JOANNE M DUNNE

WHISTLEBLOWING: REFORM AND THE PROTECTED DISCLOSURES BILL 1996

LLM RESEARCH PAPER
EMPLOYMENT LAW (LAWS 543)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1996

CONTENTS

ABSTRACT

Whistleblowing is a valuable check on action in the public and private sectors. This paper considers whether the Protected Disclosures Bill 1996 will effectively reform the law for whistleblowers. In analysing that issue this paper looks at the problems there are with the current law, whether reform is needed, what the reform options are, and whether reform would be effective. It is concluded that the current law leads to uncertainty and inadequate protection for whistleblowers. Reform is needed. When considering options for reform this paper concludes that a two-pronged approach would be the most likely and effective option to alleviate the current problems. That approach is to have reform via a statute and industrial reform encouraging employers to have internal mechanisms for whistleblowers. It is recognised that no reform would be absolutely successful countering the more subtle reprisals suffered by whistleblowers, but it is concluded that encouraging a more positive and supportive environment for whistleblowers could make those kinds of reprisals less common. It is also recognised that any reform must ensure that there is balance between the rights of whistleblowers and the rights of those named by whistleblowers. Intentionally false disclosures should be vigorously punished.

In the light of those conclusions the Protected Disclosures Bill 1996 is considered. It is compared with the Whistleblowers Protection Bill 1994 and Acts and Bills from other countries, in particular Australia. This analysis reveals the Protected Disclosures Bill to be deeply flawed. It sets up an extremely detailed and onerous set of procedures, effectively discouraging whistleblowing. Even more problematic than that, the Bill expressly preserves the common law, which runs counter to many of its provisions. The Protected Disclosures Bill is also toothless when it comes to protections from reprisals, leaving it to the whistleblower to take action. None of this leads to clarification of the existing law nor to any certainty for whistleblowers. Perhaps more forebodingly, given that there seems no major corruption in New Zealand, it seems unlikely that a Bill in this area will have high priority in a coalition or minority MMP Parliament.

This paper concludes that a new Bill is needed. A proposal of such a Bill forms the Appendix I of this paper.

Word Length
The text of this paper (excluding footnotes, bibliography and annexures) comprises approximately 15,000 words.

I INTRODUCTION

This paper starts with the premise that whistleblowing is a useful check in the public interest. For that reason it ought to be valued and a whistleblower ought to be protected from reprisal. This paper analyses the question of whether the law surrounding whistleblowing and whistleblowers needs reform. Specifically this paper considers what reform options there are, and whether the recently proposed Protected Disclosures Bill 1996 provides any useful progress.

When considering whether reform is needed this paper looks at the current legal situation. This paper concludes that whistleblowers face problems that are not adequately remedied by the current available protections, and that the protections themselves are unclear in scope and effect. It is also unclear how some of the law in this area interacts. This paper also considers the question of whether any reform would be effective in this difficult area in any case. It is concluded that the value of whistleblowing in the light of the contemporary emphasis on accountability, the evidence of reprisals suffered by whistleblowers and the confusion surrounding what legal protections are currently available for whistleblowers all mean that some sort of reform is needed.

This paper looks at two options when considering reform. Reform by legislation is one option. There are a number of different ways that legislation could reform this area. For instance it could set up a separate Authority or it could encourage internal whistleblowing. The problem with legislative reform in a difficult area such as this is that any reform will not completely alleviate the problems. General industrial reform is the other reform option looked at. It could be initiated by ensuring that there are internal whistleblowing mechanisms in every organisation. That could be achieved by a statute which impliedly encourages such internal mechanisms or by a movement in the industrial area requiring such mechanisms to be included in employment contracts. The problem with this option alone is that there is likely to be inconsistent treatment of whistleblowers. It is concluded that legislative reform and industrial reform together is the best option for reform. It is also considered to be the most palatable reform for all of the interest groups involved.

The Protected Disclosures Bill 1996 has recently been introduced into Parliament. This Bill is analysed in some detail. It follows an earlier private member's bill, the Whistleblowers Protection Bill 1994. The two Bills are compared and the analysis reveals them to be markedly different. Comparisons are also made between the New Zealand Bills, and Acts and Bills from Australia, the United Kingdom and the United States of America. The analysis shows that the Protected Disclosures Bill is flawed. The Bill will do little for whistleblowers, it will add to and not alleviate the problems with the current situation and, in New Zealand's new MMP era, such a Bill seems unlikely to gain the widespread enthusiasm of pressure groups nor to be a high priority for a minority or coalition government.

Appendices II and III set out the Protected Disclosures Bill 1996, the Whistleblowers Protection Bill 1994, the Protected Disclosures Act 1994 (NSW), the Public Interest Disclosure Act 1994 (ACT), the Whistleblowers Protection Act 1994 (Qld) and the

Whistleblowers Protection Act 1993 (South Australia). Those are the Acts and Bills that are most extensively analysed in this paper, although others are considered and referred to. Appendix I sets out my own proposed Bill which is called the Public Interest Disclosure Bill 1996 so that it is easy to distinguish from the other New Zealand Bills. This proposal is, in part, a compendium of the best aspects from the Acts and Bills analysed. It also contains some radical proposals to encourage whistleblowing. It is contended that this proposal alleviates the problems revealed in the analysis of the Protected Disclosures Bill 1996 by proposing a two-pronged approach to reform and encouraging and actively protecting whistleblowers.

II THE CURRENT LAW AND WHISTLEBLOWING

A Introduction

For the purposes of this paper I adopt the definition of "whistleblower" used by the Ministerial Review Team on Whistleblowing in their report:[1]

> A "whistleblower" is a person (usually an employee) who notifies some other person (usually in authority) of an activity being conducted within an organisation which breaches the law, or constitutes a risk to a specific interest, (such as a risk to public health or public safety, or to an individual's health or safety, or to the environment). The motivation for such a disclosure is usually a concern to have the matter at issue remedied or addressed, either by the organisation itself, or by some external agency in the public interest.

Noticeable about this definition is that a whistleblower is someone who discloses information in the public interest. For that reason whistleblowing ought to be valued and encouraged, and whistleblowers ought to be protected. Whistleblowing encourages accountability and ensures that standards are high. Further analysis of who is a whistleblower appears below in Part IV of this paper. That analysis considers specifically who ought to be covered by any reforming protective legislation. This paper considers the problems faced by whistleblowing employees. It is recognised however that it is not just employees who blow the whistle.

Whistleblowing is prima facie a breach of the contract of employment. Employees owe a duty of good faith and fidelity to their employer. This duty is to preserve the mutual trust and confidence on which the employment relationship is based. As a reflection of that duty either as an express or implied term in the employment contract an employee cannot misuse confidential information belonging to the employer. At present an employee who blows the whistle is in breach of the implied term of contract not to misuse confidential information belonging to their employer. Once that term is breached by a whistleblowing employee, an employer has grounds for dismissal.[2] The employer could also take a breach of confidence action. This has the advantage of being effective against a whistleblowing employee after the end of employment and against third parties who subsequently receive the confidential information. Another advantage is that

---

[1] *Report of the Ministerial Review Team on Whistleblowing* (20 October 1995) page 4. Some commentators have cringed at the term "whistleblower". The Ministerial Review Team (at p 4) compared the word to "snitch" "stool pigeon" and "nark". See also Derek Round *Submission on the Whistleblowers Protection Bill 1994* (undated) who contends whistleblowers should be called "informants".

[2] For instance see *Faccenda Chicken Ltd* v *Fowler* [1986] 1 All ER 617 (CA) and *Hobbs* v *North Shore City Council* [1992] 1 ERNZ 32. Even where the information is in the public domain the employee is under an obligation not to use his or her position to his or her advantage: *Schering Chemicals Ltd* v *Falkman Ltd* [1982] 1 QB 1; *British Steel Corporation* v *Granada Television Ltd* [1980] 3 WLR 775 and *Attorney-General* v *Guardian Newspapers Ltd (No.2)* (below n 3). Also see *Dominion* "Social worker suspended" 20 June 1996, page 9 and *PSA Journal* "CYPS worker sacked for speaking out" 21 August 1996, p 2. Although not every whistleblowing ought to justify a dismissal, like not every breach of contract justifies a dismissal: Y Cripps "Protection from Adverse Treatment by Employers: A Review of the Position of Employees who disclose information in the belief the disclosure is in the public interest" (1985) 101 LQR 506.

the remedies for breach of confidence are many and varied. They include injunctions,[3] orders to deliver up the confidential documents,[4] compensatory damages[5] and accounts for profits.[6] Disciplinary proceedings are also an option.[7]

Parliament and Courts have recognised that the duty of confidence in employment is not absolute. Statutory provisions and common law rules have been created. This is explicit recognition that the duty of confidence inherently involves competing public interests, one in the preservation of confidences and another in the right of the public to be informed of matters in the public interest. In defined occasions the latter public interest wins out.

B Protective statutes

In areas considered to be of acute public interest Parliament has concluded that whistleblowing is a valuable tool to be encouraged, and has created statutory provisions which stop any Court action being taken against a whistleblower.

Examples of these provisions can be found in section 41 of the Local Government Official Information and Meetings Act 1987, sections 15 and 16 of the Children Young Persons and Their Families Act 1989, section 115 of the Privacy Act 1993, section 137 of the Law Practitioners Act 1982 and section 48 of the Official Information Act 1982. All of these provisions protect good faith disclosures of information. It is unclear what that concept requires of a whistleblower. The issue of whether protective legislation should be restricted to whistleblowers who disclose in good faith will be discussed later in this paper.[8] Further, the protection is limited to civil and criminal proceedings, not disciplinary action. As is noted later in this paper[9] it is disciplinary action and other non-judicial reprisals that whistleblowers face more often. By its very nature whistleblowing is an act in the public interest. Whistleblowers ought to be protected from reprisals for that reason. Finally these provisions are obviously limited in terms of subject matter and scope. Section 66(1)(a)(iii) of the Human Rights Act 1993 makes it unlawful in terms of that Act to treat less favourably because of giving information or making a complaint under that Act. The remedies are set out in sections 89 to 91 of the Human Rights Act 1993. Despite issues about the burden of showing a nexus between the complaint or

---

[3] See for instance *Attorney-General* v *Guardian Newspapers Ltd (No.2)* [1988] 3 All ER 545 and *European Pacific Banking Corporation* v *Television New Zealand Ltd* [1994] 3 NZLR 43 (CA).

[4] See for instance *Initial Services Ltd* v *Putterill* [1968] 1 QB 396 and *British Steel Corporation* v *Granada Television Ltd* [1980] 3 WLR 775.

[5] See also *Attorney-General for United Kingdom* v *Wellington Newspapers Ltd* [1988] 1 NZLR 129 at 165 where the Court of Appeal indicated as an obiter statement that exemplary damages might also be available.

[6] See for instance *Attorney-General* v *Guardian Newspapers Ltd (No.2)* (above n 3).

[7] See for instance *Duncan* v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513. There could also be general disciplinary action - demotion etc.

[8] For instance if confidential documents are stolen and then released does that mean bad faith? If so the whistleblower who released European Pacific Banking Corporation Ltd's papers which initiated the Cook Islands tax inquiry would be unprotected. See further discussion below pp 14 to 15, Part IV of this paper at p 29.

[9] See below pp 14 and 18 of this paper. For an example of the more extreme action against a whistleblower see Stanley Adams *Roche versus Adams* (Jonathan Cape Ltd, London, 1984) and *Evening Post* "Triumph for little man" 8 November 1985, page 11.

information and the less favourable treatment, this is probably the closest that we have at present to an active protection for whistleblowers against reprisals. Significantly, I have not found any case law on this provision. Active encouragement of whistleblowing can also be found in Rule 6.03 of the Rules of Professional Conduct for Barristers and Solicitors.[10] It is unclear how this works alongside other duties as an employee.

The provisions mentioned above are intended to act as both protection and encouragement for whistleblowers. For whistleblowers seeking protection, action is also possible under the Employment Contracts Act 1991 for employees who suffer reprisals falling short of actual dismissal. A possible personal grievance action could be based upon section 27(1)(b) of the Employment Contracts Act - that is, that terms or conditions of employment have been affected to the employee's disadvantage by some unjustifiable action by the employer. Commentators have suggested that an employee would find this difficult to pursue because the employee's 'employment, or one or more conditions of employment' has to have been affected and the Courts have interpreted this to mean that there must have been a breach of a contractual obligation or entitlement before the action will fall within the section.[11] Also difficult would be alleging that the action by the employer was "unjustifiable". Some disciplinary action seems arguably justified if the employee has breached the employment contract by whistleblowing, revealing confidential information and breaking the relationship of trust and confidence. There are also the limited possibilities of a common law action for wrongful dismissal and judicial review.[12]

C Miscellaneous Protections

Provisions based upon fundamental human rights also have an impact in this area. Based on the International Covenant on Civil and Political Rights, the New Zealand Bill of Rights Act 1990 needs to be considered. Section 14 deals with the freedom of expression. Like all other sections of the Act, section 14 is subject to section 5 which provides that the rights in the Act are subject to the reasonable limits as can be justified in a free and democratic society. Section 14 could become a greater tool for whistleblowers. Certainly in two recent cases[13] it was raised in support of a

---

[10] See also Bruce Davidson "A practitioner's duty to report breaches of rules of conduct by colleagues" *Lawtalk 464* 16 September 1996, p 8 and *Independent* 'Whistleblowers infiltrate super schemes" 26 April 1996, p 1 for similar proposals for receivers of superannuation schemes. Doctors in the National Health Service in England have contractual clauses encouraging whistleblowing. The professional environment leads to a reluctance to speak out, and because of that such contractual clauses seem unlikely to be successful: Lucy Vickers "Whistleblowing and Freedom of Speech in the NHS" [1995] New Law Journal Part II 1257.

[11] Anderson, Banks, Hughes, Johnston *Employment Law Guide* (Butterworths, Wellington, 1995) pp 220 - 223. See as an example of this requirement *Pugmire* v *Good Health Wanganui (No.1)* [1994] 1 ERNZ 58 and *(No.2)* [1994] 1 ERNZ 174 where Pugmire was awarded an injunction preventing his employer from taking demotion action against him and the Court focused upon the fact that the employer had failed to give a procedurally correct suspension notice thus breaching the employment contract.

[12] Y Cripps (above n 2) at 509. A wrongful dismissal action would only lead to damages and is not as wide as the personal grievance of "unjustifiable dismissal" in s 27 of the Employment Contracts Act 1991. Judicial review would be limited to cases where the employer is a public body and where that employer took account of irrelevant considerations when disciplining the employee.

[13] *Hobbs* v *North Shore City Council* (above n 2) and *Lowe* v *Tararua District Council* [1994] 1 ERNZ 887.

whistleblower's right to speak out, but was never pursued with much vehemence. In the United States arguments from whistleblowers and particularly newspapers seeking to rely upon the First Amendment right to freedom of speech have had more success.[14] In *Lord Advocate* v *Scotsman Publications Ltd*[15] the House of Lords, pointing to Article 10 of the European Convention (which has the same wording as section 5 of the New Zealand Bill of Rights Act 1990), refused to grant an injunction preventing a former MI6 operative from publishing a book. The House of Lords held that there ought to be few limits on freedom of speech and that an injunction would only be granted if the Crown could show that the public interest would be harmed by publication. Effectively because of the guarantee of freedom of speech there was a presumption in favour of publication.[16] International Labour Organisation Convention 158 provides that a dismissal is unjustified if it is based on an employee giving evidence against an employer for alleged violations of the law. In *Tavita* v *Minister of Immigration*[17] and other cases[18] international instruments and obligations have been given greater significance.

These provisions give whistleblowing a broad human rights centred focus. Whistleblowing can be seen to be much more than an employment issue. However the relationship between these protections and employment law seems unclear. ILO Conventions have not been ratified by New Zealand. It could be argued that in terms of the New Zealand Bill of Rights Act 1990 that in the employment situation obligations of trust and confidence justify a limitation on freedom of speech. Further, the New Zealand Bill of Rights Act has been argued in the whistleblowing context before[19] and has not had a great deal of impact. The scope for the application of international instruments is unclear. Note, for instance, that section 3 of the New Zealand Bill of Rights Act limits the application of the Act to governmental bodies and bodies conferred with a public function.

---

[14] For instance see *New York Times Co* v *United States* 403 US 713 (1971). Also see Catherine Webber "Whistleblowing and the Whistleblowers Protection Bill 1994" (1995) AULR 933, 948.

[15] [1989] 2 All ER 852, note that this was prior to the enactment of the Official Secrets Act 1989 which made the divulging of information relating to defence issues a criminal offence.

[16] There have been other cases where it has been held that the Crown has to show an extra public interest if it wishes to retain confidentiality: *Attorney-General* v *Jonathan Cape Limited* [1976] 1 QB 753 and *Commonwealth of Australia* v *John Fairfax and Sons Ltd* [1980] 147 CLR 39, at 52. Those cases have implicitly rather than explicitly considered international instruments and focused more upon the new trend towards open government and freedom of information. The focus on freedom of speech is even where the whistleblower breaches a term of the employment contract, as did a Royal Servant in *Attorney-General* v *Barker* [1990] 3 All ER 257. Note that while the US Courts focus on freedom of speech, concepts like a constructive trust over the proceeds of any breach of confidence ensure that whistleblowers do not profit from such breaches of contract: e.g *Snepp* v *United States* 62 L Ed 2d 704 (1980).

[17] [1994] 2 NZLR 257.

[18] See for instance *Ankers* v *Attorney-General* [1995] 2 NZLR 595 where the facts indicated that the New Zealand Government Departments monitored New Zealand's commitment to international instruments, *Simpson* v *Attorney-General* [1994] 3 NZLR 667 and *Minister of Immigration and Ethnic Affairs* v *Teoh* (1995) 128 ALR 353 where it was held that ratification of an international instrument could lead to a legitimate expectation at law that decision makers would conform to that instrument. Also see Rodney Harrison QC "Domestic enforcement of international human rights in Courts of law: some recent developments" [1995] NZLJ 256.

[19] See *Hobbs* (above n 2), 36 - "The Tribunal considers the effect of the New Zealand Bill of Rights in this particular case to have minimal effect".

D The Common Law

1 Introduction

As well as Parliament, the Courts have considered the obligation of confidence in employment and have concluded that the obligation is not absolute. It is in the common law that the two main protections are found for whistleblowers. The first is the public interest defence and the second is the common law surrounding the protection of sources. The application of the public interest defence appears to be limited to breach of confidence actions taken by the employer and does not, for instance, affect the validity of a dismissal. The application of the defence has been the subject of some debate and is an issue of considering whether the defence is merely an exception to the duty of confidence or removes the obligation of confidence altogether, making any dismissal unjustified as well. Most commentators agree that the defence is merely an exception to the duty of confidence - only applying in breach of confidence actions.[20] Some cases say otherwise.[21] Note that there is no public interest defence to defamation proceedings and while truth is a defence, a whistleblower often discloses in the belief a disclosure is true hoping that the disclosure will be investigated. The whistleblower may be wrong about the truth of the disclosure. Threatened defamation proceedings are used as a way of silencing potential whistleblowers.[22]

The common law surrounding the protection of sources only serves to protect the whistleblower's identity. There are two parts to consider: the "newspaper rule" which only applies to disclosures to the media and only at the interlocutory stage of a proceeding, and general principles which apply after that stage. Like the public interest defence there is some controversy about the application of this protection. The application of this rule is unclear.

2 The public interest defence

(i) Rationale and scope

The rationale for the public interest defence began with the idea that confidentiality was not always in the public interest. It was developed from the equitable notion of "clean

---

[20] Sam Ricketson "Public Interest and Breach of Confidence" (1979) 12 MULR 176; P D Finn "Confidentiality and the 'Public Interest' " [1984] 58 ALJ 497; Jason Pizer "The Public Interest Exception to the Breach of Confidence Action: Are the lights about to change?" (1994) 20 Monash University Law Review 67.

[21] *Gartside* v *Outram* (1857) 26 LJ Ch 113; *Fraser* v *Evans* [1969] 1 QB 349 and *Beloff* v *Pressdram Ltd* [1973] All ER 241 where it was held that the public interest defence could apply to breach of copyright actions. Support can also be found in Geoffrey Robertson QC and Andrew Nicol *Media Law* (Penguin Books Ltd, London, 1992) pp 177 - 178. Note that in *Hobbs* above n 2, a whistleblower's dismissal was held unjustified and the public interest defence was not mentioned.

[22] See Dr William de Maria *Whistleblowers and Secrecy: Ethical Emissaries from the Public Sect[or]* (Unpublished paper, presented to the 'Freedom of the Press' Conference, Bond University, 11 November 1995) at p 2 for an example of when defamation was used to silence a whistleblower. Note however the recent more flexible application of the defence of qualified privilege (the so-called "public interest defamation defence") for the press. That involves establishing a legal or moral duty to divulge the information that duty being to divulge to the person or persons disclosed to: *Independent* "The Phillip Mills case: One step towards a free press" 13 September 1996, p 10.

hands".[23] If a plaintiff was tainted by some wrongdoing, he or she would be unlikely to be successful in a breach of confidence action. Initially the public interest defence was narrow in scope with the Courts weighing the balance between retaining confidence and allowing disclosure heavily in favour of retaining confidence. Initially a defendant to a breach of confidence action could only make out the public interest defence where the plaintiff was seeking to restrain disclosure of information showing that the plaintiff had committed an iniquity. In *Gartside* v *Outram*[24] Wood VC held:

> The true doctrine is, that there is no confidence as to the disclosure of an iniquity. You cannot make me the confidant of a crime or fraud ... such a confidence does not exist.

Over time the English Courts moved away from looking at the plaintiff's conduct to looking at the gravity of the consequences of disclosure. In *Fraser* v *Evans*[25] Lord Denning stated:

> I do not look upon the word "iniquity" as expressing a principle. It is merely an instance of just cause for breaking confidence.

In later cases the English Courts developed and extended the public interest defence to cover disclosures which revealed civil wrongs,[26] misdeeds,[27] and finally as far as disclosures where the public had a right not be misled. The test moved from being weighted heavily in favour of confidentiality with a narrow exception to being weighted in favour of disclosure in *Woodward* v *Hutchins*.[28] In *Woodward* v *Hutchins* Tom Jones, Engelbert Humperdink and Gilbert O'Sullivan sued their former manager for publishing a book which exposed their antics in detail. In holding that the public interest defence was available to Mr Hutchins, Lord Denning stated[29] "if the image they fostered was not a true image, it is in the public interest that it should be corrected". There has been criticism of the *Woodward* decision from both commentators and Judges.[30] Criticism usually focuses on the undermining of the rationale for the defence, moving the concept of the 'public interest' towards anything that titillates the public. In *X* v *Y*[31] where a newspaper sought to publish the names of HIV positive practicing doctors, the English Courts refined that approach, balancing competing interests and coming out in favour of confidentiality.

---

[23] Jill Martin *Hanbury and Martin Modern Equity* (fourteenth edition, Sweet & Maxwell Ltd, London, 1993).

[24] Above n 21 at 114.

[25] Above n 21, at 262.

[26] *Weld-Blundell* v *Stephens* [1919] 1 KB 520.

[27] *Initial Services Ltd* v *Putterill* (above n 4) - a price fixing arrangement; *Lion Laboratories Ltd* v *Evans* [1984] 3 WLR 539 - a poorly designed breathalyser; *Hubbard* v *Vosper* [1972] 2 QB 84 - the medically dangerous advice of the Church of Scientology.

[28] [1977] 1 WLR 760.

[29] Above n 27, at 764. This case was followed by *Lennon* v *News Group Newspapers and Twist* [1978] FSR 373.

[30] See P D Finn above n 20 at 507, Leo Tsaknis "The Jurisdictional Basis, Elements and Remedies in the Action for Breach of Confidence - Uncertainty Abounds" (1993) 5 Bond LR 18, 25 and *Smith Kline and French Laboratories (Australia) Ltd* v *Secretary, Department of Community Services and Health* [1990] 95 ALR 87, at 126: "The English Courts' approach to the public interest defence [has merged concepts] to produce a curious melange without any indication of the seriousness of what is being done".

[31] [1988] 2 All ER 648.

The public interest defence has been applied differently by Courts in different countries. For instance, in Australia a narrower approach was taken and the defence is a public policy defence only available for disclosures of crimes, serious wrongdoing,[32] or matters injurious to public health.

In New Zealand there have not been a lot of cases directly on point. It seems that on occasion an approach of balancing the different public interest in confidentiality and in disclosure[33] and on occasion an approach which focuses on whether the information disclosed reveals an iniquity. In *European Pacific Banking Corporation* v *Television New Zealand Limited*[34] the Court of Appeal, while noting that the iniquity rule was only an instance of when the public interest defence might apply, called it the 'primary instance' of when the defence would apply.

Given the different approaches across jurisdictions, in terms of the subject matter of disclosures that the defence will cover, the scope of the defence remains unclear. A further problem is that there are cases which suggest that the means of the disclosure of the matter alleged to be a breach of confidence will also affect the applicability of the public interest defence.

(ii) Means of disclosure

Some cases suggest that disclosure can only be to the 'proper authority'. There are conflicting cases about whether disclosure to the media will lead to the public interest defence not being available, with cases such as *Francome* v *Mirror Group Newspapers Ltd*[35] and *British Steel Corporation* v *Granada Television Ltd*[36] suggesting that disclosure to the media will mean that the defence does not apply, while *Lion Laboratories Ltd* v *Evans*,[37] *Initial Services Ltd* v *Putterill*[38] and *Cork* v *McVicar*[39] suggest that disclosure to the media will not undermine the applicability of the public interest defence. It is notable that both the Whistleblowers Protection Bill 1994 and the Protected Disclosures Bill 1996 omit the media from the concept of being an appropriate body for whistleblowers to disclose matters to.[40] That could be said to make the freedom of the press illusory. Clause 18 of the Protected Disclosures Bill 1996

---

[32] For example against Trade Practices legislation: *Allied Mills Industries Pty Ltd* v *Trade Practice Commission* (1981) 34 ALR 105; *Castrol Australia Pty Ltd* v *Emtech Associates Pty Ltd* [1980] 51 FLR 184.

[33] See *Duncan* v *Medical Practitioners Disciplinary Committee* (above n 7) where a doctor disclosed the heart condition of a local bus driver because he feared for public safety. The case was about a disciplinary rather than breach of confidence action but the Court's approach could be seen to be favouring patient/doctor confidentiality over other public interests. For further background to this case see Dr Bruce Duncan and Dr Anne Worsnop *Submission to the Parliamentary Committee on the Whistleblowers Protection Bill 1994* 6 September 1994. See a similar approach in *X* v *Y* (above n 31). Also see *Evening Post* "Jail for doctor" 15 June 1996, p 9 - former French President Francois Mitterand's doctor is in legal trouble after revealing that Mitterand had cancer for a long period of his presidency.

[34] Above n 3, 47.

[35] [1984] 1 WLR 892.

[36] Above n 2.

[37] Above n 27.

[38] Above n 4.

[39] (1984) TLR 593. See also M W Bryan "The Law Commission Report on Breach of Confidence: Not in the Public Interest" [1982] Public Law 188.

[40] Clause 6(b) Whistleblowers Protection Bill 1994 and cls 6 to 10 Protected Disclosures Bill 1996.

expressly preserves the public interest defence, which means that this case law which conflicts with the prohibition of the media would have to be considered.

In addition to the cases about disclosure to the media, there are some cases which suggest that internal avenues for disclosure must have been pursued first.[41] Dr William de Maria's research in the Queensland Whistleblower Study indicated that whistleblowers have a high degree of dissatisfaction with the effectiveness of internal avenues.[42] Clause 6 of the Protected Disclosures Bill 1996 makes internal avenues for disclosure the favoured means for a whistleblower to make disclosures, and clause 11 ensures that public sector organisations have such procedures. To add to rather than alleviate the confusion about the applicability of the public interest defence, clause 18 of the Protected Disclosures Bill preserves the public interest defence, which has on occasion been held to apply where disclosures have not been made internally.[43] While the public interest defence has conflicting decisions about the necessity for a specific means of disclosure, the Protected Disclosures Bill does not alleviate that problem.

(iii) Motive for disclosure

The motive for the whistleblower making the disclosure may also affect whether the public interest defence is available. In *Initial Services Ltd* v *Putterill* Lord Denning stated:[44]

> I say nothing as to what the position would be if [the whistleblower] had disclosed ... out of malice or spite or sold it to a newspaper for money or for reward. That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward.

Note that section 16 of the Children Young Persons and Their Families Act 1989, section 48 of the Official Information Act 1982 and section 115 of the Privacy Act 1993 all require a good faith disclosure of information before protection will be given. In *X* v *Attorney-General*[45] the High Court held that it was for the plaintiff to show a lack of good faith before the protection of section 48 of the Official Information Act would not apply. Lord Denning's statement suggests that the defendant must first show that the disclosure was made in good faith before the common law public interest defence will apply.

---

[41] For instance *Hobbs* v *North Shore City Council* (above n 2) at 38; *NZALPA* v *Air New Zealand Ltd* [1992] 1 ERNZ 353, at 360 where Cooke P (obiter) indicated that it was only as a last resort that the media ought to be used by employees; also *Ministry of Attorney-General Corrections Branch* v *British Columbia Government Employees Union* (1981) 3 LAC 190, 191:

> [O]nly when the internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.

[42] Dr William de Maria *When the Storm Bird Calls: Whistleblower Warnings in the Age of Corruption* (unpublished paper presented to the 'Whistleblowers: Protecting the Nation's Conscience?' Conference, Institute of Criminology, Melbourne University, 17 November 1995), page 7; also the stories of whistleblowing set out in Dr William de Maria *The Welfare Whistleblower: in Praise of Troublesome People* (Unpublished paper presented to the 23rd National Conference of Australian Social Workers, Newcastle, September 1993); and Richard Fox "Protecting the Whistleblower" (1993) 15 Adel LR 137, 143 quoting from US studies.

[43] Above n 37 to n 39.

[44] Above n 4, 406.

[45] Unreported, High Court Timaru Registry, Master Hansen, 9 December 1993, CP31/92.

In *Re A Company's Application*[46] the motive for disclosing (threatened disclosure as a tool in employment contract negotiations) was not relevant. It was held that an employee could not be restrained from disclosing an iniquity because of an improper motive. The conflict between *Initial Services Ltd* and *Re A Company's Application* exposes the different public interests that conflict in this area of law. In *Initial Services Ltd* Lord Denning identified with the interest in preserving confidences and his obiter comment reveals a view that the public interest defence ought to be narrow ensuring that only in very acute circumstances should disclosures be made. In *Re A Company's Application* Scott J's focus was on the nature of the disclosure. If it is in the public interest for the disclosure to be made then the motive for the disclosure is irrelevant. Following Scott J's reasoning further, it could be said that the means of disclosure ought also be irrelevant. The only matter that would be relevant is whether the disclosure is in the public interest or not. However Scott J did not follow that line of reasoning, specifically noting that the employee was seeking to make disclosures to the proper authorities. Scott J stated:[47]

> Where the disclosure ... is no more than a disclosure to a recipient which has a duty to investigate matters within its remit, it is not, in my view for the Court to investigate the substance of the proposed disclosure unless there is grounds for supposing that the disclosure goes outside the remit of the intended recipient of the information.

3. Protection of Source

This generally relates to disclosures to the media. A whistleblower's identity can be protected in Court if a journalist refuses to reveal the source of the disclosure. There are two elements to this protection. The first, known as "the newspaper rule" (but extending to all forms of media), gives protection in the early interlocutory stages of proceedings. In general, it applies fairly easily. However it is clearly a temporary protection.[48] After that, in later stages of Court proceedings, other aspects of common law and statutory law may apply to protect the identity of a whistleblower, whether the disclosure is to a journalist or another person.

A journalist will be in contempt of Court is he or she refuses to answer questions. Journalists have no privilege. Section 35 of the Evidence Amendment Act (No.2) 1980 confers a statutory discretion on the Court to excuse a witness from answering a question or producing a document. That is where to do so would be a breach by the witness of a confidence, which, having regard to the special nature of the relationship between the witness and the source, he or she should not be compelled to breach. Section 35 expressly involves the Court in balancing competing interests - section 35(2) states that regard is to be had to the likely significance of the evidence, the nature of the confidential relationship and the likely effect of disclosure on the confidant or any other person. Section 35 seems to extend to relationships beyond the journalist/source relationship, but a confidential relationship has to be established first. For the journalist/source relationship there is some common law indicating it is a confidential relationship. It may be harder to satisfy the requirements of section 35 for other

---

[46] [1989] 3 WLR 265.
[47] Above n 46, 270.
[48] Catherine Webber (above n 14), pp 944 to 947.

relationships. In *Broadcasting Corporation of New Zealand* v *Alex Harvey Industries Ltd*[49] the Court of Appeal emphasised the benefit of the freedom of the press:[50]

> [T]here [is a] desirability to protect those who contribute [to the media] from the consequences of unnecessary disclosure of their identity.

While the Court of Appeal's statements appear favourable, the limits of section 35 are unclear. There are no cases about this section and the protection of journalists' sources. It is unclear where the balance will fall.

In England, section 10 of the Contempt of Court Act 1981 has firmed up the law about the protection of sources by declaring that a Court cannot compel disclosure of a source unless it is satisfied that it is necessary to do so in the interests of justice and national security[51] or for the prevention of disorder or crime. Before section 10 was enacted the English Courts had a similar regime to New Zealand. In *British Steel Corporation* v *Granada Television Ltd*[52] the House of Lords upheld an order to disclose the identity of a whistleblowing employee because to protect that identity would be denying the company the opportunity to pursue remedies against that employee. The balance favoured the interests of justice over the interest in the media protecting its source.[53] This holding would seem to apply in every case where an employer was seeking to take action against a whistleblowing employee.

From this analysis it can be seen that there are some problems with the common law surrounding the protection of sources. Firstly, the "newspaper rule" only provides relatively certain protection at the interlocutory stages of a proceeding and there is no guarantee that a whistleblower's identity will be protected after that. Secondly, section 35 of the Evidence Amendment Act (No.2) 1980 does not specify journalists and their sources are protected, there have been no cases, and this means that the common law has to be relied upon to establish the confidentiality of the relationship. Thirdly, section 35 specifically directs that the Court balance the competing interests. In England there is case law to suggest that when a balance is made, the balance will come out in favour of disclosure. None of this leads to certainty for whistleblowers. It seems the only way to firm up this area is to ensure that journalists' sources are privileged.[54] In the area of

---

[49] [1980] 1 NZLR 163, 172.

[50] More recently re-emphasised by the Court of Appeal and High Court in *Television New Zealand Ltd* v *Attorney-General* [1995] 2 NZLR 643, 648 and *Television New Zealand Ltd* v *Police* [1995] 2 NZLR 541, 556. See also David Lewis "Whistleblowers and Job Security" (1995) 58 Modern Law Review 208, 217 quoting the European Commission "If journalists could be compelled to reveal their sources, this would make it more difficult for them to obtain information, and as a consequence to inform the public about matters of public interest". Also see *The Independent* (above n 22).

[51] The Court was so satisfied in *Secretary of State for Defence* v *Guardian Newspapers Ltd* [1985] AC 339 and the source of leaked information revealing the purchase of missiles by the Government was revealed. Sarah Tisdall was later convicted of breaching the Official Secrets Act and spent 6 months in jail.

[52] Above n 2.

[53] J F Burrows *News Media Law in New Zealand* (Oxford University Press, Auckland, 1990) at p 357.

[54] As proposed by the Law Commission *Evidence Law: Privilege* (Preliminary paper No.23, May 1994) at 132; also Human Rights Commission *Submission of the Human Rights Commission to the Justice and Law Reform Select Committee on the Whistleblowers Protection Bill* July 1994 and Gehan Gunasekara "Legislation to protect whistleblowers: Is the proposed solution just what the doctor ordered or is it too blunt an instrument?" [1994] NZLJ 303, 306.

whistleblowing generally the main problem with the protection of sources is obvious. The protection is very limited and only goes as far as protecting identity. That does not stop reprisals against suspected whistleblowers.

4. Conclusion

The two common law protections, the public interest defence and the common law about the protection of sources are the main protections available for whistleblowers. The law in these areas has limitations. In terms of the public interest defence it is not clear when it applies. It seems that the disclosure must be about a certain subject, made in a particular way, with a particular motive before there will be protection given. Further, the defence only seems to apply to one action taken by an employer and does not protect a whistleblower from other forms of retaliation. In a similar vein it is not clear when the common law about the protection of sources will apply to protect the identity of whistleblowers. It seems that this protection is limited to whistleblowers who disclose to the media. Beyond the interlocutory stage of proceedings a balancing approach is taken. Overseas case law suggests that the balance favours revealing sources leaving a whistleblower without protection.

E Conclusion

The current law operates in a piecemeal fashion.

There are some statutory provisions which protect whistleblowers who disclose certain matters from civil and criminal proceedings. Those provisions are limited in terms of the subject matters of disclosures and require "good faith" disclosures. The protection given does not extend to disciplinary action or other reprisals. Section 66(1)(a)(iii) of the Human Rights Act 1993 comes closest to an active protection, making it unlawful to treat a whistleblower less favourably because of disclosure under the Human Rights Act. Again this protection is limited in terms of subject matter, it is unclear what the remedies are, and there have been no reported cases.

While freedom of speech and other fundamental rights have had an impact in other jurisdictions, in New Zealand they have not had great influence. Some case law suggests this may change in the future. For whistleblowers there is only uncertainty at present.

The common law provides some assistance for whistleblowers in the common law public interest defence and the law about the protection of sources. The public interest defence seems only to apply to breach of confidence actions, leaving a whistleblower open to other reprisals. The defence itself is unclear- it may only apply to disclosures of a certain subject matter made to 'appropriate' authorities (possibly going through internal procedures first) and made with an 'appropriate' motive. The application of the common law about the protection of sources is also vague. It only protects the identity of sources, leaving other reprisals against suspected whistleblowers unchallenged. It seems to be limited to whistleblowers who disclose to the media. There is no certainty

that there will be protection and any such protection is only after the disclosure has been made.

The current law offers only fragmentary protections. There is no certainty for whistleblowers. Dr William de Maria's study in Queensland[55] revealed that 71% of whistleblowers experienced "official" reprisals (for example, transfers,[56] failed promotions, redundancy, psychiatric examinations, suspension Court action) of which only Court action is really covered by any current New Zealand protections, and 94% suffered from "unofficial" reprisals (for example, ostracism, difficulty getting the usual service from colleagues). Many suffered both. The current law in New Zealand clearly does not even come close to alleviating these problems.

New Zealand has recently changed its electoral system to the mixed member proportional system. This is as a result of widespread calls for accountability in government. In a number of recent cases whistleblowers have increased public awareness of wrongdoing which has led to remedial action.[57] Whistleblowing has led to increased accountability. While whistleblowing is valued because it leads to efficient systems and enhanced public confidence, the uncertainty of the law means that there is active discouragement for potential whistleblowers who will want to be sure they will be protected from reprisals.[58] There are no protections available.

For those reasons and because the current law is so uncertain, reform is necessary. What form that reform ought to take is discussed in Part III of this paper.

---

[55] Above n 42, p 13.

[56] *Pugmire* v *Good Health Wanganui (No.1)* [1994] 1 ERNZ 58; *(No.2)* [1994] 1 ERNZ 174. Mr Pugmire was subjected to both a transfer of duties and a suspension. Castle J held granting Pugmire and injunction (*Pugmire (No.2)* at 179) that the offer of alternative employment was a "reprehensible abuse of the concept of fair dealing by the employer".

[57] For example the scandal about the overspending at the Ohakea Airbase, the Cook Islands tax saga and the problems with the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Pugmire case).

[58] *Report of the Ministerial Review Team on Whistleblowing* (above n 1) noted that the current environment for whistleblowers was a "negative one" and that the perceived impediments to disclosure ought to be alleviated. Also see J G Starke QC (below n 61) at p 216. Starke suggests that it is also unclear whether the public interest defence applies to past misconduct or just to present or continuing misconduct and that this too should be clarified.

III OPTIONS FOR REFORM

A Introduction

Part III considers what is the best mechanism for reforming this area of law. There are two main options available. The first is statutory reform. This could take many forms with the spectrum running from a declaratory statute to a major piece of reforming legislation. The second option is industrial reform. By this it is meant the encouragement and facilitation of whistleblowing through the creation of internal mechanisms.

When considering what the best mechanism is for reform, issues about the scope of any reform must also be considered. Those issues are considered in Part IV of this paper, but it is noted that those issues include determining whether both the public and private sectors ought to be covered by any reform, and whether the means of disclosure ought to be narrowly specified.

B Statutory Reform

Statutory reform has many advantages. Firstly, it could codify the problematic and inconsistent common law, clarifying the position for whistleblowers. A statute could lead to certainty. Secondly, a statute would ensure a consistent approach across organisations. Thirdly, a statute could encourage whistleblowing by both protecting and rewarding whistleblowers.

There are a number of forms that statutory reform could take. At the lower end of the scale of reform would be a statute codifying and clarifying the common law public interest defence and according privilege to journalists.[59] Another option at the lower end of the scale of reform is to amend the Employment Contracts Act 1991 to ensure that disclosures of information found to be in the public interest are not a ground for dismissal nor for disadvantageous action. Both options would be only a part of the reform that is needed. The former would not stop reprisal action against whistleblowers, while the latter would keep the uncertain common law in place. Both leave it to whistleblowers to take Court action. Moving to the middle of the spectrum of reform would be reform consisting of a continuation and extension of the current process of having various statutory provisions which protect whistleblowers. Reform could be targeted to certain areas which are deemed to be acutely in the public interest, for example health or the environment.[60] There could be duties on individuals to blow the whistle in those areas. This could all be in combination with amendments to the Employment Contracts Act. This option would also leave the uncertain common law in place and would be limited to certain subject areas leaving other public interest matters not covered, simply because they had not been thought of. At the far end of the scale would be a comprehensive statute codifying and clarifying the common law, setting up processes for whistleblowers,[61] giving remedies to whistleblowers and making it an

---

[59] New Zealand Law Society *Submissions on Whistleblowers Protection Bill 1994* 14 September 1994.
[60] See Human Rights Commission (above n 54).
[61] Separate whistleblowing authorities are favoured by Dr William de Maria "Public Interest disclosure laws in Australia and New Zealand: Who are they really protecting?" [1995] 20 (6) Alternative Law

offence with defined consequences (such as large fines) to have reprisals against whistleblowers. Penalties for individuals disclosing information knowing it to be false ought also to be created. Such reform could even go as far as active encouragement of whistleblowing, for instance by awarding a whistleblower a part of any fine awarded. If the disclosure is of a crime and any pecuniary penalty or forfeiture order is made under the Proceeds of Crime Act 1991 a percentage of the proceeds could be directed to the whistleblower. These options are only some of the options available when considering statutory reform.

The main problem with statutory reform is not that it would not alleviate the current problems with the common law, but that it would not alleviate all of the problems in this area. Some submissions on the Whistleblowers Protection Bill 1994 suggested that extensive statutory reform was only required where there was endemic corruption[62] and that there was no such corruption in New Zealand. In my view whistleblowing is a check ensuring that New Zealand remains corruption free. Others suggested that such extensive reform would encourage employees to reveal issues that were really policy issues or to give more credence to the claims of disaffected employees.[63] In my view that concern can be alleviated by ensuring there is a proper balance between the right to confidentiality, the preservation of reputation and the public interest in disclosure. This reveals another problem for any statutory reform, it will have to be very carefully worded. There is another problem with statutory reform that would be a problem with any reform in this area and that is the practical effectiveness of any reform. Dr William de Maria's research indicated that 94% of whistleblowers suffer unofficial reprisals such as ostracism.[64] It is hard to imagine how problems like that could be remedied by statutory or any reform. However the creation of a more protective and supportive environment where reprisal actions are punished would arguably make such reprisals less likely.

C Industrial Reform

The other main option for reform is industrial reform. By this it is meant that disclosures are encouraged by, for example, contractual clauses, and internal mechanisms are created which deal with disclosures. Examples of such mechanisms are already in existence are the Police Complaints Authority and internal audit functions in various Government Departments. This sort of industrial reform could be encouraged by

---

Journal 270, pp 272 - 273 and a separate authority was proposed in New Zealand in the Whistleblowers Protection Bill 1994 (but not in the Protected Disclosures Bill 1996). Also see *The Independent* "Whistleblower Bills put foxes in charge of henhouses" 13 September 1996, p 32. Separate authorities are not favoured by others because it is argued that the reasons why current authorities are not utilised should be considered, not ignored, and because it arguably undermines the equitable jurisdiction of the Courts: Bruce Slane *Submission of the Privacy Commissioner on the Whistleblowers Protection Bill* July 1994; J G Starke QC "The Protection of Public Service Whistleblowers" [1991] 65 ALR 205, 212.

[62] See for example Bruce Slane (above n 61). Statutes in Queensland and New South Wales were enacted as a result of corruption and the creation of new investigatory bodies after Commissions of Inquiry (for Queensland the Criminal Justice Commission and for New South Wales the Independent Commission Against Corruption).

[63] New Zealand Employers Federation Inc *Submission to the Justice and Law Reform Select Committee on the Whistleblowers Protection Bill* August 1994.

[64] See above n 42.

specific statutory provisions[65] or could be led by the public sector.[66] The public sector could ensure internal mechanisms were created and utilised by its employees because public sector employees are more constrained by secrecy and confidentiality clauses than their private sector counterparts.[67] Those who support this sort of reform suggest that internal avenues for disclosure are the best way of balancing the rights of the whistleblower and the employer. The employer has the right to control its own workplace, to have confidentiality and to have its reputation preserved.[68] Opponents point out that there would be a lack of consistency across organisations if internal mechanisms were relied upon[69] and that internal mechanisms would not necessarily discourage reprisals. Instead internal mechanisms could discourage whistleblowing. Dr William de Maria's research[70] indicates a high degree of dissatisfaction with internal mechanisms. In my view internal mechanisms are needed and are desirable. The internal mechanisms should be encouraging and protective of whistleblowers. To ensure real reform is achieved, they should be alongside, rather than instead of statutory reform. To ensure consistency, certainty and real protection, statutory reform should take precedence over internal mechanisms where they conflict. Statutory reform should also set a minimum standard to ensure that disclosures and prohibitions on reprisals are effective.

D Conclusion

When considering reform options it needs to be recognised that no option will totally prevent the more subtle reprisals against whistleblowers. That does not mean that reform should not be undertaken. Reform will encourage an environment where whistleblowers are valued. The analysis in Part III has revealed that statutory and industrial reform together would provide some encouragement and protection for whistleblowers, to provide penalties and to discourage those who knowingly disclose false information. Industrial reform involving the creation of internal mechanisms is needed to balance matters and create a less hostile environment for whistleblowing. A combination of the two options are also more likely to satisfy the different agendas of the interest groups involved in this issue. Such compromises are likely in New Zealand's new MMP era.

The relationship between the two (industrial and statutory reform) needs to be clearly stated, with statutory reform needing to have precedence. That is necessary to ensure consistency and certainty. Statutory reform could provide a minimum standard for any internal procedures.

---

[65] A current example is the encouragement of disclosures in s 7 of the Health and Safety in Employment Act 1992.

[66] That may require an amendment to the State Sector Act 1988, or it could be achieved administratively by, for example, changes to the Public Service Code of Conduct.

[67] See for example ss 81, 203 and 221 of the Tax Administration Act 1994 and more generally pages 13, 14 and 17 of the Public Service Code of Conduct which indicate that a public sector employee is required to use internal channels at present. Also see the discussion at pp 36 - 38 of this paper.

[68] See Bruce Slane (above n 61), the Employers Federation (above n 63).

[69] Ministerial Review Team (above n 1) p 7.

[70] Above n 42.

It is concluded that this two-pronged approach to reforming the law surrounding whistleblowing would be the most effective reform option.

IV PROPOSALS FOR REFORM

A Introduction

In this part several Acts and Bills will be examined. In particular the Protected Disclosures Bill 1996 and the Whistleblowers Protection Bill 1994 will be analysed. Each Act or Bill will be examined using six different points of analysis:
(a) first, what the purpose of the Act or Bill is expressed to be;
(b) second, who that Act or Bill determines will be covered by it;
(c) third, what the subject matter of a disclosure has to be before it will be protected;
(d) fourth, whether a specific means of disclosure is specified;
(e) fifth, whether the whistleblower's motive is relevant;
(f) sixth, what sort of protection is offered.

The analysis reveals the Protected Disclosures Bill 1996 to be flawed. The Public Interest Disclosure Bill (Appendix I) seeks to alleviate the problems with the Protected Disclosures Bill 1996. In my view a reforming statute in this area should ensure that its coverage is not too detailed and narrow, that motive for disclosure is irrelevant and that there is real and effective protection against reprisals for whistleblowers; protection that is not necessarily whistleblower initiated.

B Protected Disclosures Bill 1996

1 Introduction

The Protected Disclosures Bill 1996 was introduced on 1 August 1996. It was drafted by the State Services Commission as a result of the report of the Ministerial Review Team on whistleblowing.

2. Analysis

(i) Purpose

The purpose of the Protected Disclosures Bill is set out in the long title and in clause 4. It is to promote the public interest by protecting employees who make protected disclosures of information about serious wrongdoing in or by an organisation (emphasis added). The purpose reveals a lot about this Bill. It is not intended to promote or facilitate whistleblowing. It is not intended to protect anyone disclosing public interest information, that person has to be an 'employee'.[71] There seems to be no purpose served by limiting the Bill's coverage in this way. It is also notable that the purpose reveals that this Bill's coverage is limited to 'serious' wrongdoing. That seems a high threshold.

(ii) Whistleblower defined

As already noted, it is an employee (as defined in clause 2) who discloses serious wrongdoing (as defined in clause 2) in the means defined in the Bill who is a whistleblower (clause 5).

---

[71] Note that "employee" is defined broadly in cl 2 and includes independent contractors and prior employees. Individuals who are not employees can be whistleblowers and it seems meaningless to limit the Bill in this way. However even this is less restrictive than the Whistleblowers Protection Bill 1995 (UK) which requires the information disclosed to be gleaned in the course of employment.

(iii) Subject matter of disclosure

To be covered by the Bill a whistleblower must disclose 'serious wrongdoing' (clause 5). 'Serious wrongdoing' is defined in clause 2 and can be wrongdoing occurring before or after the enactment of the Bill. It means the unlawful, corrupt or irregular[72] use of public finds or resources, or any other conduct constituting an offence, maladministration,[73] or a constituting a serious[74] risk to public health, public safety, the environment or the maintenance of law and justice. This definition confirms the view that this Bill is narrow in focus, only encompassing very serious disclosures.[75]

(iv) Means of disclosure

The Protected Disclosures Bill specifies in some detail to whom a disclosure ought to be made in clauses 6 to 10. Those clauses are worded in a way that makes it clear that some recipients are favoured over others. Clause 6 states that internal procedures must be used.[76] Clause 7 indicates that the head or deputy head of the organisation can be the recipient of the disclosure where there are no internal procedures or if the whistleblower believes[77] that using internal procedures will lead to reporting to a "tainted" employee.[78] Clause 8 states that where the whistleblower believes[79] the head is tainted, or that the matter is urgent,[80] or that there has been no action within 3 months of a disclosure made

---

[72] See below n 107. "Irregular" seems a much lesser matter than "corrupt" or "unlawful". Tenets of statutory interpretation such as *noscitur a sociis* suggest that the term will be coloured by the words surrounding it. That may mean that "irregular" use would be a more serious matter than it first appears. The purposive approach to statutory interpretation would also support that: J F Burrows *Statute Law in New Zealand* (Butterworths of New Zealand Ltd, 1992) pp 99 - 115.

[73] Defined in cl 2 to mean conduct by a public official (also defined - basically public sector employees) that is oppressive, improperly discriminatory, grossly negligent or constituting gross mismanagement. Again this is very serious conduct as is emphasised by the use of the word "gross". The Whistleblowers Protection Act 1989 (US) was amended to have "gross mismanagement" rather than mismanagement. Thus was intended to narrow the sorts of disclosures that could be made - see Fisher below n 127.

[74] The use of the word "serious" again emphasises that this Bill is intended to be limited to disclosures of serious misconduct. This is to be compared with the sliding scale of seriousness in cl 5 of the Whistleblowers Protection Bill 1994. It is unclear what degree of conduct is required to make it "serious" - would the faulty breathalyser in *Lion Laboratories* (above n 27) be enough to be a "serious" risk to the maintenance of law and justice.

[75] See Gehan Gunasekara (above n 54) pp 304 - 305 and Catherine Webber (above n 14) pp 956 - 957 who contend that such limitations of subject matter are not necessary and pointlessly limit protections. In Gunasekara's and Webber's view the focus should be on whether the disclosure is in the public interest. That, in my view, does not lead to any real certainty for whistleblowers. Some people have a skewed impression of what is in the public interest. A broad and relatively flexible definition setting out broad categories seems justifiable.

[76] Note that cl 11 requires public sector organisations to have such internal procedures (note that for the purposes of cl 11 SOEs and Local Government Trading Enterprises (LATEs) are not public sector organisations). This clause recognises that public sector employees ought to be treated differently. Matters should be dealt with internally. See discussion below at pp 36 to 38 of this paper.

[77] And note that this belief is tested objectively - it must be a belief on reasonable grounds. This is different to the US Whistleblowers Protection Act 1989 where protection is contingent on a whistleblower "reasonably believing" in the truth of the disclosure. This has been argued to be a subjective test: J G Starke QC (above n 61) p 257.

[78] That is where the employee has committed the wrongdoing or has a relationship or association with the person who has.

[79] Again that belief must be on reasonable grounds and is tested objectively.

[80] Or that there are exceptional circumstances (emphasis added). It is unclear when the circumstances will be exceptional.

under clause 6 or clause 7 and the whistleblower has made at least two written requests for action or for information, then the whistleblower can make a disclosure to an "appropriate authority". "Appropriate authority" is defined in clause 2. It is stated that the definition is not limited in any way and defines the term in an inclusive way. In general, apart from private sector disciplinary bodies (such as the Medical Council), only public sector organisations are "appropriate authorities". Notably the definition specifically excludes Ministers of the Crown and members of Parliament.[81] Supporters of this restriction would suggest that this takes whistleblowing out of the political arena. In my view this restriction, like the restriction to employees in this Bill, is needless. It restricts the rights of citizens to approach their elected representatives. Further, the Pugmire affair,[82] which effectively triggered the push for reform in New Zealand, is a prime example of when a Minister of the Crown or an MP can be the only appropriate body to disclose to.

Clause 9 allows for disclosures to the Chief Ombudsman (as long as the disclosure is about a public sector organisation and as long as there has been no disclosure to the Ombudsman already under clause 8) or to a Minister of the Crown if:
(a) the whistleblower has already made substantially the same disclosure[83] in terms of any of clauses 6 to 8; and
(b) the whistleblower believes[84] the authority disclosed to has decided not to investigate or has recommended to action or has decided to investigate but has not made progress after 6 months;[85] and
(c) the whistleblower continues to believe[86] that the disclosure is true or is likely to be true.

Clause 10 amends the clauses 6 to 9 procedure in so far as the disclosure relates to[87] an intelligence and security agency[88] or is about international relations or intelligence and security involving defined Government bodies, including the Ministry of Defence and the Ministry of Foreign Affairs and Trade.[89] Clause 6 is amended to ensure that any internal procedure directs the disclosure to someone with the appropriate security

---

[81] Note that cl 9 allows for disclosures to Ministers of the Crown in more limited circumstances. This is different to some overseas provisions. Section 5(4) of the Whistleblowers Protection Act 1993 (South Australia) specifically allows for disclosures to be to Ministers of the Crown. Sections 8(1)(d) and 19 of the Protected Disclosures Act 1994 (NSW) allow for disclosures to an MP or to the media in defined circumstances. Note also that cl 12 Protected Disclosures Bill gives the Ombudsman a counselling and advisory role.

[82] See above n 56. Pugmire first made his disclosure in a letter to his manager, then to the Director of Mental Health, then to the Minister of Health, then to the District Inspector of Mental Health, and then to the Minister of Police. There was little response. After a patient had been released and reoffended Pugmire released his letter to Phil Goff MP. Mr Goff then released the letter to the media.

[83] How much the disclosure can vary before it would not be 'substantially' the same would be a matter for case law.

[84] Again that belief must be on reasonable grounds and is objectively tested.

[85] How much progress will be needed before this clause would not apply would likewise be a matter of controversy.

[86] Again, this belief must be on reasonable grounds. It is objectively tested.

[87] "Relates to" again seems a flexible concept likely to be the subject of argument.

[88] Defined in cl 2 as the same as the definition in the Inspector-General of Intelligence and Security Act 1996. That definition includes the Government Communications Security Bureau, the Security Intelligence Service and any body deemed to be an intelligence and security agency by Order in Council.

[89] Also the Department of the Prime Minister and Cabinet and the New Zealand Defence Force.

clearance. Clauses 8 and 9 are amended to state that disclosures must be made to the Inspector-General of Intelligence and Security (where about intelligence and security) or the Chief Ombudsman (where about international relations)

The procedure in clauses 6 to 10 is very complex. It would require a well educated whistleblower to be sure of protection.

(v) Motive for disclosure

Even if a whistleblower is certain of falling within clauses 6 to 10, that whistleblower must ensure that he or she had the correct motive. Clause 5 indicates that a whistleblower must believe on reasonable grounds in the truth of the disclosure (or is likely to be true) and must be motivated by a desire to have the matter investigated and to have the disclosure protected. It is not clear whether that motive needs to be the primary motive. Nor is it clear how precisely on a practical level that motive would be tested. Clause 17 makes things even more difficult for whistleblowers, indicating that a whistleblower who "otherwise acts in bad faith" will not be protected by the Bill. It is not clear what sort of conduct will mean that there is no protection. It only adds to the uncertainty of the Bill. Whistleblowing by its very nature deals with issues of public interest. Ensuring that the disclosure is in the public interest and that the whistleblower believes in the truth of the disclosure would be all that is needed to ensure there was an adequate balance between encouraging whistleblowing and ensuring that only genuine whistleblowing is protected.

(vi) Protections offered

Clause 15 of the Protected Disclosures Bill protects whistleblowers from civil, criminal or disciplinary proceedings notwithstanding any other enactment or contract.[90] This clause specifically recognises the range of proceedings that can be taken against a whistleblower. Clause 16 indicates that the identity of a whistleblower will not always be protected, it only requires best endeavours to be made.[91] One of the exceptions when identity can be revealed is where revealing the identity of the whistleblower would be "essential having regard to the principles of natural justice" (clause 16(1)(b)(iii)).[92] That is an extremely wide exception, suggesting that it will be the exception rather than the rule for identity to be protected. Clause 14 gives a whistleblower the right to take a personal grievance under section 27(1)(a) or section 27(1)(b) of the Employment Contracts Act 1991[93] and clause 21 gives a whistleblower the option of pursuing action under the Human Rights Act 1993.[94] Clause 18 expressly preserves any other privilege,

---

[90] This is an important clause, ensuring that the Bill is predominant over other obligations - for instance it would have precedence over the Public Service Code of Conduct.

[91] Compare with cl 8 of the Whistleblowers Protection Bill 1994 which seeks to always protect the identity of a whistleblower.

[92] See *British Steel Corporation* v *Granada Television Ltd* (above n 2) where a whistleblower's identity was released because to have it protected would have emasculated the Corporation's Court proceedings. That would be a common situation.

[93] That is, unjustified dismissal or unjustifiable disadvantage. See the problems with these remedies identified above at n 11 and n 12.

[94] Clause 21 amends s 66 of the Human Rights Act 1993 by including having made a protected disclosure under the Protected Disclosures Bill as a prohibited ground of discrimination. Remedies under the Human Rights Act do not include reinstatement. See Gehan Gunasekara (above n 54) p 306 who suggests that using the discrimination provisions under the Human Rights Act is illogical. Gunasekara

immunity, protection or defence relating to the disclosure of information. This means that the common law public interest defence will continue to apply. That defence applies to disclosures that involve matters of the same seriousness or less seriousness[95] than the Protected Disclosures Bill, to disclosures made to the media[96] and disclosures made with motives that are not necessarily what the Protected Disclosures Bill requires.[97] Having the common law remain in place in this way does not clarify matters for whistleblowers. It makes the Bill appear too narrowly focused and defined if disclosures that completely contradict the limits prescribed in the Bill can be protected by the common law.

3 Conclusion

From this detailed analysis of the Protected Disclosures Bill it can be seen to be flawed under each of the six points of analysis. Its purpose is narrow, it does not seek to value or encourage whistleblowing or to recognise that whistleblowing serves a purpose by promoting accountability. Its scope is narrow; only employees can be whistleblowers and only very serious matters are deemed protected disclosures. Further a whistleblower must be aware of the very detailed clauses about who the disclosure can be made to. At every turn a whistleblower's beliefs are objectively tested. There are many hurdles where a whistleblower could fall. To make matters worse a whistleblower must ensure he or she does not "otherwise act in bad faith" and it is not clear what that means. Still further, protections from non-judicial reprisals is not given under the Bill - it is left to a whistleblower to take Court action under the Employment Contracts Act 1991 or the Human Rights Act 1993. Finally, other statutory and common law protections are preserved. The common law public interest defence conflicts with much of the Bill. The Protected Disclosures Bill can be seen to not only not fulfil its purpose,[98] but also to actually make matters more complex, more confusing and more uncertain for whistleblowers.

C Whistleblowers Protection Bill 1994

1 Introduction

The Whistleblowers Protection Bill 1994 was the first proposed reform in New Zealand. It was introduced by Phil Goff as a Private Member's Bill on 15 June 1994.[99] It went to the Justice and Law Reform Select Committee and submissions were heard. The Minister of State Services,[100] the Hon. Paul East, then referred the Bill and the matters

---

suggests that discrimination is about something external to employment (e.g race, gender) and whistleblowing is something directly connected to employment, not a status. Also see John Hughes "The Whistleblowers Protection Bill 1994" [1994] ELB 71. Note that cls 29 to 32 of the Whistleblowers Protection Bill 1994 give only discrimination as a remedy under the Employment Contracts Act or Human Rights Act.

[95] For a less serious instance - when the public has been misled about a famous person's lifestyle: *Woodward* v *Hutchins* (above n 28).

[96] For example, *Lion Laboratories Ltd* (above n 27), *Initial Services Ltd* (above n 4) and *Cork* v *McVicar* (above n 39).

[97] For example, *Re A Company's Application* (above n 46) and discussion above on p 14 of this paper.

[98] That is, it does not protect whistleblowers adequately.

[99] *NZPD* Volume 540, 15 June 1994, pp 1750 - 1772. The Whistleblowers Protection Bill 1994 is set out in Appendix II of this paper.

[100] The Whistleblowers Protection Bill 1994 covers both the public and private sectors. The fact that the Minister of State Services rather than the Minister of Justice took responsibility for this Bill is indicative

raised in the Select Committee to a Ministerial Review Team made up of John Gray, John Edwards and Ian Miller. The Ministerial Review Team reported back on 20 October 1995. Subsequent to that report the Minister referred the matter to the State Services Commission who drafted a new Bill, the Protected Disclosures Bill 1996.

The Whistleblowers Protection Bill 1994 was a reaction to the Pugmire affair.[101] This can clearly be seen from the introductory debate[102] and speeches made by Mr Goff.[103] It is a very political Bill. To a great extent it is based upon the Whistleblowers Protection Act 1993 (South Australia).

2 Analysis

(i) Purpose

The purpose of the Whistleblowers Protection Bill is set out in the long title and in clause 4. It is to facilitate and encourage disclosures and correction of activity of a specific nature. It also seek to "affirm" both that accountability and openness are essential elements of a democratic society and that informants are acting responsibly and in the public interest. Clause 4 also indicates that a specialist Whistleblowers Protection Authority is set up by the Bill. Clause 4 is a very dramatically worded purpose section.

(ii) Whistleblower defined

In terms of clauses 4(3)(a) and 5(2) of the Whistleblowers Protection Bill a whistleblower is "any person" who discloses public interest information to the Whistleblowers Protection Authority[104] (which is constituted in Part III clauses 9 to 19). The Bill specifically recognises that not just employees can be whistleblowers.[105] The Bill also encompasses both the public and private sectors (clause 5(1)).

(iii) Subject matter of disclosure

---

of the Government's response to the Bill. It would be fair to say that the Government's view is that any such Act should be limited to the public sector. See above n 99, pp 1753-1754. See also *New Zealand Herald* "Protection for whistleblowers" 15 December 1995, p 10 and *Dominion* "Group to report on whistle-blowers protection" 3 July 1995, p 2.

[101] Mr Goff was directly involved in the disclosure: see *NZPD* (above n 99) p 1753, *Dominion* "East tries to turn tables on Goff on Whistleblowers Bill" 15 June 1994, p 2. See Catherine Webber (above n 14) pp 935 - 937; Neil Pugmire *Submission to the Select Committee on the Whistleblowers Protection Bill 1994* 6 September 1994; *New Zealand Herald* "Pugmire lends support to bill protecting whistleblowers" 16 November 1995, p 2 and *Pugmire* v *Good Health Wanganui* (above n 11). In order to raise his concerns about the Mental Health (Compulsory Assessment and Treatment) Act 1992, Nurse Neil Pugmire released information about a psychiatric patient who later reoffended. He was suspended and offered a demotion or redundancy by his employer. That matter was later settled by the Courts. Also see further above n 82.

[102] Above n 99, 1753.

[103] For example, Phil Goff *Whistleblowers and Society* Address to the Medico-legal Society, 12 September 1995.

[104] Whether there is a need for a separate authority is a matter of some controversy: see Paul East *NZPD* (above n 98) p 1753, Bruce Slane (above n 61); State Services Commission *Submission on Whistleblowers Protection Bill* 10 October 1994 and 10 November 1995, p 7 and *The Independent* "Whistleblower Bills put foxes in charge of henhouse" 13 September 1996, p 32.

[105] Compare with cl 6 of the Protected Disclosures Bill which limits coverage to employees.

The Whistleblowers Protection Bill has three heads under which a disclosure must fall before it will be protected (clause 5(1)).[106] It must either concern the unlawful, corrupt or unauthorised use[107] of public funds or resources, or unlawful conduct or activity, or concern conduct which constitutes a significant risk or danger or is injurious to public health or public safety or the environment or the maintenance of law and justice. The third head shows a sliding scale of seriousness ("significant risk or danger or is injurious to") which means that more disclosures would fall within the ambit of the Whistleblowers Protection Bill.[108] This is to be compared with clauses 2 and 5 of the Protected Disclosures Bill which require a degree of seriousness in terms of subject matter before a disclosure will fall within its ambit.

Note that under the Whistleblowers Protection Bill even where the disclosure breaches another enactment or a confidence it can be disclosed and protected.[109] This has caused some concern.[110] The Bill does not mention contractual obligations and it is unclear how it works alongside such obligations.[111]

(iv) Means of disclosure

Under clauses 5(4) to 5(6) the Whistleblowers Protection Bill directs that a disclosure will only be protected where it is made to the Whistleblowers Protection Authority either orally or in writing. Disclosures to the media or other authorities are not protected. Clauses 6 and 7 provide that only "appropriate" disclosures will be protected. Apart from the disclosure having to be to the Whistleblowers Protection Authority, the only other requirement for a disclosure to be an "appropriate disclosure" is for the whistleblower to believe on reasonable grounds[112] in the truth of the information or in the urgent need for an investigation into its truth (clause 6(a)).

---

[106] See Gehan Gunasekara and Catherine Webber (above n 75).

[107] Compare to the use of the word "irregular" use in the Protected Disclosures Bill. "Unauthorised" seems a lesser standard than "irregular" - the use of public funds could be unauthorised but a usual or regular usage. It is not clear what would be "irregular use".

[108] Although for some even this sliding scale is not enough - see Diana K B Anstiss *Submission and Supplementary Submission: Whistleblowers Protection Bill* (undated) p 1. She proposes coverage for disclosures about "unwise use" of public funds or resources. Also NZ Council of Trade Unions *Submission on Whistleblowers Protection Bill* 22 July 1994 at p 3 suggest the addition of the "authorised but flagrantly wasteful use of public resources". Those proposals are getting too close to making political judgments in my view.

[109] Note the obvious mistake in cl 5(3)(d) - it suggests that a disclosure will be an appropriate disclosure unless it is in the public interest.

[110] See for instance Inland Revenue Department *Submission on the Whistleblowers Protection Bill 1994* July 1994 where concern was expressed that the tax system (which relies upon self-assessment and voluntary compliance) would be undermined if the Department's secrecy obligations could be ignored by its officers. See also New Zealand Law Society *Submissions on Whistleblowers Protection Bill 1994* 14 September 1994 for concern that the Whistleblowers Protection Bill suggests that legal professional privilege can be ignored. Clause 25(1) suggests that privilege is retained (at least for witnesses), although even that is not directly spelt out. Compare with the express preservation of legal privilege in s 8 of the Public Interest Disclosure Act 1994 (ACT).

[111] For example the Public Service Code of Conduct - see the National Council of Women *Submission on the Whistleblowers Protection Bill* July 1994. Note *Attorney-General* v *Barker* (above n 16) indicates that even where there is a confidentiality clause in an employment contract (in *Barker* it was a clause in the contract of a Royal servant) publication can still occur.

[112] This objective test of belief is rampant throughout the Protected Disclosures Bill 1996 but appears only once in the Whistleblowers Protection Bill.

(v) Motive for disclosure

Clause 6 requires a whistleblower to believe on reasonable grounds that the information disclosed is true or that it may be true and requires urgent investigation. Clause 22(1)(e) indicates that the Whistleblowers Protection Authority can choose not to investigate where the disclosure is vexatious or not made in good faith.[113] Clause 6 is a requirement for good faith to be one of the motives and clause 22(1)(e) is a more overt requirement that a whistleblower be motivated by good faith or risk not being protected. Just what is required to be good faith is not clear.[114]

(vi) Protections offered

Clause 7 states that no civil or criminal proceedings can be taken in relation to a disclosure. Clause 7 does not mention disciplinary proceedings. To alleviate other reprisals, clauses 29 to 32 make it unlawful discrimination to harass or treat a whistleblower less favourably because or substantially because[115] that person has made or intends to make an appropriate disclosure (clause 29(1)). A whistleblower suffering from such reprisals has the choice of proceeding under the Human Rights Act 1993[116] or filing a personal grievance under section 27(1)(c) of the Employment Contracts Act 1991.[117]

Clause 8 firms up the common law by ensuring that the identity of a whistleblower is protected. It is an offence punishable by a fine of $2,000 to reveal information which could be reasonably expected to reveal a whistleblower's identity. Clauses 25 and 26 offer protections to witnesses before the Whistleblowers Protection Authority providing that disclosures to the Authority will not be in breach of any secrecy enactments. That has caused some controversy.[118] Clause 40 lists a number of offences under the Whistleblowers Protection Bill. However, all of those offences relate to the proceedings of the Whistleblowers Protection Authority. Clause 39 provides that an employer is liable for the actions of its employees. This encourages employers to ensure there are no breaches of the Whistleblowers Protection Bill by its employees. Clause 41 states that the Whistleblowers Protection Bill is in addition to other provisions which give immunity from civil or criminal liability for disclosures. Clause 41 does not preserve the common law, and it is assumed that the Whistleblowers Protection Bill is intended to codify the common law.

The protections offered by the Whistleblowers Protection Bill are generally piecemeal. Like the Protected Disclosures Bill, it is left to the whistleblower to take Court action if subjected to discriminatory conduct. It is arguable that 'discrimination' is not the appropriate means to deal with whistleblowing issues. While it is helpful to codify the

---

[113] Compare with cl 17 of the Protected Disclosures Bill which indicates that there will be no protection where the whistleblower "otherwise acts in bad faith". At least the Whistleblowers Protection Authority has a choice here.

[114] See discussion above at n 8.

[115] The sliding scale of proof may make the nexus between the disclosure and the reprisal easier to prove, but until there is some case law indicating how to fulfil this test (ie what "substantially because" means) there seems no certainty for whistleblowers seeking protection.

[116] With the associated limitations in terms of remedy - see discussion above n 94.

[117] Clauses 29(3) and 32 of the Whistleblowers Protection Bill and s 39 of the Employment Contracts Act 1991 and s 64 of the Human Rights Act 1993.

[118] See Inland Revenue Department (above n 110).

common law, the Whistleblowers Protection Bill does it in such a way that is limiting rather than clarifying. For instance the common law allowed disclosures to the media in certain circumstances, while the Whistleblowers Protection Bill does not. Finally rather than making it an offence under the Bill to take reprisal action, the offences relate to the proceedings of the Whistleblowers Protection Authority. A whistleblower is basically left unprotected.

3 Conclusion

The Whistleblowers Protection Bill is only slightly better than the Protected Disclosures Bill. It is flawed in many respects. The good things in the Bill are few, but they are there. The express recognition that anyone, and not just an employee, can be a whistleblower, the sliding scale of seriousness in terms of the subject matter of disclosures, and the attempt to make the nexus between reprisal action and the disclosure easier to prove, all give the Whistleblowers Protection Bill a greater ambit than the Protected Disclosures Bill. Making it an offence to give false information is also positive, discouraging vexatious complaints from disaffected employees.[119]

However, a disclosure must be made to the Whistleblowers Protection Authority and the Whistleblowers Protection Authority is a toothless body. Clause 28 indicates that it is to be used as a filter[120] for complaints and is to refer complaints to an 'appropriate enforcement authority'. That concept is defined in clause 28(6) and means (basically) public sector agencies. In the alternative the Whistleblowers Protection Authority can recommend action and refer the matter back to the person about whom the investigation relates (clause 28(2)). The Whistleblowers Protection Authority has no ability to direct action be taken. The toothless nature of the Whistleblowers Protection Authority is confirmed by the fact that it is left to the whistleblower to take Court action if subjected to discriminatory conduct. It seems redundant having a separate specialised Authority if it cannot act on behalf of whistleblowers.

Still further, there is an undefined obligation on a whistleblower to act in good faith. Employers are not encouraged to create their own internal procedures to deal with whistleblowers. Finally, despite the fact that the Whistleblowers Protection Authority is toothless, the Whistleblowers Protection Bill seeks to codify the common law. It does this in such a way that rigidifies the common law.

The Whistleblowers Protection Bill does not fulfil its purpose. It does not encourage whistleblowing. It is hard to see how it leads to recognition the whistleblowers are acting in the public interest, or affirms accountability and openness are essential to New Zealand's democratic society.

D Overseas Legislation

1 Introduction

---

[119] Although a $2,000 fine may not be high enough.

[120] Note that cl 20 also gives the Whistleblowers Protection Authority a counselling and advisory role.

There are a number of Acts that will be discussed in this part.[121] In particular four Australian Acts[122] will be considered. Also noted will be the two United States Acts,[123] the Whistleblowers Protection Bill 1995 (UK) and statutes from Kentucky and Ontario.

2 Analysis

(i) Purpose

The Public Interest Disclosure Act 1994 (ACT) has its purpose expressed in its long title. It is simply to encourage the disclosure of conduct in the public sector that was adverse to the public interest.[124] The Whistleblowers Protection Act 1994 (Qld) has its purpose set out in its long title and in section 3. The Queensland Act seeks to protect whistleblowers who disclose certain matters which generally[125] relate to the public sector. The Protected Disclosures Act 1994 (NSW) has its purpose in its long title and in section 3. It seeks to facilitate and encourage disclosures but again, those disclosures are limited in terms of subject matter to those about the public sector. The Whistleblowers Protection Act 1993 (SA) also has its purpose in its long title and section 3. It seeks to facilitate and encourage disclosures and to protect those making disclosures. Again, in terms of subject matter, the disclosures must generally[126] relate to the public sector. Like the tendency in the Australian Acts, the Whistleblowers Protection Act 1989 (US) and the Civil Service Reform Act 1978 (US) both only relate to public sector federal employees.[127]

The purpose of these Acts predicts their scope. There is an unwillingness to have any reform relating to the private sector.[128]

(ii) Whistleblower defined

Section 8 of the Protected Disclosures Act 1994 (NSW) indicates that only a public official[129] can make a protected disclosure. Sections 8 and 9 of the Whistleblowers Protection Act 1994 (Qld) indicate that depending on subject matter sometimes a

---

[121] Note that because of space constraints not every Act will be analysed under each of the six points of analysis.

[122] The Whistleblowers Protection Act 1993 (South Australia), the Protected Disclosures Act 1994 (NSW), Whistleblowers Protection Act 1994 (Queensland), the Public Interest Disclosure Act 1994 (ACT) - all feature in Appendix III of this paper.

[123] The Whistleblowers Protection Act 1989 and the Civil Service Reform Act 1978.

[124] See discussion about public and private sector coverage below at pp 36 to 38 of this paper.

[125] Some types of disclosure have to be made by public sector employees (s 8, Part III) and others can be made by anybody (ss 9 and 19). Some disclosures have to relate to the public sector and others can be broader than that.

[126] Note that the s 4 definition of "public interest information" does extend beyond the public sector - e.g a disclosure can relate to an 'adult person' being involved in 'illegal activity'. Nevertheless it is true to say that the Act does in general only relate to public sector information.

[127] See Bruce Fisher "The Whistleblowers Protection Act of 1989" A false hope for whistleblowers" [1991] 43 Rutgers Law Review 354 for discussion of the process that led the US to limit the Act to the public sector. He suggests that the private sector are covered by exceptions to the employment at will doctrine. Note that the Ontario Public Service Act deals with whistleblowing in Part IV. That Part was inserted in 1994. This Act is also (obviously from its title) limited to the public sector.

[128] See discussion below at pp 36 to 38 of this paper.

[129] Defined in s 4 to be a public sector employee or person acting with public powers.

whistleblower can only be a public officer[130] and sometimes a whistleblower can be any person. Section 15(1) of the Public Interest Disclosure Act 1994 (ACT) and section 5 of the Whistleblowers Protection Act 1993 (SA) indicate that any person can be a whistleblower.

The Queensland and New South Wales statutes needlessly restrict their ambit by limiting those who can be whistleblowers. It seems illogical for a disclosure about a public sector organisation to be in the public interest if a public sector employee made it but not if a private sector employee made it.

(iii) Subject matter of disclosure

In general, all of the Australian Acts have similar restrictions on subject matter. The Whistleblowers Protection Act 1994 (Qld) embraces disclosures which reveal unlawful, negligent or improper[131] conduct affecting the public sector and disclosures revealing conduct that endangers public health and safety or the environment.[132] It seems strange to protect disclosures of unlawful public sector conduct but not unlawful private sector conduct.

Interestingly, section 17 of the Protected Disclosures Act 1994 (NSW), indicates that a disclosure that 'principally involves questioning the merits of government policy' will not be protected by the Act. Judging when a matter falls within that section would be difficult in my view. For instance, while Neil Pugmire's[133] disclosure may be argued to have questioned Government policy, whether it principally did so would be arguable.

Section 4 of the Public Interest Disclosure Act 1994 (ACT) specifies that the subject matter must relate to various types of conduct of public officials. It must at the least be conduct which gives reasonable grounds for dismissing the public official. Section 4 of the Whistleblowers Protection Act 1993 (SA) is the only one of the Australian Acts which does not limit the subject matter of disclosures to the public sector.[134]

The Whistleblowers Protection Bill 1995 (UK) is even more restrictive in terms of what disclosures are covered. The information must be acquired during employment, it must tend to show the kinds of wrongdoing specified in the Schedule, and the wrongdoing must be of such significance that its disclosure would be a defence in the breach of confidence action. This is clearly flawed. The public interest defence to the breach of

---

[130] Defined in Schedule 6 to be a public sector employee or a member of the Legislative Assembly. Note that the US Whistleblowers Protection Act 1989 includes applicants for federal employment as whistleblowers, but likewise limits its application to federal employees.

[131] A sliding scale of seriousness with "improper" seeming a subjective concept.

[132] Note that the Queensland Act allows for anyone to make disclosures about "substantial and specific dangers" to the health and safety of a person with a disability and about reprisals (ss 19 and 20). Dr William de Maria indicates that that s 19 was as a result of the 'Fanny K' case - see Dr William de Maria (above n 61) at p 274.

[133] See above n 82 and n 101.

[134] Note however that Dr William de Maria indicates that his research has shown that the South Australian Act has only be utilised five times since its inception. Dr de Maria suggests that this shows a lack of faith in the Act: see William de Maria (above n 61), p 272.

confidence action is not clear in scope.[135] This only reiterates the uncertainty for whistleblowers.

(iv) Means of disclosure

Each of the Australian Acts specifies that existing public sector bodies are the appropriate recipients of disclosures. The South Australian, Queensland and NSW statutes direct that the subject matter of the disclosure determines which is the appropriate body to disclose to,[136] with the Whistleblowers Protection Act 1994 (Qld) having theoretical examples set out in Schedule 3. This leads to a quite complex and detailed procedure. Note that in narrow circumstances the Protected Disclosures Act 1994 (NSW) allows for disclosures to be made to a member of Parliament or the media. Media disclosures are controversial.[137] Sections 9 and 10 of the Public Interest Disclosure Act 1994 (ACT) appear to favour utilising internal procedures first,[138] and ensures that Government agencies are to create such procedures. The US Whistleblowers Protection Act 1989 and Civil Service Reform Act 1978 establish a two-tiered independent body to receive and investigate disclosures. The Merit Systems Protection Board and the Office of Special Counsel are the appropriate bodies.[139] None of the Australian statutes create separate whistleblowing bodies.[140]

(v) Motive for disclosure

Section 9 and sections 16 to 19 of the Protected Disclosures Act 1994 (NSW) are the relevant sections when considering motive. Interestingly, unlike the New Zealand Bills, in general terms there is no need in New South Wales for the whistleblower to have a belief based on reasonable grounds that the disclosure is true.[141] The only time when there is such a requirement is when the disclosure is made to the media or a member of Parliament (section 19). The general authorities to whom disclosure is to be made are set out in sections 10 to 15. There is no requirement of a belief in the truth of the disclosure. The express requirement of motivation is in section 9. What is required is for the disclosure to have been made voluntarily (section 9(1)).[142] A whistleblower must ensure however that the disclosure is not made frivolously or vexatiously or it will not

---

[135] See analysis above at pp 11 to 15 of this paper.

[136] For example s 11 Protected Disclosures Act 1994 (NSW) indicates that the Ombudsman is the appropriate body to disclose information about maladministration to.

[137] See discussion below at p 39 of this paper. The Kentucky Whistleblowers Protection Act also allows for media disclosures.

[138] Although the subject matter can mean that another public sector body will be appropriate - for example if ACT police officers were failing to pay fringe benefit tax on kickbacks this could be reported to the Police or to the tax authorities. There is also the catch-all provision in s 9(a)(iv) that an 'appropriate authority' is the government agency that the whistleblower believes is appropriate.

[139] Note that in the US Whistleblowers Protection Act 1989 amendments were made to ensure that the Office of Special Counsel and the Merit Systems Protection Board were related but independent of each other - see Bruce Fisher (above n 127).

[140] See discussion of the value of separate bodies above at n 61 and n 104.

[141] There is such a requirement in s 5 of the Whistleblowers Protection Act 1993 (SA) and not surprisingly, since the New Zealand Whistleblowers Protection Bill is based upon this Act, it is markedly similar to the Whistleblowers Protection Bill 1994 provision. Also see above n 77.

[142] This is in contrast to s 22 of the Whistleblowers Protection Act 1994 (Qld) which expressly states that involuntary disclosures are protected. Involuntary disclosures would be a judicial setting and it may be that existing privileges for witnesses are sufficient. Dr William de Maria (above n 61) p 276 suggests that the reason that involuntary disclosures are not considered to be whistleblowing is because they are not 'free acts of conscience'.

be investigated (section 16). Further if the disclosure is motivated by an object of avoiding unrelated disciplinary action it will not be protected (section 18).

The Public Interest Disclosure Act 1994 (ACT) also deals with frivolous and vexatious disclosures (section 17) and interestingly, section 16 indicates that a whistleblower cannot anonymously make a disclosure, or risk having the disclosure not be investigated. This is different to the Whistleblowers Protection Act 1994 (Qld) which expressly allows anonymous disclosures (section 27(1)). That is probably to help the Criminal Justice Commission which continues its investigations into corruption in Queensland. The Queensland statute has no express requirement of good faith motivation, the only statute to lack such a requirement.

The Queensland statute, perhaps reflecting the reason for its enactment, allows whistleblowers within its ambit to have any motivation at all. What is important is that the disclosure is made not the reason for it. The other Australian statutes have various requirements of good faith.[143]

(vi) Protections offered

The final point of analysis is what protection is offered under overseas legislation.

The Whistleblowers Protection Act 1989 (US) offers whistleblowers the chance to take court action themselves if subjected to retaliatory conduct. The Office of Special Counsel is also available to investigate and take action on its own behest. The Merit Systems Protection Board can issue protective orders. Action can be taken against employees who instigate reprisals - fines and suspension are available options.[144] The Whistleblowers Protection Act 1989 amended the Civil Service Reform Act 1978 in an important respect. The nexus between the retaliation and the whistleblowing is easier to prove - whistleblowing now has to be a factor behind the retaliatory conduct not the significant or motivating factor.[145]

Sections 25 to 32 of the Public Interest Disclosure Act 1994 (ACT) make engaging in an 'unlawful reprisal'[146] an offence. The penalty is $10,000[147] and/or 1 year's imprisonment. Section 25(2) gives a broad defence to an action however. It is similar to the *Mount Healthy* judgment in the United States.[148] Where the reprisal action was engaged in prior to the whistleblowing and where there were reasonable grounds for engaging in that action, that is a defence to an action alleging an unlawful reprisal. This lessens the scope of the provisions. Section 30 gives the Ombudsman the ability to take

---

[143] See Bruce Fisher (above n 127) p 374. There is a clash of authority in the United States about whether motive is relevant - see *Gady* v *Department of Navy* 38 MSPR 118 (1988) and *Fiorillo* v *US Department of Justice, Bureau of Prisons* 795 F 2d 1544 (Fed.Cir 1986).

[144] J G Starke QC (above n 61) p 259.

[145] See Bruce Fisher (above n 127) p 405. See also *Mount Healthy Board of Education* v *Doyle* 429 US 274 (1976) where the Board was able to dismiss an outspoken employee by pointing to other conduct as their motivation.

[146] Defined broadly in s 2 as conduct that causes or threatens to cause detriment, either to a person in the belief that person has/will make a public interest disclosure (testing the repriser's belief may be difficult), or to a public official because s/he has resisted attempts to be involved in the commission of an offence.

[147] Section 37 allows Court to impose 5 times these penalties if the defendant is a corporation.

[148] See above n 144.

the necessary court action on behalf of a whistleblower - not necessarily at its own behest. The Authority reported to can also take appropriate disciplinary action to prevent reprisals commencing or continuing (sections 22(1)(e) and 22(1)(f)). Also available to whistleblowers is the option of relocation[149] and the possibility of a civil claim (with damages (section 29) or injunctions or declarations (section 30) as remedies). The whistleblower's identity is protected, but only so far as there is no reasonable excuse for revealing it.[150] Section 35 gives whistleblowers a broad exemption for liability in any action as a result of having made a public interest disclosure, including an exemption from liability under secrecy provisions. Section 34 has a $10,000 and/or 1 year's imprisonment penalty to be imposed upon a person who knowingly or recklessly makes a false or misleading disclosure.

The Whistleblowers Protection Act 1994 (Qld) also has defined offences for reprisal action.[151] A reprisal is an indictable offence (section 42(2)). Unlike the ACT statute the Whistleblowers Protection Act 1994 has broader impact - it is sufficient that the whistleblowing is a substantial ground for the reprisal, even if there is another ground (section 41(5)). It also allows for civil claims with damages and injunctions as remedies.[152] Section 44 directs public sector organisations to have internal mechanisms for dealing with whistleblowing and allows for judicial review if reprisals occur (section 45). Section 56 makes it an offence to intentionally give a false or misleading disclosure. That carries the same penalty as taking reprisal action. Section 39 gives a broad exemption for whistleblowers from civil, criminal and disciplinary action, and indicates that whistleblowing will not be a breach of any secrecy enactment or oath either. Section 6 preserves the common law and other remedies available to whistleblowers. Retention of the common law leads to some confusion for whistleblowers.

The Queensland and ACT statutes reveal a breadth of protection that is not contemplated in either of the New Zealand Bills.[153] Both Acts act against reprisals. The Queensland statute encourages there to be effective internal procedures available. Both statutes also have reasonably heavy penalties available for false disclosures. The ACT statute is undermined by the broad defence in section 25(2) which enables a repriser to escape liability. The US Act specifically authorises action to be taken at the behest of the Office of Special Council, not necessarily the whistleblower. Neither Australian Act has such a provision.

---

[149] See Dr William de Maria *Fridges that Don't Freeze ... Planes that Don't Fly... Laws that don't work ... Design Failure in Australia's Whistleblower Legislation* (Unpublished paper presented to the second National Whistleblowers Conference, Melbourne, June 1996) p 15 - Dr de Maria suggests that it is reprisers who should be relocated.

[150] Section 33 gives a penalty of $5,000 for releasing identifying information if there is no reasonable excuse for doing so.

[151] Section 41 defines reprisals, and s 42 sets out the penalty 167 penalty units or 2 years' imprisonment.

[152] Relocation is also possible - s 46, but s 46(5) requires the consent of the CEO if transferring across Departments. Identity is also generally protected - s 55 - like the Protected Disclosures Bill 1996 (New Zealand) the broad exception is where natural justice demands release.

[153] Note that the Whistleblowers Protection Act 1993 (SA) has similar remedies to the Whistleblowers Protection Bill 1994 (New Zealand) - i.e giving immunity from civil and criminal liability (s 5), protecting identity (s 7), establishing a tort of victimisation (s 9) leaving the whistleblower to take action and leaving other immunities in place while possibly codifying the common law (s 11).

3. Conclusion

In terms of scope, the overseas legislation is narrower that the New Zealand Bills because the overseas legislation generally only relates to the public sector. The Queensland and New South Wales statutes go as far as restricting both the subject matter and who can be a whistleblower.[154] The Australian statutes also set up an overly complex set of procedures where the subject matter of the disclosure defines which authorities a disclosure must be reported to. The New Zealand Protected Disclosures Bill 1996 also has a complex set of procedures, but does not link those procedures with subject matter. However, almost without exception, the Australian and US statutes give better protection for whistleblowers that the New Zealand Bill do. Further there is active discouragement for people making false disclosures.

The New Zealand Bills are only more favourable in one respect - they extend into the private sector. Whether whistleblowing reform should extend into the private sector and whether the media ought to be an appropriate authority to disclose to are discussed below.

E Two Issues Discussed

1. Public and Private Sectors

(i) Whether both should be covered

There is debate about whether whistleblowing legislation ought to extend into the private sector. In the introductory debate for the Whistleblowers Protection Bill 1994 the Government's view was that it should not.[155] Many submissions were also of the view that this was unnecessary regulation of the private sector,[156] but on the whole it was recognised that there were valid reasons to extend whistleblowing reform to the private sector.[157] The Ministerial Review Team[158] made it clear that in their view both sectors ought to be covered by legislation because of the blurring of the division between the two sectors. It was also recognised that a number of significant public interest issues would also be significant in the private sector - for example issues of health and safety and the environment. It was also recognised that private sector employees ought to have the same remedies available as their public sector counterparts.

Limiting whistleblowing legislation to the public sector is shortsighted in my view. In addition to the reasons outlined by the Ministerial Review Team it is clear that public

---

[154] The Whistleblowers Protection Bill 1995 (UK) is even more restrictive in ambit. See Dr William de Maria *The British Whistleblowers Protection Bill - A Shield Too Small?* Unpublished paper, November 1995.

[155] See above n 99. Although Paul East (at p 1753) proposed 'starting' with the public sector and then moving to covering the private sector. Also see Bruce Fisher (above n 127) at p 357 who supports the US Whistleblowers Protection Act 1989 not extending into the private sector, partially because the private sector is covered by exceptions to the US employment at will doctrine, and partially because in Fisher's view the public sector is more susceptible to whistleblowing.

[156] Notably the New Zealand Employers Federation Inc (above n 63).

[157] See Bruce Slane (above n 61) and State Services Commission (above n 104) - who both recognise that the blurring of the division between the public and private sectors is an important reason why whistleblowing reform ought to cover both sectors.

[158] See above n 1, pp 2 - 4.

interest disclosures will also occur in the private sector. Both public and private sector organisations can have general impact - for example both sectors have the capacity to affect the environment negatively. Both sectors ought therefore to be covered by any reform.

(ii) Treating public sector whistleblowers differently

While both public and private sector whistleblowers ought to be covered by any reform there is a case for saying that public sector whistleblowers should be treated differently than their private sector counterparts. That is because public sector employees have different obligations to private sector employees. In addition to any professional obligations of confidence public servants have greater obligations of secrecy imposed by legislation and the Public Service Code of Conduct. Further, the consequences of disclosure are harsher for public servants. Section 78A of the Crimes Act 1961 makes it an offence punishable by three years' imprisonment to wrongfully communicate or retain official information knowing that it is likely to prejudice the security or defence of New Zealand.[159] The Public Service Code of Conduct is explicit, requiring public servants to communicate wrongdoing internally.[160]

Arguably these obligations of secrecy are necessary because of the special nature of public service employment.[161] Public sector employment involves dealing with information that has been gathered from the public in the public interest. Public sector employees have access to a great deal of information about members of the public. The Protected Disclosures Bill 1996 recognises that public service employment has special features. Clause 6 requires disclosures to be via internal mechanisms and clause 11 requires public sector organisations to have internal mechanisms.

Going against the secrecy provisions and instruments mentioned above which seek to limit the disclosure of information, cases for breach of confidence taken by the State have been treated differently than other breach of confidence cases. It seems that a Government plaintiff must show an additional public interest beyond merely the public interest in the preservation of confidence before disclosure of the information will be restrained. The additional public interest can be something like national security or

---

[159] Note that commentary in *Adams on Criminal Law* (Brooker and Friend Ltd, Wellington 1996) pp 1F-7 to 1F-10 indicates that this provision has the potential for wide application. Compare with the stricter UK Official Secrets Act 1989 where disclosures about certain matters (eg defence, national security) are a criminal offence no matter what the knowledge of the offender. See also s 25 of the Armed Forces Discipline Act 1971 for a similar provision with a penalty of two years' imprisonment and s 221 Tax Administration Act 1994 for a provision with the possibility of a term of six months' imprisonment or a $15,000 fine.

[160] See pp 13, 14 and 17 Public Service Code of Conduct. Note that the Code of Conduct suggests that there is a responsibility to the Minister of the particular Department and not the public in general.

[161] J G Starke QC (above n 61); Leo Tsaknis (above n 30); Richard Fox *Protecting the Whistleblower* (1993) 15 Adel LR 137, 148; compare Dr William de Maria *Whistleblowers and Secrecy: Ethical Emissaries from the Public Sect[or]* (Unpublished paper presented to the 'Freedom of the Press' Conference, Bond University, 11 November 1995) who claims that such secrecy requirements run counter to the idea of open government and are really indicative of government control of dissent. Dr de Maria also points to the extraordinary number of secrecy requirements in Queensland and questions whether the public service is really a secret service.

defence. In *Attorney-General* v *Jonathan Cape Limited*[162] the passage of time (some 6 years) lessened the impact of disclosure of information from Cabinet meetings. The doctrine of joint Cabinet responsibility was not undermined by disclosure. In *Commonwealth of Australia* v *John Fairfax & Sons Ltd*[163] the High Court of Australia held:

> The Court determines the government claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest it will not be protected.

Where the case is finely balanced, the High Court indicated that the public interest in knowing and expressing its opinion outweighs the need to protect confidentiality. This seems consistent with the focus on freedom of information in Government and on accountability. Where national security is threatened however the Courts will not hesitate to restrain the information.[164] In general though, while the public sector has endeavoured to position itself as a sector requiring secrecy, the Courts have indicated that there is a presumption of disclosure when dealing with public sector information. There is clear inconsistency between the two positions.

In a sense the issue of whether a public service whistleblower ought to be treated differently depends upon the nature of the disclosure. If the disclosure reveals information about a member of the public it is arguable that internal mechanisms ought to be used first in order to protect and encourage the public to give information to public sector organisations. Privacy issues arise in that situation as well. However of the disclosure does not reveal information of that nature it is arguable that public sector whistleblowers need not be treated differently than private sector whistleblowers. Often the difficulty is that the line between these two sorts of disclosure by public service whistleblowers is hard to draw.[165] In other words just because the information is governmental does not mean that it requires special protection. This is what the Courts were grappling with in the *John Fairfax* and *Jonathan Cape* cases.

It is a difficult balance to strike between the protection of the public through retaining secrecy in the public service and encouraging and protecting public servants who disclose wrongdoing in the public service. Other policy factors such as freedom of information, which suggests that public sector information should not be unduly restricted, also have to be considered when dealing with public sector disclosures. Public service whistleblowers ensure there is accountability in the public sector. For that reason they are valuable and should be protected. To balance all the competing interests some specially tailored rules could be created for the public service. Where the whistleblowing identifies a member of the public it could be encouraged to be internal

---

[162] Above n 16. Also note *Lord Advocate* v *Scotsman Publications Ltd* (above n 15) weighs the importance of freedom of speech into the mix.

[163] Above n 16, p 52.

[164] See *Attorney-General* v *Guardian Newspapers (No.2)* (above n 2) - the "Spycatcher" case and *Snepp* v *United States* above n 16 which has very similar facts. Note however *Attorney-General for UK* v *Wellington Newspapers Ltd* [1988] 1 NZLR 129 that it seems that the national security issues have to be within the country where the publication is being sought to be restrained otherwise there will not be an acute enough public interest in restraining confidentiality.

[165] For instance the *Pugmire* case involved a disclosure by a public service employee (if CHEs are viewed as public sector organisations) which identified a patient but had its main focus about deficiencies in the Mental Health (Compulsory Assessment and Treatment) Act 1992. See above n 82 and n 101.

or to be confidential (perhaps to be made to a Parliamentary Committee if a particular issue relevant to the Department of State is being analysed). If the whistleblower uses other mechanisms protection could be limited to situations where:
- the public service whistleblower had reasonable grounds for believing that the disclosure was true;
- the disclosure was shown to be substantially true; and
- notwithstanding the failure to use established procedures, in the circumstances the course taken was excusable.

Those limitations on disclosing information which identifies member of the public would balance the public interest in retaining secrecy alongside the public interest in encouraging the efficient operation of the public service, which whistleblowing would help regulate. Disclosures of information about maladministration and corruption in the public service could be through any channels. This would encourage public confidence in the accountability of the public sector. Proposals of this nature form a part of the Public Interest Disclosure Bill in Appendix I of this paper.

2. Media Disclosure

Another issue to consider is whether disclosures to the media ought to be protected. Neither New Zealand Bill contemplates disclosures to the media being protected disclosures.[166] The freedom of the press may arguably be undermined by these Bills. It is consistent with case law to suggest that in certain circumstances disclosures to the media can be considered protected.[167] In *NZALPA* v *Air New Zealand Ltd*[168] Cooke P specifically noted that in certain acute circumstances, for example public safety, disclosure to the media would be justified. Section 19 of the Protected Disclosures Act 1994 (NSW) allows for disclosures to the media in narrow circumstances.[169] Those narrow circumstances require a whistleblower waiting for six months before the media can be used. The New South Wales Act and *NZALPA* contemplate two different scenarios when disclosure to the media may be appropriate. In the first situation it is where no other avenues have been effective. In the second it is where the matter is of such urgency and such general effect that the media ought to be used to inform the public as quickly as possible.

Both situations do seem to warrant disclosures to the media. Another reason to allow media disclosures is to promote the freedom of the press. The media is also a useful tool to ensure the public accountability of organisations. In my view disclosures to the media ought to be contemplated and ought to be protected. There is a risk that a media disclosure can harm reputation unduly. Media disclosures could be limited to those matters of acute urgency and there would need to be onerous punishments for whistleblowers who disclose to the media knowing the disclosure to be false. The focus

---

[166] Neither does Catherine Webber (above n 14) at p 935 - her definition of "whistleblower" specifically excludes those who disclose to the media.

[167] See *Lion Laboratories Ltd* v *Evans* (above n 27), *Initial Services Ltd* v *Putterill* (above n 4) and *Cork* v *McVicar* (above n 39).

[168] Above n 41.

[169] Where the disclosure is substantially true and the matter had been previously referred to an Authority who failed within 6 months to investigate.

ought to be on the public interest in the in the subject of the disclosure, not to whom the disclosure is being made.

F Conclusion

Part IV analysed several Acts and Bills and briefly discussed two important points that need to be considered when looking at reform in this area.

The analysis revealed that the Protected Disclosures Bill is flawed. It did not compare favourably with any of the other legislation, except that it applies to the private sector as well as the public sector. It creates a complicated procedure and leave protections to the whistleblower to instigate. Further, it leaves the unclear common law in place presumably on the basis that it will add flexibility. All of this leads to more uncertainty for whistleblowers. It does not reform this area. It effectively discourages whistleblowers.

Part IV also considered two particular points: first whether the public and private sectors ought both be covered by whistleblowing reform and, if so, whether the public sector ought to be treated differently. It was concluded that both sectors ought to be covered and that in circumstances where disclosures were about members of the public there was a case for public service whistleblowers being treated differently than private sector whistleblowers. The second point that was considered was whether the media is an appropriate body to make disclosures to. It was concluded that the media can be an appropriate body and that the focus should not be on the recipient of the disclosure but on the subject matter of the disclosure. It was also considered that media disclosures require special protections to be in place to ensure that the media is not used inappropriately.

V CONCLUSION

[I]t's a curious culture we have nurtured when special laws must be passed to protect people from being ostracised for telling the truth.

The Independent
'Whistleblower Bills leave the foxes in charge of the henhouse'
13 September 1996, page 32

Whistleblowing leads to increased accountability and ensures that society's standards continue to be high. Whistleblowing by its very nature is in the public interest. Studies have shown that whistleblowers suffer from reprisals for acting in the public interest. Reprisals can be anything from facing a civil law suit to dismissal from employment to demotion and ostracism. This paper started with the premise that reprisals are not acceptable and that whistleblowing ought to be encouraged and protected.

This paper began by considering the current legal position for whistleblowers. Currently a whistleblower can be justifiably dismissed from employment for making a public interest disclosure, and can face Court action even after dismissal. The defences available to whistleblowers are piecemeal, limited to specific statutes or in the ill-defined common law public interest defence. While international instruments and the New Zealand Bill of Rights Act 1990 are growing in prominence they have not had a great impact in this area in New Zealand and are arguably limited in scope. The reprisals suffered by whistleblowers are not contemplated by the current protections which only grant limited defences against certain types of Court action. It was concluded that the current situation was a negative environment for whistleblowers which did not foster accountability and the high standards of behaviour we should expect. The current law did nothing to value, encourage and protect whistleblowers. For those reasons reform is necessary.

Two options for reform were considered. There were many options for statutory reform. Industrial reform would involve leaving organisations themselves to set up their own tailored internal procedures. It was concluded that a combination of the two options would be most likely to be enacted. However it was also recognised that to ensure reform was effective the statutory reform ought to take precedence where it and internal mechanisms conflicted, and to ensure consistency the statutory reform should set a minimum standard for internal mechanisms to comply with. A proposal for a new Bill, the Public Interest Disclosure Bill, forms Appendix I of this paper.

It was recognised that any reform could not be completely effective against the more subtle sorts of reprisals. However reform could foster a more positive environment for whistleblowers which would make such subtle reprisals less likely. It was also recognised that any reform had to ensure that there was a balance between the rights of the whistleblower and the rights of the subject of the disclosure. For instance any Bill ought to have a provision ensuring that intentionally false disclosures would be vigorously punished.

The current proposal, the Protected Disclosures Bill 1996, was analysed and comparisons were made with other Acts and Bills including the Whistleblowers Protection Bill 1994. The Protected Disclosures Bill was revealed to be flawed. It does not achieve the reform that is needed. It adds to the current uncertainty, putting in place a complex procedure, extremely limited protections, and judging whistleblowers harshly in terms of their motives for disclosure. The Protected Disclosures Bill adds to and does not alleviate the problems in this area.

This paper concludes that comprehensive reform is needed and the Protected Disclosures Bill does not give that reform. Statutory reform ought to codify and clarify the common law, it ought not to be limited unnecessarily, it ought to cover both public and private sectors while recognising that public sector whistleblowers ought on occasion be treated differently, it ought to provide remedies and penalties for reprisals and for intentionally false disclosures, and it ought to provide for a body apart from the whistleblower to take action against reprisals at its own behest. Finally the statutory reform ought to encourage and value whistleblowing. Industrial reform ought to be encouraged with a minimum standard for internal mechanisms set by statute. Only this sort of reform would truly alleviate the problems with the law at present and provide real protection for genuine whistleblowers.

A proposed statute which achieves the above forms Appendix I of this paper. Commentary is also included in Appendix I. This proposal is in part a compendium of the best matters from the Bills and Acts considered in this paper and it also includes three matters that are not found in any other proposal:
(a) it actively encourages whistleblowing by awarding to the whistleblower a part of any monetary penalty imposed upon a person or organisation for the wrongdoing that was the subject of the whistleblower's disclosure;
(b) it allows for disclosures to the media to be protected; and
(c) it allows for the office of the Ombudsman to investigate reprisals and to take prosecution action at its own behest.
The Public Interest Disclosure Bill is not narrowly defined in scope, provides a means of disclosure that is flexible and not too detailed, and provides remedies for whistleblowers and active protections against reprisals. It also serves to encourage and value whistleblowing while at the same time recognising that other public interests, such as the secrecy of some information in the public sector, can outweigh a whistleblower's freedom of speech on occasion. The Bill also encourages organisations to take responsibility and create internal mechanisms for such disclosures to be made. The Bill recognises that there has to be minimum protection for whistleblowers and ensures that any internal mechanisms cannot contract out of the protections available in the Bill.

It is concluded that the Protected Disclosures Bill 1996 is flawed and that the Public Interest Disclosure Bill proposed in this paper is the sort of Bill that is really needed to reform this area.

APPENDIX I

New proposal
Commentary and the Public Interest Disclosure Bill

COMMENTARY ON THE PUBLIC INTEREST DISCLOSURE BILL

This commentary will be a clause by clause commentary. I will indicate the source of that clause and any comments about that clause. Naturally the commentary for some clauses will be more extensive than for others.

Clause 1: This is the short title and commencement date of this Bill.

Clause 2: The definitions in clause 2 are general only. The definition of "Ombudsman" is drawn from the Protected Disclosures Bill 1996 but is extended to allow the Governor-General to appoint an Ombudsman to work with this Bill (like the Privacy Commissioner does with the Privacy Act 1993). It may be that the role contemplated for the Ombudsman in this Act will require extra funding for that office.

Clause 3: This is the declaration that the Crown is bound by this Bill.

Clause 4: This is the purpose of the Bill. It is drawn from the Whistleblowers Protection Bill 1994 and the Protected Disclosures Bill 1996. The difference in this Bill is that it seeks to also reward whistleblowers. Like the Whistleblowers Protection Bill, this Bill also specifically identifies how it fulfils its purpose.

Clause 5: This clause defines the scope of this Bill. It defines who can make a public interest disclosure (and hence who is protected by the Bill), and what sort of subject matter is a public interest disclosure. Clause 5 is deliberately worded widely ensuring optimum coverage; anybody can be a whistleblower and in terms of subject matter clause 5(2)(d) is intended to ensure as far as possible that all disclosures made in the public interest are covered by this Bill. This Bill keeps in place the sliding scale of seriousness for disclosures relating to public health, public safety, the environment and the maintenance of law and justice. That sliding scale appears in the Whistleblowers Protection Bill. That reflects the view that such matters are acutely in the public interest and that only the most frivolous of disclosures about those matters will not fall within the Public Interest Disclosure Bill. The only other requirement is that the whistleblower believes on reasonable grounds that the disclosure is true (clause 5(3)). Clauses 5(2) and 5(3) are taken in part from the Whistleblowers Protection Bill 1994.

As distinct from the Whistleblowers Protection Bill and the Protected Disclosures Bill, the Public Interest Disclosure Bill does not restrict to whom the disclosure can be made. Clause 5(4) and 5(5) are new. Those clauses are the start of an active role for the Ombudsman. The Ombudsman is notified of a disclosure and, if the whistleblower does not consent, the Ombudsman is consulted when the recipient of the disclosure wishes to refer the disclosure to another person or organisation considered more appropriate. Clause 5(5) specifically recognises that the whistleblower should be consulted when determining which authority a disclosure ought to go to. The notification of the Ombudsman predicts the Ombudsman's later role and allows the Ombudsman to monitor the situation ensuring no reprisal action occurs.

This Bill reflects the view that what is important is that disclosures are made in the public interest. They should therefore be encouraged. While saying that, this Bill does not go as far as forcing disclosures. It does not make it a duty for certain professions or groups to make public interest disclosures. Such a proposal has been made for receivers appointed as super trustees of superannuation schemes.[1] Instead this Bill seeks to encourage voluntary disclosures in the public interest.

Clause 6: This is a new clause. This clause follows on from clause 5's broad coverage indicating that this Bill contemplates the media being recipients of public interest disclosures. This clause also reflects the view that what is important is that it is in the public interest for such disclosures to be made. There should not therefore be unnecessary restrictions on the ability to make disclosures. Clause 6(2) sets out a necessary restriction on a public sector whistleblower's ability to make disclosures to the media. This restriction is to ensure that public confidence is retained in public sector employees keeping information about members of the public confidential. Clause 6(2) recognises that in some circumstances it might be necessary for a public sector whistleblower to make a disclosure to the media but ensures that it is clear that such circumstances will be rare.

Clause 7: This clause is drawn from section 39 of the Whistleblowers Protection Act 1994 (Qld) and section 21 of the Protected Disclosures Act 1994 (NSW). This clause goes much further than do either of the proposals in the New Zealand Bills at present. It not only ensures that a whistleblower is not subjected to liability of any sort, it also ensures that the publisher of a protected disclosure is protected from a defamation action as well. That protects the freedom of the press in particular.

Clause 8: This clause is loosely based upon the Protected Disclosures Bill 1996 but a lot of it is new. This clause recognises that on occasion the disclosure of a whistleblower's identity may be necessary to further the investigation of the disclosure and to ensure natural justice is complied with. This Bill recognises that there are different interests that will need to be balanced. However this clause limits such circumstances by ensuring that the whistleblower or the Ombudsman must authorise the disclosure. This clause also ensures that the whistleblower is informed that his or her identity will be released and when that will be. Because this is a statutory power of decision judicial review proceedings may be possible.

Clause 9: This is a new clause. This clause in particular seeks to encourage whistleblowing. It also seeks to recognise that whistleblowing performs a valuable role and should be rewarded. Where there is a link between the whistleblowing and the monetary penalty imposed on the person or organisation named in the disclosure the whistleblower is awarded a portion of that monetary penalty. If property is seized the whistleblower may then be rewarded a sum of money which reflects the market value of that property. In both cases the amount that may be awarded is left to the discretion of the Court or Tribunal which determines the penalty.

---

[1] This proposal was buried in the Law Reform (Miscellaneous Provisions) Bill (No 5) 1996 - see *Independent* ""Whistleblowers infiltrate super schemes" 26 April 1996, p 1.

Clause 10: This clause is loosely based upon the clause 20 of the Whistleblowers Protection Bill 1994. It again reflects the role in this Bill for the Ombudsman ensuring that office as well as the recipient of the disclosure have a role in informing the whistleblower of the rights and obligations involved in this Bill. It is recognised that this Bill assumes that the recipients of disclosures will be aware of this Bill and will be able to perform this task. That would clearly require publication and education across the private and public sectors.

Clause 11: This is a new clause. It allows for internal whistleblowing procedures to be in place within organisations. However it ensures that any whistleblower within an organisation continues to have access to the remedies outlined in this Bill if he or she is subjected to a reprisal. This clause has at its heart a view that organisations need to take responsibility for whistleblowing.

Clause 12: This clause is in part based upon section 41 of the Whistleblowers Protection Act 1994 (Qld). It defines a reprisal action. Clause 12(2) ensures that where there are a number of reasons for the reprisal including the public interest disclosure made by the whistleblower, that whistleblower can still prove there is a nexus between the reprisal and the public interest disclosure. This clause also declares that a reprisal is an offence against this Act. Implicitly this Bill recognises that a Court determining penalty will consider all of the reasons for the reprisal.

Clause 13: This clause is based in part upon clause 39 of the Whistleblowers Protection Bill 1994. It indicates that employers and principals are liable for the reprisal actions of their employees or agents. It ensures that there is impetus for employers or principals to ensure that their employees or agents do not take reprisal action against whistleblowers. Clause 13(2) in combination with clause 11 encourages employers or principals to have internal procedures available. Clause 13(2) gives an employer or a principal a defence if all reasonable steps have been taken to prevent reprisals and internal procedures must form a part of those steps.

Clause 14: This clause is based in part upon clauses 29 to 32 of the Whistleblowers Protection Bill 1994, clause 14 of the Protected Disclosures Bill 1996 and section 42 of the Whistleblowers Protection Act 1994 (Qld). It sets out the remedies available to whistleblowers who are subjected to reprisals. The personal grievance procedures in the Employment Contracts Act 1991 are available, the procedures in the Human Rights Act are available and the Bill also authorises the whistleblower to pursue an action in tort for damages, for instance based upon stress and mental anguish. Clause 14 also specifically recognises that in certain circumstances a judicial review action may be possible against a public sector organisation which has internal mechanisms in place to deal with whistleblowers. This ensures that public sector organisations have judgments and have procedures in place to make internal procedures effective.

Clause 15: This is a new clause. Again this clause continues the trend of a high level of involvement by the Ombudsman. This clause enables the Ombudsman to prosecute an individual or company which commits a reprisal. The Ombudsman can do this without the necessity for a complaint from a whistleblower. That ensures that there is proactive protection for whistleblowers and recognises that reprisal action can leave a

whistleblower in a very difficult position. It is recognised that such an active role for the Ombudsman would require special funding to that office. The Ombudsman was chosen for this particularly active role because it is considered that a new specialist body is not needed and such a proposal is unlikely to be supported. In my view the Office of the Ombudsman has high public standing and epitomises accountability.

Clause 16: This clause is based upon the penalty sections in the Public Interest Disclosure Act 1994 (ACT) (sections 25 - 32) and the Whistleblowers Protection Act 1994 (Qld) (sections 41 and 42). It provides for monetary penalties to be imposed upon individuals and organisations that are responsible for reprisals. Differing penalties are imposed, with a higher level of penalty on organisations. This further encourages corporates to ensure that the workplace does not cultivate a culture that accepts and encourages reprisals. Further, the Court may award that a portion of the fine be paid to the whistleblower. This is intended to be a kind of monetary compensation for the whistleblower.

Clause 17: This clause is likewise drawn from the Public Interest Disclosure Act 1994 (ACT) and the Whistleblowers Protection Act 1994 (Qld). This clause indicates that it is an offence punishable by a $20,000 fine to knowingly or recklessly make a false public interest disclosure. It is important to ensure that the rights of those named in such false disclosures are protected (clause 5(3) indicates that knowingly false disclosures are not protected under this Bill so proceedings for instance in defamation are a possibility) and to ensure that the principle behind this Bill is not undermined. That principle is that whistleblowers make disclosures in this public interest. Knowingly or recklessly making a false disclosure would not be in the public interest.

Clause 18: This clause is new. It indicates that the common law public interest defence is codified by this Bill. This ensures some certainty in this area of the law. The common law public interest defence was uncertain in scope - this Bill clarifies what types of disclosure will fall within it and what action a disclosure made under this Bill is protected from - the common law public interest defence was uncertain as to its requirements - this Bill clears up that uncertainty, in general it does not matter to whom the disclosure is made nor the motive of the whistleblower. This clause also indicates that there can be specialist protective sections in particular statutes which remain in place but that Part III of this Bill is unaffected by any such statutes. This ensures that all whistleblowers have access to the remedies available in this Bill.

Clause 19: This clause simply lists the Acts that will need to be amended as a result of this Bill.

Clause 20: This clause is taken from clause 20 of the Protected Disclosures Bill 1996 and in part from clause 19 of the Whistleblowers Protection Bill 1994. It provides that the Minister of Justice must prepare a report and Parliament must formally review the operation of this Bill after it has operated for five years. This would enable Parliament to ensure that whistleblowers are effectively protected from reprisals, that the Bill has worked to limit the number of reprisals and that the Bill has worked to encourage organisations to have procedures to deal with whistleblowing. The move away from

the State Services Minister (as in clause 20 of the Protected Disclosures Bill) to the Minister of Justice reflects this Bill's focus on justice.

Concluding comments

The Public Interest Disclosure Bill is a better Bill than either of the New Zealand Bills in three broad respects:

- its coverage - this Bill is not narrow in scope. It is directed at providing optimum coverage;
- its requirements - this Bill does not have difficult and detailed requirements. It seeks to encourage whistleblowing, not discourage it;
- its codification of the common law public interest defence - this Bill ensures that uncertainty is resolved.

PUBLIC INTEREST DISCLOSURE

ANALYSIS

A BILL INTITULED

An Act to promote the public interest by facilitating, encouraging, rewarding and protecting persons who make disclosures of information in the public interest

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement - (1) This Act may be cited as the Public Interest Disclosure Act 1996.
(2) This Act shall come into force on the **1st day of July 1997**.

PART I
PRELIMINARY PROVISIONS

2. Interpretation - In this Act, unless the context otherwise requires.-

"Media" includes a journalist and includes all forms of print or electronic media:

"Ombudsman" means as Ombudsman holding office under the Ombudsmen Act 1975; and includes -
(a) Any person holding office under an Ombudsman to whom any of the powers of an Ombudsman have been delegated under section 28 of that Act; and

(b) Any person whom an Ombudsman or the Governor-General by Order in Council has appointed to perform an Ombudsman's functions under this Act:

"Organisation" includes all private sector and public sector bodies:

"Person" includes natural persons:

"Public interest disclosure" has the meaning set out in section 5 of this Act:

"Reprisal" has the meaning set out in section 12 of this Act:

"Whistleblower" means a person who makes a public interest disclosure in terms of section 5 of this Act:

3. Act to bind the Crown - This Act binds the Crown.

4. Purpose of this Act - (1) The purpose of this Act is to promote the public interest by facilitating, encouraging, rewarding and protecting persons who make disclosures of information in the public interest.
(2) For attaining its purpose, this Act -
(a) provides encouragement and rewards for public interest disclosures by awarding a whistleblower a portion of any monetary penalty imposed as a result of that whistleblower's public interest disclosure;
(b) clarifies and codifies the common law making the law more certain for whistleblowers;
(c) provides protection from reprisals by providing penalties for reprisals, providing whistleblowers with remedies and by providing that the Ombudsman can prosecute persons or organisations committing reprisals without the need for a complaint from a whistleblower;
(d) ensures that only genuine public interest disclosures are encouraged by providing penalties for intentionally false disclosures.

PART II
PUBLIC INTEREST DISCLOSURES

5. Public interest disclosures - (1) Any person can make a public interest disclosures and become a whistleblower in terms of this Act.
(2) A public interest disclosure is a disclosure which relates to any conduct or activity by a person or organisation that-
(a) is unlawful; or
(b) involves the unauthorised use of public funds or resources; or
(c) constitutes a serious risk or is injurious or dangerous to
- public health or the health of a person; or
- public safety or the safety of a person; or
- the environment; or
- the maintenance of law and justice; or

(d) constitutes misconduct of a very serious nature.

(3) A public interest disclosure is only protected where the whistleblower, at the time of making the disclosure, believes on reasonable grounds that the information is true or that it may be true, and involves matters of extreme urgency which justify its disclosure in any case.
(4) The person or organisation to whom the disclosure is made shall not less than 5 days after the disclosure is made inform the Ombudsman that a disclosure has been made.
(5) With the whistleblower's or Ombudsman's consent the person or organisation to whom the disclosure is made may refer the disclosure to a person or organisation considered to be an appropriate authority to investigate the matters raised in the disclosure.

6. Media disclosures - (1) A public interest disclosure can be made to the media.
(2) Where a whistleblower who is a public service employee makes a public interest disclosure to the media relating to the conduct or activity of a member of the public and where the whistleblower gained knowledge of that conduct as a result of his other employment the disclosure will not be protected under this Act unless -
(a) the whistleblower had reasonable grounds at the time the disclosure was made for believing that the disclosure was true; and
(b) the disclosure was shown to be substantially true; and
(c) in all the circumstances it was excusable for the disclosure to be made to the media.

7. Immunity for public interest disclosures - (1) A whistleblower is not subject to any liability for making a public interest disclosure and no action, claim or demand may be taken against the whistleblower for making the disclosure.
(2) Without limiting subsection (1) a whistleblower -
(a) does not breach a provision of an Act which imposes an obligation or confidentiality; and
(b) does not breach any contractual obligation of confidentiality; and
(c) cannot be liable for any disciplinary action;
by reason of having made a public interest disclosure.
(3) In a defamation proceeding a person publishing a public interest disclosure has a defence of absolute privilege for publishing the disclosure.

8. Protection of identity - (1) Subject to subsection (2) of this section, a whistleblower's identity must not be disclosed by the person or organisation to whom the disclosure is made, unless the whistleblower consents to its disclosure.
(2) Where the Ombudsman agrees and where it is essential because of natural justice, the person or organisation may release the whistleblower's identity.
(3) Before a release is made pursuant to subsection (2) of this section the person or organisation must advise the whistleblower that his or her identity will be disclosed and of the date that disclosure will be made.

9. Reward for disclosures in certain cases - (1) Where the public interest disclosure discloses conduct or an activity by a person or organisation that results in the imposition of a monetary penalty on that person or organisation, a part of that monetary penalty shall be awarded to the whistleblower.

(2) The amount to be awarded shall be determined by the Court, Tribunal or organisation imposing that penalty.
(3) Where the public interest disclosure discloses conduct by a person or organisation that results in property or money being seized by the Crown under any Act of Parliament a percentage of the market value of that property or a part of that money may be awarded to the whistleblower.
(4) The percentage or amount to be awarded, if any, shall be determined by the Court or Tribunal which hears the application for seizure by the Crown.

10. Advice and counselling - (1) The person or organisation to whom the disclosure is made shall inform the whistleblower of the remedies available under this Act and any other information relating to this Act that is requested.
(2) After informing the Ombudsman that a disclosure has been made pursuant to section 5(4) of this Act, the person or organisation to whom the disclosure is made shall inform the whistleblower that the Ombudsman can also provide advice and assistance.

11. Internal procedures - (1) Subject to subsection (2) of this section where an organisation has internal procedures relating to the making of public interest disclosures which do not conflict with this Act, those internal procedures are not abrogated by this Act.
(2) Any internal procedures cannot avoid the remedies and penalties in Part III of this Act.

PART III
REMEDIES FOR REPRISALS

12. Meaning of reprisal - (1) A reprisal is an act, omission or conduct which causes detriment to a whistleblower and occurs because the whistleblower has made or may make a public interest disclosure.
(2) It is sufficient that the making of or possibility of making a public disclosure is one of the purposes of the reprisal.
(3) A reprisal is an offence against this Act subject to the penalties outlined in section 16 of this Act.

13. Liability of employers and principals - (1) Subject to subsection (2) of this section an employer or principal is liable for acts, omissions or conduct of his or her employees or agents which contravenes this Act.
(2) It shall be a defence for an employer or principal to show that all reasonable steps were taken to prevent the employee or agent from contravening this Act. Those reasonable steps must include but not be limited to the presence of an internal procedure to facilitate whistleblowing and ensuring that reprisals do not occur within the employer or principal's organisation.

14. Remedies for reprisals - (1) A whistleblower who is an employee within the meaning of the Employment Contracts Act 1991 and who has suffered reprisal action from his or her employer or former employer can -

(a) if the reprisal consists of or includes dismissal, claim the personal grievance of unjustifiable dismissal under section 27(1)(a) of the Employment Contracts Act 1991 with Part III of that Act applying accordingly; and
(b) if the reprisal consists of action other than or in addition to dismissal, claim the personal grievance of unjustifiable disadvantage set out in section 27(1)(b) of the Employment Contracts Act 1991, with Part III of that Act applying accordingly; and
(2) It shall be victimisation in terms of section 66 of the Human Rights Act 1993 to treat a whistleblower less favourably because he or she has made a public interest disclosure. A whistleblower alleging victimisation shall have access to the remedies in the Human Rights Act 1993.
(3) A whistleblower can also pursue a claim for damages in tort if he or she suffers detriment as a result of a reprisal.
(4) If a public sector organisation has internal procedures in accordance with sections 11 and 13(2) of this Act, and a whistleblower is subject to a reprisal by that organisation, an employee or agent of that organisation, the whistleblower may pursue a judicial review action against that organisation.

15. Action by Ombudsman - (1) Pursuant to section 12(3) and subsection (3) of this section, the Ombudsman can prosecute any person or organisation which commits a reprisal against a whistleblower.
(2) Any action by the Ombudsman is not dependent upon a whistleblower making a complaint about a reprisal.
(3) A prosecution by the Ombudsman under this Act will be filed in the District Court and the Rules of that Court will apply accordingly.

16. Penalties for reprisals - (1) Where a natural person is convicted of the offence in section 12(3) of this Act, that person will be fined a sum not exceeding $20,000.
(2) Where an organisation is convicted of the offence in section 12(3) of this Act, that organisation will be fined a sum not exceeding $200,000.
(3) The Court may award that a portion of the fine imposed be paid to the whistleblower.

17. Other offences and penalties - (1) It is an offence against this Act for a person to knowingly or recklessly make a false public interest disclosure.
(2) The penalty for the offence in subsection (1) of this Act is a fine not exceeding $20,000.

PART IV
MISCELLANEOUS PROVISIONS

18. Current protections - (1) The common law public interest defence is codified by this Act.
(2) Subject to subsection (3) of this section, statutory provisions which provide protection for whistleblowers or specifically encourage whistleblowing are not affected by this Act.
(3) Section 7 of this Act and the procedure in Part III of this Act will be available to all whistleblowers.

19. Amendments to other Acts - The following Acts will need to be amended as a result of this Act:
(a) Human Rights Act 1993 (to provide that discrimination of a whistleblower is unlawful)
(b) Ombudsmen Act 1975 (to provide that an Ombudsman's duties include those described in this Act).

20. Review of the operation of this Act - (1) The Minister of Justice must, following consultations with the Ombudsman, not sooner than 3 years after the commencement of this Act, cause a report to be prepared on -
(a) the operation of this Act since its commencement; and
(b) whether any amendments to the scope and contents of this Act are necessary or desirable, including an amendment to require further periodic reports to the House of Representatives on the operation of this Act.
(2) The Minister of Justice must, not later than 5 years after the commencement of this Act lay a copy of the report before the House of Representatives.

APPENDIX II

New Zealand Bills
Protected Disclosures Bill 1996
Whistleblowers Protection Bill 1994

Hon. Paul East

PROTECTED DISCLOSURES

ANALYSIS

A BILL INTITULED

An Act to promote the public interest by protecting employees who make certain disclosures of information

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Protected Disclosures Act 1996.

(2) This Act shall come into force on the 1st day of July 1997.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Appropriate authority", without limiting the meaning of that term,—

(a) Includes—

(i) The Commissioner of Police, a Deputy Commissioner of Police, and a senior member of the Police:

(ii) The Controller and Auditor-General holding office under the Public Finance Act 1977:

(iii) The Director of the Serious Fraud Office under the Serious Fraud Office Act 1990, and any designated member of that Office within the meaning of that Act:

(iv) The Inspector-General of Intelligence and Security holding office under section 5 of the Inspector-General of Intelligence and Security Act 1996:

(v) An Ombudsman:

(vi) The Police Complaints Authority established by section 4 of the Police Complaints Authority Act 1988, and the deputy to the Police Complaints Authority:

(vii) The Solicitor-General:

(viii) The State Services Commissioner appointed under section 3 of the State Sector Act 1988, and the Deputy State Services Commissioner; and

(b) Includes the head of every public sector organisation, whether or not mentioned in paragraph (a) of this definition; and

(c) Includes a private sector body which comprises members of a particular profession or calling and which has power to discipline its members; but

(d) Does not include—

(i) A Minister of the Crown; or

(ii) A member of Parliament:

"Employee", in relation to an organisation, includes—

(a) A former employee:

(b) A homeworker within the meaning of section 2 of the Employment Contracts Act 1991:

(c) A person seconded to the organisation:

(d) An independent contractor:

(e) A person concerned in the management of the organisation:

(f) In relation to the New Zealand Defence Force, a member of the Armed Forces:

"Environment" has the meaning given to it by section 2 of the Environment Act 1986:

"Intelligence and security agency" has the meaning given to it by section 2 (1) of the Inspector-General of Intelligence and Security Act 1996:

"Maladministration" means an act, omission, or course of conduct that is oppressive, improperly discriminatory, or grossly negligent or that constitutes gross mismanagement:

"Ombudsman" means an Ombudsman holding office under the Ombudsmen Act 1975; and includes—

(a) Any person holding office under an Ombudsman to whom any of the powers of an Ombudsman have been delegated under section 28 of that Act; and

(b) Any person whom an Ombudsman has appointed to perform an Ombudsman's functions under this Act:

"Organisation" means a body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector; and includes a body of persons comprising one employer and one or more employees:

"Protected", in relation to a disclosure of information, means a disclosure that is made in accordance with this Act:

"Public funds or public resources" includes—

(a) Public money and public stores within the meaning of the Public Finance Act 1977:

(b) Money and stores of a Government agency, or of a local authority, within the meaning of the Public Finance Act 1977:

(c) Money and stores of—

(i) A Crown entity within the meaning of the Public Finance Act 1989:

(ii) A State enterprise within the meaning of the State-Owned Enterprises Act 1986:

(iii) A local authority trading enterprise within the meaning of section 594B (1) of the Local Government Act 1974:

(iv) An airport company within the meaning of the Airport Authorities Act 1966:

(v) A port company within the meaning of the Port Companies Act 1988:

(vi) Any energy company within the meaning of the Energy Companies Act 1992, including any company or other entity

that is deemed, by section 78 or section 81 of that Act, to be an energy company for the purposes of sections 36, 37, 39 to 46, 85, 87, and 88 of that Act:

(vii) Any energy supply operation to which section OC 2 of the Income Tax Act 1994 applies:

(viii) The New Zealand Local Government Association Limited:

(ix) Any company or any other organisation (as defined in section 594B (2) of the Local Government Act 1974) of which the New Zealand Local Government Association Limited has control directly or indirectly by any means whatsoever:

"Public official" means a person who—

(a) Is an employee of a public sector organisation; or

(b) Is concerned in the management of a public sector organisation:

"Public sector organisation" means—

(a) An organisation named or specified in the First Schedule to the Ombudsmen Act 1975:

(b) An organisation named in the First Schedule to the Official Information Act 1982:

(c) A local authority or public body named or specified in the First Schedule to the Local Government Official Information and Meetings Act 1987:

(d) The Office of the Clerk of the House of Representatives:

(e) The Parliamentary Service:

(f) An intelligence and security agency:

"Serious wrongdoing" means—

(a) The unlawful, corrupt, or irregular use of public funds or public resources:

(b) Any other act, omission, or course of conduct that constitutes—

(i) An offence; or

(ii) Maladministration by a public official; or

(iii) A serious risk to public health, or public safety, or the environment; or

(iv) A serious risk to the maintenance of law, including the prevention, investigation,

and detection of offences, and the right to a fair trial,—

whether the wrongdoing occurs before or after the commencement of this Act.

3. Act to bind the Crown—This Act binds the Crown.

4. Purpose of Act—The purpose of this Act is to promote the public interest by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organisation.

Protected Disclosures

5. Disclosures to which Act applies—Where an employee of an organisation—

(a) Has information about serious wrongdoing in or by that organisation; and

(b) Believes on reasonable grounds that the information is true or likely to be true; and

(c) Wishes to disclose the information so that the serious wrongdoing can be investigated; and

(d) Wishes the disclosure of the information to be protected,—

that employee may disclose the information in the manner provided by this Act.

6. Disclosure must be made in accordance with internal procedures—Subject to **sections 7 to 10** of this Act, an employee must disclose information in the manner provided by internal procedures established and published in the organisation, or the relevant part of the organisation, for receiving and dealing with information about serious wrongdoing.

7. Disclosure may be made to head of organisation in certain circumstances—Subject to **section 10** of this Act, a disclosure of information may be made to the head or a deputy head of the organisation, if—

(a) The organisation has no internal procedures established and published for receiving and dealing with information about serious wrongdoing; or

(b) The employee making the disclosure believes on reasonable grounds that the person to whom the wrongdoing should be reported in accordance with

the internal procedures is or may be involved in the serious wrongdoing alleged in the disclosure; or

(c) The employee making the disclosure believes on reasonable grounds that the person to whom the wrongdoing should be reported in accordance with the internal procedures is, by reason of any relationship or association with a person who is or may be involved in the serious wrongdoing alleged in the disclosure, not a person to whom it is appropriate to make the disclosure.

8. Disclosure may be made to appropriate authority in certain circumstances—Subject to **section 10** of this Act, a disclosure of information may be made to an appropriate authority, if the employee making the disclosure believes on reasonable grounds—

(a) That the head of the organisation is or may be involved in the serious wrongdoing alleged in the disclosure; or

(b) That immediate reference to an appropriate authority is justified by reason of the urgency of the matter to which the disclosure relates, or some other exceptional circumstance; or

(c) That there has been no action or recommended action on the matter to which the disclosure relates within 3 months after the date on which the disclosure was made, despite at least 2 written requests by the employee for action on, or information about, the matter.

9. Disclosure may be made to Minister of Crown or Chief Ombudsman in certain circumstances—(1) Subject to **section 10** of this Act, a disclosure of information may be made to a Minister of the Crown or the Chief Ombudsman, if the employee making the disclosure—

(a) Has already made substantially the same disclosure in accordance with **section 6** or **section 7** or **section 8** of this Act; and

(b) Believes on reasonable grounds that the person or appropriate authority to whom the disclosure was made—

(i) Has decided not to investigate the matter; or

(ii) Has decided to investigate the matter but has not made progress with the investigation within 6 months after the date on which the disclosure was made to the person or appropriate authority; or

(iii) Has investigated the matter but has not taken any action in respect of the matter nor recommended the taking of action in respect of the matter, as the case may require; and

(c) Continues to believe on reasonable grounds that the information disclosed is true or likely to be true.

(2) A disclosure under this section may be made to the Chief Ombudsman only if—

(a) It is in respect of a public sector organisation; and

(b) It has not already been made to an Ombudsman under **section 8** of this Act.

10. Special rules on disclosures relating to intelligence and security and international relations—(1) Except as provided in this section, **sections 6 to 9** of this Act do not apply to—

(a) Information relating to an intelligence and security agency; and

(b) Information relating to the international relations of the Government of New Zealand or intelligence and security matters involving—

(i) The Department of the Prime Minister and Cabinet; or

(ii) The Ministry of Foreign Affairs and Trade; or

(iii) The Ministry of Defence; or

(iv) The New Zealand Defence Force.

(2) The disclosure of such information—

(a) Must be made in the manner provided by internal procedures established and published in the organisation, or the relevant part of the organisation, for receiving and dealing with information about serious wrongdoing, to a person holding an appropriate security clearance and authorised to have access to the information; and

(b) May be made to the head or a deputy head of the organisation, if the conditions for a disclosure under **section 7** of this Act are met; and

(c) May be made, if the conditions for a disclosure under **section 8** or **section 9** of this Act are met,—

(i) To the Inspector-General of Intelligence and Security, where the information relates to an intelligence and security agency; and

(ii) To the Chief Ombudsman, where the information relates to the international relations of the Government of New Zealand or intelligence and

security matters involving an organisation referred to in subsection (1) (b) of this section,—

and to no other person.

(3) Neither the Inspector-General of Intelligence and Security nor the Chief Ombudsman shall disclose information received under this section except in accordance with the provisions of the Inspector-General of Intelligence and Security Act 1996 or the Ombudsmen Act 1975, as the case may be.

11. Public sector organisations to establish internal procedures—(1) Subject to subsection (4) of this section, not later than 6 months after the commencement of this Act, every public sector organisation must have in operation appropriate internal procedures for receiving and dealing with information about serious wrongdoing in the organisation.

(2) The internal procedures referred to in subsection (1) of this section must comply with the principles of natural justice.

(3) Information about the existence of the internal procedures referred to in subsection (1) of this section, and adequate information on how to use those procedures, must be widely published within the organisation and must be republished at regular intervals.

(4) This section does not apply to—

(a) A State enterprise within the meaning of the State-Owned Enterprises Act 1986:

(b) A local authority trading enterprise within the meaning of section 594B (1) of the Local Government Act 1974.

12. Information and guidance for employees making disclosures—(1) Subject to subsections (2) and (3) of this section, where an employee notifies the Office of the Ombudsmen, orally or in writing, that he or she has disclosed, or is considering the disclosure of, information under this Act, an Ombudsman must provide information and guidance to that employee on the following matters:

(a) The kinds of disclosures that are protected under this Act:

(b) The manner in which, and the persons to whom, information may be disclosed under this Act:

(c) The broad role of each authority referred to subparagraphs (i) to (viii) of paragraph (a) of the definition of the term "appropriate authority" in section 2 of this Act:

(d) The protections and remedies available under this Act and the Human Rights Act 1993 if the disclosure of

information in accordance with this Act leads to victimisation of the person making the disclosure:

(e) How particular information disclosed to an appropriate authority may be referred to another appropriate authority under this Act.

(2) Where the information referred to in **subsection (1)** of this section relates to an intelligence and security agency, notification must be given to the Inspector-General of Intelligence and Security (and to no other person) who shall perform the functions of an Ombudsman under **subsection (1)** of this section.

(3) Where the information referred to in **subsection (1)** of this section relates to the international relations of the Government of New Zealand or intelligence and security matters involving the organisations listed in **section 10 (1) (b)** of this Act, notification must be given to the Chief Ombudsman (and to no other person).

13. Reference from one appropriate authority to another of information disclosed—(1) Where an appropriate authority to whom a protected disclosure of information is made considers, after consultation with another appropriate authority, that the information disclosed can be more suitably and conveniently investigated by that other appropriate authority, the appropriate authority to whom the information is disclosed may refer that information to that other appropriate authority.

(2) Where, under **subsection (1)** of this section, information is referred from one appropriate authority to another, the appropriate authority to whom the information has been referred must promptly notify the person by whom the protected disclosure of information was made that the information disclosed has been so referred.

(3) A protected disclosure of information does not, by reason of the information being referred under **subsection (1)** of this section, cease to be a protected disclosure of information.

(4) Nothing in this section prevents a protected disclosure of information being transferred from one appropriate authority to another on more than one occasion.

Protections

14. Personal grievance—(1) Where an employee who makes a protected disclosure of information under this Act claims to have suffered retaliatory action from his or her employer or former employer, that employee,—

(a) If that retaliatory action consists of or includes dismissal, may have a personal grievance, for the purposes of section 27 (1) (a) of the Employment Contracts Act 1991, because of a claim of unjustifiable dismissal, and Part III of that Act shall apply accordingly; and

(b) If that retaliatory action consists of action other than dismissal or includes an action in addition to dismissal, may have a personal grievance, for the purposes of section 27 (1) (b) of the Employment Contracts Act 1991, because of a claim described in section 27 (1) (b) of that Act, and Part III of that Act shall apply accordingly.

(2) This section applies only to employees within the meaning of the Employment Contracts Act 1991.

(3) This section does not apply in respect of a disclosure of information that an employee has chosen to make otherwise than in accordance with this Act.

15. Immunity from civil and criminal proceedings—(1) No person who—

(a) Makes a protected disclosure of information; or

(b) Refers a protected disclosure of information to an appropriate authority for investigation—

is liable to any civil or criminal proceeding or to a disciplinary proceeding by reason of having made or referred that disclosure of information.

(2) **Subsection (1)** of this section applies notwithstanding any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice.

16. Confidentiality—(1) Every person to whom a protected disclosure is made or referred must use his or her best endeavours not to disclose information that might identify the person who made the protected disclosure unless—

(a) That person consents in writing to the disclosure of that information; or

(b) The person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of identifying information—

(i) Is essential to the effective investigation of the allegations in the protected disclosure; or

(ii) Is essential to prevent serious risk to public health or public safety or the environment; or

(iii) Is essential having regard to the principles of natural justice.

(2) A request for information under the Official Information Act 1982 (other than one made by a member of the Police for the purpose of investigating an offence) may be refused, as contrary to this Act, if it might identify a person who has made a protected disclosure.

Miscellaneous Provisions

17. False allegations—The protections conferred by this Act and by **section 66 (1) (a)** of the Human Rights Act 1993 do not apply where the person who makes a disclosure of information makes an allegation known to that person to be false or otherwise acts in bad faith.

18. Other protections preserved—This Act does not limit any protection, privilege, immunity, or defence, whether statutory or otherwise, relating to the disclosure of information.

19. Provisions relating to Ombudsmen—(1) The functions and powers of Ombudsmen under the Ombudsmen Act 1975 are not limited by this Act.

(2) The Chief Ombudsman has the same powers in relation to investigating a disclosure of information made under—

(a) **Section 9** of this Act; or

(b) **Section 10 (2) (c)** of this Act where the conditions for a disclosure under **section 9** are met,—

as Ombudsmen have in relation to a complaint under the Ombudsmen Act 1975, but is not bound to investigate the disclosure of information.

20. Review of operation of Act—(1) The Minister of State Services must, not sooner than 3 years after the commencement of this Act, cause a report to be prepared on—

(a) The operation of this Act since its commencement; and

(b) Whether any amendments to the scope and contents of this Act are necessary or desirable, including an amendment to require further periodic reports to the House of Representatives on the operation of the Act.

(2) The Minister of State Services must, not later than 4 years after the commencement of this Act, lay a copy of the report before the House of Representatives.

Amendment to Human Rights Act 1993

21. Victimisation—Section 66 (1) of the Human Rights Act 1993 is hereby amended by repealing paragraph (a), and substituting the following paragraph:

"(a) On the ground that that person, or any relative or associate of that person,—

"(i) Intends to make use of his or her rights under this Act or to make a disclosure under the Protected Disclosures Act 1996; or

"(ii) Has made use of his or her rights, or promoted the rights of some other person, under this Act, or has made a disclosure, or has encouraged disclosure by some other person, under the Protected Disclosures Act 1996; or

"(iii) Has given information or evidence in relation to any complaint, investigation, or proceeding under this Act or arising out of a disclosure under the Protected Disclosures Act 1996; or

"(iv) Has declined to do an act that would contravene this Act; or

"(v) Has otherwise done anything under or by reference to this Act; or".

WELLINGTON, NEW ZEALAND: Published under the authority of the New Zealand Government—1996

69940—96/NS

P.C.O. 49/7

Hon Phil Goff

WHISTLEBLOWERS PROTECTION

ANALYSIS

A BILL INTITULED

An Act—

(a) To facilitate and encourage, in the public interest, the disclosure, investigation, and correction of unlawful, improper, or injurious conduct or activity:

(b) To constitute the Whistleblowers Protection Authority and establish procedures to deal with such disclosures:

(c) To protect persons who make appropriate disclosures of public interest information:

(d) To make provision on matters incidental thereto

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Whistleblowers Protection Act **1994**.

(2) This Act shall come into force on the **1st day of July 1995**.

PART I

Preliminary Provisions

2. Interpretation—In this Act, unless the context otherwise requires,—

"Appropriate disclosure of public interest information" means a disclosure made in accordance with **section 6** of this Act:

"Complaints Division" means the Complaints Division referred to in section 12 (1) of the Human Rights Act 1993:

"Environment" has the same meaning as in section 2 of the Environment Act 1986:

"Informant" means a person who makes a disclosure of public interest information under **section 5** of this Act:

"Protected informant status" has the meaning given to it in **section 29 (3)** of this Act:

"Public funds or public resources" includes—

(a) Public money within the meaning of the Public Finance Act 1977:

(b) Public stores within the meaning of that Act:

(c) Money and stores of a Government agency within the meaning of that Act:

(d) Money and stores of a local authority within the meaning of that Act;—

and also includes like money and stores of—

(e) A Crown entity within the meaning of the Public Finance Act 1989:

(f) A State enterprise within the meaning of the State-Owned Enterprises Act 1986:

(g) A local authority trading enterprise within the meaning of section 594B (1) of the Local Government Act 1974:

(h) An airport company within the meaning of the Airport Authorities Act 1966:

(i) A port company within the meaning of the Port Companies Act 1988:

"Public interest information" means information relating to conduct or activity of the kind specified in **section 5 (1)** of this Act:

"Whistleblowers Protection Authority" or "Authority" means the Whistleblowers Protection Authority constituted under **section 9** of this Act.

3. Act to bind the Crown—This Act binds the Crown.

4. Purpose of Act—(1) The purpose of this Act is to facilitate and encourage, in the public interest, the disclosure, investigation, and correction of any conduct or activity that—

(a) Concerns the unlawful, corrupt, or unauthorised use of public funds or public resources:

(b) Is otherwise unlawful:

(c) Constitutes a significant risk or danger, or is injurious, to—

(i) Public health:

(ii) Public safety:

(iii) The environment:

(iv) The maintenance of the law and justice, including the prevention, investigation, and detection of offences, and the right to a fair trial.

(2) The purpose of this Act is further to affirm—

(a) That public accountability and the ethic of openness are essential elements of a democratic society and for promoting the wellbeing of the community:

(b) That informants who act in accordance with this Act should be recognised as acting responsibly and in the public interest.

(3) For attaining its purpose, this Act—

(a) Constitutes a Whistleblowers Protection Authority and establishes procedures to facilitate and encourage disclosure of public interest information:

(b) Provides for such disclosures to be properly investigated and dealt with:

(c) Provides for the protection of persons (commonly known as whistleblowers) who make disclosures of public interest information to the Authority:

(d) Provides for remedies for such persons who encounter discrimination or harassment for disclosing public interest information.

PART II

Disclosure of Public Interest Information

5. Making disclosure of public interest information—

(1) Public interest information is information which relates to any conduct or activity, whether in the public sector or in the private sector, that—

(a) Concerns the unlawful, corrupt, or unauthorised use of public funds or public resources:

(b) Is otherwise unlawful:

(c) Constitutes a significant risk or danger, or is injurious, to—

(i) Public health:

(ii) Public safety:

(iii) The environment:

(iv) The maintenance of the law and justice, including the prevention, investigation, and detection of offences, and the right to a fair trial.

(2) Any person may disclose public interest information to the Authority.

(3) A person may disclose to the Authority—

(a) Information the disclosure of which could properly be withheld in accordance with—

(i) The Official Information Act 1982; or

(ii) The Local Government Official Information and Meetings Act 1987:

(b) Personal information the disclosure of which would breach the Privacy Act 1993 or a code of practice issued under section 63 of that Act:

(c) Information the disclosure of which another enactment prohibits or regulates:

(d) Information the disclosure of which would breach a confidence, unless the disclosure would be in the public interest.

(4) A person may disclose public interest information to the Authority either orally or in writing.

(5) If a person discloses public interest information orally, that person shall put the information in writing as soon as is practicable.

(6) The Authority shall assist any person who wishes to disclose public interest information to the Authority to put the disclosure in writing.

Cf. 1975, No. 9, s. 16; 1993, No. 28, ss. 34, 68; Whistleblowers Protection Act 1993 (South Australia), s. 4 (1)

6. Appropriate disclosures of public interest information—A person discloses public interest information appropriately if, and only if,—

(a) The person—

(i) Believes on reasonable grounds that the information is true; or

(ii) Is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated; and

(b) The person discloses that information to the Authority.

Cf. Whistleblowers Protection Act 1993 (South Australia), s. 5 (2)

7. Immunity for appropriate disclosures of public interest information—No person who makes an appropriate disclosure of public interest information shall be subject to civil or criminal proceedings concerning that disclosure.

Cf. Whistleblowers Protection Act 1993 (South Australia), ss. 5 (1), 10

8. Offence to disclose identity of informant—Every person commits an offence against this Act and is liable on summary conviction to a fine not exceeding $2,000 who discloses, or who attempts or conspires to disclose, to any person any information which could reasonably be expected to

identify any person who has disclosed public interest information appropriately under this Act without that person's consent.

Cf. 1985, No. 120, s. 140 (1)

PART III

WHISTLEBLOWERS PROTECTION AUTHORITY

9. Whistleblowers Protection Authority constituted—(1) There shall be appointed, as an officer of Parliament, a Whistleblowers Protection Authority.

(2) Subject to **section 15** of this Act, the Authority shall be appointed by the Governor-General on the recommendation of the House of Representatives.

(3) The Authority shall be a corporation sole with perpetual succession and a seal of office, and shall have and may exercise all the rights, powers, and privileges, and may incur all the liabilities and obligations, of a natural person of full age and capacity.

Cf. 1986, No. 127, s. 4; 1993, No. 28, s. 12

10. Functions of Authority—(1) The functions of the Authority shall be—

(a) To investigate any disclosure of public interest information made to the Authority:

(b) To provide advice, counselling, and assistance to prospective informants and protected informants:

(c) To monitor developments in relation to disclosures of public interest information:

(d) To report to the House of Representatives or, as the case may be, the Prime Minister from time to time on any matter relating to the disclosure of public interest information, including the need for, or desirability of, taking legislative, administrative, or other action to give better protection to informants:

(e) To make public statements in relation to disclosures of public interest information:

(f) To review the operation of this Act as required by **section 19** of this Act:

(g) To do anything incidental or conducive to the performance of the preceding functions:

(h) To exercise and perform such other functions, powers, and duties as are conferred or imposed on the Authority by or under this Act or any other enactment.

11. Deputy Authority—(1) There may from time to time be appointed a deputy to the person appointed as the Whistleblowers Protection Authority.

(2) The Deputy Authority shall be appointed in the same manner as the Authority, and **sections 12** to **16** of this Act shall apply to the Deputy Authority in the same manner as they apply to the Authority.

(3) Subject to the control of the Authority, the Deputy Authority shall have and may exercise all the powers, duties, and functions of the Authority under this Act or any other enactment.

(4) On the occurrence from any cause of a vacancy in the office of the Authority (whether by reason of death, resignation, or otherwise), and in the case of the absence from duty of the Authority (from whatever cause arising), and so long as any such vacancy or absence continues, the Deputy Authority shall have and may exercise all the powers, duties, and functions of the Authority.

(5) The fact that the Deputy Authority exercises any power, duty, or function of the Authority shall be conclusive evidence of the Deputy Authority's authority to do so.

(6) Subject to this Act, the Deputy Authority shall be entitled to all the protections, privileges, and immunities of the Authority.

Cf. 1993, No. 28, s. 15

12. Term of office—(1) Except as otherwise provided in this Act, the Authority shall hold office for a term of 5 years.

(2) The Authority shall be eligible for reappointment from time to time.

Cf. 1986, No. 127, s. 6 (1)

13. Continuation in office after term expires—(1) Where the term for which a person who has been appointed as the Authority expires, that person, unless sooner vacating or removed from office under **section 14** of this Act, shall continue to hold office, by virtue of the appointment for the term that has expired, until—

(a) That person is reappointed; or

(b) A successor to that person is appointed.

(2) The person appointed as the Authority—

(a) May at any time resign his or her office by notice in writing addressed to the Speaker of the House of Representatives, or to the Prime Minister if there is

no Speaker or Deputy Speaker or if both the Speaker and Deputy Speaker are absent from New Zealand:

(b) Shall resign the office on attaining the age of 72 years.

Cf. 1986, No. 127, s. 6 (2); 1991, No. 126 s. 9 (3); 1993, No. 28, s. 17

14. Removal or suspension from office—(1) Subject to **subsection (2)** of this section, the person appointed as the Authority may be removed or suspended from office only by the Governor-General, upon an address from the House of Representatives, for disability, bankruptcy, neglect of duty, or misconduct.

(2) At any time when Parliament is not in session, the person appointed as the Authority may be suspended from office by the Governor-General in Council for disability, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General in Council; but any such suspension shall not continue in force beyond the end of the 24th sitting day of the next ensuing session of Parliament and the salary of the Authority shall continue to be paid notwithstanding the suspension.

Cf. 1975, No. 9, s. 6; 1986, No. 127, s. 8; 1988, No. 2, s. 7

15. Filling of vacancy—(1) If the person appointed as the Authority dies, or resigns from office, or is removed from office, the vacancy thereby created shall be filled as soon as practicable in accordance with this section.

(2) Subject to **subsection (3)** of this section, a vacancy in the office of Authority shall be filled by the appointment of a successor by the Governor-General on the recommendation of the House of Representatives.

(3) If—

(a) A vacancy occurs while Parliament is not in session or exists at the close of a session; and

(b) The House of Representatives has not recommended an appointment to fill the vacancy,—

the vacancy, at any time before the commencement of the next ensuing session of Parliament, may be filled by the appointment of a successor by the Governor-General in Council.

(4) Any appointment made under **subsection (3)** of this section shall lapse and the office shall again become vacant unless, before the end of the 24th sitting day of the House of Representatives following the date of the appointment, the House confirms the appointment.

(5) **Subsection (1)** of this section does not apply where the Authority is a Judge; but nothing in this subsection shall limit the application of that subsection where the Authority ceases to be a Judge during that person's term of office as the Authority.

Cf. 1975, No. 9, s. 7; 1986, No. 127, s. 8; 1991, No. 126, s. 11; 1993, No. 28, s. 18

16. Holding of other offices—(1) The Authority shall not be capable of being a member of Parliament or of a local authority, and shall not, without the approval of the Speaker of the House of Representatives in each particular case, hold any office of trust or profit or engage in any occupation for reward outside the duties of the Authority's office.

(2) The appointment of a Judge as the Authority, or service by a Judge as the Authority, does not affect that person's tenure of his or her judicial office or his or her rank, title, status, precedence, salary, annual or other allowances, or other rights or privileges as a Judge (including those in relation to superannuation), and, for all purposes, that person's service as the Authority shall be taken to be service as a Judge.

Cf. 1991, No. 126, ss. 8, 10; 1993, No. 28, s. 19

17. Further provisions relating to Authority—The provisions of the **Schedule** to this Act apply to the Authority and the Authority's affairs.

Reporting and Review Provisions

18. Annual report—(1) Without limiting the right of the Authority to report at any other time, the Authority shall in each year make a report to the House of Representatives on the performance of the Authority's functions under this Act.

(2) The report shall include information on the number and kinds of disclosures of public interest information made to the Authority.

(3) The annual report shall be laid before the House of Representatives in accordance with section 39 of the Public Finance Act 1989.

19. Review of operation of Act—As soon as practicable after the expiry of the period of 3 years beginning on the commencement of this section, and then at intervals of not more than 5 years, the Authority shall—

(a) Review the operation of this Act since—

(i) The date of the commencement of this section (in the case of the first review carried out under this paragraph); or

(ii) The date of the last review carried out under this paragraph (in the case of every subsequent review); and

(b) Consider whether any amendments to this Act are necessary or desirable; and

(c) Report the Authority's findings to the House of Representatives.

Cf. 1990, No. 72, s. 12; 1993, No. 28, s. 26

PART IV

PROCEDURES

Advice and Counselling

20. Advisory and counselling service—The Authority shall provide advice, counselling, and assistance on the following matters to any person who discloses, or who notifies the Authority that he or she is considering disclosing, public interest information under this Act:

(a) The kinds of disclosures that may be made under this Act:

(b) The manner and form in which public interest information may be disclosed under this Act:

(c) How particular information disclosed to the Authority may be disclosed under this Act and what consequences disclosure may have:

(d) The protections and remedies available under this Act or otherwise in relation to discrimination or harassment:

(e) The operation of this Act in any respect.

Investigation by Authority

21. Action on receiving disclosure of public interest information—On receiving a disclosure of public interest information under section 5 of this Act, the Authority shall—

(a) Investigate the disclosure of public interest information; or

(b) Decide, in accordance with section 22 of this Act, to take no action on the disclosure.

Cf. 1993, No. 28, s. 70

22. Authority may decide to take no action on disclosure of public interest information in certain circumstances—(1) The Authority may decide to take no

action or, as the case may require, no further action, on any disclosure of public interest information if, but only if,—

(a) The Authority considers that under the law there is an adequate remedy, right of appeal, or agency for investigation to which it would have been reasonable for the person disclosing the public interest information to resort; or

(b) The Authority considers that the information disclosed is already publicly known or concerns a matter of public policy or debate on which diverse opinions may reasonably or sincerely be held, unless in the circumstances of the particular case there are other considerations which render it desirable in the public interest for the Authority to investigate the matter; or

(c) The length of time that has elapsed between the date when the subject-matter of the disclosure of the public interest information arose and the date when the disclosure was made is such that an investigation of the information is no longer practicable or desirable; or

(d) The subject-matter of the information is trivial; or

(e) The making of the disclosure is frivolous or vexatious or is not made in good faith; or

(f) The information is insufficient to allow an investigation to proceed.

(2) In any case where the Authority decides to take no action or, as the case may be, no further action, on any disclosure of public interest information, the Authority shall inform the person who made the disclosure of that decision and the reasons for it.

Cf. 1975, No. 9, s. 17; 1977, No. 49, s. 35; 1981, No. 127, s. 3; 1982, No. 156, s. 9 (1); 1993, No. 28, s. 71

Proceedings

23. Proceedings of Authority—(1) Before investigating any matter under this Part of this Act, the Authority shall inform the person to whom the investigation relates of the Authority's intention to make the investigation.

(2) Every investigation by the Authority under this Part of this Act shall be conducted in private.

(3) The Authority may hear or obtain information from such persons as the Authority thinks fit, and may make such inquiries as the Authority thinks fit.

(4) It shall not be necessary for the Authority to hold any hearing, and no person shall be entitled as of right to be heard by the Authority:

Provided that if at any time during the course of an investigation it appears to the Authority that there may be sufficient grounds for making any report or recommendation that may adversely affect that person, the Authority shall give that person an opportunity to be heard.

(5) Subject to the provisions of this Act, the Authority may regulate the Authority's procedure in such manner as the Authority thinks fit.

Cf. 1975, No. 9, s. 18; 1993, No. 28, s. 90

24. Evidence—(1) The Authority may summon before him or her and examine on oath any person who in the Authority's opinion is able to give information relevant to an investigation being conducted by the Authority under **this Part** of this Act.

(2) The Authority may administer an oath to any person summoned pursuant to **subsection (1)** of this section.

(3) Every examination by the Authority under **subsection (1)** of this section shall be deemed to be a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

(4) The Authority may from time to time, by notice in writing, require any person who in the Authority's opinion is able to give information relevant to an investigation being conducted by the Authority under **this Part** of this Act to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Authority are relevant to the subject-matter of the investigation or inquiry.

(5) Where the attendance of any person is required by the Authority under this section, the person shall be entitled to the same fees, allowances, and expenses as if the person were a witness in a court and, for the purpose,—

(a) The provisions of any regulations in that behalf under the Summary Proceedings Act 1957 shall apply accordingly; and

(b) The Authority shall have the powers of a court under any such regulations to fix or disallow, in whole or in part, or to increase, any amounts payable under the regulations.

Cf. 1977, No. 49, s. 73 (1), (2), (7); 1991, No. 126, ss. 24, 26 (5)

25. Protection and privileges of witnesses, etc.—(1) Except as provided in **section 35** of this Act, every person shall have the same privileges in relation to the giving of information to, the answering of questions put by, and the production of documents and things to, the Authority or any employee of the Authority as witnesses have in any court.

(2) No person shall be liable to prosecution for an offence against any enactment, other than **section 40** of this Act, by reason of that person's compliance with any requirement of the Authority or any employee of the Authority under **section 24** of this Act.

Cf. 1975, No. 9, s. 19 (5), (7); 1977, No. 49, s. 73 (3), (6); 1991, No. 126, s. 26 (1), (4); 1993, No. 28, s. 94

26. Disclosures of information, etc.—(1) Subject to **subsection (2)** of this section and to **section 25** of this Act, any person who is bound by the provisions of any enactment to maintain secrecy in relation to, or not to disclose, any matter may be required to supply any information to, or answer any question put by, the Authority in relation to that matter, or to produce to the Authority any document or thing relating to it, notwithstanding that compliance with that requirement would otherwise be in breach of the obligation of secrecy or non-disclosure.

(2) Compliance with a requirement of the Authority (being a requirement made pursuant to **subsection (1)** of this section) is not a breach of the relevant obligation of secrecy or non-disclosure or of the enactment by which that obligation is imposed.

Cf. 1975, No. 9, s. 19 (3), (4); 1987, No. 8, s. 24 (1); 1991, No. 126, s. 26 (2), (3); 1993, No. 28, s. 95 (1), (2)

27. Proceedings privileged—(1) This section applies to—

(a) The Authority; and

(b) Every person engaged or employed in connection with the work of the Authority.

(2) Subject to **subsection (3)** of this section,—

(a) No proceedings, civil or criminal, shall lie against any person to whom this section applies for anything he or she may do or report or say in the course of the exercise or intended exercise of his or her duties under this Act, unless it is shown that he or she acted in bad faith:

(b) No person to whom this section applies shall be required to give evidence in any court, or in any proceedings

of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions.

(3) Nothing in **subsection (2)** of this section applies in respect of proceedings for—

(a) An offence against section 78 or section 78A (1) or section 105 or section 105A or section 105B of the Crimes Act 1961; or

(b) The offence of conspiring to commit an offence against section 78 or section 78A (1) or section 105 or section 105A or section 105B of the Crimes Act 1961.

(4) Anything said or any information supplied or any document or thing produced by any person in the course of any inquiry by or proceedings before the Authority under this Act shall be privileged in the same manner as if the inquiry or proceedings were proceedings in a court.

(5) For the purposes of clause 3 of Part II of the First Schedule to the Defamation Act 1992, any report made under this Act by the Authority shall be deemed to be an official report made by a person holding an inquiry under an Act of Parliament.

Cf. 1975, No. 9, s. 26; 1982, No. 164, s. 5; 1991, No. 126, s. 29; 1993, No. 28, s. 96

28. Procedure after investigation—(1) The provisions of this section shall apply in every case where, after making any investigation under this Act, the Authority is of the opinion that the matter disclosed as public interest information to the Authority—

(a) Has substance; and

(b) Appears to—

(i) Concern the unlawful, corrupt, or unauthorised use of public funds or public resources; or

(ii) Be otherwise unlawful; or

(iii) Constitute a significant risk or danger, or be injurious, to—

(A) Public health; or

(B) Public safety; or

(C) The environment; or

(D) The maintenance of the law and justice, including the prevention, investigation, and detection or offences, and the right to a fair trial.

(2) The Authority shall, where appropriate, refer the matter—

(a) To the person to whom the investigation relates with a recommendation that appropriate corrective action be taken:

(b) To an appropriate enforcement agency for investigation and, where that agency is so empowered, decision whether to institute proceedings.

(3) In any case where the Authority has referred the matter in accordance with **paragraph (a)** of **subsection (2)** of this section, the Authority may request the person to notify the Authority, within a specified time, of the steps, if any, that that person proposes to take to give effect to the Authority's recommendation.

(4) If within a reasonable time no action is taken that seems to the Authority to be adequate and appropriate, the Authority may report to the Prime Minister accordingly, and may thereafter make such report to the House of Representatives on the matter as the Authority thinks fit.

(5) The Authority shall, in any case to which this section relates, inform the person who made the disclosure of public interest information of the result of the Authority's investigation.

(6) In **subsection (2) (b)** of this section, the term "appropriate enforcement agency" includes (but without limitation)—

(a) The Solicitor-General:

(b) The State Services Commissioner appointed under section 3 of the State Sector Act 1988:

(c) The Audit Office (as defined by section 14 of the Public Finance Act 1977):

(d) The Commissioner of Police:

(e) The Police Complaints Authority established by section 4 of the Police Complaints Authority Act 1988, in relation to information alleging Police misconduct:

(f) The Director of the Serious Fraud Office within the meaning of the Serious Fraud Office Act 1990:

(g) The Public Health Commission established by section 27 of the Health and Disability Services Act 1993:

(h) The Director-General of Health, in relation to information relevant to the administration of—

(i) The Toxic Substances Act 1979; or

(ii) The Medicines Act 1981; or

(iii) The Food Act 1981:

(i) The Director of Mental Health appointed in terms of section 91 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, in relation to

information relevant to the administration of that Act:

(j) The Director-General of Agriculture and Fisheries or, as the case may require, the Registrar of the Pesticides Board, in relation to information relevant to the administration of the Pesticides Act 1979:

(k) The Director-General defined by the Biosecurity Act 1993 as responsible for the time being for the administration of that Act:

(l) The Hazards Control Commission established by section 346 of the Resource Management Act 1991:

(m) The Parliamentary Commissioner for the Environment appointed under section 4 of the Environment Act 1986:

(n) The Secretary for Justice, in relation to information relevant to the administration of—

(i) The Penal Institutions Act 1954:

(ii) The Criminal Justice Act 1985:

(o) The Director-General of Social Welfare, in relation to information relevant to the administration of the Children, Young Persons, and Their Families Act 1989:

(p) The Secretary of the Department defined by the Health and Safety in Employment Act 1992 as responsible for the administration of that Act:

(q) The Secretary of Labour,—

(i) As Chief Inspector of Explosives under the Explosives Act 1957:

(ii) As Chief Inspector of Dangerous Goods under the Dangerous Goods Act 1974:

(r) The Transport Accident Investigation Commission established by section 3 of the Transport Accident Investigation Commission Act 1990:

(s) The Civil Aviation Authority of New Zealand established by section 72A of the Civil Aviation Act 1990 (as inserted by section 31 of the Civil Aviation Amendment Act 1992) or, as the case may require, the Director of Civil Aviation appointed under section 72I of that Act (as so inserted):

(t) The General Manager of the Aviation Security Service appointed under section 72L of the Civil Aviation Act 1990 (as inserted by section 14 of the Civil Aviation Amendment Act 1993) or, as the case may require, an authorised provider of aviation security service under Part VIII of that Act:

(u) The Land Transport Safety Authority of New Zealand established by section 15 of the Land Transport Act 1993 or, as the case may require, the Director of Land Transport Safety appointed under section 24 of that Act:

(v) The Maritime Safety Authority of New Zealand established by section 3 of the Maritime Transport Act 1993 or, as the case may require, the Director of Maritime Safety appointed under section 13 of that Act.

Cf. 1975, No. 9, s. 22

PART V

Remedies for Injury to Protected Informants

29. Unlawful discrimination—(1) Subject to subsection (2) of this section, it shall be unlawful for any person to subject a person to any detriment, or to treat or threaten to treat that other person less favourably, or to harass that person, on the ground, or substantially on the ground, that the other person has made or intends to make an appropriate disclosure of public interest information.

(2) Subsection (1) of this section applies in relation to any of the following areas:

(a) The making of an application for employment:

(b) Employment, which term includes unpaid work:

(c) Participation in, or the making of an application for participation in, a partnership:

(d) Membership, or the making of an application for membership, of an industrial union or professional or trade association:

(e) Access to any approval, authorisation, or qualification:

(f) Vocational training, or the making of an application for vocational training:

(g) Access to places, vehicles, and facilities:

(h) Access to goods and services:

(i) Access to land, housing, or other accommodation:

(j) Education.

(3) The status of being a person who has made an appropriate disclosure of public interest information (in this Act referred to as protected informant status) shall be regarded as if it were a prohibited ground of discrimination within the meaning of the Human Rights Act 1993; and the provisions of

Part II of that Act shall apply accordingly with the necessary modifications.

Cf. 1993, No. 82, ss. 62 (3), 63 (2)

30. Complaints relating to breach of protection of informant—Any informant may make a complaint to the Complaints Division that—

(a) His or her identity has been disclosed; and that

(b) He or she is being or has been subjected to detriment or less favourable treatment or harassment in any of the areas described in section 29 of this Act,—

on the ground, or substantially on the ground, that he or she has made or intends to make an appropriate disclosure of public interest information.

31. Procedures under Human Rights Act 1993 to apply to complaints—Where any informant makes a complaint in terms of section 30 of this Act, Parts III, IV, V, and VII of the Human Rights Act 1993, so far as applicable and with all necessary modifications, shall apply in relation to that complaint as if it were a complaint under that Act.

Cf. 1956, No. 65, s. 22F

Extension of Grounds of Prohibited Discrimination

32. Application of provisions relating to Human Rights Act 1993—Every reference to a complaint under the Human Rights Act 1993 shall be construed in the following enactments (which relate to choice of procedure where circumstances give rise to a personal grievance by an employee) as including a reference to a complaint under section 30 of this Act:

(a) The Police Act 1958: section 95:

(b) The State-Owned Enterprises Act 1986: section 6:

(c) The New Zealand Symphony Orchestra Act 1988: section 10:

(d) The Broadcasting Act 1989: clause 7 of the First Schedule:

(e) The Employment Contracts Act 1991: sections 26 (e) and 39.

(2) Every reference to the Human Rights Act 1993 in section 12 (5) of the Residential Tenancies Act 1986 (which relates to the letting of residential premises) shall be construed as if it included a reference to protected informant status.

(3) The grounds of prohibited discrimination specified in section 28 (1) of the Employment Contracts Act 1991 shall be deemed to include protected informant status.

PART VI

MISCELLANEOUS PROVISIONS

Integrity of Information

33. Authority and staff to maintain secrecy—(1) Every person to whom **section 27** of this Act applies shall maintain secrecy in respect of all matters that come to that person's knowledge in the exercise of that person's functions under this Act.

(2) Notwithstanding anything in **subsection (1)** of this section, the Authority may disclose such matters as in the Authority's opinion ought to be disclosed for the purposes of an investigation under this Act.

(3) The power conferred by **subsection (2)** of this section shall not extend to—

(a) The disclosure of any information which would be likely to prejudice—

(i) The security or defence of New Zealand; or

(ii) Any interest protected by section 7 of the Official Information Act 1982; or

(iii) The prevention, investigation, or detection of offences; or

(iv) The safety of any person; or

(b) Any information, answer, document, or thing obtained by the Authority by reason only of compliance with a requirement made pursuant to **section 24 (1)** of this Act.

Cf. 1975, No. 9, s. 21 (2), (4), (5); 1987, No. 8, s. 24 (2); 1991, No. 126, s. 30; 1993, No. 28, s. 116

34. Corrupt use of official information—Every person to whom **section 27** of this Act applies shall be deemed for the purposes of sections 105 and 105A of the Crimes Act 1961 to be an official.

Cf. 1977, No. 49, s. 77; 1987, No. 8, s. 25 (1); 1991, No. 126, s. 31; 1993, No. 28, s. 118

35. Exclusion of public interest immunity—The rule of law which authorises or requires the withholding of any document, or the refusal to answer any question, on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest shall not apply in respect of—

(a) Any investigation by or proceedings before the Authority under this Act; or

(b) Any application under section 4 (1) of the Judicature Amendment Act 1972 for the review of any decision under this Act;—

but not so as to give any party any information that he or she would not, apart from this section, be entitled to.

Cf. 1982, No. 156, s. 11; 1987, No. 174, s. 9; 1991, No. 126, s. 28

Delegations

36. Delegation of functions or powers of Authority—(1) The Authority may from time to time delegate to any person holding office under the Authority all or any of the Authority's functions and powers under this Act or any other Act.

(2) Every delegation under this section shall be in writing.

(3) No delegation under this section shall include the power to delegate under this section.

(4) The power of the Authority to delegate under this section does not limit any power of delegation conferred on the Authority by any other Act.

(5) Subject to any general or special directions given or conditions imposed by the Authority, the person to whom any functions or powers are delegated under this section may exercise any functions or powers so delegated to that person in the same manner and with the same effect as if they had been conferred on that person directly by this section and not by delegation.

(6) Every person purporting to act pursuant to any delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.

(7) Any delegation under this section may be made—

(a) To a specified person or to persons of a specified class, or to the holder or holders for the time being of a specified office or specified class of offices:

(b) Subject to such restrictions and conditions as the Authority thinks fit:

(c) Either generally or in relation to any particular case or class of cases.

(8) No such delegation shall affect or prevent the exercise of any function or power by the Authority, nor shall any such

delegation affect the responsibility of the Authority for the actions of any person acting under the delegation.

Cf. 1975, No. 9, s. 28; 1991, No. 126, s. 33 (1)-(8); 1993, No. 28, s. 12

37. Delegation to produce evidence of authority—Any person purporting to exercise any power of the Authority by virtue of a delegation under section 36 of this Act shall, when required to do so, produce evidence of that person's authority to exercise the power.

Cf. 1991, No. 126, s. 33 (9); 1993, No. 28, s. 122

38. Revocation of delegations—(1) Every delegation under section 36 of this Act shall be revocable in writing at will.

(2) Any such delegation, until it is revoked, shall continue in force according to its tenor, notwithstanding that the Authority by whom it was made may have ceased to hold office, and shall continue to have effect as if made by the successor in office of the Authority.

Cf. 1991, No. 126, s. 34; 1993, No. 28, s. 123

Liability and Offences

39. Liability of employer and principals—(1) Subject to subsection (3) of this section, anything done or omitted by a person as the employee of another person shall, for the purposes of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.

(2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.

(3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she or it took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

Cf. 1977, No. 49, s. 33; 1993, No. 28, s. 126

40. Offences—Every person commits an offence against this Act and is liable on summary conviction to a fine not exceeding $2,000 who,—

(a) Without reasonable excuse, obstructs, hinders, or resists the Authority or any other person in the exercise of their powers under this Act:

(b) Without reasonable excuse, refuses or fails to comply with any lawful requirement of the Authority or any other person under this Act:

(c) Makes any statement or gives any information to the Authority or any other person exercising powers under this Act, knowing that the statement or information is false or misleading:

(d) Represents directly or indirectly that he or she holds any authority under this Act when he or she does not hold that authority.

Cf. 1975, No. 9, s. 30; 1991, No. 126, s. 35; 1993, No. 28, s. 127

Savings

41. Act not to derogate from protection under other Acts—This Act is in addition to, and does not derogate from, any privilege, protection, or immunity existing apart from this Act under which information may be disclosed without civil or criminal liability.

Cf. Whistleblowers Protection Act 1993 (South Australia), s. 11

Amendments

42. Official Information Act 1982 amended—The First Schedule to the Official Information Act 1982 is hereby amended by inserting, in its appropriate alphabetical order, the following item:

"Whistleblowers Protection Authority".

43. Public Finance Act 1989 amended—Section 2 (1) of the Public Finance Act 1989 is hereby amended by repealing the definition of the term "Office of Parliament" (as substituted by section 129 (1) of the Privacy Act 1993), and substituting the following definition:

" 'Office of Parliament' means the Parliamentary Commissioner for the Environment (and that Commissioner's office), the Office of Ombudsmen, the Whistleblowers Protection Authority (and that

Authority's office), and the Audit Office (including the Audit Department):".

44. Privacy Act 1993 amended—Section 2 (1) of the Privacy Act 1993 is hereby amended by inserting in paragraph (b) of the definition of the term "agency", after subparagraph (ix), the following new subparagraph:

"(ixa) The Whistleblowers Protection Authority; or".

Section 17

SCHEDULE

Provisions Applying in Respect of Authority

1. Employment of experts—(1) The Authority may, as and when the need arises, appoint any person who, in the Authority's opinion, possesses expert knowledge or is otherwise able to assist in connection with the exercise by the Authority of the Authority's functions to make such inquiries or to conduct such research or to make such reports or to render such other services as may be necessary for the efficient performance by the Authority of the Authority's functions.

(2) The Authority shall pay persons appointed by the Authority under this clause, for services rendered by them, fees or commission or both at such rates as the Authority thinks fit, and may separately reimburse them for expenses reasonably incurred in rendering services for the Authority.

2. Staff—(1) Subject to the provisions of this clause, the Authority may appoint such employees (including acting or temporary or casual employees) as may be necessary for the efficient carrying out of the Authority's functions, powers, and duties under this Act.

(2) The Authority, in making an appointment under this clause, shall give preference to the person who is best suited to the position.

(3) The number of persons that may be appointed under this clause, whether generally or in respect of any specified duties or class of duties, shall from time to time be determined by the Speaker of the House of Representatives.

(4) Subject to subclause (5) of this clause, employees appointed under this clause shall be employed on such terms and conditions of employment as the Authority from time to time determines.

(5) The Authority shall—

(a) Before entering into a collective employment contract in relation to all or any of the Authority's employees appointed under this clause, consult with the State Services Commissioner with respect to the terms and conditions of employment to be included in the collective employment contract; and

(b) From time to time consult with the State Services Commissioner in relation to the terms and conditions of employment applying to those employees appointed under this clause who are not covered by a collective employment contract.

3. Salaries and allowances—(1) There shall be paid to the Authority and the Deputy Authority—

(a) A salary at such rate as the Higher Salaries Commission from time to time determines; and

(b) Such allowances as are from time to time determined by the Higher Salaries Commission.

(2) Subject to the Higher Salaries Commission Act 1977, any determination made under subclause (1) of this clause may be made so as to come into force on a date to be specified for that purpose in the determination, being the date of the making of the determination, or any other date, whether before or after the date of the making of the determination.

(3) Every determination made under subclause (1) of this clause in respect of which no date is specified as provided in subclause (2) of this

SCHEDULE—*continued*

PROVISIONS APPLYING IN RESPECT OF AUTHORITY—*continued*

clause shall come into force on the date of the making of the determination.

(4) There shall also be paid to the Authority and the Deputy Authority, in respect of time spent in travelling in the exercise of the Authority's or, as the case may be, the Deputy Authority's functions, travelling allowances and expenses in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly as if the Authority and the Deputy Authority were members of a statutory Board and the travelling were in the service of the statutory Board.

4. Superannuation or retiring allowances—(1) For the purpose of providing superannuation or retiring allowances for the Authority, the Deputy Authority, and for any of the employees of the Authority, the Authority may, out of the funds of the Authority, make payments to or subsidise any superannuation scheme that is registered under the Superannuation Schemes Act 1989.

(2) Notwithstanding anything in this Act, any person who, immediately before being appointed as the Authority or the Deputy Authority or, as the case may be, becoming an employee of the Authority, is a contributor to the Government Superannuation Fund under Part II or Part IIA of the Government Superannuation Fund Act 1956 shall be deemed to be, for the purposes of the Government Superannuation Fund Act 1956, employed in the Government service so long as that person continues to hold office as the Authority or the Deputy Authority or, as the case may be, to be an employee of the Authority; and that Act shall apply to that person in all respects as if that person's service as the Authority or the Deputy Authority or, as the case may be, as such an employee were Government service.

(3) Subject to the Government Superannuation Fund Act 1956, nothing in subclause (2) of this clause entitles any such person to become a contributor to the Government Superannuation Fund after that person has once ceased to be a contributor.

(4) For the purpose of applying the Government Superannuation Fund Act 1956, in accordance with subclause (2) of this clause, to a person who holds office as the Authority or the Deputy Authority or, as the case may be, is in the service of the Authority as an employee and (in any such case) is a contributor to the Government Superannuation Fund, the term "controlling authority", in relation to any such person, means the Authority.

5. Application of certain Acts to Authority and staff—No person shall be deemed to be employed in the service of the Crown for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 by reason only of that person's appointment as the Authority, or the Deputy Authority, or a person appointed under clause 1 or clause 2 of this Schedule.

6. Services for Authority—The Crown, acting through any Department, may from time to time, at the request of the Authority, execute any work or enter into any arrangements for the execution or provision by the Department for the Authority of any work or service, or

SCHEDULE—*continued*

PROVISIONS APPLYING IN RESPECT OF AUTHORITY—*continued*

for the supply to the Authority of any goods, stores, or equipment, on and subject to such terms and conditions as may be agreed.

7. Seal—The Authority's seal of office shall be judicially noticed in all courts and for all purposes.

8. Exemption from income tax—The income of the office of Authority shall be exempt from income tax.

WELLINGTON, NEW ZEALAND: Published under the authority of the New Zealand Government—1994

49161H —94/NS

APPENDIX III

Australian Statutes

Whistleblowers Protection Act 1993 (SA)
Protected Disclosures Act 1994 (NSW)
Whistleblowers Protection Act 1994 (Qld)
Public Interest Disclosure Act 1994 (ACT)

WHISTLEBLOWERS PROTECTION ACT 1993

No. 21 of 1993

SUMMARY OF PROVISIONS

Section

ANNO QUADRAGESIMO SECUNDO

ELIZABETHAE II REGINAE

A.D. 1993

****

No. 21 of 1993

An Act to protect persons disclosing illegal, dangerous or improper conduct; and for other purposes.

[*Assented to 8 April 1993*]

The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *Whistleblowers Protection Act 1993*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Object of Act

3. The object of this Act is to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally—

(a) by providing means by which such disclosures may be made; and

(b) by providing appropriate protections for those who make such disclosures.

Interpretation

4. (1) In this Act, unless the contrary intention appears—

"**adult**" means of or above the age of 18 years;

"**government agency**" means—

(a) a department or administrative unit of the Public Service; or

(b) a body corporate that is an instrumentality or agency of the Crown;

"**maladministration**" includes impropriety or negligence;

"**public interest information**" means information that tends to show—

(a) that an adult person (whether or not a public officer), body corporate or government agency is or has been involved (either before or after the commencement of this Act)—

(i) in an illegal activity; or

(ii) in an irregular and unauthorised use of public money; or

(iii) in substantial mismanagement of public resources; or

(iv) in conduct that causes a substantial risk to public health or safety, or to the environment; or

(b) that a public officer is guilty of maladministration in or in relation to the performance (either before or after the commencement of this Act) of official functions;

"**public officer**" means—

(a) a person appointed to public office by the Governor; or

(b) a member of Parliament; or

(c) a person employed in the Public Service of the State; or

(d) a member of the police force; or

(e) any other officer or employee of the Crown; or

(f) a member, officer or employee of—

(i) an agency or instrumentality of the Crown; or

(ii) a body that is subject to control or direction by a Minister, agency or instrumentality of the Crown; or

(iii) a body whose members, or a majority of whose members, are appointed by the Governor or a Minister, agency or instrumentality of the Crown; or

(g) a member of a local government body or an officer or employee of a local government body.

(2) The question whether a public officer—

(a) is or has been involved in—

(i) an irregular and unauthorised use of public money; or

(ii) substantial mismanagement of public resources; or

(b) is guilty of maladministration in or in relation to the performance of official functions,

is to be determined with due regard to relevant statutory provisions and administrative instructions and directions.

Immunity for appropriate disclosures of public interest information

5. (1) A person who makes an appropriate disclosure of public interest information incurs no civil or criminal liability by doing so.

(2) A person makes an appropriate disclosure of public interest information for the purposes of this Act if, and only if—

(a) the person—

(i) believes on reasonable grounds that the information is true; or

(ii) is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated; and

(b) the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.

(3) A disclosure is taken to have been made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure if it is made to an appropriate authority (but this is not intended to suggest that an appropriate authority is the only person to whom a disclosure of public interest information may be reasonably and appropriately made).

(4) For the purposes of subsection (3), a disclosure of public interest information is made to an appropriate authority if it is made to a Minister of the Crown or—

(a) where the information relates to an illegal activity—to a member of the police force;

(b) where the information relates to a member of the police force—to the Police Complaints Authority;

(c) where the information relates to the irregular or unauthorised use of public money—to the Auditor-General;

(d) where the information relates to a public employee—to the Commissioner for Public Employment;

(e) where the information relates to a member of the judiciary—to the Chief Justice;

(f) where the information relates to a member of Parliament—to the Presiding Officer of the House of Parliament to which the member belongs;

(g) where the information relates to a public officer (other than a member of the police force or a member of the judiciary)—to the Ombudsman;

(h) where the information relates to a matter falling within the sphere of responsibility of an instrumentality, agency, department or administrative unit of government—to a responsible officer of that instrumentality, agency, department or administrative unit;

(i) where the information relates to a matter falling within the sphere of responsibility of a local Government body—to a responsible officer of that body;

(j) where the information relates to a person or a matter of a prescribed class—to an authority declared by the regulations to be an appropriate authority in relation to such information.

(5) If a disclosure of information relating to fraud or corruption is made, the person to whom the disclosure is made must pass the information on as soon as practicable to—

(a) in the case of information implicating a member of the police force in fraud or corruption—the Police Complaints Authority;

(b) in any other case—the Anti-Corruption Branch of the police force.

Informant to assist with official investigation

6. (1) A person who discloses public interest information must assist with any investigation of the matters to which the information relates by the police or any other official investigating authority.

(2) Such a person is not, however, obliged to assist with an investigation by an authority or body to which, or a person to whom, the public interest information relates.

(3) A person who fails, without reasonable excuse, to comply with the obligation imposed by subsection (1) forfeits the protection of this Act.

Identity of informant to be kept confidential

7. (1) A person to whom another makes an appropriate disclosure of public interest information must not, without the consent of that person, divulge the identity of that other person except so far as may be necessary to ensure that the matters to which the information relates are properly investigated.

(2) The obligation to maintain confidentiality imposed by this section applies despite any other statutory provision, or a common law rule, to the contrary.

Informant to be informed of outcome of complaint

8. If an appropriate disclosure of public interest information is made to a public official, that official must, wherever practicable and in accordance with the law, notify the informant of the outcome of any investigation into the matters to which the disclosure relates.

Victimisation

9. (1) A person who causes detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure of public interest information commits an act of victimisation.

(2) An act of victimisation under this Act may be dealt with—

(a) as a tort; or

(b) as if it were an act of victimisation under the *Equal Opportunity Act 1984*,

but, if the victim commences proceedings in a court seeking a remedy in tort, he or she cannot subsequently lodge a complaint under the *Equal Opportunity Act 1984* and, conversely, if the victim lodges a complaint under that Act, he or she cannot subsequently commence proceedings in a court seeking a remedy in tort.

(3) Where a complaint alleging an act of victimisation under this Act has been lodged with the Commissioner for Equal Opportunity and the Commissioner is of the opinion that the subject matter of the complaint has already been adequately dealt with by a competent authority, the Commissioner may decline to act on the complaint or to proceed further with action on the complaint.

(4) In this section—

"**detriment**" includes—

(a) injury, damage or loss; or

(b) intimidation or harassment; or

(c) discrimination, disadvantage or adverse treatment in relation to a person's employment; or

(d) threats of reprisal.

Offence to make false disclosure

10. (1) A person who makes a disclosure of false public interest information knowing it to be false or being reckless about whether it is false is guilty of an offence.

Penalty: Division 5 fine or division 5 imprisonment.

(2) A person who makes a disclosure of public interest information in contravention of this section is not protected by this Act.

Non-derogation

11. This Act is in addition to, and does not derogate from, any privilege, protection or immunity existing apart from this Act under which information may be disclosed without civil or criminal liability.

Regulations

12. The Governor may make regulations for purposes contemplated by this Act.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor

BY AUTHORITY: A. J. SECKER, Government Printer, South Australia

1994-92

[Assented to, 12 December 1994]

NO AMENDMENTS (SINCE DATE OF ASSENT)

PROTECTED DISCLOSURES ACT 1994 No. 92

[Reprinted as at - not reprinted]

TABLE OF PROVISIONS

Beginning of Act

PROTECTED DISCLOSURES ACT 1994 No. 92

[Reprinted as at - not reprinted]

PROTECTED DISCLOSURES ACT 1994 No. 92

[Reprinted as at - not reprinted]

An Act to provide protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector, and for related purposes. [Assented to 12 December 1994]

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Protected Disclosures Act 1994.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Object

3. (1) The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:

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

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

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

(2) Nothing in this Act is intended to affect the proper administration and management of an investigating authority or public authority (including action that may or is required to be taken in respect of the salary, wages, conditions of employment or discipline of a public official), subject to the following:

(a) detrimental action is not to be taken against a person if to do so would be in contravention of this Act; and

(b) beneficial treatment is not to be given in favour of a person if the purpose (or one of the purposes) for doing so is to influence the person to make, to refrain from making, or to withdraw a disclosure.

Definitions

4. In this Act:

"**Commission**" means the Independent Commission Against Corruption;

"**corrupt conduct**" has the meaning given to it by the Independent Commission Against Corruption Act 1988;

"**detrimental action**" is defined in section 20;

"**disciplinary proceeding**" includes a disciplinary inquiry within the meaning of the Public Sector Management Act 1988;

"**exercise**" of a function includes, where the function is a duty, the performance of the duty;

"**function**" includes power, authority or duty;

"**investigate**" includes inquire or audit;

"**investigating authority**" means:

(a) the Auditor-General; or

(b) the Commission; or

(c) the Ombudsman;

"**investigation Act**" means:

(a) the Independent Commission Against Corruption Act 1988; or

(b) the Ombudsman Act 1974; or

(c) the Public Finance and Audit Act 1983;

"**journalist**" means a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media;

"**maladministration**" is defined in section 11 (2);

"**protected disclosure**" means a disclosure satisfying the applicable requirements of Part 2;

"**public authority**" means any public authority whose conduct or activities may be investigated by an investigating authority

investigated by an investigating authority;

"**public official**" means a person employed under the Public Sector Management Act 1988, an employee of a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority;

"**relevant investigation Act**", in relation to an investigating authority, means the Act that appoints or constitutes the investigating authority.

Relationship of this Act and other Acts

5. (1) This Act prevails, to the extent of any inconsistency, over the provisions of any investigation Act.

(2) However, nothing in this Act otherwise limits or affects the operation of any Act or the exercise of the functions conferred or imposed on an investigating authority or any other person or body under it.

(3) Nothing in this Act (except section 13 (2) and (4)) authorises an investigating authority to investigate any complaint that it is not authorised to investigate under the relevant investigation Act.

Act binds the Crown

6. This Act binds the Crown in right of New South Wales.

PART 2—PROTECTED DISCLOSURES

Effect of Part

7. A disclosure is protected by this Act if it satisfies the applicable requirements of this Part.

Disclosures must be made by public officials

8. (1) To be protected by this Act, a disclosure must be made by a public official:

(a) to an investigating authority; or

(b) to the principal officer of a public authority or investigating authority or officer who constitutes a public authority; or

(c) to another officer of the public authority or investigating authority to which the public official belongs in accordance with an internal procedure established by the authority for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any of its officers; or

(d) to a member of Parliament or to a journalist.

(2) A disclosure is protected by this Act even if it is made about conduct or activities engaged in, or about matters arising, before the commencement of this section.

(3) A disclosure made while a person was a public official is protected by this Act even if the person who made it is no longer a public official. person it is no longer

(4) A disclosure made about the conduct of a person while the person was a public official is protected by this Act even if the person is no longer a public official.

Disclosures must be made voluntarily

9. (1) To be protected by this Act, a disclosure must be made voluntarily.
(2) A disclosure is not made voluntarily for the purposes of this section if it is made by a public official in the exercise of a duty imposed on the public official by or under an Act.
(3) A disclosure is made voluntarily for the purposes of this section if it is made by a public official in accordance with a code of conduct (however described) adopted by an investigating authority or public 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.

Disclosure to Commission concerning corrupt conduct

10. To be protected by this Act, a disclosure by a public official to the Commission must:

(a) be made in accordance with the Independent Commission Against Corruption Act 1988; and

(b) be a disclosure of information that shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.

Disclosure to Ombudsman concerning maladministration

11. (1) To be protected by this Act, a disclosure by a public official to the Ombudsman must:

(a) be made in accordance with the Ombudsman Act 1974; and

(b) be a disclosure of information that shows or tends to show that, in the exercise of a

function relating to a matter of administration conferred or imposed on a public authority or another public official, the public authority or public official has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration.

(2) For the purposes of this Act, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:

(a) contrary to law; or

(b) unreasonable, unjust, oppressive or improperly discriminatory; or

(c) based wholly or partly on improper motives.

Disclosure to Auditor-General concerning serious and substantial waste

12. (1) To be protected by this Act, a disclosure by a public official to the Auditor-General must:

(a) be made in accordance with the Public Finance and Audit Act 1983; and

(b) be a disclosure of information that shows or tends to show that an authority or officer

(2) In this section, "**authority**" and "**officer of an authority**" have the meanings given to those expressions in the Public Finance and Audit Act 1983.

Disclosures about investigating authorities

13. (1) Despite section 10, a disclosure by a public official to the Commission that shows or tends to show that, in the exercise of a function relating to a matter of administration conferred or imposed on the Ombudsman, the Ombudsman or an officer of the Ombudsman has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration is protected by this Act.
(2) The Commission may investigate, and report, in accordance with the Independent Commission Against Corruption Act 1988 on any matter raised by a disclosure made to it that is of a kind referred to in subsection (1).
(3) Despite section 11, a disclosure by a public official to the Ombudsman that shows or tends to show:

(a) that the Commission or an officer of the Commission has engaged, is engaged, or proposes to engage, in corrupt conduct; or
(b) in the exercise of a function relating to a matter of administration conferred or imposed on the Commission, the Commission or an officer of the Commission has engaged, is engaged, or proposes to engage, in conduct of a kind that amounts to maladministration; or
(c) that the Auditor-General or a member of the staff of the Auditor-General has seriously and substantially wasted public money,

is protected by this Act.
(4) The Ombudsman may investigate, and report, in accordance with the Ombudsman Act 1974 on any matter raised by a disclosure made to it that is of a kind referred to in subsection (3). For the purposes of such an investigation the Ombudsman may engage consultants or other persons for the purpose of getting expert assistance.
(5) An investigating authority may decline to investigate or may discontinue the investigation of any matter referred to in this section.
(6) A disclosure referred to in this section is protected by this Act only if it satisfies all other applicable requirements of this Part.

Disclosures to public officials

14. (1) To be protected by this Act, a disclosure by a public official to the principal officer of, or officer who constitutes, a public authority must be a disclosure of information that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any of its officers.
(2) To be protected by this Act, a disclosure by a public official to another officer of the public authority to which the public official belongs in accordance with an internal procedure established by the authority for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any of its officers must be a disclosure of information that shows or tends to show such corrupt conduct, maladministration or serious and substantial waste

(3) In this section:

"**public authority**" includes an investigating authority.

Referred disclosures protected

15. (1) A disclosure is protected by this Act if it is made by a public official to an investigating authority and is referred (whether because it is not authorised to investigate the matter under the relevant investigation Act or otherwise) by the investigating authority under Part 4 to another investigating authority or to a public official or public authority.
(2) A disclosure is protected by this Act if it is made by a public official to another public official in accordance with section 8 (1) (b) or (c) and is referred under Part 4 by the other public official to an investigating authority or to another public official or public authority.

Disclosures made on frivolous or other grounds

16. (1) An investigating authority, or principal officer of or officer constituting a public authority, may decline to investigate or may discontinue the investigation of any matter raised by a disclosure made to the authority or officer of a kind referred to in this Part if the investigating authority or officer is of the opinion that the disclosure was made frivolously or vexatiously.
(2) A disclosure is not (despite any other provision of this Part) protected by this Act if an investigating authority or officer declines to investigate or discontinues the investigation of a matter under this section.
(3) Nothing in this section limits any discretion an investigating authority has to decline to investigate or to discontinue the investigation of a matter under the relevant investigation Act.

Disclosures concerning merits of government policy

17. A disclosure made by a public official that principally involves questioning the merits of government policy is not (despite any other provision of this Part) protected by this Act.

Disclosures motivated by object of avoiding disciplinary action

18. A disclosure that is made solely or substantially with the motive of avoiding dismissal or other disciplinary action, not being disciplinary action taken in reprisal for the making of a protected disclosure, is not (despite any other provision of this Part) a protected disclosure.

Disclosure to a member of Parliament or journalist

19. (1) A disclosure by a public official to a member of Parliament, or to a journalist, is protected by this Act if the following subsections apply.
(2) The public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of this Part.
(3) The investigating authority, public authority or officer to whom the disclosure was made

or if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred:

(a) must have decided not to investigate the matter; or

(b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made; or

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

(d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.

(4) The public official must have reasonable grounds for believing that the disclosure is substantially true.

(5) The disclosure must be substantially true.

PART 3—PROTECTIONS

Protection against reprisals

20. (1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

(2) In this Act, "**detrimental action**" 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;

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

(e) disciplinary proceeding.

Protection against actions etc.

21. (1) A person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.

(2) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person.

(3) The following are examples of the ways in which this section protects persons who make protected disclosures. A person who has made a protected disclosure:

- has a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in proceedings for defamation
- on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act
- who is subject to an obligation by way of oath, rule of law or practice to maintain

breached the confidentiality with respect to the disclosure is taken not to no
oath, rule of law or practice or a law relevant to the oath, rule or practice
is not liable to disciplinary action because of the disclosure.

Confidentiality guideline

22. An investigating authority or public authority (or officer of an investigating authority or public authority) or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:

(a) the person consents in writing to the disclosure of that information; or

(b) it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern; or

(c) the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

Rights and privileges of Parliament

23. Nothing in this Act affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

Other protection preserved

24. This Act does not limit the protection given by any other Act or law to a person who makes disclosures of any kind.

PART 4—MISCELLANEOUS

Referral of disclosures by investigating authorities

25. (1) An investigating authority may refer any disclosure concerning an allegation of corrupt conduct, maladministration or serious and substantial waste that is made to it by a public official to another investigating authority or to a public official or public authority considered by the authority to be appropriate in the circumstances, for investigation or other action.

(2) The investigating authority must refer such a disclosure if:

(a) it is not authorised to investigate the matter concerned under the relevant investigation Act; and

(b) it is of the opinion that another investigating authority or some public official or public authority may appropriately deal with the matter concerned.

(3) A disclosure may be referred before or after the matter concerned has been investigated and whether or not any investigation of the matter is complete or any findings have been made by the investigating authority.

(4) The investigating authority may communicate to the other investigating authority or to the public official or public authority any information the investigating authority has obtained

during the investigation (if any) of the matter concerned.
(5) The investigating authority may recommend what action should be taken by the other investigating authority or the public official or public authority.
(6) The investigating authority is not to refer the disclosure to another investigating authority, or to a public official or public authority, except after taking into consideration the views of the authority, public official or public authority.
(7) An investigating authority referring a matter to another investigating authority may enter into arrangements with the other authority:

(a) to avoid duplication of action; and
(b) to allow the resources of both authorities to be efficiently and economically used to take action; and
(c) to ensure that action is taken in a manner providing the most effective result.

Referral of disclosures by public officials

26. (1) A public official may refer any disclosure concerning an allegation of corrupt conduct, maladministration or serious and substantial waste made to the public official under Part 2 to an investigating authority or to another public official or a public authority considered by the public official to be appropriate in the circumstances, for investigation or other action.
(2) The public official may communicate to the investigating authority, the other public official or the public authority any information the public official has obtained during investigation (if any) of the matter concerned.

Notification to person making disclosure

27. The investigating authority, public authority or officer to whom a disclosure is made under this Act or, if the disclosure is referred, the investigating authority, public authority or officer to whom the disclosure is referred must notify the person who made the disclosure, within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

False or misleading disclosures

28. A public official must not, in making a disclosure to an investigating authority, public authority or public official, wilfully make any false statement to, or mislead or attempt to mislead, the investigating authority, public authority or public official.
Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

Proceedings for offences

29. Proceedings for an offence against this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Regulations

30. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Amendment of Acts

31. The Acts specified in Schedule 1 are amended as set out in that Schedule.

Review

32. (1) A joint committee of members of Parliament is to review this Act.
(2) The review is to be undertaken as soon as practicable after the expiration of one year after the date of assent to this Act, and after the expiration of each following period of 2 years.
(3) The committee is to report to both Houses of Parliament as soon as practicable after the completion of each review.

SCHEDULE 1—AMENDMENT OF ACTS

(Sec. 31)

Defamation Act 1974 No. 18
Sections 17Q, 17QA:

After section 17P, insert:

Matters arising under the Public Finance and Audit Act 1983

17Q. There is a defence of absolute privilege for a publication to or by the Auditor-General or a member of the Auditor-General's Office as such a member of a disclosure made in relation to a complaint under section 38B (1A) of the Public Finance and Audit Act 1983.

Matters relating to the Protected Disclosures Act 1994

17QA. There is a defence of absolute privilege for a publication to or by a public official or public authority referred to in section 8 (1) (b) or (c) of the Protected Disclosures Act 1994 of a disclosure made to the public official or public authority in relation to an allegation of corrupt conduct, maladministration or serious and substantial waste of public money if the publication is for the purpose of investigating that allegation.

Freedom of Information Act 1989 No. 5
Schedule 1 (Exempt documents):

At the end of clause 20, insert:

; or

(d) matter relating to a protected disclosure within the meaning of the Protected Disclosures Act 1994.

Government and Related Employees Appeal Tribunal Act 1980 No. 39
Section 24 (Right of appeal):

At the end of section 24, insert:

(2) Such an appeal may be made on the ground that the decision appealed against was made substantially in reprisal for a protected disclosure within the meaning of the Protected Disclosures Act 1994.

Public Finance and Audit Act 1983 No. 152

Section 38B (Special audit by Auditor-General):

After section 38B (1), insert:

(1A) A public official within the meaning of the Protected Disclosures Act 1994 may complain to the Auditor-General (whether orally or in writing) that public money has been seriously and substantially wasted by an authority or an officer of an authority. When a public official makes such a complaint the Auditor-General may conduct an audit under this section.

Public Sector Management Act 1988 No. 33

Section 66 (Breaches of discipline):

(a) At the end of section 66 (f), insert:

; or

(g) takes any detrimental action (within the meaning of the Protected Disclosures Act 1994) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act; or

(h) takes any disciplinary proceedings or disciplinary action against another officer that is substantially in reprisal for an internal disclosure made by that officer.

(b) At the end of section 66, insert:

(2) In this section, "**internal disclosure**" means a disclosure made by an officer regarding an alleged breach of discipline by another officer belonging to the same Department as that to which the officer belongs.

Information about this reprint

Act is reprinted as at 2 March 1995.

ır editorial changes allowed under the provisions of the Reprints Act 1992 ioned in the following list have been made to—
use standard punctuation consistent with current drafting practice (s 27)
use expressions consistent with current drafting practice (s 29)
insert references to body of law (s 33B)
use aspects of format and printing style consistent with current drafting practice (s 35)
omit provisions that are no longer required (s 40)
omit the enacting words (s 42A)
number and renumber certain provisions and references (s 43)
correct minor errors (s 44).

Endnotes for information about—
when provisions commenced
editorial changes made in the reprint, including Table of corrected minor errors.

Queensland

WHISTLEBLOWERS PROTECTION ACT 1994

TABLE OF PROVISIONS

WHISTLEBLOWERS PROTECTION ACT 1994

[reprinted as in force on 2 March 1995]

An Act to protect whistleblowers and for other purposes

PART 1—PRELIMINARY

Division 1—Title and commencement

Short title

1. This Act may be cited as the *Whistleblowers Protection Act 1994*.

Commencement

2. This Act commences on a day to be fixed by proclamation.

Division 2—Object of Act

Principal object of Act

3. This Act's principal object is to promote the public interest b protecting persons who disclose—

- unlawful, negligent or improper conduct affecting the publi sector
- danger to public health or safety
- danger to the environment.

Division 3—Definitions

Definitions and dictionary

4.(1) The dictionary[1] in Schedule 6 defines particular words used in this Act.

(2) Schedule 5 contains certain definitions in separate sections.

(3) Schedule 5 definitions and definitions found elsewhere in this Act are signposted in the dictionary.

Division 4—Operation of Act

Act generally binding

5. This Act binds all persons, including the State.

Other protection saved

6. This Act does not limit the protection given by another law to a person who makes disclosures of any type or affect another remedy available to the person.

PART 2—GENERAL EXPLANATION OF ACT

What is the general nature of the Act's scheme?

7.(1) This Act provides a scheme that, in the public interest, gives special protection to disclosures about unlawful, negligent or improper public sector conduct or danger to public health or safety or the environment.

(2) Because the protection is very broad, the scheme has a number of

1 In some Acts, definitions are contained in a dictionary that appears as the last Schedule and forms part of the Act—*Acts Interpretation Act 1954*, section 14.

balancing mechanisms intended to—

(a) focus the protection where it is needed; and

(b) make it easier to decide whether the special protection applies to a disclosure; and

(c) ensure appropriate consideration is also given to the interests of persons against whom disclosures are made; and

(d) encourage the making of disclosures in a way that helps to remedy the matter disclosed; and

(e) prevent the scheme adversely affecting the independence of the judiciary and the commercial operations of GOCs.

(3) The scheme gives protection only to a **"public interest disclosure"**,[2] which is a particular type of disclosure defined by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made (the **"appropriate entity"**).

(4) Certain types of public interest disclosures may be disclosed under the scheme by a **"public officer"**, which includes any officer of a **"public sector entity"**.

(5) The expression **"public sector entity"** is widely defined and a lis can be found in Schedule 5, section 2.

(6) Other types of public interest disclosures may be made under th scheme by anybody.

Public disclosures made by public officers (Pt 3)

8.(1) Under section 15, a public officer may disclose **"offici misconduct"**, an expression defined in the *Criminal Justice Act 1989*.

(2) Under section 16, a public officer may disclo **"maladministration"** that specifically, substantially and adversely affe someone's interests.

(3) Maladministration is widely defined to cover illegal, arbitra oppressive or improper public sector **"administrative action"**.

2 Each expression in this Part that is in bold type and in quotation marks is def either in the dictionary or in a section signposted by the dictionary.

(4) Under section 17, a public officer may disclose negligent or improper management involving a substantial waste of **"public funds"**.

(5) The disclosure may concern the conduct of any public officer or public sector entity or anyone contracting to supply goods or services (other than as an employee) to a public sector entity.

(6) Under section 18, a public officer may disclose a substantial and specific danger to **"public health or safety"** or the **"environment"**.

(7) Public health or safety is widely defined in this Act and the wide definition of environment in the *Environmental Protection Act 1994* is introduced by cross reference.

Public interest disclosures made by anybody

9.(1) Under section 19, anybody may disclose a substantial and specific danger to the health or safety of a person with a **"disability"**.

(2) The wide definition of disability in the *Disability Services Act 1992* is introduced by cross reference.

(3) Under section 19, anybody may disclose a substantial and specific danger to the environment from contraventions of, or of conditions under, provisions of Acts listed in Schedule 2.

(4) Under section 20, anybody may disclose a **"reprisal"** taken against anybody for making a public interest disclosure.

How must a public interest disclosure be made (Pt 4)?

10.(1) Under Part 4, Division 2, a public interest disclosure must be made to an appropriate entity, which is a **"public sector entity"** identified under the Division.

(2) This requirement ensures that—

(a) public interest disclosures are made to public sector entities that have responsibility or power to take appropriate action about the information disclosed or to provide an appropriate remedy; and

(b) unfair damage is not caused to the reputations of persons against whom disclosures are made by inappropriate publication of

(3) Under the Division, a public interest disclosure may be made to an appropriate unit—

(a) in any way, unless certain exceptions apply including, for example, another law requiring a particular procedure or the appropriate entity having established reasonable procedures; and

(b) despite any exception otherwise applying, always to specified persons within the appropriate entity, including the appropriate entity's **"chief executive officer"**.

(4) Under Part 4, Division 3—

(a) public sector entities receiving public interest disclosures are required to keep proper records about them, because of the special protection given for public interest disclosures; and

(b) certain information about public interest disclosures is required to be provided annually to the Legislative Assembly; and

(c) reasonable information about action taken on a public interest disclosure made or referred to an appropriate entity, and the results, is required to be given to the discloser or referrer.

(5) Part 4, Division 4 provides for the application of the Act to courts, tribunals and judicial officers in a way intended to prevent the Act's administration adversely affecting judicial work or independence.

(6) Part 4, Division 5 provides for the application of the Act to GOCs in a way intended to prevent the Act's administration adversely affecting GOCs commercial operations.

What is the special protection given for public interest disclosures (Pt 5)?

11.(1) Under Part 5, Division 2, a person is declared not to be liable, civilly, criminally or under an administrative process, for making a public interest disclosure.

(2) Under Part 5, Divisions 3 to 5, causing or attempting or conspiring to cause **"detriment"** to any person because of a public interest disclosure is declared to be a **"reprisal"** and unlawful, both under the civil law of tort and the criminal law.

(3) Under Part 5, Division 6—

(a) public sector entities must establish reasonable procedures to protect their officers from reprisals; and

(b) public officers with existing rights to appeal against, or to apply for a review of, disciplinary action, appointments, transfers or unfair treatment are permitted to use these rights against reprisals; and

(c) officers of the public service and departmental employees are given the additional right to appeal to the Commissioner for Public Sector Equity to be relocated to remove the danger of reprisals.

(4) Under Part 5, Division 7, the Industrial Commission, or, if the Industrial Commission does not have jurisdiction, the Supreme Court, may grant injunctions against reprisals.

General sections (Pt 6)

12.(1) Part 6 provides for certain offences and the criminal proceedings about the offences.

(2) The Part makes it an offence—

(a) for a public officer to record or disclose certain confidential information gained through involvement in this Act's administration other than under certain circumstances including, for example, the investigation under an Act of information disclosed under a public interest disclosure; and

(b) for a person intentionally to give false or misleading information as a public interest disclosure or in subsequent inquiries into the person's disclosure.

(3) The Part also declares that a public officer who commits one of these offences or the offence of reprisal is guilty of misconduct under any Act under which the officer may be dismissed or disciplined for misconduct.

PART 3—DISCLOSURES THAT MAY BE MADE

Purpose of Part

13. The purpose of this Part is to describe the type of disclosures that may be made as public interest disclosures under this Act and who may make them.

What type of information can be disclosed?

14.(1) The types of information that may be disclosed by a public interest disclosure, and who may make the disclosure, are specified in sections 15 to 20.

(2) A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.

(3) If information is about an event, it may be about something that has or may have happened, is or may be happening, or will or may happen.

(4) If the information is about someone else's conduct, the information may be about conduct in which the other person has or may have engaged, is or may be engaging, or is or may be intending to engage.

(5) The information need not be in a form that would make it admissible evidence in a court proceeding.

Example—

The information may take the form of hearsay.

Public officer may disclose official misconduct

15. A public officer[3] may make a public interest disclosure about someone else's conduct if—

3 This and other sections allowing a person to make public interest disclosures as a public officer do not generally contain rules limiting the disclosures to disclosures about the public sector unit of which the person is an officer.

(a) the officer has information about the conduct; and

(b) the conduct is official misconduct.

Public officer may disclose maladministration

16. A public officer may make a public interest disclosure about someone else's conduct if—

(a) the officer has information about the conduct; and

(b) the conduct is maladministration that adversely affects anybody's interests in a substantial and specific way.

Public officer may disclose negligent or improper management affecting public funds

17.(1) A public officer may make a public interest disclosure about the conduct of another public officer, a public sector entity or a public sector contractor if—

(a) the officer has information about the conduct; and

(b) the conduct is negligent or improper management directly or indirectly resulting, or likely to result, in a substantial waste of public funds.

(2) The disclosure cannot be based on a mere disagreement over policy that may properly be adopted about amounts, purposes and priorities of expenditure.

Public officer may disclose danger to public health or safety or environment

18.(1) This section applies if a public officer has information about a substantial and specific danger to public health or safety or to the environment.

(2) The public officer may make a public interest disclosure of the information.

Anybody may disclose danger to person with disability or to environment from particular contraventions

19.(1) This section applies if anybody has information about—

(a) a substantial and specific danger to the health or safety of a person with a disability; or

(b) the commission of an offence against a provision mentioned in Schedule 2, if commission of the offence is or would be a substantial and specific danger to the environment; or

(c) a contravention of a condition imposed under a provision mentioned in Schedule 2, if the contravention is or would be a substantial and specific danger to the environment.

(2) The person may make a public interest disclosure of the information.

Anybody may disclose reprisal

20. Anybody may make a public interest disclosure about someone else's conduct if—

(a) the person has information about the conduct; and

(b) the conduct is a reprisal.

Conduct of unknown person

21. A person may make a public interest disclosure whether or not the person is able to identify a particular person to which the information disclosed relates.

Involuntary disclosures

22. A disclosure may be a public interest disclosure even though it is made under a legal requirement.

Disclosure of events that happened before commencement

23. A public interest disclosure may be made under this Act about events that happened or may have happened before the commencement of this Act.

PART 4—DISCLOSURE PROCESS

Division 1—Purpose of Part

Purpose of Part

24. The purpose of this Part is to describe the ways in which a person may make a public interest disclosure and provide for related processes.

Division 2—Disclosure must be to appropriate entity

Disclosure must be made to an appropriate entity

25.(1) Section 26 specifies appropriate entities to which public interest disclosures may be made.[4]

(2) Section 27 provides more detail on how and to whom the public interest disclosure may be made within the appropriate entities.

(3) To be treated as a public interest disclosure, a disclosure under sections 15 to 20 must be made to an appropriate entity.

(4) The fact that a public interest disclosure may be made under a particular provision to a particular appropriate entity does not exclude it from being made under another provision to the same or another appropriate entity.

Every public sector entity is an appropriate entity for certain things

26.(1) Any public sector entity is an appropriate entity to receive a public interest disclosure—

(a) about its own conduct or the conduct of any of its officers; or

(b) made to it about anything it has a power to investigate or remedy; or

4 See Division 4 for overriding limitations about courts, tribunals and judicial officers and Division 5 for overriding limitations about statutory GOCs.

(c) made to it by anybody who is entitled to make the public interes disclosure and honestly believes it is an appropriate entity t receive the disclosure under paragraph (a) or (b); or

(d) referred to it by another public sector entity under section 28.[5]

(2) Subsection (1)(c) does not permit a public sector entity to receive public interest disclosure if, apart from this section, it would not be able t receive the disclosure because of Division 4 or 5.[6]

(3) If a person makes a public interest disclosure to an appropriate entit the person may also make a public interest disclosure to the entity about reprisal taken against the person for making the disclosure.

Examples—

Schedule 3 has examples of the operation of subsection (1)(a) and (b).

How to disclose to appropriate entity

27.(1) A public interest disclosure may be made to an appropriate enti in any way, including anonymously.

(2) However, if an appropriate entity establishes a reasonable procedu for making a public interest disclosure to the entity, the procedure must b used by a person making a public interest disclosure to the entity.

(3) Despite subsection (2), a public interest disclosure made to a appropriate entity may always be made to—

(a) its chief executive officer;[7] or

(b) if the appropriate entity has a governing body—a member of i governing body; or

(c) if an officer of the entity is making the disclosure—a person wh directly or indirectly, supervises or manages the officer; or

(d) an officer of the entity who has the task of receiving or taki

5 Section 28 (Disclosure may be referred to an appropriate entity)

6 Division 4 (Limitation on disclosure process for courts, tribunals and judic officers)
Division 5 (Limitation on disclosure process for GOCs)

7 See Schedule 5, section 1 for the definition of "chief executive".

action on the type of information being disclosed.

(4) This Act does not affect a procedure required under another Act for disclosing the type of information being disclosed.

(5) If a public interest disclosure is properly made to an appropriate entity, the entity is taken to have received the disclosure for the purpose of this Act.

(6) However, subsection (5) is subject to Division 4 and 5.[8]

Examples of subsection (3)(d)—

1. The entity's internal auditor, if the public interest disclosure is made under section 17.[9]

2. A health officer or environmental officer of the department having a statutory or administrative responsibility to investigate something mentioned in a disclosure under section 18(1) or 19(1).[10]

3. The officer of the entity in charge of its human resource management if the public interest disclosure is made under section 20[11] and is about detriment to the career of an employee of the entity.

Example of subsection (4)—

This Act does not affect the requirement under the *Criminal Justice Act 1989* that all complaints and information about misconduct to be brought to the notice of the Criminal Justice Commission must be communicated to the Commission's Complaints Section.[12]

8 Division 4 (Limitation on disclosure process for courts, tribunals and judicial officers)
Division 5 (Limitation on disclosure process for GOCs)

9 Section 17 (Public officer may disclose negligent or improper management affecting public funds)

10 Section 18 (Public officer may disclose danger to public health or safety or environment)
Section 19 (Anybody may disclose danger to person with disability or to environment from particular contraventions)

11 Section 20 (Anybody may disclose reprisal)

12 See *Criminal Justice Act 1989*, section 36(5).

Disclosure may be referred to an appropriate entity

28.(1) If a public interest disclosure received by an appropriate entity about—

(a) the conduct of another public sector entity or the actions of officer of another public sector entity; or

(b) the conduct of anybody, including itself, or anything that anot public sector entity has a power to investigate or remedy;

the entity may refer the public interest disclosure to the other public sec entity.

(2) If the entity refers the disclosure to another public sector entity, power to investigate or remedy is unaffected by the reference.

(3) An appropriate entity must not refer a public interest disclosure another public sector entity unless it first considers whether there is unacceptable risk that a reprisal would be taken against any person beca of the reference.

(4) In considering whether there would be an unacceptable risk, appropriate entity must, if practicable, consult with the person who m the public interest disclosure.

(5) An appropriate entity must not refer a public interest disclosure another public sector entity if it considers there is an unacceptable risk.

(6) This section does not affect another law under which the entity m refer a report, complaint, information or evidence to another entity.

Example—

The duty of a principal officer in a unit of public administration within meaning of the *Criminal Justice Act 1989* to refer suspected official misconduct to Criminal Justice Commission as required by that Act is unaffected.[13]

13 See *Criminal Justice Act 1989*, section 37(2).

Division 3—Records and reports about disclosures

Records must be kept of disclosures

29.(1) In this section—

"disclosure" means a public interest disclosure or purported public interest disclosure.

"public sector entity" does not include—

(a) the Executive Council; or

(b) a court or tribunal.

(2) The objectives of this section are to—

(a) ensure that disclosures are sufficiently identifiable to allow Part 5[14] to be easily applied; and

(b) assist in the preparation of accurate reports to the Legislative Assembly under sections 30 and 31.

(3) The chief executive officer of a public sector entity must ensure that a proper record is kept about disclosures received by the public sector entity, including—

(a) the name of the person making the disclosure, if known; and

(b) the information disclosed; and

(c) any action taken on the disclosures.

Units must report to Legislative Assembly on disclosures

30.(1) In this section—

"disclosure" means a public interest disclosure or a purported public interest disclosure.

"public sector entity" does not include—

(a) the Executive Council; or

(b) a court or tribunal; or

[14] Part 5 (Privilege, protection and compensation)

(c) a GOC.

"report period" of an annual report means the period covered by the report.

"substantially verified" disclosure includes a disclosure for which an offence prosecution or disciplinary action has been taken o recommended.

(2) A public sector entity or an officer of a public sector entity required under an Act to prepare an annual report of the entity's activities during report period for tabling in the Legislative Assembly must include statistica information about—

(a) the number of disclosures received by it over the report perioc for each type of information disclosed; and

(b) the number of disclosures substantially verified over the repo period, even if received before the period, for each type c information verified.

Minister must report to Legislative Assembly on Act's administratio

31.(1) In this section—

"public sector entity" does not include—

(a) the Executive Council; or

(b) a court or tribunal; or

(c) a GOC.

(2) The Minister must prepare for each financial year an annual report the Legislative Assembly on the administration of this Act.

(3) If asked by the chief executive of the department in which this Act administered, a public sector entity must provide reasonable assistance the chief executive to enable the department to compile information a statistics for inclusion in the annual report.

(4) The report may be included in the department's annual report.

Reasonable information about result of disclosure must be given to discloser or referring agency

32.(1) If asked by a person who makes a public interest disclosure or by a public sector entity that has referred a public interest disclosure to it, an appropriate entity must give the person or the referring entity reasonable information about action taken on the disclosure and the results.

(2) If the request is for written information, the information must be written.

(3) Information need not be given under subsection (1) to a person who makes a public interest disclosure, if—

(a) giving the information would be impractical in the circumstances; or

(b) the information requested has already been given to the person; or

(c) the request is vexatious.

(4) Information must not be given under subsection (1), if giving the information would be likely to adversely affect—

(a) anybody's safety; or

(b) the investigation of an offence or possible offence; or

(c) necessary confidentiality about an informant's existence or identity.

(5) If the public interest disclosure is made to the Criminal Justice Commission in a complaint of misconduct or official misconduct, this section does not impose on the Commission any duty that the director of the Commission's Official Misconduct Division does not already have under that Act.[15]

15 The *Criminal Justice Act 1989*, under section 33(4) to (6), regulates the release of information to complainants under that Act by the director of the Criminal Justice Commission's Official Misconduct Division.

Division 4—Limitation on disclosure process for courts, tribunals and judicial officers

Object of Division

33.(1) This Division deals with some issues about the treatment of court and tribunals as public sector entities and judicial officers as public officers under this Act.

(2) The purpose of the Division is to clarify the application of this Act and to ensure this Act's administration does not detrimentally affect judicial work or independence.

(3) Section 34 deals with public interest disclosures made administratively about judicial officers.

(4) Section 35 deals with public interest disclosures made in proceedings before courts or tribunals.

Disclosures made administratively to or about a judicial officer

34.(1) This section applies to public interest disclosures made administratively about judicial officers.

(2) A person may make a public interest disclosure about the conduct of a judicial officer only under this section, despite any other provision of this Act.

(3) A public interest disclosure under section 15[16] about the conduct of a judicial officer may be made only—

(a) to the chief judicial officer of the relevant court or tribunal; or

16 Section 15 (Public officer may disclose official misconduct)

(b) to the Criminal Justice Commission.

(4) A public interest disclosure under section 16, 17, 18 or 19[17] about the conduct of a judicial officer may be made only to the chief judicial officer of the relevant court or tribunal.

(5) If a reprisal that is conduct of a judicial officer is taken against a person for making a public interest disclosure under this section, the person may make a public interest disclosure about the reprisal only to—

(a) the chief judicial officer of the relevant court or tribunal; or

(b) if the reprisal is official misconduct—the chief judicial officer of the relevant court or tribunal or the Criminal Justice Commission.

(6) A chief judicial officer may receive a public interest disclosure only if the disclosure is about the conduct of another judicial officer.

(7) Under section 28,[18] the chief judicial officer may refer a public interest disclosure made to the chief judicial officer about the conduct of another judicial officer to an appropriate entity.

Disclosures in court or tribunal proceedings

35.(1) The purpose of this section is to declare how this Act applies to disclosures made to a court or tribunal in a proceeding.

(2) This section applies if a person—

(a) has information that the person may disclose as a public interest disclosure to an appropriate entity; and

(b) discloses the information to a court or tribunal in a proceeding in which the information is relevant and admissible.

17 Section 16 (Public officer may disclose maladministration)
Section 17 (Public officer may disclose negligent or improper management affecting public funds)
Section 18 (Public officer may disclose danger to public health or safety or environment)
Section 19 (Anybody may disclose danger to person with disability or to environment from particular contraventions)

18 Section 28 (Disclosure may be referred to an appropriate entity)

(3) The disclosure is a public interest disclosure made to the court or tribunal as an appropriate entity under section 26(1)(b).[19]

(4) The court or tribunal may refer the disclosure to another appropriate entity under section 28.[20]

(5) The fact that a court or tribunal is treated as a public sector entity under this Act, and therefore can be an appropriate entity under section 26(1)(b) to receive a public interest disclosure, does not give a person a right to take a proceeding before the court or tribunal that the person does not have apart from this Act.

Division 5—Limitation on disclosure process for GOCs

Object of Division

36.(1) This Division deals with some issues about the treatment of GOCs as public sector entities and their officers as public officers under this Act.

(2) The purpose of the Division is to clarify the application of this Act and to ensure this Act's administration does not detrimentally affect the commercial operation of GOCs.

Application of Act to GOCs

37.(1) An officer of a statutory GOC may, under section 15, 16 or 18,[21] make a public interest disclosure to the statutory GOC about its conduct or the conduct of another officer of the statutory GOC.

(2) An officer of a statutory GOC may, under section 15, make a public interest disclosure to the Criminal Justice Commission about the conduct of

19 Section 26 (Every public sector entity is an appropriate entity for certain things)

20 Section 28 (Disclosure may be referred to an appropriate entity)

21 Section 15 (Public officer may disclose official misconduct)
Section 16 (Public officer may disclose maladministration)
Section 18 (Public officer may disclose danger to public health or safety or environment)

the statutory GOC or the conduct of another officer of the statutory GOC.

(3) An officer of a statutory GOC may, under section 17,[22] make a public interest disclosure to the statutory GOC about its conduct, the conduct of another officer of the statutory GOC or the conduct of a public sector contractor contracting with the statutory GOC.

(4) An officer of a statutory GOC may also make a public interest disclosure about a reprisal taken against the officer for making the public interest disclosure under subsection (1) or (3)—

(a) under section 26(3),[23] to the statutory GOC; or

(b) if the reprisal is official misconduct—to the Criminal Justice Commission.

(5) For the purpose of public interest disclosures under subsections (1) to (4) and of applying any law about the disclosures—

(a) the statutory GOC is a public sector entity; and

(b) the officer making the public interest disclosure is a public officer; and

(c) if the public interest disclosure is made under section 17[24] about the conduct of another officer of the statutory GOC—the other officer is a public officer.

(6) Other than as provided by subsection (5)—

(a) a GOC is not a public sector entity under this Act; and

(b) an officer of a GOC is not a public officer under this Act; and

(c) an officer of a GOC cannot, as a public officer, make a public interest disclosure.

22 Section 17 (Public officer may disclose negligent or improper management affecting public funds)

23 Section 26 (Every public sector entity is an appropriate entity for certain things)

24 Section 17 (Public officer may disclose negligent or improper management affecting public funds)

(7) This section does not affect the making of a public interest disclosure by anybody under section 19 or 20.[25]

(8) This section does not affect the reference under section 28[26]—

(a) from a statutory GOC to another public sector entity of a public interest disclosure made to the statutory GOC in accordance with this section; or

(b) from a public sector entity to a statutory GOC of a public interest disclosure made to the public sector entity.

PART 5—PRIVILEGE, PROTECTION AND COMPENSATION

Division 1—Purpose of Part

Purpose of Part

38. The purpose of this Part is to describe the legal privilege, protection and rights of compensation given to a person who makes a public interest disclosure.

Division 2—Limitation of action

General limitation

39.(1) A person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure.

(2) Without limiting subsection (1)—

25 Section 19 (Anybody may disclose danger to person with disability or to environment from particular contraventions)
Section 20 (Anybody may disclose reprisal)

26 Section 28 (Disclosure may be referred to an appropriate entity)

(a) in a proceeding for defamation the person has a defence of absolute privilege for publishing the disclosed information; and

(b) if the person would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice—the person—

(i) does not contravene the Act, oath, rule of law or practice for making the disclosure; and

(ii) is not liable to disciplinary action for making the disclosure.

Liability of discloser unaffected

40. A person's liability for the person's own conduct is not affected only because the person discloses it in a public interest disclosure.

Division 3—Reprisal unlawful

Reprisal and grounds for reprisal

41.(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, anybody has made, or may make, a public interest disclosure.

(2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.

(3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.

(4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.

(5) For the contravention to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

Division 4—Criminal prosecution about reprisal

Reprisal is an indictable offence

42.(1) A public officer who takes a reprisal commits an offence.

Maximum penalty—167 penalty units or 2 years imprisonment

(2) The offence is an indictable offence.

(3) If a public officer commits the offence, the Criminal Code, sections and 8[27] apply even though a person other than a public officer may also b taken to have committed the offence because of the application.

Division 5—Civil claims about reprisal

Damages entitlement for reprisal

43.(1) A reprisal is a tort and a person who takes a reprisal is liable damages to anyone who suffers detriment as a result.

(2) Any appropriate remedy that may be granted by a court for a tort m be granted by a court for the taking of a reprisal.

(3) If the claim for the damages goes to trial in the Supreme Court or District Court, it must be decided by a Judge sitting without a jury.

Division 6—Administrative action about reprisal

Public sector entity must protect its officers against reprisals

44. A public sector entity must establish reasonable procedures to prot its officers from reprisals that are, or may be, taken against them by entity or other officers of the entity.

---

27 Criminal Code, section 7 (Principal offenders)
Criminal Code, section 8 (Offences committed in prosecution of comm purpose)

Appeal against action affected by reprisal

45.(1) This section applies to a public officer who, under an Act, may appeal against, or apply for a review of, any of the following actions—

(a) disciplinary action taken against the officer;

(b) the appointment or transfer of the officer or another public officer to a position as a public officer;

(c) unfair treatment of the officer.

(2) Whether or not the Act specifies grounds for the appeal or application, the officer may also appeal or apply to have the action set aside because it was the taking of a reprisal against the officer.

(3) Subsection (2) applies even if the decision on the hearing of the appeal or application is in the form of a recommendation.

Relocation of public sector employee

46.(1) This section—

(a) must be read with the *Public Sector Management Commission Act 1990*; and

(b) gives a right to appeal for the relocation of an officer of the public service or employee of a department (the **"employee"**).

(2) The appeal may be made on the ground that—

(a) it is likely a reprisal will be taken against the employee if the employee continues in the employee's existing work location; and

(b) the only practical way to remove or substantially remove the danger is to relocate the employee.

(3) The appeal may be made to the Commissioner for Public Sector Equity by the employee or for the employee by the chief executive of the employee's department.

(4) If the Commissioner considers the ground is proved, the Commissioner may recommend to the Governor in Council that the employee and, if the employee is an officer of the public service, the employee's position be relocated—

(a) if the employee is an officer of the Senior Executive Service—within the public sector; or

(b) if the employee is not an officer of the Senior Executive Service—within the employee's department or another department.

(5) The Commissioner cannot recommend the relocation without the consent of—

(a) the employee; and

(b) if the relocation is to another unit of the public sector—the other unit's chief executive officer.

(6) The Governor in Council may relocate the employee and, if the employee is an officer of the public service, the employee's position—

(a) if the employee is an officer of the Senior Executive Service—within the public sector; or

(b) if the employee is not an officer of the Senior Executive Service—within the employee's department or another department.

(7) For subsection (6), the Governor in Council has power to do, or authorise the doing of, anything necessary or convenient to relocate the employee, including—

(a) abolishing an office in the public service held by the employee and creating another to be held by the employee; or

(b) ending the employee's appointment to an office and appointing the employee to another for which the maximum salary is no less than the previous office's.

Division 7—Injunctions about reprisal

Right to apply for Industrial Commission injunction

47.(1) An application for an injunction about a reprisal may be made to the Industrial Commission if the reprisal—

(a) has caused or may cause detriment to an employee within the meaning of the *Industrial Relations Act 1990*; and

(b) involves or may involve a breach of the *Industrial Relations Act 1990*, or an award, industrial agreement, certified agreement or enterprise flexibility agreement under that Act.

(2) The application may be made by—

(a) the employee; or

(b) an industrial organisation—

(i) whose rules entitle it to represent the industrial interests of the employee; and

(ii) acting in the employee's interests with the employee's consent; or

(c) the Criminal Justice Commission acting in the employee's interests with the employee's consent if—

(i) the employee is a public officer; and

(ii) the reprisal involves or may involve an act or omission that the Criminal Justice Commission may investigate.

(3) The *Industrial Relations Act 1990*, section 42[28] applies to the application, but this Division prevails if it is inconsistent with that section.

(4) If the Industrial Commission has jurisdiction to grant an injunction on an application under subsection (1), the jurisdiction is exclusive of the jurisdiction of any other court or tribunal other than the Industrial Court.

(5) Without limiting this section, the application is an industrial cause within the meaning of the *Industrial Relations Act 1990*.

Right to apply for Supreme Court injunction

48.(1) This section applies only to a person who cannot apply to the Industrial Commission for an injunction about a reprisal under section 47.

(2) An application for an injunction about a reprisal may be made to the Supreme Court by—

(a) a person claiming that the person is suffering or may suffer detriment from a reprisal; or

28 *Industrial Relations Act 1990*, section 42 (Power to grant injunctions)

(b) the Criminal Justice Commission acting in the person's interest with the person's consent if—

(i) the employee is a public officer; and

(ii) the reprisal involves or may involve an act or omission tha the Criminal Justice Commission may investigate.

Grounds for injunction

49. The Industrial Commission or Supreme Court may grant a injunction, in terms it considers appropriate, if it is satisfied that a perso has engaged, is engaging or is proposing to engage, in conduct (th **"reprisal conduct"**) amounting to—

(a) the taking of a reprisal; or

(b) aiding, abetting, counselling or procuring a person to take reprisal; or

(c) inducing or attempting to induce, whether by threats, promises c otherwise, a person to take a reprisal; or

(d) being in any way, directly or indirectly, knowingly concerned i or party to, the taking of a reprisal.

Order may require specified action

50. If the Industrial Commission or Supreme Court is satisfied that person has engaged or is engaging in reprisal conduct, it may grant a injunction requiring the person to take specified action to remedy an detriment caused by the conduct.

Evidence

51.(1) The Industrial Commission or Supreme Court may grant a injunction restraining a person from engaging in reprisal conduct—

(a) whether or not it considers that the person intends to enga again, or to continue to engage, in the conduct; or

(b) whether or not the person has previously engaged in the condu or

(c) whether or not there is an imminent danger of substantial damage to anyone if the person engages in the conduct.

(2) The Industrial Commission or Supreme Court may grant an injunction requiring a person to do something—

(a) whether or not it considers that the person intends to fail again, or to continue to fail, to do the thing; or

(b) whether or not the person has previously failed to do the thing; or

(c) whether or not there is an imminent danger of substantial damage to anybody if the person fails to do the thing.

Interim injunction

52. An interim injunction may be granted pending the final decision on the application.

Confidentiality of applications

53.(1) For an application before it, the Industrial Commission or Supreme Court may direct that—

(a) a report of the whole or part of the proceeding for the application must not be published; or

(b) evidence given, or anything filed, tendered or exhibited in the application must be withheld from release or search, or released or searched only on a specified condition.

(2) The direction may be given if the Industrial Commission or Supreme Court considers that—

(a) disclosure of the report, evidence or thing would not be in the public interest; or

(b) persons other than parties to the application do not have a sufficient legitimate interest in being informed of the report, evidence or thing.

(3) An application for an injunction may be heard in chambers.

(4) An application for an injunction may be heard ex parte if the Industrial Commission or Supreme Court considers an ex parte hearing is necessary in the circumstances.

(5) This section does not limit the power of the Industrial Commission or Supreme Court.

Undertakings as to damages and costs

54. If the Criminal Justice Commission applies for an injunction, no undertaking about damages or costs is to be required.

PART 6—GENERAL

Preservation of confidentiality

55.(1) If a person gains confidential information because of the person's involvement as a public officer in this Act's administration, the person must not make a record of the information, or intentionally or recklessly disclose the information to anyone, other than under subsection (3).

Maximum penalty—84 penalty units.

(2) A public officer gains information through involvement in the administration of this Act if the officer gains the information because o being involved, or an opportunity given by being involved, in th administration.

Example—

If a public officer gains information because the public officer receives a publi interest disclosure for an appropriate entity, the public officer gains the informatio through involvement in the administration of this Act.

(3) A person may make a record of confidential information, or disclos it to someone else—

(a) for this Act; or

(b) to discharge a function under another Act including, for exampl to investigate something disclosed by a public interest disclosu or

(c) for a proceeding in a court or tribunal; or

(d) if authorised under a regulation or another Act.

(4) This section does not affect an obligation a person may have under the law about natural justice to disclose information to a person whose rights would otherwise be detrimentally affected.

(5) Subsection (4) applies to information disclosing, or likely to disclose, the identity of a person who makes a public interest disclosure only if it is—

(a) essential to do so under the law about natural justice; and

(b) unlikely a reprisal will be taken against the person because of the disclosure.

(6) To remove doubt, if there is an inconsistency between this section and section 6, this section prevails.

(7) In this section—

"confidential information" includes—

(a) information about the identity, occupation, residential or work address or whereabouts of a person—

(i) who makes a public interest disclosure; or

(ii) against whom a public interest disclosure has been made; and

(b) information disclosed by a public interest disclosure; and

(c) information about an individual's personal affairs; and

(d) information that, if disclosed, may cause detriment to a person;

but does not include information publicly disclosed in a public interest disclosure made to a court, tribunal or other entity that may receive evidence under oath, unless further disclosure of the information is prohibited by law.

"law" for a public interest disclosure made to a committee of the Legislative Assembly, includes a standing rule, order or motion of the Legislative Assembly.

False or misleading information

56.(1) A person commits an offence if the person—

(a) makes a statement to an appropriate entity intending that it be acted on as a public interest disclosure; and

(b) in the statement, or in the course of inquiries into the statement, intentionally gives information that is false or misleading in a material particular.

Maximum penalty—167 penalty units or 2 years imprisonment.

(2) The offence is an indictable offence.

Misconduct by breach of Act

57.(1) A public officer is guilty of misconduct under an Act under which the officer may be dismissed from office or disciplined for misconduct, if the officer contravenes the following—

- section 42 (Reprisal is an indictable offence)
- section 55 (Preservation of confidentiality)
- section 56 (False or misleading information).

(2) To remove doubt, it is declared that under the *Criminal Justice Act 1989*, section 29(3)(d),[29] the Criminal Justice Commission may investigate the contravention, or the alleged or suspected contravention, if—

(a) the public officer is a member of the Police Service; or

(b) the contravention is official misconduct by a person holding an appointment in a unit of public administration within the meaning of the *Criminal Justice Act 1989*.

Proceedings for offences generally

58. An offence against this Act other than an offence declared to be an indictable offence is a summary offence.

Proceedings for indictable offences

59.(1) A proceeding on a charge for an indictable offence under this Ac

29 *Criminal Justice Act 1989*, section 29 (Role and functions)

ay be taken, at the election of the prosecution—

(a) by summary proceeding under the *Justices Act 1886*; or

(b) on indictment.

(2) A Magistrates Court must not hear the charge summarily if—

(a) the defendant asks the court at the start of the hearing to treat the proceeding as a committal proceeding; or

(b) the court considers that the charge should be prosecuted on indictment.

(3) A Magistrates Court may start to hear and decide the charge mmarily even if more than 1 year has passed since the offence was mmitted.

hange to a committal proceeding during summary proceeding

60.(1) This section applies if, during a proceeding before a Magistrates ourt to hear and decide a charge for an indictable offence summarily, the urt decides the charge is not one that should be decided summarily.

(2) The court must stop treating the proceeding as a proceeding to hear d decide the charge summarily and start treating it as a committal oceeding.

(3) The defendant's plea at the start of the hearing must be disregarded.

(4) The evidence already heard by the court must be taken to be evidence the committal proceeding.

(5) To remove doubt, it is declared that the *Justices Act 1886*, ction 104[30] must be complied with for the committal proceeding.

egulation making power

61.(1) The Governor in Council may make regulations under this Act.

(2) A regulation may provide that, for all or particular public interest sclosures—

[30] *Justices Act 1886*, section 104 (Proceedings on an examination of witnesses in relation to an indictable offence)

(a) a public sector entity is to be treated as a part of another public sector entity; or

(b) a part of a public sector entity is to be treated as part of another public sector entity or a separate public sector entity; or

(c) public sector entities or parts of public sector entities are to be treated as a single public sector entity.

(3) A regulation under subsection (2) may not—

(a) apply to a public sector entity specified in Schedule 5, section 2(1)(a), (b) or (g);[31] or

(b) provide for a court or tribunal to be treated as part of a public sector entity not consisting of courts or tribunals of like jurisdiction or their administrative offices; or

(c) be inconsistent with a requirement under an Act that a public sector entity act independently.

[31] Schedule 5, section 2 (Meaning of "public sector entity")

SCHEDULE 1

CHIEF EXECUTIVE OFFICERS

Schedule 5, section 1 of the Act

Public sector entities	Chief executive officers
Legislative Assembly committee	Speaker or chairperson
Parliamentary Service Commission and Parliamentary Service	Speaker or Clerk of the Parliament
court or tribunal presided over by Supreme Court Judge	Chief Justice
court or tribunal presided over by a District Court Judge	Chief Judge of District Courts
court or tribunal presided over by a magistrate or justice of the peace	Chief Stipendiary Magistrate
administrative office of a court or tribunal	proper officer of the court or tribunal or chief executive of the relevant department
Executive Council	senior officer appointed as clerk of Executive Council
department	department's chief executive or Minister
local government	mayor or chief executive officer, including, for Brisbane City Council, the town clerk
Regional Health Authority	chairperson, regional director or chief executive of the relevant department
statutory GOC	director or chief executive officer
office of the Parliamentary Commissioner for Administrative Investigations	Parliamentary Commissioner for Administrative Investigations

SCHEDULE 1 (continued)

SCHEDULE 2

OFFENCES ENDANGERING THE ENVIRONMENT

section 19(1)(b) and (c) of the Act

Clean Air Act 1963

- Section 46(3A) (Special penalties in certain cases)

Clean Waters Act 1971

- Section 48 (Special penalties in certain cases)

Contaminated Land Act 1991

- Section 13 (Prohibition of land contamination)
- Section 14(2), (3) or (4) (Sites for disposal of hazardous substances)
- Section 17(1), (2), (3) or (4) (Notification of contamination)
- Section 20(4) (Notice to remediate contaminated land)

Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987

- Section 56(1) or (2) (Offences concerning Queensland Estate)

Environmental Protection Act 1994

- All provisions for which a contravention is an offence

Fisheries Act 1994

- Section 89 (Noxious fisheries resources not to be possessed, released etc.)

SCHEDULE 2 (continued)

- Section 90 (Nonindigenous fisheries resources not to b possessed, released etc.)
- Section 91 (Aquaculture fisheries resources not to be released)
- Section 92 (Duty of person who takes or possesses noxious nonindigenous fisheries resources)
- Section 123 (Protection of marine plants)

Forestry Act 1959

- Section 53(1)(b) (Interference with forest products on Crow holdings and mining leases)
- Section 54 (Interfering with forest products on Crown lands etc.

Land Act 1962

- Section 250(1) (Tree clearing permit)
- Section 372(1) (Trespass to Crown land etc. and removal trespassers)

Mineral Resources Act 1989

- Section 6.15 (Conditions of mineral development licence)
- Section 6.27 (Contravention by holder of mineral developm licence)
- Section 7.33 (Conditions of mining lease)

Nature Conservation Act 1992

- Section 88(1) (Restriction on taking etc. protected animals)
- Section 89(1) (Restriction on taking etc. protected plants)
- Section 91 (Prohibition on release etc. of international prohibited wildlife)

SCHEDULE 2 (continued)

- Section 92 (Prohibition on breeding etc. hybrids of protected animals)
- Section 93 (Aborigines' and Torres Strait Islanders' rights to take etc. protected wildlife)
- Section 94 (Conservation officers prohibited in dealing with protected wildlife)
- Section 97(2) (Restriction on taking etc. of native wildlife in areas of major interest and critical habitats)
- Section 109 (Compliance with order)

Petroleum Act 1923

- Section 63A (Penalties)

Petroleum Regulation 1966

- Section 243 (Penalties)

Queensland Heritage Act 1992

- Section 33(1) (Development not to be carried out without Council's approval)
- Section 47 (Offences)
- Section 51 (Offence to destroy protected area etc.)
- Section 59 (Contravention of stop order)
- Section 65(2) (Restoration orders)

Transport Operations (Marine Pollution) Act 1995

- All provisions for which a contravention is an offence

SCHEDULE 2 (continued)

Water Resources Act 1989

- Section 4.44 (Destruction of vegetation, excavation or placing o fill)
- Section 4.48(3) (Suspension of permit in exceptiona circumstances)
- Section 4.50(2) (Notice to stop activities)
- Section 4.51(2) (Notice to remove vegetation etc.)

SCHEDULE 3

EXAMPLES OF APPROPRIATE ENTITIES IN PARTICULAR CIRCUMSTANCES

section 26 of the Act

Examples, under section 26(1)(a) of the Act, of public interest disclosures made to appropriate entities because the disclosure is about the conduct of the entities or of their officers—

1. W, an employee of a department, has information that officers of a disability service run by the department have been committing serious abuses against clients. The conduct is of a type mentioned in section 19(1)(a) of the Act.[32] W discloses the conduct to the department. The department is an appropriate entity to receive the disclosure because it is about the conduct of its staff.

2. W, an employee of a local government, has information about the local government's conduct in using negligent management practices resulting in substantial loss of public funds. The conduct is of a type mentioned in section 17 of the Act.[33] W discloses the conduct to the local government. The local government is an appropriate entity to receive the disclosure because it is about its own conduct.

3. W, a prison officer employed by the Corrective Services Commission, has information that another prison officer has committed a criminal assault on a prisoner. The conduct is of a type mentioned in section 18(1) of the Act.[34] W discloses the conduct to the Corrective Services Commission. The Corrective Services Commission is an appropriate entity to receive the disclosure because it is about the conduct of its staff.

32 Section 19 (Anybody may disclose danger to person with disability or to environment from particular contraventions)

33 Section 17 (Public officer may disclose negligent or improper management affecting public funds)

34 Section 18 (Public officer may disclose danger to public health or safety or environment)

SCHEDULE 3 (continued)

4. W, a police officer, has information that certain other police officers are not investigating certain offences in return for corrupt payments. The conduct is official misconduct mentioned in section 15 of the Act.[35] W discloses the conduct to the Queensland Police Service. The Queensland Police Service is an appropriate entity to receive the disclosure because it is about the conduct of one of its officers.

5. W, an employee of a State instrumentality, has information that a senior officer of the instrumentality has misappropriated funds from the instrumentality. The conduct is official misconduct mentioned in section 15 of the Act. W discloses the conduct to the instrumentality. The instrumentality is an appropriate entity to receive the disclosure because it is about the conduct of one of its officers.

Examples, under section 26(1)(b) of the Act, of disclosures made to appropriate entities because the disclosures are about something the entities have a power to investigate or remedy—

1. W, an employee of a department, has information that officers of a disability service run by the department have been committing serious abuses against clients. The conduct is official misconduct mentioned in section 15 of the Act. W discloses the conduct to the Criminal Justice Commission. The Criminal Justice Commission is an appropriate entity to receive the disclosure because it involves conduct it may investigate.

2. W, an employee of a department, has information about the department's conduct in using negligent accounting practices resulting in substantial loss of public funds. The conduct is of a type mentioned in section 17(1) of the Act.[36] W discloses the conduct to the Queensland Audit Office. The Queensland Audit Office is an appropriate entity to receive the disclosure because it involves conduct it may investigate.

3. W, an employee of a department, gives evidence at a hearing of the

35 Section 15 (Public officer may disclose official misconduct)

36 Section 17 (Public officer may disclose negligent or improper management affecting public funds)

SCHEDULE 3 (continued)

Parliamentary Public Accounts Committee inquiring into the department's management practices. At the hearing W discloses information about the department's conduct in using negligent management practices resulting in substantial loss of public funds. The conduct is of a type mentioned in section 17(1) of the Act. The Committee is an appropriate entity to receive the disclosure as it involves conduct it may investigate.

4. W, a prison officer employed by the Corrective Services Commission, has information that another prison officer has committed a criminal assault on a prisoner. The conduct is of a type mentioned in section 18(1) of the Act.[37] W discloses the conduct to the Queensland Police Service. The Queensland Police Service is an appropriate entity to receive the disclosure because it involves conduct it may investigate.

5. W, an employee of a private sector company, has information that the company has committed an offence against the *Environmental Protection Act 1994* that is a substantial and specific danger to the environment. The conduct is of a type mentioned in section 19(1)(b) of the Act.[38] W discloses the conduct to the department in which the *Environmental Protection Act 1994* is administered. The department is an appropriate entity to receive the disclosure because it involves conduct it may investigate.

6. W, an employee of a shipping company, has information that a ship owned by the company has discharged oil into coastal waters of Queensland. The conduct is an offence under the *Transport Operations (Marine Pollution) Act 1995* and is a substantial and specific danger to the environment. The conduct is of a type mentioned in section 19(1)(b) of the Act. W discloses the conduct to the department in which the *Transport Operations (Marine Pollution) Act 1995* is administered. The department is an appropriate entity to receive the disclosure because it is about conduct it may investigate.

37 Section 18 (Public officer may disclose danger to public health or safety or environment)

38 Section 19 (Anybody may disclose danger to person with disability or to environment from particular contraventions)

SCHEDULE 3 (continued)

7. W, an employee of a State instrumentality, has information that senior officer of the instrumentality has misappropriated funds of t instrumentality. The conduct is official misconduct mentioned in section of the Act, involving the commission of an offence. W discloses t conduct to the Queensland Police Service. The Queensland Police Servi is an appropriate entity to receive the disclosure because it is about condu it may investigate.

8. W, a police officer, has information that certain other police office are not investigating certain offences in return for corrupt payments. T conduct is official misconduct mentioned in section 15 of the Act, involvi official misconduct within the meaning of the *Criminal Justice Act 19* The Criminal Justice Commission is an appropriate entity to receive t disclosure because it is about conduct it may investigate.

SCHEDULE 5

SECTIONAL DEFINITIONS

section 4(2) of the Act

Meaning of "chief executive officer"

1.(1) The **"chief executive officer"** of an appropriate entity includes, if the entity is listed in Schedule 1 of the Act, a person specified in the Schedule as chief executive officer of the entity.

(2) A regulation may specify a person who is to be treated as a chief executive officer of a particular public sector entity for all or particular public interest disclosures.

(3) The object of a specification under Schedule 1 of the Act or a regulation is—

(a) to make it easier to identify who is to be treated as the chief executive officer, particularly of entities for which this might otherwise be difficult to decide; or

(b) to provide for a person other than a chief executive officer to be also treated as a chief executive officer because the function given to chief executive officers under this Act may also be appropriately given to the person.

(4) A regulation under subsection (2) may not specify a chief executive officer for a public sector entity specified in the Schedule 1 of the Act, other than a part of a department.

Meaning of "public sector entity"

2.(1) A **"public sector entity"** is any of the following—

(a) a committee of the Legislative Assembly;

(b) the Parliamentary Service Commission and the Parliamentary Service;

SCHEDULE 5 (continued)

(c) a court or tribunal;

(d) the administrative office of a court or tribunal;

(e) the Executive Council;

(f) a department;

(g) a local government;

(h) a university, university college, State college or agricu college;

(i) a commission, authority, office, corporation or instrumen established under an Act or under State or local govern authorisation for a public, State or local government purpose

(j) a GOC, but only to the extent indicated under Part 4, Divis of the Act;

(k) an entity, prescribed by regulation, that is assisted by f funds.

(2) However, the following are not public sector entities—

(a) a GOC, other than to the extent indicated under Part 4, Divi of the Act;

(b) the following entities, under or within the meaning c *Education (General Provisions) Act 1989*—

(i) a parents and citizens association;

(ii) a school that is not a State school;

(iii) an advisory committee;[39]

(iv) an international educational institution;[40]

(c) an entity prescribed by regulation.

(3) For the purpose of this Act, a State educational institution is f

39 See *Education (General Provisions) Act 1989*, section 9.

40 See *Education (General Provisions) Act 1989*, section 75.

SCHEDULE 5 (continued)

the department in which the *Education (General Provisions) Act 1989* is administered.

SCHEDULE 6

DICTIONARY

section 4(1) of th

"administrative action" is an act or omission of an administr character done or made by, in or for a public sector entity, includes, for example—

(a) a decision or failure to decide; and

(b) a formulation of a proposal or intention.

"agricultural college" means an agricultural college under the *Agricul Colleges Act 1994*.

"annual report" of a department means the annual report of department required to be prepared and tabled in the Legisl Assembly under the *Financial Administration and Audit Act 1977*

"appropriate entity" is a public sector entity to which a public int disclosure may be made or referred under—

(a) section 26 of the Act (Every public sector entity is an appro entity for certain things); or

(b) section 28 of the Act (Disclosure may be referred t appropriate entity).

"chief executive officer" see Schedule 5, section 1 of the Act.

"chief judicial officer" means a judicial officer who is treated unde Act as a chief executive officer of a court or tribunal.

"commission of inquiry" means a commission of inquiry unde *Commissions of Inquiry Act 1950* and includes an inquiry un commission mentioned in section 4(2) of that Act.

"detriment" includes—

(a) personal injury or prejudice to safety; and

(b) property damage or loss; and

SCHEDULE 6 (continued)

(c) intimidation or harassment; and

(d) adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; and

(e) threats of detriment; and

(f) financial loss from detriment.

"disability" of a person has the same meaning as in the *Disability Services Act 1992*.

"environment" has the same meaning as in the *Environmental Protection Act 1994*.

"investigate" includes take evidence.

"judicial officer" includes a registrar or deputy registrar of a court or tribunal performing delegated judicial tasks.

"maladministration" is administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose.

"officer" of a public sector entity includes—

(a) a constituent member of the public sector entity, whether holding office by election or selection; and

(b) an employee of the public sector entity, whether employed on a permanent or temporary basis; and

(c) if the public sector entity is a department—the Minister responsible for its administration.

"official misconduct" has the same meaning as in the *Criminal Justice Act 1989*.

"proper officer" of a court or tribunal means—

(a) for the Supreme Court, a District Court or the Childrens Court constituted by a Judge—the registrar of the court; or

(b) for a Magistrates Court or the Childrens Court constituted other than by a Judge—the clerk of the court; or

SCHEDULE 6 (continued)

(c) for another court or tribunal—the administrative officer in ch of the administrative office attached to the court or tribunal.

"public funds" are funds available to, or under the control of, a pu sector entity and includes, for example, public moneys within meaning of the *Financial Administration and Audit Act 1977*.

"public health or safety" includes the health or safety of persons—

(a) under lawful care or control; or

(b) using community facilities or services provided by the publ private sector; or

(c) in employment workplaces.

Examples of paragraph (a)—

1. Student under the care or control of a teacher.
2. Patient under the care or control of a doctor, nurse or other health professic
3. Prisoner under the care and control of a prison officer.

"public interest disclosure" means a disclosure of information spec in sections 15 to 20 of the Act made to an appropriate entity includes all information and help given by the discloser t appropriate entity.

"public officer" is a person who is an officer of a public sector entity includes—

(a) a public sector entity that is a corporation; and

(b) only to allow a member of the Legislative Assembly to m public interest disclosure—a member of the Legisl Assembly.

"public sector contractor" is a person who contracts with a public s entity to supply goods to the entity or services to the entity other as an employee.

"public sector entity" see Schedule 5, section 2 of the Act.

"Regional Health Authority" means a Regional Health Auth established under the *Health Services Act 1991*.

SCHEDULE 6 (continued)

"relevant court or tribunal" of a judicial officer is the court or tribunal of which the judicial officer is a member or is attached.

"relevant department" means—

(a) for a Regional Health Authority—the chief executive of the department in which the *Health Services Act 1991* is administered; or

(b) for an administrative office attached to a court or tribunal—the department in which is administered the Act under which the court or tribunal is established.

"reprisal" see section 41 of the Act.

"State college" has the same meaning as in the *Vocational Education, Training and Employment Act 1991*.

"State educational institution" has the same meaning as in the *Education (General Provisions) Act 1989*.

"tribunal" means—

(a) a tribunal constituted by a person acting judicially; or

(b) a body or person performing a function under an Act to hear appeals by employees about dismissal from employment, disciplinary action or other unfair treatment; or

(c) a commission of inquiry; or

(d) a Misconduct Tribunal within the meaning of the *Criminal Justice Act 1989*.

ENDNOTES

1 Index to Endnotes

2 Date to which amendments incorporated

This is the reprint date mentioned in the Reprints Act 1992, section 5(c). no amendments have commenced operation on or before that day amendments of the Whistleblowers Protection Act 1994 may be made in a with this reprint under the Reprints Act 1992, section 49.

3 List of legislation

Whistleblowers Protection Act 1994 No. 68
date of assent 1 December 1994
ss 1–2 commenced on date of assent
remaining provisions commenced 16 December 1994 (1994 SL No. 4

AUSTRALIAN CAPITAL TERRITORY

Public Interest Disclosure Act 1994

No. 108 of 1994

TABLE OF PROVISIONS

Job No.: 1992/139

TABLE OF PROVISIONS—continued

AUSTRALIAN CAPITAL TERRITORY

Public Interest Disclosure Act 1994

No. 108 of 1994

An Act to encourage the disclosure of conduct adverse to the public interest in the public sector, and for related purposes

[Notified in ACT Gazette S289: 22 December 1994]

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Public Interest Disclosure Act 1994*.

Commencement

2. (1) Section 1 and this section commence on the day on which this Act is notified in the *Gazette*.

(2) The remaining provisions commence on a day, or respective days, fixed by the Minister by notice in the *Gazette*.

(3) If a provision referred to in subsection (2) has not commenced before the end of the period of 6 months commencing on the day on which

this Act is notified in the *Gazette*, that provision, by force of this subsection, commences on the first day after the end of that period.

Interpretation

3. In this Act, unless the contrary intention appears—

"act" includes investigate;

"conduct" includes act or omission;

"disclosable conduct" means conduct which, by virtue of subsection 4 (1), is to be taken to be disclosable;

"detriment" means—

(a) injury, damage or loss;

(b) intimidation or harassment; or

(c) discrimination, disadvantage or adverse treatment in relation to career, profession, employment, trade or business;

"government agency" has the same meaning as in the *Public Sector Management Act 1994*;

"offence" means an offence under an Act;

"officer" has the same meaning as in the *Public Sector Management Act 1994*;

"proper authority" means a person or body authorised to receive a public interest disclosure under this Act and includes, in relation to such a person or body—

(a) its Chief Executive Officer; or

(b) its governing body;

"public interest disclosure" means a disclosure of information that the person making the disclosure believes on reasonable grounds tends to show—

(a) that another person has engaged, is engaging, or proposes to engage, in disclosable conduct;

(b) public wastage;

(c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or

(d) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public;

"public official" means—

(a) an officer of a government agency;

(b) a person employed, by or on behalf of the Territory or in the service of a Territory authority or Territory instrumentality, whether under a contract of service or a contract for services, including a person who has ceased to perform those services; or

(c) a person otherwise authorised to perform functions on behalf of the Territory, a Territory authority or Territory instrumentality;

"public wastage" means conduct by a public official that amounts to negligent, incompetent or inefficient management within, or of, a government agency resulting, or likely to result, directly or indirectly, in a substantial waste of public funds, other than conduct necessary to give effect to a law of the Territory;

"Territory instrumentality" has the same meaning as in the *Public Sector Management Act 1994*;

"unlawful reprisal" means conduct that causes, or threatens to cause, detriment—

(a) to a person in the belief that any person has made, or may make a public interest disclosure; or

(b) to a public official because he or she has resisted attempts by another public official to involve him or her in the commission of an offence.

Disclosable conduct

4. (1) For the purposes of this Act, conduct is to be taken to be disclosable if—

(a) it is of a type referred to in subsection (2); and

(b) it could constitute—

(i) a criminal offence;

(ii) a disciplinary offence; or

(iii) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public official who is engaged in it.

(2) Paragraph (1) (a) applies in relation to the following types of conduct:

(a) conduct of a person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by a public official or government agency;

(b) conduct of a public official which amounts to the performance of any of his or her official functions dishonestly or with partiality;

(c) conduct of a public official, a former public official or a government agency that amounts to a breach of public trust;

(d) conduct of a public official, a former public official or a government agency that amounts to the misuse of information or material acquired in the course of the performance of official functions (whether for the benefit of that person or agency or otherwise);

(e) a conspiracy or attempt to engage in conduct referred to in paragraphs (a) to (d) (inclusive).

(3) In this section—

"criminal offence" means an offence against a law in force in the Territory;

"disciplinary offence" means conduct that constitutes grounds for disciplinary action under a law in force in the Territory.

Disclosures during proceedings

5. If information that could amount to a public interest disclosure is disclosed in the course of the proceedings of a court or tribunal, the court or tribunal may refer the information to a proper authority.

Other protection preserved

6. This Act does not limit the protection given by any other Act or law to a person who makes a public interest disclosure or prejudice any other remedy available to the person.

Liability of agent of the Crown

7. An agent of the Territory who commits an offence against this Act is liable for a penalty for the offence.

Legal professional privilege

8. Nothing in this Act shall be taken to entitle a person to disclose information which would otherwise be the subject of legal professional privilege.

PART II—PROPER AUTHORITIES

Division 1—Government agency

Proper authorities

9. Each government agency is a proper authority to receive—

(a) a public interest disclosure—

(i) concerning the agency's conduct or the conduct of an officer of the agency;

(ii) concerning a matter, or the conduct of a person, that the agency has a function or power to investigate;

(iii) referred to it by another government agency; or

(iv) if the person making the disclosure believes that the agency is a proper authority to receive the disclosure; or

(b) a public interest disclosure that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal where—

(i) in the case of an unlawful reprisal that relates to a previous public interest disclosure—the previous public interest disclosure was made to the government agency; or

(ii) in the case of an unlawful reprisal that relates to an attempt by a public official to involve another person in the commission of an offence—the public official is an officer of the government agency.

Procedures

10. (1) A government agency shall establish procedures—

(a) to facilitate the making of public interest disclosures; and

(b) to deal with public interest disclosures that it is the proper authority to receive;

as soon as practicable, and in any event, within 12 months after—

(c) the commencement of this section; or

(d) the government agency comes into existence;

whichever is later.

(2) A government agency shall ensure that procedures established under subsection (1) are maintained.

(3) The procedures to be established under subsection (1) shall include procedures dealing with the following:

(a) making public interest disclosures;

(b) assisting and providing information to a person who makes a public interest disclosure;

(c) protecting a person who makes a public interest disclosure from unlawful reprisals, including unlawful reprisals taken by officers of the government agency;

(d) acting on public interest disclosures.

(4) The government agency shall, in respect of a document setting out the procedures established and maintained in accordance with this section—

(a) make a copy of the document available to its officers;

(b) make a copy of the document available to the public for inspection at all reasonable times; and

(c) supply to a person a copy of the document on payment of an amount directed by the government agency to be paid in relation to supply of such a copy (being an amount that the government agency has determined, on reasonable grounds, to be equal to the costs that will be incurred by the government agency in providing such a copy).

Report on disclosures

11. (1) A government agency that is required by an Act to prepare an annual report of its activities during a year for tabling before the Legislative Assembly shall include in the report—

(a) a description of the procedures maintained by it under section 10 during the year;

(b) statistics relating to the year in accordance with subsection (2); and

(c) particulars relating to the year in accordance with subsection (3).

(2) The statistics to be included in the annual report are—

(a) the number of public interest disclosures received by the government agency;

(b) the number of each type of public interest disclosure received by the government agency;

(c) the number of public interest disclosures received by the government agency that were referred to it by other government agencies;

(d) the number of public interest disclosures investigated by the government agency;

(e) where the government agency has referred public interest disclosures to other government agencies for investigation—

(i) the total number of disclosures referred;

(ii) the identity of each other agency to which a disclosure was referred;

(iii) the number of disclosures referred to each other agency; and

(iv) the number of each type of public interest disclosure referred to each other government agency;

(f) the number of public interest disclosures on which the government agency declined to act under section 17; and

(g) the number of public interest disclosures that were substantiated by the government agency's investigation of the disclosure.

(3) The annual report shall include particulars of remedial action taken by the government agency in relation to—

(a) each public interest disclosure that was substantiated on investigation by the government agency; and

(b) any recommendations of the Ombudsman that relate to the government agency.

Division 2—The Ombudsman

Application of *Ombudsman Act 1989*

12. For the purposes of this Act, the Ombudsman may exercise any of the powers referred to in the *Ombudsman Act 1989* as if a reference to an investigation under the *Ombudsman Act 1989* were a reference to an investigation under this Act.

Ombudsman a proper authority

13. The Ombudsman is a proper authority to receive a public interest disclosure from any person.

Intervention by Ombudsman

14. If, in relation to a public interest disclosure that he or she has received, the Ombudsman considers—

(a) that there is no other proper authority that can adequately or properly act on the disclosure; or

(b) that any proper authority that should have acted on the disclosure has failed, or been unable for any reason, to adequately act on the disclosure;

the Ombudsman may exercise his or her powers to act on the disclosure.

PART III—PUBLIC INTEREST DISCLOSURES

Making a public interest disclosure

15. (1) Any person may make a public interest disclosure to a proper authority.

(2) Without limiting the generality of subsection (1) a person may make a public interest disclosure—

(a) about conduct in which a person engaged, or about matters arising, before the commencement of this Act; and

(b) whether or not the person is able to identify any person that the information disclosed concerns.

Anonymous disclosures

16. Nothing in this Act requires a proper authority to investigate a public interest disclosure if the person making the disclosure does not identify himself or herself.

Frivolous etc. disclosures

17. (1) A proper authority may decline to act on a public interest disclosure received by it if it considers that the disclosure—

(a) is frivolous or vexatious;

(b) is misconceived or lacking in substance;

(c) is trivial; or

(d) has been adequately dealt with by itself or another proper authority.

(2) If an issue raised in a public interest disclosure has been determined by a court or tribunal authorised to determine the issue at law after consideration of the matters raised by the disclosure, the proper authority shall decline to act on the disclosure to the extent that the disclosure attempts to reopen the issue.

(3) If a public interest disclosure was referred to the proper authority by the Ombudsman, the proper authority shall not decline to act on the disclosure under this section unless the Ombudsman is satisfied that the proper authority has adequate grounds under this section to make that decision.

Referral without investigation

18. Subject to section 21, if a public interest disclosure received by a proper authority is not related to—

(a) the conduct of the authority or of an officer of the authority; or

(b) a matter, or the conduct of any person, that it has a function or power to investigate;

the proper authority shall refer the disclosure to a government agency that, because it has a function or power to deal with the conduct or matter the disclosure concerns, is a proper authority to receive the disclosure.

Investigation by proper authority

19. A proper authority shall investigate a public interest disclosure received by it if the disclosure relates to—

(a) its own conduct or conduct of an officer of the authority;

(b) a matter, or the conduct of any person, that the authority has a function or power to investigate; or

(c) the conduct of a person, other than an officer, performing services for or on behalf of the authority.

Referral with investigation

20. (1) Subject to subsection (2), if a public interest disclosure being investigated by a proper authority relates to—

(a) the conduct of another government agency or the conduct of an officer of another government agency; or

(b) a matter, or the conduct of any person, that another government agency has a function or power to investigate;

the proper authority may refer the public interest disclosure to the other government agency.

(2) Nothing in this section affects the duty of a proper authority to act under section 19.

No referral

21. (1) A proper authority shall not refer a public interest disclosure to another government agency, other than the Ombudsman, under section 18 or subsection 20 (1) if, in the authority's opinion—

(a) there is a serious risk that a person would engage in an unlawful reprisal; or

(b) the proper investigation of the disclosure would be prejudiced;

as a result of the reference to the other government agency.

(2) Where, but for subsection (1), a proper authority would have referred a public interest disclosure to another public authority under section 18, the proper authority shall refer the disclosure to the Ombudsman.

Action by proper authority

22. (1) Subject to subsection (2), if, after investigation, a proper authority is of the opinion that a public interest disclosure has revealed—

(a) that a person has engaged, is engaging, or proposes to engage, in disclosable conduct;

(b) public wastage;

(c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or

(d) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public;

the authority shall take such action as is necessary and reasonable—

(e) to prevent the conduct or reprisal continuing or occurring in future; and

(f) to discipline any person responsible for the conduct or reprisal.

(2) Where the Ombudsman reports that a public interest disclosure has revealed—

(a) that a person has engaged, is engaging, or proposes to engage, in disclosable conduct;

(b) public wastage;

(c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or

(d) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public;

a proper authority to which the disclosure relates shall, having regard to any recommendations of the Ombudsman, take such action as is necessary and reasonable—

(e) to prevent the conduct or reprisal continuing or occurring in future; and

(f) to discipline any person responsible for the conduct or reprisal.

(3) Subsections (1) and (2) do not apply if—

(a) an investigation, or a report by the Ombudsman, reveals conduct referred to in paragraphs (1) (d) or (2) (d); and

(b) the conduct is necessary to give effect to a law of the Territory.

Progress report

23. (1) A person who makes a public interest disclosure, or a proper authority which refers a disclosure to another proper authority, may request the proper authority to which the disclosure was made or referred to provide a progress report.

(2) Where a request is made under subsection (1), the proper authority to which it is made shall provide a progress report to the person or authority who requested it—

(a) as soon as practicable after receipt of the request; and

(b) if the proper authority takes further action with respect to the disclosure after providing a progress report under paragraph (a)—

(i) while the authority is taking action—at least once in every 90 day period commencing on the date of provision of the report under paragraph (a); and

(ii) on completion of the action.

(3) A progress report provided under subsection (2) shall contain the following particulars with respect to the proper authority that provides the report:

(a) where the authority has declined to act on the public interest disclosure under section 17—that it has declined to act and the ground on which it so declined;

(b) where the authority has referred the public interest disclosure to another proper authority—that it has referred the disclosure to

another authority and the name of the authority to which the disclosure has been referred;

(c) where the authority has accepted the public interest disclosure for investigation—the current status of the investigation;

(d) where the authority has accepted the public interest disclosure for investigation and the investigation is complete—its findings and any action it has taken or proposes to take as a result of its findings.

(4) Nothing in this section prevents the proper authority from providing a progress report in accordance with subsection (3) to a person who may make a request under subsection (1).

Joint action

24. If more than 1 proper authority is required by this Act to act on a public interest disclosure, the proper authorities may enter into such arrangements with each other as are necessary and reasonable—

(a) to avoid duplication of action;

(b) to allow the resources of the authorities to be efficiently and economically used to take action; and

(c) to achieve the most effective result.

PART IV—UNLAWFUL REPRISALS

Division 1—Unlawful reprisals—general

Offence

25. (1) A person shall not engage, or attempt or conspire to engage, in an unlawful reprisal.

Penalty: $10,000 or imprisonment for 1 year, or both.

(2) It is a defence to a prosecution under subsection (1) if it is established that the accused person—

(a) had just and reasonable grounds for engaging in the conduct, or attempting or conspiring to engage in the conduct, that would, except for this subsection, amount to an unlawful reprisal; and

(b) was engaging, or had engaged, in the conduct, or had conspired or attempted to engage in the conduct, before forming the belief that a person had made or may make a public interest disclosure.

Function to assist complainant

26. Where a proper authority receives a public interest disclosure that relates to an unlawful reprisal it shall provide the person who made the public interest disclosure with information about the protection and remedies available under this Act in relation to an unlawful reprisal.

Relocation powers

27. Where an officer of a government agency applies in writing to the government agency for relocation and the government agency considers—

(a) that there is a danger that a person will engage in an unlawful reprisal in relation to the officer if the officer continues to hold his or her current position; and

(b) that the only practical means of removing or substantially removing the danger is relocation of the officer to another position in a government agency;

the government agency shall, as far as practicable, make arrangements for relocation of the officer to another position in a government agency.

Consent to relocation

28. Section 27 does not authorise the relocation of an officer to another position in a government agency without the consent of the officer.

Division 2—Civil claims

Liability in damages

29. (1) A person who engages in an unlawful reprisal is liable in damages to any person who suffers detriment as a result.

(2) The damages may be recovered in an action as for a tort in any court of competent jurisdiction.

(3) Any remedy that may be granted by a court with respect to a tort, including exemplary damages, may be granted by a court in proceedings under this section.

Application for injunction or order

30. An application to a court of competent jurisdiction for an injunction or order under section 31 may be made—

(a) by a person claiming that he or she is suffering or may suffer detriment from an unlawful reprisal; or

(b) by the Ombudsman on behalf of a person referred to in paragraph (a).

Injunction or order to take action

31. (1) If, on receipt of an application under section 30, a court is satisfied that a person has engaged or is proposing to engage, in—

(a) an unlawful reprisal; or

(b) conduct that amounts to or would amount to—

(i) aiding, abetting, counselling or procuring a person to engage in an unlawful reprisal;

(ii) inducing or attempting to induce, whether by threats, promises or otherwise, a person to engage in an unlawful reprisal; or

(iii) being in any way, directly or indirectly, knowingly concerned in, or party to, an unlawful reprisal;

the court may—

(c) order the person to take specified action to remedy any detriment caused by the unlawful reprisal; or

(d) grant an injunction in terms the court considers appropriate.

(2) The court may, pending the final determination of an application under section 30, make an interim order in the terms referred to in paragraph (1) (c) or grant an interim injunction.

(3) The court may grant an injunction or an interim injunction under this section whether or not the person has previously engaged in conduct of that kind.

(4) The court may make an order or an interim order under this section requiring a person to take specified action, whether or not the person has previously refused or failed to take that action.

Undertakings as to damages and costs

32. (1) If the Ombudsman applies under section 30 for an injunction or order, no undertaking as to damages or costs shall be required.

(2) The Ombudsman may give an undertaking as to damages or costs on behalf of a person applying under section 30 and, in that event, no further undertaking shall be required.

PART V—MISCELLANEOUS

Confidentiality

33. (1) A public official shall not, without reasonable excuse, make a record of, or wilfully disclose to another person, confidential information gained through the public official's involvement in the administration of this Act.

Penalty: $5,000.

(2) Subsection (1) does not apply to a public official who makes a record of, or discloses, confidential information—

(a) to another person for the purposes of this Act or the regulations;

(b) to another person, if expressly authorised under another law of the Territory; or

(c) for the purposes of a proceeding in a court or tribunal.

(3) In this section—

"confidential information" means—

(a) information about the identity, occupation or whereabouts of a person who has made a public interest disclosure or against whom a public interest disclosure has been made;

(b) information contained in a public interest disclosure;

(c) information concerning an individual's personal affairs; or

(d) information that, if disclosed, may cause detriment to a person.

False or misleading information

34. A person shall not knowingly or recklessly make a false or misleading statement, orally or in writing, to a proper authority with the intention that it be acted on as a public interest disclosure.

Penalty: $10,000 or imprisonment for 1 year, or both.

Limitation of liability

35. (1) A person is not subject to any liability for making a public interest disclosure or providing any further information in relation to the disclosure to a proper authority investigating it, and no action, claim or demand may be taken or made of or against the person for making the disclosure or providing the further information.

(2) Without limiting subsection (1), a person—

(a) does not commit an offence under a provision of an Act which imposes a duty to maintain confidentiality with respect to a matter; and

(b) does not breach an obligation by way of oath or rule of law or practice requiring him or her to maintain confidentiality with respect to a matter;

by reason only that the person has made a public interest disclosure with respect to that matter to a proper authority.

(3) Without limiting subsection (1), in proceedings for defamation there is a defence of qualified privilege in respect of the making of a public interest disclosure, or the provision of further information in relation to a public interest disclosure, to a proper authority.

Liability of person disclosing

36. A person's liability for his or her own conduct is not affected by the person's disclosure of that conduct in a public interest disclosure.

Corporations—penalties

37. Where a body corporate is convicted of an offence under this Act, the penalty that the court may impose is a fine not exceeding 5 times the maximum amount that, but for this section, the court could impose as a pecuniary penalty for the offence.

Regulations

38. The Executive may make regulations, not inconsistent with this Act, prescribing matters—

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Amendment of *Ombudsman Act 1989*

39. Section 4 of the *Ombudsman Act 1989* is amended—

(a) by omitting from subsection (1) "For the purposes of this Act, there shall be an" and substituting "There shall be established the office of the"; and

(b) by adding at the end of subsection (2) "or the *Public Interest Disclosure Act 1994*".

Amendment of *Public Sector Management Act 1994*

40. Part XII of the *Public Sector Management Act 1994* is repealed.

[Presentation speech made in Assembly on 23 February 1994]

Printed by Authority of Liz Harley, ACT Government Printer

BIBLIOGRAPHY

VI BIBLIOGRAPHY

Adams, Stanley *Roche versus Adams* (Jonathan Cape Ltd, London, 1984)

Anderson, Banks, Hughes and Johnston *Employment Law Guide* (Butterworths of New Zealand Ltd, Wellington, 1995)

Anstiss, Diana K B *Submission and Supplementary Submission: Whistleblowers Protection Bill* (undated)

Arthur Thomas Retrial Committee Inc *Submission on Whistleblowers Protection Bill 1994* 15 July 1994

Australian and New Zealand College of Mental Health Nurses Inc (New Zealand Branch) *Submission on Whistleblowers Protection Bill* 30 June 1994

Bryan, M W "The Law Commission Report on Breach of Confidence: Not in the Public Interest?" [1982] Public Law 188

Burns, C *Submission on Whistleblowers Protection Bill* 19 July 1994

Burrows, J F *News Media Law in New Zealand* (Oxford University Press, Auckland, 1990)

Burrows J F *Statute Law in New Zealand* (Butterworths of New Zealand Ltd, Wellington, 1992)

Chapman, J T *Office of Controller and Auditor-General Submission on Whistleblowers Protection Bill* 22 July 1994

Christchurch City Council *Submission on Whistleblowers Protection Bill* 22 July 1994

Cripps, Yvonne "Protection from Adverse Treatment by Employers: A Review of the Position of Employees who disclose information in the belief the disclosure is in the public interest" (1985) 101 LQR 506

Davidson, Bruce "A practitioner's duty to report breaches of rules of conduct by colleagues" *Lawtalk 464* 16 September 1996, page 8

De Maria, Dr William *Fridges that don't freeze ... Planes that Don't Fly ... Laws that Don't Work: Design failure in Australia's whistleblower legislation* (Unpublished paper presented to the Second National Whistleblowers Conference, Melbourne, June 1996)

De Maria, Dr William "Public Interest disclosure laws in Australia and New Zealand: Who are they really protecting?" [1995] 20 (6) Alternative Law Journal 270

De Maria, Dr William *The British Whistleblowers Protection Bill - A Shield Too Small?* (Unpublished paper, November 1995)

De Maria, Dr William *The Welfare Whistleblower: In praise of Troublesome People* (Unpublished paper presented to the 23rd National Conference of the Australian Association of Social Workers, Newcastle, September 1993)

De Maria, Dr William *When the Storm Bird Calls: Whistleblower Warnings in the Age of Corruption* (Unpublished paper presented to the 'Whistleblowers: Protecting the Nation's Conscience?' Conference, Institute of Criminology, Melbourne University, 17 November 1995)

De Maria, Dr William *Whistleblowers and Secrecy: Ethical Emissaries from the Public Sect[or]* (Unpublished paper presented to the 'Freedom of the Press' Conference, Bond University, 11 November 1995)

Department of Justice *Submission on Whistleblowers Protection Bill 1994* 30 September 1994

Dominion "East tries to turn tables on Goff on Whistleblowers Bill" 15 June 1994, page 2

Dominion "Group to report on whistle-blowers' protection" 3 July 1995, page 2

Dominion "Law urged to protect whistle blowing" 15 December 1995, page 1

Dominion "Longer wait for legal protection" 16 December 1995, page 2

Dominion "Social worker suspended" 20 June 1996, page 9

Dominion "Whistleblower law opposed" 15 November 1995, page 10

Duncan, Dr Bruce and Worsnop, Dr Anne *Submission to the Parliamentary Committee on the Whistleblowers Protection Bill 1994* 6 September 1994

Edwards, Gray and Miller *Report of the Ministerial Review Team on Whistleblowing* (Office of Minister for State Services, 20 October 1995)

Evening Post "Jail for doctor" 15 June 1996, page 9

Evening Post "Triumph for little man" 8 November 1985, page 11

Evening Post "Whistle blower leaves school" 18 May 1996, page 1

Finn, P D "Confidentiality and the "Public Interest"" [1984] 58 ALJ 497

Fisher, Bruce "The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers" [1991] 43 Rutgers Law Review 354

Fox, Richard "Protecting the Whistleblower" (1993) 15 Adel LR137

Goff, Phil "Report endorses Goff's call for whistleblower protection" (Media release, 14 December 1995)

Goff, Phil *Whistleblowers and Society* (Address to the Auckland Medico-Legal Society, 12 September 1995)

Gunasekara, Gehan "Legislation to protect whistleblowers: Is the proposed solution just what the doctor ordered or is it too blunt an instrument" [1994] NZLJ 303

Halsbury's Laws of England (4th edition reissue, Butterworths London, 1992)

Hughes, Helen *Office of the Parliamentary Commissioner for the Environment: Submission on Whistleblowers Protection Bill* 20 July 1994

Hughes, John "The Whistleblowers Protection Bill" (1994) ELB 71

Human Rights Commission *Submission of the Human Rights Commission to the Justice and Law Reform Select Committee on the Whistleblowers Protection Bill* July 1994

Independent "The Phillip Mills case: One step towards a free press" 13 September 1996, page 10

Independent "Whistleblower Bills put foxes in charge of henhouse" 13 September 1996, page 32

Independent "Whistleblowers infiltrate super schemes" 26 April 1996, page 1

Inland Revenue Department *Submission on the Whistleblowers Protection Bill 1994* July 1994

Institute of Internal Auditors New Zealand Inc *Submission to the Justice and Law Reform Select Committee on the Whistleblowers Protection Bill* July 1994

Keaney, Michael *Submission on Whistleblowers Protection Bill* 19 July 1994

Laster, Daniel "Commonalities between Breach of Confidence and Privacy" [1990] New Zealand Universities Law Review 144

Law Commission *Evidence Law:Privilege* (Preliminary Paper No.23, May 1994)

Lewis, David "Whistleblowers and Job Security" (1995) 58 Modern Law Review 208

Ley, Dennis *Submission concerning Whistleblowers Protection Bill 1994* 28 July 1994

Lomnicka, Eva "The Employee Whistleblower and his duty of confidentiality" (1990) 106 LQR 43

Martin, Jill *Hanbury and Martin Modern Equity* (fourteenth edition, Sweet & Maxwell Ltd, London, 1993)

National Council of Women *Submission on Whistleblowers Protection Bill* July 1994

New Zealand Council of Trade Unions *Submission on Whistleblowers Protection Bill* 22 July 1994

New Zealand Employers Federation Inc *Submission to the Justice and Law Reform Select Committee on the Whistleblowers Protection Bill* August 1994

New Zealand Herald "Protection for Whistleblowers" 16 June 1994 page 12

New Zealand Herald "Protection for Whistleblowers" 15 December 1995, page 10

New Zealand Herald "Pugmire lends support to bill protecting whistleblowers" 16 Novmber 1995, page 2

New Zealand Law Society *Submissions on Whistleblowers Protection Bill 1994* 14 September 1994

New Zealand Local Government Association Inc *Whistleblowers Protection Bill 1994: Submission* July 1994

New Zealand Nurses Organisation *Submission on Whistleblowers Protection Bill* July 1994

NZPD Volume 540, 15 June 1994, pages 1750 - 1772

New Zealand Public Service Association Inc *Submission on Whistleblowers Protection Bill* 21 July 1994

Peterson, Keith *Whistleblowers Protection Bill 1994: Submissions to the Justice and Law Reform Select Committee* (undated)

Pizer, Jason "The Public Interest Exception to the Breach of Confidence Action: Are the Lights about to change?" (1994) 20 Monash LR 67

PSA Journal "CYPS worker sacked for speaking out" 21 August 1996 page 2

Pugmire, Neil *Submission to the Select Committee on Whistleblowers Protection Bill 1994* 6 September 1994

Ricketson, Sam "Public Interest and Breach of Confidence" (1979) 12 MULR 176

Robertson ed *Adams on Criminal Law* (Brooker & Friend Ltd, Wellington, 1996)

Robertson, Geoffrey QC and Andrew Nicol *Media Law* (Penguin Books Ltd, London, 1992)

Rose, Nicholas "Whistleblowing: Time for a Change?" (1995) 145 New Law Journal 113

Roth, Paul *Privacy Law and Practice* (Butterworths of New Zealand Ltd, Wellington, 1995-1996)

Round, Derek *Submission on the Whistleblowers Protection Bill 1994* (undated)

Slane, Bruce *Report to the Minister of Justice by the Privacy Commissioner on the Whistleblowers Protection Bill* July 1994

Slane, Bruce *Submission by the Privacy Commissioner to the Ministerial Review Team on Whistleblowing* 26 July 1995

Starke, J G "The Protection of Public Service Whistleblowers Parts I and II" [1991] 65 ALR 205; 252

State Services Commission *Submission on Whistleblowers Protection Bill* 10 October 1994 and 10 November 1995

Tsaknis, Leo "The Jurisdictional Basis, Elements and Remedies in the Action for Breach of Confidence - Uncertainty Abounds" (1993) 5 Bond LR 18

Vickers, Lucy "Whistleblowing and Freedom of Speech in the NHS" (1995) Part II New Law Journal 1257

Webber, Catherine "Whistleblowing and the Whistleblowers Protection Bill 1994" (1995) AULR 933

Western Bay of Plenty Mental Health Trust *Submission: Whistleblowers Protection Bill 1994* 14 July 1994

CASE TABLE

VII CASE TABLE

Australia

Allied Mills Industries Pty Ltd v *Trade Practices Commission* [1981] 34 ALR 105
Castrol Australia Pty Ltd v *Emtech Associates Pty Ltd* [1980] 51 FLR 184
Commonwealth of Australia v *John Fairfax & Sons Ltd* [1980] 147 CLR 39
Smith Kline and French Laboratories (Australia) Ltd v *Secretary, Department of Community Services and Health* [1990] 95 ALR 87

Canada

Ministry of Attorney-General Corrections Branch v *British Columbia Government Employees Union* (1981) 3 LAC 190

England

Attorney-General v *Barker* [1990] 3 All ER 257
Attorney-General v *Guardian Newspapers Ltd (No.2)* [1988] 3 All ER 545
Attorney-General v *Jonathan Cape Ltd*; *Attorney-General* v *Times Newspapers Ltd* [1976] 1 QB 753
Beloff v *Pressdram Ltd* [1973] 1 All ER 241
British Steel Corporation v *Granada Television Ltd* [1980] 3 WLR 775
Cork v *McVicar* (1984) TLR 593
Francome v *Mirror Group Newspapers Ltd* [1984] 1 WLR 892
Fraser v *Evans* [1969] 1 QB 349 (CA)
Gartside v *Outram* (1857) 26 LJ Ch 113
Hubbard v *Vosper* [1972] 2 QB 84
Initial Services Ltd v *Putterill* [1968] 1 QB 396
Lennon v *News Group Newspapers and Twist* [1978] FSR 373
Lion Laboratories Ltd v *Evans* [1984] 3 WLR 539
Lord Advocate v *Scotsman Publications Ltd* [1989] 2 All ER 852
Marcel v *Commissioner of Police of the Metropolis* [1992] Ch 225
Malone v *Metropolitan Police Commissioner* [1979] 1 Ch 344
Re A Company's Application [1989] 3 WLR 265
Schering Chemicals Ltd v *Falkman Ltd* [1982] 1 QB 1
Secretary of State for Defence v *Guardian Newspapers Ltd* [1983] AC 339
Tournier v *National Provincial and Union Bank of England* [1924] 1 KB 461
Weld-Bundell v *Stephens* [1919] 1 KB 520
Woodward v *Hutchins* [1977] 2 All ER 751
X v *Y* [1988] 2 All ER 648

New Zealand

Attorney-General for UK v *Wellington Newspapers Ltd* [1988] 1 NZLR 129
Brill v *Television One* [1976] 1 NZLR 683
Broadcasting Corporation of New Zealand v *Alex Harvey Industries Ltd* [1980] 1 NZLR 163
Duncan v *Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513

European Pacific Banking Corporation v *Television New Zealand Ltd* [1994] 3 NZLR 43
Hobbs v *North Shore City Concil* [1992] 1 ERNZ 32
Lowe v *Tararua District Council* [1994] 1 ERNZ 887
New Zealand Airline Pilots Association v *Air New Zealand Ltd* [1992] 1 ERNZ 353
Pugmire v *Good Health Wanganui (No.1)* [1994] 1 ERNZ 58; *(No.2)* [1994] 1 ERNZ 174
Television New Zealand Ltd v *Police* [1995] 2 NZLR 541
Television New Zealand Ltd v *Attorney-General* [1995] 2 NZLR 643
X v *Attorney-General* Unreported, High Court, Timaru Registry, Master Hansen, CP31/92

United States of America

Fiorillo v *US Department of Justice Bureau of Prisons* 795 F2d 1544 (Fed.Cir 1986)
Gady v *Department of Navy* 38 MSPR 118 (1988)
New York Times Co v *United States* 403 US 713 (1971)
Poorsina v *US Merit System Protection Board* 726 F 2d 507 (9th Cir 1984)
Snepp v *United States* 62 L Ed 2d 704 (1980)
Twist v *Meese* 854 F 2d 507 (9th Cir 1984)