



GREY AREAS NEWSLETTER

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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Whistleblowers and Regulators Part 2

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As discussed in the July edition of *Grey Areas*, whistleblowers are insiders within an organization who disclose apparent wrongdoing to outsiders because the organization is unable or unwilling to address the issue.

In the July article, we looked at the topic of whistleblowers who make disclosure to regulators about a regulated person or entity. In this article we discuss two other contexts in which regulators may deal with whistleblower reports:

1. Regulated entities who report whistleblowers to the regulator for improper whistleblowing activities.
2. Insiders within a regulator who blow the whistle about the actions of the regulator.

Using Regulators to Stifle Whistleblowers

Some organizations operate under the principle that the best defence is a good offence. Thus, where a whistleblower has made disclosure to the regulator, or to a third party, the organization may complain to the regulator about the conduct of the whistleblower.

Typically, the concern of the organization is about one of the following:

1. The whistleblower breached confidentiality.
2. The whistleblower was an active participant in the misconduct on which they reported.
3. The whistleblower's report was dishonest and/or made for a collateral, self-interested purpose.

Regulators must be cautious that their processes are not used to retaliate

against the whistleblower. Recently the [physician regulator in the UK commented](#) on this phenomenon in the context of the public inquiry into tainted blood:

Over the last few days we have also seen investigative media reports alleging that a number of NHS [National Health Service] managers have taken actions to silence whistleblowers, including threatening referral to the GMC [General Medical Council].

We are of course aware that referrals to us are sometimes used to intimidate. This is completely unacceptable, has significant consequences for doctors' wellbeing and puts the safety of patients at risk.

We've put a number of safeguards in place to help make sure that the referrals that come to us are fair, appropriate, and proportionate.

Concerns raised with the regulator are occasionally overblown. Confidentiality provisions often do not apply or are unenforceable when a whistleblower reports misconduct, particularly illegal misconduct or misconduct that affects the health and safety of individuals. It is not uncommon for whistleblowers to have had some involvement in the misconduct until they realize its significance or the moral injury to the whistleblower reaches the point where they can no longer tolerate the behaviour. Also, the motivation or accuracy of the whistleblower's report does not nullify the need for investigation and evaluation.

This is not to say that a complaint against a self-styled whistleblower is never valid.

For example, in [Mulligan v Ontario Civilian Police Commission](#), 2020 ONSC 2031, an OPP police Sergeant submitted a letter to the editor of the Sudbury Star criticizing the move of an OPP helicopter from Sudbury to Orillia saying it would jeopardize public safety. He was disciplined for breach of confidence and discreditable conduct. On judicial review the Divisional Court upheld the finding that the "whistleblower defence" was not available to Sergeant Mulligan because he had not first raised his concerns within his chain of command. The Court said:

There may be a situation where the issues raised are so pressing and urgent and the chain of command so obviously dysfunctional or corrupt that going public first is the only reasonable option. However, Sergeant Mulligan never argued that the urgency of the situation made it impractical for him to raise the matter internally first. Furthermore, the evidence he presented did not meet the threshold required to demonstrate the type of dysfunctionality or corruption that would be required for this type of exception to the usual rule.

Further, it is also not inconceivable that the major player in a scheme of misconduct might pre-emptively report against a less involved participant in order to wrap themselves in the mantle of a whistleblower.

Regulators need to be cautious about their processes being used to inappropriately intimidate or retaliate against legitimate whistleblowers. Regulators should consider the

possibility that organizations are using them to avoid or mitigate the actions of whistleblowers. For example, exercising the authority to take no action on frivolous and vexatious complaints might be suitable in some cases.

Whistleblowers About Regulators

Regulators themselves might be the subject of a whistleblower report by a staff, committee or Council member. Such an occurrence can be dismaying and disruptive.

For example, in the UK a whistleblower received extensive media coverage when alleging that the attempts of the Nursing and Midwifery Council to address its backlog of complaints have placed unwarranted pressures on staff and have resulted in hasty decisions that do not adequately protect the public interest. The oversight body for the regulator, the Professional Standards Authority, has become involved, publishing the following statement:

We are grateful to the whistleblower for raising concerns about the Nursing and Midwifery Council with us. It took courage to raise these concerns and we know the toll that whistleblowing can take on individuals.

We met with the whistleblower in October 2023 and discussed how we will take forward the information shared with us. Since then we have been copied in to further communications about the concerns raised. We have also responded directly to the whistleblower following their

communication to the PSA this week.

We agree that their concerns are serious and have the potential to impact public protection. As part of our role, we assess regulators, including the NMC, against our [Standards of Good Regulation](#).

These Standards are designed to assess whether regulators are performing their role in a manner that protects the public, upholds professional standards and maintains confidence in the profession. We undertake our assessments on an annual basis, reviewing evidence throughout the year in order to form judgements at the end of each review period as to whether our Standards are met. The whistleblower's concerns form an important part of the evidence base for our current review of the NMC, which runs from July 2023 to June 2024.

We are aware that the NMC has commissioned independent external investigations into the matters raised by the whistleblower. The Charity Commission has also initiated an investigation. We have been engaging with both the NMC and the Charity Commission in relation to these and will be monitoring their progress carefully. The outcomes of these investigations and how the NMC responds to them will be important evidence for us, informing any additional work we may undertake. We retain the right to launch our own investigation, in addition and separate to our performance

review process, at any time. We are keeping the Department of Health and Social Care informed about the situation and our work relating to the issues raised.

Apart from good governance and good management, ensuring adequate resources for regulatory tasks, and a culture of openness to feedback, regulators can proactively address the risk of being the subject of a report by establishing a credible whistleblower program within the organization. Such a program could address concerns before they become bigger issues and enhance the regulator's effectiveness. These advantages need to be balanced against common disadvantages, including the

resources required for a good whistleblower program and the possibility that the program will be overused for less serious or inappropriate types of concerns.

Conclusion

Whistleblowers are a reality for regulators. With proper planning and good processes in place, whistleblowing can enhance the ability of regulators to achieve their mission. Inappropriate responses can create undesirable consequences for the public interest and the regulators themselves.

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