nobody's really got a good handle on what best practice would look like, people have experimented in the wrong direction, people have made mistakes that have been repeated by other jurisdictions, the Commonwealth has effectively no real legislation, and so accordingly, it's not the situation where biting around the edges of problems in some jurisdictions is really going to solve the legislative problems anywhere.

Damien Carrick: So what are the big problems with this tapestry? What do you regard as the big shortfalls?

AJ Brown: One of the big problems is definitely the fact that most legislation except for New South Wales, doesn't deal with the scenario where it's reasonable for a whistleblower to go public. That's an obvious shortfall. There are problems in some jurisdictions we define a whistleblower to be any member of the public, just like any other complainant or witness in a criminal trial, as opposed to people within organisations, which is what we're really interested in. They're the people who these??? regimes are intended to try and protect and encourage to come forward in a responsible way. That's a basic piece of confusion that doesn't help us.

There's the fact that in some jurisdictions wrongdoing has to be extremely serious in the public sector before it even triggers anything under the Act, and Victoria is the jurisdiction that first introduced this particular problem, and it appears to have been by accident. It appears to have been a legislative drafting error as far as we can tell. That means that in Victoria something would have to be a criminal offence, or something would require the dismissal of a public official before that particular type of misconduct could trigger a protected disclosure.

In another jurisdiction it could be something very serious, but not that serious, or not that possible to route home to one culpable individual. It might be a systemic failure of policy in an organisation leading to the deaths of people, but you wouldn't be able to treat that as a protective disclosure in Victoria. But the problem with that particular principle for example, is that that was the principle that's been adopted in the Victorian legislation, that legislation was then copied in Tasmania, and the Bill that's been sitting before the Northern Territory parliament for some time is similarly based on a copy of the same legislation, without anyone up until now having noticed the extent of the difference

between the legislation or the instruments in those jurisdictions, and what would happen anywhere else in the country.

Damien Carrick: Now presumably all the legislation we're talking about only covers the public sector; is there any protection offered to whistleblowers in the private sector?

AJ Brown: Well there is, and that's a really encouraging sign and it's very important. The legislation we've reviewed is all public sector wrongdoing related, and generally speaking that's how it started out. But especially since things like Enron and WorldCom and US legislative developments, there's been amendments to the Corporations Act, which means that in the private sector, any employee of any corporation who reports any breach of the Corporations Act, which is very broad, either internally or to ASIC, the company regulator, receives a variety of quite significant legal protections for doing so. So the private sector has in parallel, been catching up with the public sector. And what we've now got to look at is how to maximise best practice from each sector, and then try and look for ways to make that mutually reinforcing.

Damien Carrick: What sorts of harm have you seen whistleblowers experience as a result of fronting up and saying, 'We've got a problem here'.

AJ Brown: Well the first harm that whistleblowers experience, and will almost always experience, is just stress, is just dealing with the process. It's never an easy process, so even if people aren't actively harassed, it's very easy for people to simply find that their life is suffering, and that consequently their career is suffering. But beyond that, it can go through to people being sacked, people being terminated, people being harassed by colleagues, people being physically assaulted by colleagues, or associates of colleagues. I mean in almost any type of human behaviour that you can imagine, is potentially going to be part of a reprisal whistleblowing scenario.

Damien Carrick: Dr AJ Brown, head of the Whistleblower Project, and Director of Integrity and Corruption Research at the Key Centre for Ethics, Law, Justice and Governance at Griffith University.

Of course one person's public interest whistleblow, is another person's breach of confidentiality, personal vendetta, politically-motivated leak or even crazy ramblings. And when talkback jocks and point-scoring politicians get involved, things can get very messy. As they did in the case of Nurse Nola Fraser.

Several years back she spoke to the media about conditions in Sydney's Campbelltown and Camden Hospitals. She claimed that patients were dying unnecessarily, and deaths were being covered up. There were even claims of euthanasia, and rape of patients.

Last year, after a number of inquiries and the ending of several careers, the New South Wales Independent Commission Against Corruption, found that there was no substance to any of these serious allegations. Certainly, Fraser's claims brought attention to medical

error in under-resourced hospitals, but there have been no findings of fundamental wrongdoing.

But there was no such ambiguity in the case of Bundaberg Hospital's Dr Jayant Patel. Nurse Toni Hoffmann made repeated attempts to draw attention to the surgeon's work.

Toni Hoffman: It was about five weeks after he started, I put in the first complaint. And it was because he was described; his first patient that we had in that he did very large-scale surgery on, an oesophagectomy on a patient in Bundaberg, and the patient came back very unstable and progressed to being brain-dead, and Dr Patel insisted on describing him as stable. And that was my first email that I sent to the Director of Medicine, and I went up to see him. And I was very concerned that our thought processes were so different. I remember saying to him, 'You know, it was like we were on a different planet when he told me that I had to learn to work with him, because he was from a different country.'

Damien Carrick: And from then on, what happened?

Toni Hoffman: From then on, I just became increasingly concerned and when I looked back on my emails and my complaints there was probably about one every one to two months, something like that. And whether it will be a report or an email, or a complaint, we tried lots of different avenues to try and address the issues that we had. There were patients coming in that wounds were falling apart, there was wound dehiscence. We tried to address that from an infection control point of view, we tried to address the types of surgery he was doing from the service capability point of view. Infection control, we tried so many different ways, and I became the problem, and they tried to discredit me and they wanted to send me for counselling, and the Director of Nursing gave me a book to read on how to deal with difficult people, and said that I lacked conflict resolution skills.

Damien Carrick: Although I believe that there were indications that some of the medical staff also had concerns about Dr Patel?

Toni Hoffman: They had concerns. It was one of the medical staff that coined his name, 'Dr Death'. You know, they said that they would never allow him near them, and towards the end of the two years, we were actually hiding patients from him. Admitting the surgical patients medically and transferring them to Brisbane, so that he couldn't operate on them.

Damien Carrick: So you were telling whoever would listen about your concerns about Dr Patel, and there were other senior medical staff who also had concerns about his competence, yet nothing was happening?

Toni Hoffman: Well they also tried. They at times took their concerns up to the Medical Director, but they were very afraid. Dr Patel had ingratiated himself among the executive, and they were very afraid that a lot of them were there on work visas and they were afraid that they would lose their jobs and Patel would keep his.

Damien Carrick: I understand you actually took your concerns to 12 different people?

Toni Hoffman: At least 12 different groups of people. I mean there were a lot more than that, because when I talk about doctors, I talk about the whole group of doctors, not just individuals. But yes, it included the police, the coroner, the Chief Health Officer of Queensland Health, the Head of the Royal Flying Doctor Service. The union took my concerns on my behalf to the Health Rights Commission. It was endless. As well as the internal people. And the final large complaint, the October complaint, which Commissioner Davis calls the Hoffman letter, that was in relation to a really terrible situation we had that Dr Patel delayed the transfer of a patient to Brisbane, and he died later that night. And the next month they gave Patel Employee of the Month. So we knew, like everybody knew, that whatever they said, it wasn't going to make any difference, and that was a very good example of how our complaints weren't being taken seriously.

Damien Carrick: So what changed? I understand you actually went to your local MP, Rob Messenger.

Toni Hoffman: Yes. We were waiting on the complaints to be looked at, and nothing was happening, and then something did happen, the Chief Health Officer came up and did an audit, it was called a fact finding mission, and nothing happened and nothing happened, and there were still more cases of patients dying; a 16-year-old boy lost his leg, and things were just getting worse, and we just thought what can we possibly do? And I went to Rob Messenger, who was the local MP, who was known for his concern about what was going on at Bundaberg Hospital. And I went to see him and he tabled the letter in parliament, and then the media got hold of it.

Damien Carrick: Tell me, what was the response from your colleagues once you'd gone to Rob Messenger and people put two and two together and worked out that you were the one who'd gone to your MP?

Toni Hoffman: Well initially, they were appalled that this had happened, because it was against the Queensland Health Code of Conduct, and we were threatened with jail, the ICU staff, and I couldn't say that it was me who did it, so it was a good probably two or three weeks after that happened before I acknowledged that it was me.

Damien Carrick: But did you suffer any reprisals from your work-mates?

Toni Hoffman: There were people that wouldn't speak to me, and yes, I've been threatened. Not so much from my workmates that I work with in Intensive Care, but other people, definitely.

Damien Carrick: Just last week, the Queensland government put forward changes to legislation which would offer protection to people like yourself when you actually go and talk to an MP about a whistleblowing issue, and the Queensland Opposition have said

that doesn't go far enough, you should be offered protection even if you go public, even if you go direct to the media. What's your view on that debate?

Toni Hoffman: Definitely I think you should be offered protection if you go to the media. I mean not just about everything, and not just about little things, and you know, you have to have gone through the right channels first, you know, internally, but when you do that and you get no result, and you're extremely worried there should be some avenue for anybody to go to in anything, whether it's health or whatever, there should be some sort of avenue for people to be able to do legally, without having to whistle-blow.

Damien Carrick: But where do you draw the line between legitimate whistleblowing like Toni Hoffman's, and breach of confidentiality?

AJ Brown admits the line is grey, and that's why he maintains we need proper systems to deal with difficult cases, because right now, employees are sometimes charged for leaking confidential documents.

AJ Brown: We don't have any hard statistics on how often it happens but we know it does happen, certainly in the public sector, that public servants are often threatened with the fact that even though they're expected to act in an ethical way, that actually includes not going outside the organisation with their concerns, and that's problematic because sometimes it is going to be reasonable in the public interest for people to go outside with information. So as long as legislation doesn't deal with that issue and provide some clear rules for it, there's always going to be a problem area.

Damien Carrick: There was a celebrated case, you had the *Herald Sun* journalists who are possibly facing contempt of court charges for I think publishing a document which was leaked from the Department of Veterans' Affairs and the person who actually did the leak has I think been prosecuted and convicted, I don't think they went to jail or anything like that, but they were prosecuted.

AJ Brown: Yes, and at the same time you have a situation where the journalists involved could have been prosecuted for contempt of court for not revealing their source, but the federal government intervened to suggest that that would have been too harsh.

Damien Carrick: I think the prosecution might still go ahead but jail would be an inappropriate response.

AJ Brown: Yes. So on one hand government recognises politically and from a public policy perspective, all governments recognise that public whistleblowing is an inevitable part, and in fact a reasonable part of the landscape when it comes to whistleblowing; it will be reasonable for some people to go public and they'll end up being vindicated, and everybody will agree that it was reasonable for them to go public. But only in New South Wales to some extent is there legislative provisions which makes it clear that in fact where it's reasonable, those people are protected. In every other jurisdiction we've got this massive problem of the mixed message, a big double message about saying 'We expect

you to behave ethically and report wrongdoing but if for whatever reason you persist in doing that publicly, then we might take a completely different attitude.

Damien Carrick: Very complex question though when you're dealing with issues which may have political dimensions to [them]. If you're not suggesting criminal activity or misallocation of resources, or if it is something which is simply embarrassing, where's the public interest in terms of an employee breaching their obligations to their employer?

AJ Brown: Well we'll only ever know that fully at the end of the day, that's the nature of these cases, which is why the law, what the law needs to do is set out some clear procedures that says that people should raise concerns internally first, and then they need a valid cause to go wider if in fact they expect their disclosure to be protected. And what the protected means is that at the end of the day the protection is a defence that they can assert. If they are being prosecuted, if they are being charged with disciplinary action, or they're being sued for defamation, or whatever, it's at that point that the protection cuts in. What the legislation can provide is a defence, so they can stand up and say 'No, I've got a conclusive defence. I believe, I am arguing that I was vindicated, that I had valid cause to go wider.' This is why, this is why the disclosure is reasonable, irrespective of in fact what the technical outcome of the investigation might be, who, what, or could, or could not exactly be proved.

Damien Carrick: Dr AJ Brown.

Lawyer Guy Dehn is familiar with the complex issues around whistleblowing. In Britain, he's regarded as the whistleblower-in-chief, looking after the interests of those who expose wrongdoing.

Guy Dehn: There were a number of really quite bad public transport disasters, and also financial scandals in the late '80s and early '90s. There was a rail crash at Clapham Junction in London, where the official inquiry had found that one of the inspectors had seen the loose wiring, but had not said anything about it, because he didn't want to rock the boat. There was a ferry disaster at Zeebrugge where 192 people lost their lives, and the reason the ferry sank was that it had been sailing with the bow doors open, and the inquiry found that on five occasions before the disaster, staff had raised concerns about the ferry sailing with the bow doors open. But those concerns had been lost in middle management. We had a newspaper tycoon called Robert Maxwell who sacked a whistleblower who questioned what he was doing with the pension fund and that gave him two years to pillage the pension fund and make off with 400 million pounds. And then there were disasters in the healthcare field as well, where a doctor who was a serial murderer called Howard Shipman; and there were disasters at one of the paediatric units in one of England's major hospitals.

Damien Carrick: In Bristol.

Guy Dehn: In Bristol, indeed, yes. Where Steve Bolsin, who is now back in Australia, played a vital role and really demonstrated how important the role of whistleblowing is and what whistleblowers can do.

Damien Carrick: Now the director of Public Concern at Work, Guy Dehn, was responsible for drafting groundbreaking British legislation aimed at protecting whistleblowers from victimisation or dismissal.

The Legislative scheme also tries to impartially separate out vexatious complainants from genuine whistleblowers.

Guy Dehn: The legislation provides a framework within which we know that the organisations and the regulators will need to behave, and it gives reassurance to people that it is safe and acceptable for them to raise their concerns, and in the very extreme cases where someone might be victimised for it, then it obviously means they're fully protected. I think one of the important things that's happened in the UK is that when we started, to be called a whistleblower meant that you had lost your job, your spouse had divorced you, your children didn't speak to you, and your home had been repossessed. So encouraging people to blow the whistle would be a bit like say if you wanted to encourage people to go church and you said they had to be crucified. That culture has changed now, and the pejorative meaning has disappeared, and many, many people see whistleblowing as a perfectly safe and acceptable thing to do.

Damien Carrick: Now the legislation you're talking about, I think it's the Public Interest Disclosure Act of I think 1998. It covers both the private sector and the public sector, and I understand that you can come forward and say, look, I tried to raise a complaint and I was punished because I did. What kinds of remedies can you get if you are punished by your employer, or indeed former employer for having raised concerns?

Guy Dehn: It's a civil law protection, there's no criminal sanctions attached to it, and you are compensated for your losses. It's based on discrimination legislation, so it's very similar to if someone discriminates on the grounds of sex, race, sexual orientation, age, whatever; but it's saying you don't discriminate against people who are raising public interest concerns. And the compensation is uncapped, so it can be very substantial. The largest award so far is five million-pounds, which is about \$12 million.

Damien Carrick: About \$AU12 million?

Guy Dehn: Yes.

Damien Carrick: What was that for?

Guy Dehn: That was two guys who worked at an estate agents, so they were very senior estate agents and there was some malpractice in the way there was a possible takeover of the estate agent, and they reported that to the regulatory authorities and they were dismissed for that. But ordinary people get compensation for their losses. If the culture is

one where they are unlikely to work again, then essentially they will be paid their salary until they retire, but without any obligation to turn up at work. So that helps shift the culture in organisations, so that they view whistleblowers and public interest whistleblowers as perfectly employable.

Damien Carrick: Are there any such cases? What do you do? You front up to a tribunal and say 'I was punished; I was penalised for speaking out?'

Guy Dehn: Yes, the whistleblowing law is part of overall employment law, so there's an employment tribunal that people can go to if they think they've been victimised. So in the last year, there were just over 1,000 whistleblowing claims registered at tribunals, pretty much two-thirds of those will settle, so in other words the employers will compensate the employee at that stage. Of those that don't settle, the whistleblowers win, about one in three of them.

Damien Carrick: What happens to the other two-thirds?

Guy Dehn: They're lost. Most of the claims that do get to tribunal we would imagine would lose because basically the good ones, the employer won't shoot the messenger and will deal with the message. The bad employers who do shoot the messenger, should very quickly realise what a big mistake they've made, and would settle it. So it's trying to stop things going wrong and where they do go wrong, sort them out very early.

Damien Carrick: Well we've had the \$AU12 million payout. Can you describe some of the more everyday or prosaic sort of cases that come before the tribunal?

Guy Dehn: There can be a whole range. There was one quite recently about a guy who - there was a beach in the northeast of England which was run by the National Trust, and one of the guys who looked after the beach was concerned to find that there'd been a report saying that the beach was actually unsafe for public access. It had been a report that had been commissioned by the local authority. They were trying to work out what to do about the dangerous material on the beach, and after they'd been to-ing and fro-ing for about a year, he thought this was more than enough. The report was confidential, and he raised it with the local media and he was dismissed for that, and the tribunal held he was protected.

There's really a full range. They can be people in voluntary organisations raising concerns about misuse of charitable money; it's as rich and varied as human life. Basically what the legislation is focusing on is where the whistleblowing concern affects others. So it's not about where one's own personal interests are at risk.

Damien Carrick: Is there a fine line between what constitutes whistleblowing and wanton breach of confidentiality or pursuing your own agenda?

Guy Dehn: It is a grey area. I mean you can help people through it. If someone is, in a sense, pursuing entirely their own agenda, it's sort motivated by spite, and there's no

public interest aspect to what they're doing, then the chances are they would not be protected under the legislation. There's still quite a lot of people who may confuse what is a whistleblowing issue with a private complaint, but that gets sorted out in the wash, so to speak, and I suspect that quite a few of the tribunal cases that fail, where in a sense there is no whistleblowing, and it was just a private employment dispute going on.

Damien Carrick: It's tricky, isn't it, because a private employment dispute can be a personality issue between you and your manager; it can then skid into bullying, it can skid into sexual harassment, and where do you draw the line between what constitutes a private internal situation and something where there are issues of public interest both internally and perhaps externally?

Guy Dehn: Well in the end it's an issue of fact. It's whether what someone was doing was that did they make a public interest disclosure? Were they blowing the whistle, and were they victimised for blowing the whistle?

Damien Carrick: Have you seen any lawyers or perhaps opportunistic complainants come forward, and can you tell me about them?

Guy Dehn: Well surely there are, because you know one of the effects of the move towards whistleblowing in the UK has been this change in the culture. It has meant that if you win your claim you can get more money, and obviously there are some bad guys and sometimes bad guys, they don't want to put their hands up and saying 'Fair cop, I'm a bit of a shit', what they actually want to do is say, 'The other guys have got it all wrong'. And so they may attempt to sort of engineer that their dismissal, victimisation, was due to whistleblowing. But as I say, those to the best of our knowledge, they seem to come out in the wash, and it's important to say that the legislation now which is six, seven years old, retains the strong support of the business community, unions, employers organisations and regulators and the wider public. So it's pretty well constructed. I can't say it's watertight, but it's seaworthy.

Damien Carrick: UK lawyer Guy Dehn, director of Public Concern at Work.

And that ends this Cup Day edition of The Law Report. I hope you backed a winner. A big Thank You to producer Anita Barraud, and to technical producer, Brendan O'Neill.

Guests

Toni Hoffman,
Whistleblower, Dr Jayent Patel scandal, Bundaberg Hospital

Dr AJ Brown,
Head, Whistleblower Project, and director, Integrity and Corruption Research at the Key Centre for Ethics, Law, Justice and Governance, Griffith University

Guy Dehn,
Director, Public Concern at Work, UK

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