University College of the Cayman Islands Caribbean Conference 2014
Towards a Corruption-Free Caribbean: Ethics, Values, Trust and Morality

Roundtable Session - Whisltleblowing as an Anti-Corruption Tool

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Evolution of whistleblowing legislation in the Cayman Islands

1. International anti-corruption agreements and conventions promote the enactment of whistleblower legislation in signatory states. The Cayman Islands does not have the power to sign or ratify international conventions in its own right and the UN Convention Against Corruption has yet to be extended to the Cayman Islands nonetheless the coming into force of the Anti-Corruption Law, 2008, on 1st January, 2010, gave effect to that convention.

2. One of the first modern uses of the term "whistleblower" was by US consumer activist Ralph Nader who, in 1971, described it as:

> "*An act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity*."

3. It is recognized globally that, in the fight against corruption, an essential element is the provision of information about wrongdoing by witnesses of such, but that the fear of reprisal will often deter persons from disclosing such acts.

   In 2013 Transparency International said whistleblowing:

> *"...plays a key role in the fight against corruption."*

4. The recognition of this key principle has resulted in more governments, corporations and non-profit organisations around the world putting whistleblower procedures in place, more usually officially known as "protected disclosures".

5. According to Transparency International, for legislation to be meaningful:

> *All employees and workers in public and private sectors need:*
> - *accessible and reliable channels to report wrongdoing;*
> - *robust protection from all forms of retaliation; and*
> - *mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing.* [1]

6. The Cayman Islands has enacted legislation during this century which attempts to provide a framework for the reporting of wrongdoing and for the protection of persons making such disclosures; however this has tended to be in an incremental fashion, with variable levels of protection scattered throughout various laws. It could be argued that the past reputation, deserved or underserved, of secrecy in both the public and corporate world, underpinned by the **Confidential Relationships (Preservation) Law** (CRPL), originally enacted in 1979, which provides that certain types of unauthorized disclosures are offences, has meant that it has taken some time to shake off such reputation and to inculcate that the reporting of reasonably perceived wrongdoing without fear of reprisals requires more robust legislation.

7. However, allow me to digress here to observe that the CRPL is not and has never been a hindrance to the provision of information to law enforcement or regulatory agencies where there is evidence of wrongdoing. Rather it provides a legislative gateway for the provision of such information and provides protection where it is done in compliance thereof. (see section 4)

[1] *Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest*, Transparency International, November 2013.

8. It can be argued that "Whistleblowing" needs to be distinguished from any statutory "duty to inform"; the positive duty of individuals to inform superiors or others of any wrongdoing that they discover or are aware of is often described as whistleblowing but this doesn't really fit with the Ralph Nader definition mentioned earlier. This type of "duty to inform" provision is becoming especially common in financial services regulatory regimes, and protection for such informers has perhaps, become mistakenly confused with protection for whistleblowers as contemplated by public disclosure legislation.

9. The functionality is similar; there is a disclosure and the person who made the disclosure requires some protection from sanctions that they may face. However, the motivation and the type of problems are different. In the case of the required disclosure, the person faces the choice of being subject to criminal or other sanctions for the act of non-disclosure. In the case of the whistleblower, it is more an ethical issue; something is wrong and they wish to see it set right often for the benefit of the organisation. Their disclosure also tends have a broader scope; the act might not be criminal; it could just be that there is inefficiency or, in the case of health and safety, that potential accidents would be prevented. For example, the investigation into the Herald of Free Enterprise disaster in 1987[2] found that employees had aired their concerns on five previous occasions about the ship sailing with its bow doors open. A member of staff had even suggested fitting lights to the bridge to indicate whether the doors were closed. The inquiry concluded:

> *"If this sensible suggestion ... had received the serious consideration it deserved this disaster might well have been prevented."*[3]

[2] Ferry which capsized moments after leaving the Belgian port of Zeebrugge on the night of 6 March 1987, killing 193 passengers and crew, because the bow doors were still open as they left the jetty allowing water into the car deck.
[3] Department of Transport, Court of Enquiry No 8074 (London: HMSO, 1987)

10. If this distinguishable character of duty to inform and pure whistleblowing is accepted then even some of the protections in some of the Cayman Islands financial regulatory laws have been wrongly identified by some as true whistleblower provisions.

11. The Insurance Law, 2010, which repealed its predecessor, was lauded because:

> *"Among the amendments is a strengthening of protection for whistle-blowing insurance managers and auditors."*[4]

The "new" Law provides protection against civil liability for persons making statutory disclosures to the Cayman Islands Monetary Authority. An example is at section 20, the duties of auditors, at subsection (6):

> *(6) A person carrying out or charged with the carrying out of any duty, obligation or function under this section shall not incur civil liability to any other person for anything done or omitted to be done in respect of the discharge or purported discharge of that duty or function unless it is shown that the act or omission concerned was in bad faith*.

For example an auditor may discover that a company is unable to meet its obligations as they fall due, is not keeping its books in a way that enables them to be audited, is carrying on business in a fraudulent or criminal manner or is not in compliance with regulatory requirements. The failure to make such mandated disclosures can result in professional sanctions including limited professional disqualification, and criminal offences. Failing to disclose are offences liable to fines of up to one hundred thousand dollars or to imprisonment for a term of five years, or to both.

12. Arguably this is not a true whistleblowing provision, because the disclosures under section 20, although still reporting "wrongdoing", are not made voluntarily and are not made for purely ethical purposes, they are statutory duties and the disclosures are made

[4] Whistle-blower protection strengthened by insurance law, Cayman Compass, 22 September 2010

under threat of serious sanctions; note the fine is up to $100,000. There is no provision in the Insurance Law for protection of a professional who makes a disclosure outside of his remit as, for example, auditor for a particular body.

13. Making such disclosures mandatory under the Law is one way of ensuring that the *decision* to make such a report is removed from the discretion of the individual. Therefore it could be said that the removal of personal responsibility in itself gives a level of protection for the individual. Reprisals may be minimized or eliminated because the person can "hide" behind the statute, so-to-speak. He or she makes the disclosures involuntarily, i.e. there is a statutory duty to do so. However, under the Law, there is no protection against harassment or other personal or specific employment related retaliation that may be meted out after making an unpopular statutory disclosure. The majority of provisions found in the financial regulatory laws of the Cayman Islands are similar to the above.

14. This can be contrasted with subsections (7) and (8) of section 21 of the **Anti-Corruption Law, 2008**, which do provide such protection for disclosers:

> *(7) A person who commits an act of victimisation against a person who has made a disclosure under subsection (1), (3) or (5) commits an offence and is liable on summary conviction to imprisonment for a term of two years.*
>
> *(8) In this section, "victimisation" means an act-*
>
> *(a) which causes injury, damage or loss;*
>
> *(b) of intimidation or harassment;*
>
> *(c) of discrimination, disadvantage or adverse treatment in relation to a person's employment; or*
>
> *(d) amounting to threats of reprisals.*

15. However the protection provided for the discloser here, again, is for disclosures mandated by the law, as such the question could be asked, are the persons who disclose under this protection truly whistleblowers? The disclosures are still made under the threat of

penalty for failing to do so; sanctions for failing to disclose range in severity, depending on the type of disclosure fines of $20,000 and imprisonment can result.

16. Cayman has perhaps incorporated a "true" whistleblowing provision in two laws in recent years. Under the heading "Part VIII Measures To Promote Openness" in the **Freedom of Information Law, 2007**, section 50 provides:

> *50. (1) No person may be subject to any legal, administrative or employment related sanction, regardless of any breach of a legal or employment-related obligation, for releasing information on wrong-doing, or that which would disclose a serious threat to health, safety or the environment, as long as he acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrong-doing or a serious threat to health, safety or the environment.*
>
> *(2) For the purposes of subsection (1), "wrongdoing" includes but is not limited to-*
>
> *(a) the commission of a criminal offence;*
> *(b) failure to comply with a legal obligation;*
> *(c) miscarriage of justice; or*
> *(d) corruption, dishonesty, or serious maladministration.*

This provision has been repeated verbatim in the **Standards in Public Life Law, 2013** (yet to come into force).

17. The above provision provides for disclosures made more out of conscience and not because of any statutory obligations. However this does not have general application and the protection afforded can only be claimed by persons working for public authorities. However certain public officers are not subject to the law in some circumstances, for example it does not afford protection to police officers in relation to their strategic or operational intelligence-gathering activities, or the judicial functions of court staff. However limited the application, the person making a disclosure will have made it

because of some reason not necessarily connected with his or her direct professional duties, and often may have done so for ethical reasons.

18. This provision has to be read and construed with with the Public Servant's Code of Conduct under section 5 of the **Public Service Management Law**:

> *(2) (h) a public servant shall not directly or indirectly disclose information which comes into his possession in his official capacity unless authorised or allowed to do so under this section, the Freedom of Information Law, 2007 or any other Law"*

19. The provision under the Freedom of Information Law would allow public servants to disclose wrongdoing, provided that the disclosure fulfilled the requirements set out therein; a complex set of circumstances and some may wonder aloud how the provision in the FOI Law would be applicable in this context; how would a public servant disclose wrongdoing, and to whom? The use of the term "*releasing Information*" is odd as opposed to disclosing to a specific body or person.

20. The provision of protection for "Whistleblowing" and protection for persons with a "duty to inform" is constantly evolving, it has been a work in progress, scattered throughout various pieces of Cayman Islands legislation giving various but limited protection to persons in the private and public sector.

21. Interestingly the Freedom of Information Law was not on the statute book during the 2005 Cayman Islands General Election when perhaps the most intense debate on whistleblowing in the public sector took place. The former Permanent Secretary of the Ministry of Tourism was alleged to have handed information to the local media in the form of documents he had obtained during his employment in the civil service. He claimed that the documents exposed potential corruption and abuse of office and the notoriety of the disclosures prompted a Commission of Enquiry to be set up

22. The Commission of Inquiry, held in 2008, was headed by Sir Richard Tucker, and still at that point the Freedom of Information Law, 2007 was not in force, that Law finally came into force on 9th January 2009.

23. The former P.S. claimed his actions in giving the information to the media were in the public interest and only made after complaints allegedly made to the Governor had been ignored, in fact the then Governor had no recollection of any such formal complaint. He therefore felt, according to him, that his only recourse to air the matters was to use the local media. However at the time of the disclosures, he had resigned from the civil service and was a candidate in the general election. In his report Commissioner Tucker remarked that the information which was the subject of the inquiry would be the type of information which could be disclosed under the coming Freedom of Information Law and that section 50 of the Law would provide adequate protection for whistleblowers.

24. Although he was found by the inquiry to have acted in breach of the then General Orders which regulated the public service it was recommended that no action be taken against him as, inter alia, the unauthorised disclosures did not cause any damage and the public had a legitimate interest in the information disclosed. He said that the information disclosed was of the kind the public will have a right of access to under the FOI Law.

25. In his report Commissioner Tucker opined that

> *"when it comes into force Section 50 of the Freedom of Information Law should provide bona fide "whistleblowers" with adequate protection"*[5]

26. However, he went on to say that it would be better if this protection was clarified in some form of practical guidance, perhaps in the form of regulations giving guidance to civil servants about the appropriate channels of communication. He repeated this advice in his concluding paragraphs, stating that :

[5] At para 8.3.1

> *"an important part of a whistleblower's protection is the knowledge that the person to whom it is blown will react appropriately. In other words guidance is needed both for the whistleblower and for the listener…"*[6]

27. Commissioner Tucker recommended that the "listener" should be the whistleblower's head of department, or if he or she is implicated, the Chief Officer of the Portfolio of the Civil Service or the Chief Secretary. If he feels he cannot disclose to them then he should go to the Governor or to the Auditor General, who he said, has authority to investigate the matter, no matter whether the complaint comes from the most senior or junior civil servant. However Commissioner Tucker did not recommend that Personnel Regulations were the appropriate place to provide protection for disclosures made to outside agencies, such as to the RCIPS, persons making such disclosures would need to rely the protection afforded by on section 50 of the FOI Law.

28. Following on from the Commission of Enquiry Report, the Law Reform Commission has decided to undertake a study of how to best provide protection to whistleblowers in Cayman. It is conceivable that their recommendation will go further than Commissioner Tucker and suggest that a Law be enacted which provides the necessary level of protection and gives an appropriate framework for the reporting of wrongdoing. It is possible that this new law will cover the private as well as the public sector.

29. Accepting the best practice recommendations of Transparency International and a study of globally accepted standards of such legislation; tailoring legislation to fit this jurisdiction should mean that Cayman can craft a modern, forward-thinking Law drawing on the experience of other jurisdictions.

30. For example Commissioner Tucker wrestled with the motive of the former PS when he made his alleged disclosures. Sir Richard concluded that the reasons were personal to the former PS and not because he truly thought it was in the public interest. Commissioner

[6] At para 11.3.1

Tucker therefore opined that the former PS was not engaged in whisteblowing[7]. However, should motive be a bar to protection of the whistleblower when it is clear that the information should, as a matter of public interest, be disclosed? I would add, provided such information is true, or there is a reasonable belief that it is in fact true.

31. This is a topic recently visited in the UK when the **Public Interest Disclosure Act 1998** (PIDA) was subject to reform last year. Despite its name, the legislation never made any reference to the "public interest" in affording protection to whistleblowers. Now, since June 2013, employees must reasonably believe that their disclosures are made "in the public interest" before any protection will be afforded. No guidance has been provided on what "in the public interest" will mean instead this concept will be left to the courts and relevant tribunals to develop.

32. Some may find it surprising that an additional layer of complexity in the form of the "public interest test" has been introduced, and it has been argued this may discourage those that would otherwise have decided to make a protected disclosure. The charity, **Public Concern at Work**, considered to be the UKs leading advocate organization for whistleblowers, says that, although PIDA offers strong and comprehensive protection for workplace whistleblowing and is a vital tool in the fight against corruption, it suffers from a lack of promotion and support by the UK government. Rather than see the legislation as key in the fight against corruption the charity thinks that the UK government views the legislation as "additional red tape" for UK businesses. The charity opined, in 2012, that the proposed amendments would create an additional barrier for those wishing to seek protection from the legislation.[8]

33. The justification put forward by some is, since PIDA was originally enacted, there has been a widening of the definition, by employment tribunals, of what amounts to a "qualifying disclosure". This has enabled opportunistic employees to make protected disclosures regarding purely private matters, such as issues regarding their individual

[7] At 10.6.5
[8] **Public Concern at Work**: UK submission to Transparency International whistleblower protection research project**,** 2012

employment contracts; a way of those employees circumventing the rules and being able to claim large amounts of damages for unfair dismissal because of whistleblowing that would otherwise have been capped.

34. The findings of a 2002 employment tribunal[9] appeared to allow employees to have a whole new cause of action for automatic unfair dismissal, with no service or age requirement and no cap on compensation, the employee could also claim interim relief until the date of the hearing which, if successful, would mean the employer must continue to pay the dismissed employee their full wages during that period.

    This was not considered to be within the spirit of the original legislation and prompted the 2013 reforms in the UK.

35. The requirement for disclosures to be made in "good faith" has also been removed. The rationale for this being, perhaps, that if the public interest is served by disclosures, it matters not what motivation a worker has in making them. This could lead to the somewhat peculiar outcome that disclosures may be made purely out of malice, or with the intention of personal gain, as Commissioner Tucker said was the reason for the disclosures by the former PS, but will be protected provided they are reasonably believed to be true and also reasonably believed to be in the public interest. Tribunals will be able to reduce compensation by up to 25% where bad faith is proved.

36. In conclusion the common law has never given workers a general right to disclose information about their employment. Even the revelation of non-confidential material could be regarded as undermining the implied duty of trust and give rise to an action for breach of contract. In relation to confidential information obtained in the course of employment, the common law again provides protection against disclosure. The duty of fidelity can be used to prevent disclosures while the employment subsists and restrictive covenants can be used to inhibit the activities of former employees after the relationship has ceased. However, post-employment restraints will only be enforceable if they can be

[9] Parkins v Sodexho Ltd [2002] IRLR 109,[2001] All ER (D) 377 (Jun)

shown to protect legitimate business interests and are reasonable in all the circumstances. Where employees have allegedly disclosed confidential information in breach of an express or implied contract term they may seek to invoke a public interest defence to a legal action. Thus to ensure a robust framework for the Cayman Islands to provide protection to those who would blow the whistle it is my belief that bespoke legislation is required.

Questions on what should or should not be contained in a Cayman Islands "Whistleblower" Law.

A. Should the legislation cover both the public and private sectors and should specific categories be exempted, for example the police service, or allegations about wrongdoing occurring abroad?

B. Should protection should be afforded to employees, a broader category of worker or to members of the public generally. Should the disclosures be directly related to the employee's workplace? UK and South African whistleblowing statutes do not require any link between the matter disclosed and the worker's employment, in New Zealand the "serious wrongdoing" must be "in or by that organization".

C. Should whistleblowers need to establish good faith as well as reasonable grounds for believing that their information is true? Arguably the public interest is best served if malicious reporting is dealt with simply by denying protection to those who have knowingly made a false allegation.

   For example section 10 of South Australia's **Whistleblowers Protection Act 1993** makes it an offence for a person to make a disclosure of "false public interest information knowing it to be false or being reckless about whether it is false".

D. How should disclosures which are found to be frivolous or vexatious be dealt with?

E. Legislation in the UK, South Africa, Queensland and the Australian Capital Territory provide the matter disclosed may have occurred in the past, be currently occurring or likely to occur. Should a Cayman Islands Law address potential future wrongdoing?

F. Should employers be vicariously liable for their employee's actions if reprisals occur? The 2013 amendment in the UK introduced a provision that treats detrimental acts of one co-worker towards another as being done by the employer, making the employer responsible. (The amendment includes a defence for employers that are able to show that they took all reasonable steps to prevent the detrimental treatment of a co-worker).

21st March 2014