KATRINE E. SHARP

LIFE ON THE EDGE

A CALL FOR WHISTLEBLOWER PROTECTION IN NEW ZEALAND

LLB (HONS) RESEARCH PAPER

PUBLIC LAW (545)

LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

1994

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ABSTRACT

This paper considers the law relating to the disclosure, by employees, of information in the public interest. It examines the possibility of protecting these employees, commonly known as "whistleblowers", from victimisation in the workplace which arises as a result of their disclosures. The law in its present state discourages rather than encourages public interest disclosures of information, despite a variety of methods of protection which are available to the whistleblower. Several countries overseas have introduced protective legislation, and it is argued that New Zealand should do likewise, with some necessary modifications.

This paper aims to demonstrate that there are compelling constitutional and practical arguments which suggest that encouragement of whistleblower disclosures in New Zealand would be desirable. The types of disclosures and the method of protection must, however, be carefully worked out in order adequately to protect the interests of employers, employees and the public. The author believes that the jurisdiction of the Ombudsman should be extended to deal with whistleblower complaints.

WORD LENGTH

The length of this paper, excluding the contents page, footnotes, bibliography and appendices, is approximately 18,000 words.

INTRODUCTION

Early in 1994, a new term was introduced into common parlance in New Zealand. The case of Neil Pugmire is a classic example of "whistleblowing", which captured the attention of the New Zealand public for many weeks, and created a good deal of debate.

The term is an unusually colloquial one to find in a formal legal context, but is strangely apt for its purpose. It creates images of someone raising the alarm when danger threatens, or of a warning blast on a police whistle, or of a referee ensuring fair play. Legally speaking, a "whistleblower" is a person who reveals information about issues of significant public interest. Examples of such issues are illegal activities, misuse of public funds, or situations which constitute a serious danger to public health, or safety. Whistleblowers typically have access to this information in the course of their employment.[1]

Such disclosures are not uncommon in this country, but generally appear in the form of "leaks" to the news media. It is rare for the informant to become publicly known. Consequently, we do not usually discover what happens to the informants when, as often happens, their employer manages to pinpoint the "leak". The problems faced by whistleblowers have remained largely hidden until now.

A The Case of Neil Pugmire

Neil Pugmire revealed that psychiatric institutions such as Lake Alice Hospital, where he worked, were required by the new mental health legislation[2] to release certain categories of patients into the community. From his experience as a charge nurse in the secure unit, he firmly

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[1] To avoid confusion in this paper, the general term "employment" (and, consequently, the term "employee and employer") refers both to contracts of service and contracts for services. Whistleblowers can be either employees under a contract of service, (to whom the Employment Contracts Act 1991 applies) or independent contractors (to whom it does not). The principles governing whistleblower protection are the same whichever the mode of employment, and no distinction should be made.

[2] The Mental Health (Compulsory Assessment and Treatment) Act 1992.

believed that some of these patients posed a very significant danger to the public.This opinion was later fully vindicated.[3]

Mr Pugmire raised his concerns with the Minister of Health, in a letter containing confidential details about a particular patient. These were included to provide a specific example in order to substantiate his claims. When nothing happened, even after trying other Government channels, he copied the letter to Labour's justice spokesperson, Hon Phil Goff MP. Mr Goff released the letter to the news media, including the information about the patient and the name of the informant.

Good Health Wanganui, the Crown Health Enterprise which employs staff at Lake Alice, promptly suspended Mr Pugmire for misconduct in releasing patient information. After a very public debate, two interlocutory hearings in the Employment Court, and a great deal of stress for all parties, Neil Pugmire was able to return to his normal duties.[4]

This brief summary of one particular case of whistleblowing illustrates several typical features of the area. First, a whistleblower is an employee with a grievance about a matter of significant public interest. Secondly, employers, often understandably, tend not to approve of disclosures of information by employees. Thirdly, the whistleblower can suffer severe detriment in his or her employment as a result of the employer's displeasure. Consequently, employees who feel they should reveal information in the public interest find themselves living constantly "on the edge".

B. Public and Private Concerns

Whistleblowing is a subject which is itself on the edge, at the interface between public and private law. This adds to its interest, although it is not altogether unusual in this regard. It is often said that the distinction

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[3] One of the patients released under the "loophole" in the legislation raped a two-year old child within a very short time of his release. The new Minister of Health, Mrs Jenny Shipley, appeared to accept that the definition of "mental disorder" in section 2 was too narrow to allow for the continued confinement of many dangerous patients. She estimated that there were thirty seven potentially dangerous patients who might go free. The legislation is to be amended.

[4] For a full discussion of Neil Pugmire's side of the story, see A. Hubbard "Why I blew the whistle" (interview with Neil Pugmire) *NZ Listener* May 14-20 1994, 16-22. The facts are also neatly summarised in *Pugmire* v *Good Health Wanganui Ltd* , unreported, 10 March 1994, Employment Court Wellington Registry WEC 6/94.

between the public and the private sectors is becoming ever more blurred.[5] This is certainly true of New Zealand over the last decade, especially given the extensive restructuring of the state with the creation of state-owned companies, and privatisation of formerly state-owned assets. Methods of statutory regulation of these bodies, and rules of administrative law, have had to adapt accordingly.[6] Recent changes in employment law mean that public and private sector employees are dealt with according to the same principles of contract. It is also becoming more difficult to determine who exactly is a public servant, given the scaling-down of the core public service, and the increased tendencies of government to contract out service provision.

All these issues are relevant to the whistleblowing debate. It raises constitutional issues, such as principles of open government and accountability. It entails discussion of protection of human rights, particularly freedom of speech and privacy. It impacts on present administrative law agencies, for example the Ombudsman. All these are concerns of the State, and belong to the area of public law. However, whistleblower protection also affects private, contractual employment relationships, either in organisations which do work for government or which use public funding, or in organisations whose area of activity could be said to be of significant public interest. Protecting "public interest" informants from retribution by private employers is a direct interference by the state with the way people choose to run their businesses.

This is always going to be a controversial matter. The Whistleblower Protection Bill proposes to apply to both sectors. I agree with this universal coverage. When it comes to public interest information, no useful purpose can be served by drawing a largely artificial distinction between public and private sectors, and then having to cope with the inevitable grey areas. The limitations on interference with business efficiency and autonomy will depend on what authority is created to deal with grievances, and on what types of information are deemed to be in the

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[5] Galbraith refers to it as "the shrinking divide". See AR Galbraith QC "Deregulation, Privatisation and Corporatisation of Crown Activity: How Will the Law Respond?" in *Conference Papers (Vol. 1)* (New Zealand Law Conference, Wellington, 1993) 226, at 240.

[6] For one of the most recent statements on this subject, see M. Chen "Accountability of SOEs and Crown-Owned Companies: Judicial Review, the New Zealand Bill of Rights Act and the Impact of MMP" [1994] NZLJ 296.

public interest. The legislative drafters need to ensure that these are no wider than necessary and are as clear as possible.

C. Academic literature

The topic of whistleblowing has only very recently come to be considered as a discrete area of law, with the enactment of statutes in the United States and Australia, and proposed legislation elsewhere. Yet, already, there has been a good deal of academic comment, although it tends to focus narrowly on one or two of the many possible issues. Probably the most comprehensive work which I have encountered is that of Yvonne Cripps, who canvasses many of the issues raised in this field.[7] However, her book is centred largely on English law, and therefore much of the discussion is inapplicable to a New Zealand context. For example, the existence of the Official Secrets Act in England creates a presumption of secrecy in government. The exact converse is true in New Zealand, where principles of open government have been adopted. Official information is available to the public, with only limited exceptions.[8] The exceptions arise where a countervailing public interest requires the information to be withheld.[9]

Employment law, on which much of the discussion hinges, also differs widely between various jurisdictions. A large amount of the United States literature on the subject, therefore, is also inapplicable, because of the authors' focus on the effect of whistleblower protection on the strict "employment-at-will" doctrine.[10] British employment law, as discussed by Yvonne Cripps and others, is also not wholly transferrable to a New Zealand environment, especially since the passing of our Employment

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[7] Y. Cripps *The Legal Implications of Disclosure in the Public Interest: An Analysis of Prohibitions and Protections with Particular Reference to Employers and Employees* (ESC Publishing Ltd, Oxford, 1986).

[8] Official Information Act 1982, s. 5.

[9] Official Information Act, s. 4 (c). The exceptions are contained in ss 6, 7 and 9.

[10] This doctrine applies where there is no collective or individual employment contract, and allows either party to terminate for any reason at any time. All New Zealand employment is contract-based, however. For a useful summary of the American position, see VF Kuhlmann-Macro "Blowing the Whistle on the Employment-at-Will Doctrine" (1992) 41 Drake Law Review 339.

Contracts Act 1991. However, the general comments on whistleblowing are useful.[11]

The Australian contributions to the debate also have to be treated with care. The concern about whistleblowing in Australia arose as a result of severe problems with corruption in government, particularly in Queensland.[12] This problem simply does not exist on the same scale in New Zealand, perhaps in part because our more comprehensive application of open government principles acts as a deterrent. Whistleblower protection legislation in this country may therefore be said to be aimed at slightly different, but no less important concerns.

The media has conducted much of the discussion about whistleblowing, as particular cases come to light. Such reports cannot, however, do much more than examine whistleblowing in the specific context of the case. This method of focusing on a narrow area of interest is also characteristic of many of the legal articles on whistleblowing. This is hardly surprising, given the ad hoc nature of the law on the subject, but the time has come to bring together the major issues for consideration into a single document, and to present a principled overview of whistleblowing as it applies to New Zealand. As the considerable moves towards whistleblower protection overseas indicate, this is an idea whose time seems to have come.

D. A Summary of the Argument

The aim of this paper is to demonstrate why I believe that whistleblower protection legislation is desirable in New Zealand. A summary of the course of my argument is as follows.

Part I of this paper discusses the present position of whistleblowers in New Zealand. It outlines briefly how whistleblowing affects both the informants and those about whom the information is disclosed. It then

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[11] For example, see GG James "In Defense of Whistle Blowing" in -Hoffmann W, Moore J (eds) *Business Ethics: Readings and Cases in Corporate Morality* (McGrawHill, New York, 1984).

[12] GE Fitzgerald QC, chairperson, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct *Report* (Queensland Government Printer, Brisbane, 1989) 370. The Fitzgerald Report recommended the introduction of whistleblower protection legislation as a means to protect against corruption. The inquiry was, itself, sparked by the revelations of a whistleblower.

analyses the current legal position, to ascertain what action is commonly taken against whistleblowers, and what legal protection is available to them. My conclusion here is that, although a variety of potential avenues for protection exist, they are insufficient actively to encourage whistleblowers to reveal public interest information. The risks involved with breaching confidentiality in the employment relationship remain too high for any but the crusaders of this world to undertake. Reducing the risks will prompt more timorous employees to consider disclosing wrongdoing which they discover at work. More comprehensive protection for whistleblowers is therefore required.

Part II considers what types of disclosures might be said to be worthy of encouragement, and what the framework of any whistleblower legislation should be. To determine this, I consider various overseas examples of such legislation, to see what common themes emerge, and how particular problems are dealt with. Largely prompted by the Pugmire incident, Phil Goff has recently introduced a private Member's Bill into Parliament in New Zealand.[13] The overseas material is compared with these projected statutory provisions, and an assessment made as to appropriate types of disclosure.

Part III aims to establish a case for encouraging these disclosures in New Zealand. It examines how encouragement of whistleblowing complements constitutional principles such as open government, and also sits well with such concepts as freedom of speech. This section also considers relevant issues arising from state restructuring, both in fairly general terms and as regards public service employment in particular. The conclusion here is that encouragement of public interest disclosures will fit well with the recent changes in New Zealand, and will lead to higher standards of behaviour, particularly in the public service.

In Part IV, I argue that, given that a case can be made for whistleblower protection, the final question is what structure is to be put in place to achieve that. Many parties have interests at stake when one is considering information of a more or less confidential nature. A system to deal with whistleblower complaints should, therefore, be seen to achieve the best balance possible between the interests of employer, employee

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[13] The Whistleblowers Protection Bill 1994.

and public. If this is done, all parties will have faith in the system, and support it.

It might be possible simply to amend existing legislation to deal with these concerns. Ideally, however, one authority should be nominated as the recipient of whistleblower complaints, given the authority to investigate those complaints and ensure correction of any problems found, and also enforce the legislative provisions to protect whistleblowers from any subsequent victimisation. This could be done either by a totally new authority, or by extending the jurisdiction of an existing authority such as the Ombudsman. For reasons which should become clear, I favour the latter approach.

PART I

THE PRESENT POSITION OF WHISTLEBLOWERS IN NEW ZEALAND

A. The Problem of Whistleblowing

1. The perceptions of employers

If anyone ever compiled a "Thesaurus for Employers", the entry under "whistleblower" would probably contain such synonyms as "troublemaker, meddler, busybody, snitch, sneak, telltale ...". Those who publicly expose problems within their organisations are generally extremely unpopular with their superiors, and also with their colleagues. "Dobbing in" one's co-workers is not part of the New Zealand workplace culture, whatever one's motives for doing it.

However, employers also have more serious causes for concern about whistleblowing. Release of prejudicial information can significantly damage public confidence in an organisation. This has consequent effects on commercial interests, in the case of a private firm or state commercial entity. Disclosures of government mismanagement may be politically embarrassing, or can result, initially, in low morale among employees or in public perceptions of inefficiency.[14] Employers therefore have an interest in keeping disclosures to a minimum, and trying to keep many matters out of the media in particular.

However, not all employers are averse to having their employees free to speak out. Some, in my opinion justifiably, view it as good management practice to encourage as much openness as possible, and have strong internal complaints procedures to deal with aggrieved employees. Where other channels exist to air a complaint, and have it adequately dealt with, it becomes less likely that people will feel the need to blow the whistle to the world at large.

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[14] I argue below, however, that whistleblowing will ultimately encourage higher standards of behaviour. This will then lead to greater pride in the organisation. Promoting openness in the public sector also enhances legitimacy. See below, Part III.

2. Suffering the slings and arrows - the whistleblowers

Although not all employers victimise those who "spill the beans" about faulty practices, most whistleblowers are likely to suffer considerable retaliation for their actions. A recent study has been done in Australia by Dr Jean Lennane, a psychiatrist who was sacked from the NSW Health Department after questioning budget cuts.[15] All but one of the thirty-five respondents to her survey said that they had been victimised for speaking out about misconduct. The single exception had not been working for the organisation involved.[16] Dr Lennane's conclusions about the prevalence of victimisation have been supported by all the available literature about whistleblowers.[17] The risk of retributive action is recognised even by authorities who are not in favour of protection.[18]

The 'slings and arrows' take many forms, from the outrageous to the mild. Dr Lennane's study showed that almost half of her sample were pressured to resign, eight were dismissed and several were made redundant, pressured to take redundancy, or were transferred.[19] As well as this, these people were subjected to "informal tactics" such as threat of legal or disciplinary action, personal isolation, abuse or denigration, forced psychiatric referral and removal of normal work.[20] The effect on many whistleblowers was devastating. Some suffered mental breakdown or

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[15] Gay Alcorn "Doctor Fallout" *Time* November 29 1993, 30-31.

[16] K. Jean Lennane "'Whistleblowing': a health issue" (1993) 307 *British Medical Journal* 667 at 668.

[17] See, as a small sample, Clare Dyer "NHS whistleblower wants charter" (1992) 304 *British Medical Journal* 203; Richard Fox "Protecting the Whistleblower" (1993) 15 *Adelaide Law Review* 137; Yvonne Cripps "Protection from adverse treatment by employers: a review of the positino of employees who disclose information in the belief that the disclosure is in the public interest" (1985) 101 *LQR* 506.

[18] Malcolm Dean "A gag on whistleblowing" (1992) 340 *The Lancet* 1277. The British Health Secretary recognised the problems that whistleblowers face. She reinstated a consultant haematologist, Dr Helen Zeitlin, who was made redundant after criticising health service charges. Yet her proposed guidelines to 'aid' whistleblowers in the National Health Service in fact will continue to penalise staff who make disclosures outside their organisation.

[19] Mr Pugmire was initially suspended, then offered a choice between dismissal or demotion to a clerical position on lower pay. See *Pugmire*, as above note 4.

[20] A detailed example is given by David Ewing "An Employee Bill of Rights" in *Business Ethics* above note 11, 241 at 242. The man in question revealed that his company was breaching environmental regulations. The action against him ranged from cancelling his place in the company car park to slashing his research budget. He eventually resigned and moved to another city.

difficulty in relationships, drastic loss of income and most had undergone a great deal of stress, with varying results. Two attempted suicide and ten others seriously considered it. A recent United States example vividly supports these conclusions. Roger Boisjoly, a chief engineer on the 'Challenger project', repeatedly warned his superiors about defects in the space shuttle, but was ignored. After the disaster, he was "candid and outspoken at government hearings". The response was classic:[21]

> ... Boisjoly's bosses and many of his colleagues treated him like a pariah. Six months after the accident, no longer able to endure what he termed the "hostile" environment at Morton Thiokol, he left the company on extended sick leave. Eventually Boisjoly was diagnosed as having a post-traumatic stress disorder and underwent two years of psychotherapy.

He attributed the stress he suffered mainly to his treatment as a whistleblower, rather than being a result of the tragedy itself.

Naturally, not all whistleblowers are angels. Some are, undoubtedly, true troublemakers who will be a thorn in the side of any organisation for which they work. These people will be probably be a rare exception, however. It is unlikely that many people will be prepared to put their careers and health on the line merely for the sake of causing disruption.[22] Whistleblower protection should aim to remove this disincentive to speaking out, while still giving no credit to troublemakers.

B. Contracts and Confidences

A variety of weapons are currently available to one wishing to challenge a whistleblower's actions. First, many informants are in breach of their employment contract, and if, as often happens, they are subjected to disciplinary action,[23] they will not necessarily be able to win a personal

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[21] Samuel C. Florman "Beyond whistleblowing: organizational changes can eliminate the need for corporate martyrdom" (1989) 92 *Technology Review* 20.

[22] At least, this is so as long as there is no financial reward available for whistleblowing. Some American states have legislation allowing whistleblowers to take an action on behalf of the government, and to claim a percentage of any damages awarded. This can amount to millions of dollars. Common sense indicates that this might encourage less than bona fide disclosures. Employers will also be keen to settle out of court to avoid a potentially reputation-shattering jury trial, even when there is no actual wrongdoing.

[23] This may take many forms, the most common of which are probably termination of employment, transferral or demotion. See above for details of other common reprisals.

grievance action.[24] Secondly, an employer may use legal actions such as those for defamation or for breach of confidence against employees who release information which is prejudicial to the employer. There is a defence to an action for breach of confidence that the information was disclosed in the public interest. However, the scope of the defence is not altogether clear, and not many potential whistleblowers are likely to risk relying on it.

1. Breach of express contractual terms

Many employment contracts contain an express clause prohibiting disclosure of information, or particular types of information, received during the course of the employment. This is frequently used by commercial bodies, to prevent revelation of trade secrets or highly commercially sensitive material. Public servants may also be under express obligations of secrecy, for instance in the areas of national security or patient confidentiality. However, it may be increasingly common to use express confidentiality clauses even where no material of a truly sensitive nature is involved.[25] Breach of such a clause, whatever one's motives for doing so, is a clear breach of contract, and the employee is then at risk of retaliatory action.

Codes of conduct in particular fields of activity will also import certain terms into the employment contract. One example of this in New Zealand is the Public Service Code of Conduct,[26] which provides "the minimum standards of integrity and conduct for the Public Service."[27] Confidentiality is a major focus of the Code. For example, it refers to the need for discretion when making comments on policies with which a public

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24 In New Zealand, an employee under a contract of service can bring an action for a personal grievance under Part III of the Employment Contracts Act. Independent contractors cannot avail themselves of the provisions of the Act, however. The personal grievance provisions are included in Appendix B.

25 This seems to be so in Britain, at least. See Richard Smith "Whistleblowing: a curse on ineffective organisations" (1992) 305 *British Medical Journal* 1308-9.

26 State Services Commission *Public Service Code of Conduct* (SSC, Wellington, 1990).

27 Ibid, page 7.

servant is involved.[28] A broader statement is also included about release of official information generally[29]:

> It is unacceptable for public servants to make unauthorised use or disclosure of information to which they have official access. Whatever their motives, such employees betray the trust put in them, and undermine the relationship that should exist between Ministers and the Public Service. Depending on the circumstances of the case, the unauthorised disclosure of information may lead to disciplinary action, including dismissal.

This is clearly a problem for potential whistleblowers in government departments. Health sector professionals also have a code of conduct which imposes strict confidentiality requirements.

2. Implied terms of confidentiality

Often, there is no express 'gagging clause', and no code of conduct which incorporates terms into the contract. However, an employee, whether in the public or private sector, is still subject to an implied term of confidentiality:[30]

> An employee has a duty not to disclose, during employment or after it has terminated, any information received in confidence during the course of the employment. Unlike the duty of fidelity, the duty not to disclose confidential information survives the termination of the contract of employment.

Therefore, if a person indicates a wish to disclose information about an organisation, and is sacked for that, he or she would still be in breach of this implied term. It is, however, unclear what is meant by "information received in confidence during the course of the employment". To clarify this, one must look at the way in which issues of confidential material have been interpreted in the civil law action for breach of confidence. This is discussed below.

The effect of breaching an express or implied term of confidentiality in an employment contract is that any subsequent dismissal might be said to be substantively justified. Unless there is some procedural impropriety in the

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[28] Ibid, at page 13.

[29] Ibid, at page 17.

[30] Butterworths *Employment Law Guide* (Butterworths, Wellington, 1993) 517.

manner of the dismissal,[31] the employee may therefore not be able to obtain a remedy under the personal grievance provisions of the Employment Contracts Act.[32] It may be that proof that the disclosure was in the public interest will provide the employee with an excuse for breach of contract, so as to render a dismissal unjustifiable, although this is rather unclear.[33] Alternatively, a public interest in disclosure of information could be said to mean that the information is not truly confidential at all. Therefore, there would be no breach of contract. At common law, however, public interest clearly goes to a defence, rather than being an element of confidentiality itself.

If the employer takes detrimental action other than dismissal, the employee may bring a personal grievance claim under section 27(1)(b) that the employer has acted unjustifiably and has thereby affected the employee's employment to his or her disadvantage. It appears, however, that the grievance has to relate to a breach of a contractual obligation on the part of the employer.[34] Unless the employee can show that, because the disclosure was in the public interest, the employer's actions were therefore unjustified, and amounted to a breach of contract, this ground of action will probably fail. Employees who breach their employment contracts by disclosing information therefore have few defences in employment law against retributive action.[35]

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31 For example, a warning is required in situations other than where summary dismissal is justified. The employer also has the obligation to investigate the alleged wrongdoing thoroughly, and to conduct a hearing with the employee being given a chance to state his or her case.

32 Section 27 (1) (a). See Appendix B.

33 *New Zealand Air Line Pilots' Association* v *Air New Zealand Ltd* [1992] 1 ERNZ 353 at 360 (CA). The case allows (obiter) that senior staff may have an "overriding public duty to disclose serious doubts about the safety of an aircraft" in "an extreme case, and as a last resort". This was a case where damages were claimed, however, not a dismissal incident.

34 *Employment Law Guide* as above note 30, at 71; *Alliance Freezing Co (Southland) Ltd v NZ Engineering Union* [1990] ILB 18, (1990) 3 NZELC 97,328.

35 Moreover, if the revelations are made, for example, to a newspaper, which then publishes the story, the employer may also have a cause of action against the newspaper for inducement to breach of contract, and can claim compensatory damages for any economic loss caused. *Employment Law Guide* as above note 30, page 530. This cause of action is apparently becoming increasingly common.

3. Breach of confidence

As well as asserting an ability to dismiss, or otherwise sanction an employee, the employer may also bring a separate legal action for breach of confidence.[36] This may be necessary if an employer wishes to get injunctive relief to prevent publication of the information, or to have documents returned, or if compensatory damages are requested.

To sustain the action, the employer must show that the information disclosed has "the necessary quality of confidence" about it. While clearly covering such things as trade secrets, the term does not extend to cover all information received in the course of work. The disclosure must also occur in "circumstances importing an obligation of confidence".[37] It is necessary too for a plaintiff to show that unauthorised use has subsequently been made of the confidential material.[38] What is considered confidential will depend entirely upon the facts of each case. Some of the factors involved are:[39]

a) the nature of the employment (whether confidential material is habitually handled);

b) the nature of the information itself (a trade secret or something equally deserving of protection);

c) whether the employer told the employee the information was confidential;

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36 Other possible legal actions here include defamation, breach of copyright and breach of fiduciary duty. A public interest defence is probably available in some form for all of these. One should also note the existence of various statutory obligations of confidentiality. One of the most far-reaching of these is the Privacy Act 1993. Information privacy principle 11 restricts disclosure of personal information held about another to very limited circumstances.

37 Ibid, at page 519-520. The tests are given in *Thomas Marshall Ltd v Guinle* [1979] Ch 227, and *Faccenda Chicken Ltd v Fowler* [1989] Ch 117.

38 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, approved by the New Zealand Court of Appeal in *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515.

39 These guidelines were adopted in *Korbond Industries Ltd v Jenkins and Anor* [1992] 1 ERNZ 1141, from the list given in *Faccenda Chicken*, above note 16. See also Susan Singleton "Employee Mobility and Confidential Information" [1992] *NLJ* 1419.

d) whether the information can easily be isolated from other material which the employee would be free to disclose.

4. The "public interest" defence to breach of confidence

Whistleblower legislation would provide New Zealand whistleblowers with protection from civil action as a result of their public interest disclosures.[40] At common law, a whistleblower may already have a defence to a breach of confidence, if the court is satisfied that the disclosure was in the public interest. The defence originated with the case of *Gartside v Outram,* which stated that "there is no confidence as to the disclosure of iniquity".[41] This clearly covers such extremes as disclosure of illegal acts,[42] but the word "iniquity" is perhaps too vague to be helpful.

The leading case establishing the public interest defence is *Initial Services v Putterill.*[43] A sales manager of the plaintiff laundering company resigned, taking with him documentation of an unregistered (and therefore illegal) pricing ring, as well as other problems with the firm's management. He gave the documents to a national newspaper, which published the story. Using reasoning which seems to reflect general ideas in whistleblowing, Lord Denning stated the rule as follows: [44]

> [The exception to the duty of confidentiality] ... extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. ... The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest. The reason is because 'no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare'[45]

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[40] Whistleblowers Protection Bill, clause 7. This would give whistleblowers immunity from criminal or civil action in relation to making a disclosure of public interest information.

[41] (1857) 26 LJ Ch 113, 114.

[42] The case of *Weld-Blundell v Stephens* [1919] 1 KB 520 even attempted to restrict the "iniquity" even here to *proposed* illegal actions, but not to acts which had already been committed. Bankes LJ's concern (at page 527) was to preserve such institutions as solicitor/client, or doctor/patient confidentality. However, this interpretation of the *Gartside* doctrine has been overruled as being too narrow, in *Initial Services v Putterill* [1968] 1QB 396.

[43] See above note 42.

[44] *Initial Services*, as above note 42, at 405.

[45] *Annesley v (Earl) Anglesea* (17430 LR 5 QB 317.

The public interest defence has been adopted in New Zealand.[46] A whistleblower might well, at present, be able to establish this defence if an action for breach of confidence were brought.

However, the cases are not always totally clear on which types of disclosures are, in fact, justified in the public interest. To cite two extremes, in *Woodward v Hutchins*,[47] the court allowed publication of highly personal information about the singer Tom Jones, on the basis that the public had a right to know that the reality of his life was different from his public image. Yet the 'British Steel mole' case[48] seemed to take a much more limited approach to public interest information. Grenada Television made a documentary alleging serious financial mismanagement within British Steel, a public corporation. It made substantial use of damaging and highly confidential information, which had been leaked by an unnamed member of British Steel management. The company brought an action against Grenada to make it disclose the name of the source so that it could discipline the employee. The question of confidentiality was discussed in general. Although Lord Wilberforce suggested that where publication of confidential material may be justified where there is misconduct to report, the House of Lords decided that there was no misconduct on the part of British Steel here. "Wrongdoing" was construed narrowly, and excluded the mismanagement of a public corporation which resulted in huge financial loss. A potential whistleblower will find it hard to discover what aspects of wrongdoing *will* be covered under the common law defence and therefore how great her risk of liability is.

The success of the defence could also rest on whether the information is given to "one who has a proper interest to receive it".[49] In *Initial Services,* Lord Denning made it plain that reporting a crime to the police, or breach of a statute to the appropriate watchdog authority was within the scope of

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[46] *Attorney-General for the United Kingdom* v *Wellington Newspapers Ltd* [1988] 1 NZLR 129 at 176 (the *Spycatcher* litigation) approved the defence, although without specific reference to any of the English cases. The recent "winebox papers" case of *European Pacific Banking Corporation* v *Fourth Estate Publications Ltd* [1993] 1 NZLR 559 at 563-4, however, did apply the English cases.

[47] [1977] 2 All ER 751.

[48] *British Steel Corporation Ltd v Granada Television Ltd* [1981] AC 1096.

[49] *Initial Services*, above note 42, 405.

the defence. So, in New Zealand, a whistleblower could probably give confidential information to the Ombudsman[50] about mismanagement of funds in a State Owned Enterprise, for example, and feel secure that he or she would have a defence to any allegations of breach of confidence.[51] However, problems may occur if there is no obviously appropriate authority to which to turn. Frustration may also arise for an informant when he or she reports a matter to a proper authority, and nothing is done, or there appears to be a cover-up. At this stage, many people choose to turn to the media.[52]

Lord Denning was prepared to allow that the media have a role to play in publicising serious misconduct. He said "There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."[53] Indeed, the cases in this area almost invariably involve publication in the news media. Lord Denning's view is forcefully supported by Stephenson LJ in *Lion Laboratories v Evans*.[54] He states that there is some confidential information which it will be in the public interest to be made known, and which the press has a right to receive and publish, even if it was unlawfully obtained in flagrant breach of confidence.[55] Again, however, the parameters of the defence are unclear here. The test from *Lion Laboratories* is one of balancing the public interest in maintaining confidences against the public interest in disclosing this particular information. This pragmatic approach seems to have been adopted in

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50 For details of the role of the Ombudsman with whistleblowers, see below, Part IV.

51 It should be noted, however, that this will not necessarily protect a whistleblower from dismissal or other retributive action for breach of the employment contract. A separate personal grievance action in the Employment Court would still be required.

52 For example, a former Defence force employee, who had been stationed at the Linton army camp, told "Morning Report" (National Radio, 16 September 1994) that allegations of misappropriation of funds had first been made about three years previously, yet nothing had been done. This was why he was speaking out now.

53 *Initial Services*, above note 42 at page 406.

54 [1984] 3 WLR 539.

55 *Lion Laboratories* concerned disclosure of information from a senior technician, who knew that a new and widely-used breath-testing device (the Intoximeter) was highly unreliable in its measurement of alcohol. A considerable number of potential convictions hinged on the device. The story was published in the papers, to the detriment of the British manufacturer. Although the material was admitted to be highly confidential, the Court of Appeal decided that the disclosure was in the public interest because of the high risk of false convictions from use of the machine.

New Zealand.[56] This would seem to be the fairest way for a court to approach the issue, but it does not give very clear guidelines to potential whistleblowers. There is substantial risk involved.

The motives of the defendant in disclosing the information may also be relevant to the defence. Lord Denning, in *Initial Services*, indicated (obiter) that the defence may not be available if the informant acted out of malice or spite, or for reward. "It is a great evil when people purvey scandalous information for reward".[57] An informant who genuinely believes that the material is true, however, should surely be entitled to the defence. The public interest lies in the disclosure of that particular information, not in the motives of the informant. Stephenson LJ, in *Lion Laboratories*, was clearly uninterested in whether the informant had received payment from the newspaper for the story. He focused instead on the risk of false convictions because of the faulty breath testing device.[58] Clearly, there can be no public interest in the dissemination of lies. But, short of this, the public interest defence should not automatically be ruled out.

5. The role of trade unions

Trade unions have probably had a significant role to play in the protection of workplace standards and the exposure and rectification of wrongdoing. A reasonably powerful union may have had a chance to encourage an employer to alter unacceptable practices, such as those which might constitute a danger to public health. Unions are also not directly subject to contractual obligations of confidentiality. Therefore, it could be that a union would be in a position to publicly expose wrongdoing, in government and elsewhere, while preserving the anonymity of their whistleblowing member.[59]

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[56] The *European Pacific* case frames its test in these terms. See above note 46, at 564.

[57] See above note 42 at 406.

[58] Lord Denning himself, in *Hubbard v Vosper* [1972] 2 QB 84 seemed quite unconcerned by the fact that the defendant was making money from the publication of his book, which contained confidential material. The public interest lay in revealing the 'dangerous nature' of Scientology practices.

[59] The submissions of the Australian Public Service Union to the Senate Select Committee on Whistleblowing suggests that this is so. See *Submissions* 30 November 1993.

Should that anonymity be breached, and the whistleblower subjected to workplace harassment, a trade union would also be able to provide support and some measure of protection. A union could take a case to court on a member's behalf, and might cover at least part of the court costs. It could also act as a whistleblower's media spokesperson, thus taking the pressure off the individual informant to a large degree. The effectiveness of a union in this regard can be seen from the experiences of Neil Pugmire, who was lucky enough to have the backing of the Public Service Association.

However, recent alterations in industrial law in New Zealand have arguably reduced the powers of trade unions significantly. It appears as if membership has fallen, and many unions have disappeared. Those which remain have been at least partially emasculated by the provisions of the Employment Contracts Act. The increased tendency to contract out work in government probably means that much government work is being directed to non-unionised organisations. The protection which was probably previously available to whistleblowers through their unions has therefore been greatly reduced. Potential informants are likely to be deterred to a far greater extent if they think they have to act alone. The removal of this area of protection from many whistleblowers therefore increases the need for some more formal type of whistleblower protection.

C. Present and potential protection for whistleblowers

At present, there are many different remedies which a whistleblower may have against an employer. A public servant may complain to the Ombudsman about decisions made within the department, including employment decisions. A public or private sector employee who is sacked may bring an action in the Employment Courts for unjustified dismissal. It may be shown that the employee's right to freedom of expression under the New Zealand Bill of Rights Act has been breached, and in the wake of the *Baigent* case, the whistleblower may be entitled to damages from an offending public authority. If sued for breach of confidence, he or she may claim the defence of disclosure in the public interest. Yet, with all these apparent protections available, people still suffer as a result of revealing information about their employers. Since the risks and stresses are so high, people will generally avoid trouble, and keep information to themselves.

It may be possible to amend the present law to aid whistleblowers, without the necessity for separate legislative provisions and a statutory authority to deal with the problem. Various improvements could be made. For example, the scope of the public interest defence to an action for breach of confidence could be legislatively clarified.[60] However, even if this happened, there is unlikely to be a great increase in the incidence of whistleblowing. The defence can only come into play once an informant is being sued for breach of confidence. Most people will be unwilling to undergo the stress involved of having to defend a court action in this way. It also does not deal with the problem of inevitable loss of employment.

In addition, disclosure of public interest information could be specifically incorporated into the Employment Contracts Act. One ground for asserting a personal grievance is that of discrimination.[61] It would be a relatively small matter to include disclosure of public interest information among the categories of prohibited discrimination which are already listed. However, this again would aid whistleblowers only to a small extent. Many informants would not be covered by the Act, because they are independent contractors. This is a particular concern given the recent trends towards contracting out government service provision. Many people who do work for the government, and who are therefore in a unique position to know what is going on with government money, are not public employees but independent contractors. Also, even if an informant is covered by the Act, and could claim the benefit of the personal grievance provisions, this does not protect him or her against job loss or other retributive action in the first place. Again, the strain of having to fight a court battle with one's employer should be avoided if at all possible. As Brown and McKenna say, "The problems of the common law in this area are evident: protection is only retrospective and what an employee needs most is on-the-job protection."[62]

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60 See G Gunasekara "Legislation to Protect Whistleblowers: is the proposed solution just what the doctor ordered or is it too blunt an instrument?" [1994] NZLJ 303.

61 Section 27 (1) (c). The heads of prohibited discrimination are set out in section 28 (1). See Appendix B.

62 Damian Brown and Bronwyn McKenna "Protecting 'whistleblowers' from victimisation" *Solicitors Journal.*

One further possibility is to expand the definition of discrimination in the Human Rights Act 1993 itself to cover instances of retaliation against whistleblowers. The Human Rights Commission has well-established advisory and counselling procedures,[63] but can also make judicial determinations and award substantive remedies. However, there are two problems with using this method of protection.

First, the Commission is presently overworked. This could result in some delay in processing claims, which will not give whistleblowers much confidence in the new system. Secondly, and more importantly, however, the focus of whistleblower protection is not on the discrimination itself. Protecting employees from retaliation is a means to an end. The real emphasis lies on the public interest information which is revealed. The initial allegations of wrongdoing must be investigated and remedied, and the Commission is not the body to do that. Effectively, the Whistleblowers Protection Bill in clause 29 (3) seems to envisage a partnership between the investigating Authority and the Commission as the agency which enforces the anti-victimisation provisions. This is sensible, but separate legislation is needed to constitute that Authority. To spare whistleblowers from confusion, a single easily identifiable authority should, where possible, have ultimate control over the case and the Commission cannot fulfil that role.

There may, therefore, be justification for adding to the statute-book by creating whistleblower legislation, and for allocating substantial government resources to whichever agency is chosen to deal with whistleblower complaints. The party with the most protection at present under the law is the employer organisation. Whistleblowers have limited protection, but the risks are too high for many to be prepared to make a stand. The public interest also is largely ignored, in favour of private rights to control employees, and to keep information confidential which would be better disclosed. If disclosures are to be encouraged, bona fide informants must be guaranteed the maximum possible protection from retribution. What types of disclosures should be covered, in the light of overseas legislative models, is the subject of the next section.

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63 Avoidance of adversarial procedures is also seen as desirable in the Whistleblowers Protection Bill (NZ); see, for example, clause 20. However, where this is not possible, the procedures under the Human Rights Act are to be used (clauses 29, 31).

PART II

PROTECTED DISCLOSURES - SOME OVERSEAS MODELS

Opponents of whistleblowing legislation often see protective measures as encouraging the disclosure of all types of information, including malicious revelations of trivial material. Disgruntled employees, they say, could make a serious nuisance of themselves by prosecuting numerous minor complaints, and employers would be powerless to dismiss, or otherwise discipline them. Costs would increase and administrative efficiency would be drastically impaired.

If whistleblower protection indeed covered any type of disclosure, this might well be true. However, no overseas whistleblowing legislation has created a general outlet for complaints, and nor does New Zealand's proposed legislation. Only those complaints which concern matters of serious public importance qualify the informant for legislative protection from victimisation. The reasoning behind the legislative provisions may be very similar to that behind the public interest defence to breach of confidence. However, legislation can state more explicitly those matters which are said to be in the public interest, and leaves less room for totally different interpretations in the courts. This chapter will discuss what types of disclosures should be covered by legislation in New Zealand. It is useful to look overseas for some guidance on this issue.[64]

A. The Level of Interest Overseas

The concept of protecting whistleblowers is one which has taken firm root in many Western countries. The development is a very recent one; most of the debate and introduction of legislation has taken place in the last five years, with the exception of the limited protection offered by the Civil Service Reform Act in the USA as early as 1978. This Act was amended and extended in 1989 by the Whistleblowers Protection Act. Almost three quarters of the states in the USA also have whistleblower statutes. These are of very varying coverage and quality.

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64 It is significant that the tendency is to define particular types of disclosure rather than the term "whistleblower". Emphasising the information itself, rather than the informant makes it clear that protection of the informant is not a public good in itself but rather a means to an end.

Australia also has legislation in place. South Australia has the Whistleblowers Protection Act 1993, the Australian Capital Territory has whistleblower provisions incorporated in its Public Administration Act, and Queensland introduced interim legislation in 1990, with a new statute planned for this year.[65]

Legislation is under consideration elsewhere. The Protected Disclosures Bill is before the New South Wales Parliament. The Australian Senate Select Committee on Public Interest Whistleblowing recently reported back, recommending that federal whistleblower legislation should be put in place. One of the models that they considered was a Private Member's Bill introduced by Senator Chamarette. In Canada, a Private Member's Bill on whistleblowing had its first reading in May of this year. Finally, there is our own Whistleblowers Protection Bill, again a Private Member's Bill, introduced by Hon Phil Goff. The Justice and Law Reform Select Committee will be considering the Bill fairly soon.[66]

The "odd country out" in the list is, of course, Britain. The reason for this is undoubtedly that the existence of the Official Secrets Act creates a very different mentality in government. The official focus tends to be on secrecy rather than openness, on maintaining confidence at all costs rather than on acknowledging a public interest in the disclosure of some types of information.[67] The existence of the defence to breach of confidence mitigates the severity of this to a certain extent, but, as we have seen, it cannot be regarded as a panacea. However, even in Britain, there has been a good deal of debate about this subject. Most of the British literature which I have encountered has tended to focus more on the problems faced by individual whistleblowers in their employment than on any theoretical justifications for encouraging particular types of disclosures, however. This would seem to be a product of the different prevailing mentality.

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65 The Whistleblowers (Interim Protection) and Miscellaneous Amendments Act (Queensland). It was decided that immediate measures were necessary to tackle the need for whistleblowing. Premier Goss announced on 10 April 1994 that a new statute was to be drafted this year, covering both public and private sectors.

66 There is, as yet, no clear indication from the Clerk of Committees when the hearings will commence.

67 This is evidenced by the extensive *Spycatcher* litigation, eg *Attorney-General* v *Observer Ltd and Ors* [1988] 3 WLR 776.

B. Public or Private Sector Coverage

One of the first questions to ask when assessing what types of disclosures to encourage is what source they should come from. Should legislation cover only public service employees, or should protection extend to those in the private sector?

Overseas models have addressed this issue in a variety of ways. The United States legislation provides protection only for federal employees,[68] and the draft legislation in New South Wales and, apparently, Canada, also limits coverage to public service whistleblowers.[69] Alternatively, legislation may cover private sector employees whose organisations are involved with use of public funds. The reasoning behind the restricted coverage is not made explicit. However, the basis would seem to be that the focus is on countering corruption and misuse of public funds. Legislation is clearly justified by principles of openness and accountability of government.

In contrast, the South Australian legislation, on which the provisions of the New Zealand Bill are modelled, covers both private and public sectors. Its application to the private sector is, however, limited. The purpose of the 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."[70] These concerns are mirrored in clause 5(1) of the New Zealand Bill, but the application to the private sector is not limited to conduct which can be described as corrupt or illegal. Public interest information is defined as "information which relates to any conduct or activity, whether in the public sector or in the private sector ..." which falls into particular categories.[71]

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68 Whistleblowers Protection Act 1989, section 2.

69 The reason for my tentative phrasing as regards the Canadian Bill is that, on the wording of the amendment to the Canadian Human Rights Act (clause 1), it looks as if the new discriminatory practice of retaliating against whistleblowers applies generally. The explanatory notes, however, refer to the purpose of the Bill as being "to provide appropriate sanctions against retaliatory discharges by public sector employers of employees who report or "blow the whistle" on serious misconduct of their employers." It is unclear whether "employees" refers only to public servants, or whether it would cover private sector contractors working for the government.

70 Whistleblowers Protection Act 1993, section 3.

71 See Appendix A.

The application of the legislation to both public and private sectors would seem to make practical sense. Much government work is now done outside the core public sector, so private organisations are frequently involved with work using public funds. Attempting to frame legislation to cover only the public service, but to catch also these types of situations, can lead to somewhat convoluted drafting.[72] It is simpler to cover both sectors, but ensure that interference with the private sector only occurs in fairly extreme instances. For example, there are certain matters of fundamental public importance, such as public health and safety issues, which may arise as a result of the behaviour of organisations in either sector.

Also, and perhaps most fundamentally, the line between public and private is becoming increasingly blurred. This is reflected in current attitudes to public and administrative law, where a private entity may find itself subject to traditionally public law actions. It is also shown in employment law, which treats the employment of the individual on the same principles of contract, whatever the status of the employer as private or public sector.[73] It may simply be too unhelpful to refer to "public" and "private" sectors where matters of public interest information are in issue.

C. Categories of Public Interest Information

All the examples of legislation considered have attempted to formulate with reasonable precision what categories of information should be deemed to be of public interest. All cover illegal activity and unauthorised use or mismanagement of public funds. The wording varies, but the sentiments are the same. Corruption and other breaches of law are a clear target.[74]

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[72] This is reflected in Senator Chamarette's Bill (Australia), in clause 4. "Where a person or body is engaged as a consultant to, or to provide services for, a part of the federal public service, that person or body shall, while doing an act for the purposes of, or in connection with, the performance of functions as consultant or the provision of those services, as the case may be, be deemed to be employed in the federal public service."

[73] The Privacy Act 1993 supplies another precedent for legislation which applies to both sectors here. It appears to operate comfortably within that framework despite initial objections.

[74] For example, the South Australian Act defines public interest information, in section 4, as "information that tends to show [a person etc] has been involved in illegal activity, irregular and unauthorised use of public money, or a substantial mismanagement of public resources ..." The

Some provisions also refer to "maladministration" by public officials. This can be defined in a number of ways. The South Australian legislation makes it plain that maladministration includes impropriety or negligence.[75] The New South Wales proposals are arguably wider. Maladministration is conduct which 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."[76] (my emphasis). In contrast, maladministration as such is omitted from the definition of public interest information in the New Zealand Bill.[77] This appears to be a significant error. There may be categories of seriously unacceptable behaviour in government which may not fit under the headings of unlawfulness, corruption, unauthorised use of public funds or resources and so on. Disclosures about such behaviour should be covered by the legislation, to encourage the improvement of management practices in these areas.

Conduct which poses a significant threat to public health or safety is almost invariably something which attracts protection for disclosure.[78] This would cover the Neil Pugmire type of situation. The New Zealand Bill, however, also follows the South Australian Act in that disclosures about the environment are included. This coverage is unusual, perhaps because of its very wide implications for the private sector. The degree of alleged injury is different in the two statutes, however. "Substantial risk" to the environment is required by South Australia[79], but it is sufficient under our proposals that something is "injurious" to the environment. As long as the complaint is not of a trivial or vexatious nature, it would be investigated.[80]

Canadian Bill is more equivocal, but the effect is probably the same. Clause 2 refers to conduct which is "illegal or contrary to public policy".

75 Section 4, under the definition of "maladministration".

76 Clause 11(2).

77 See Appendix A at Clause 5.

78 The US Whistleblowers Protection Act refers to "a substantial and specific danger to public health or safety"; the South Australian Act also talks of "substantial risk to public health or safety". The New Zealand Bill covers conduct which is a significant risk or danger, or is injurious to public health or public safety. The Canadian Bill does not include a requirement of degree of risk. The odd one out here is the NSW Protected Disclosures Bill, which does not cover this issue at all.

79 Section 4, under the definition of "public interest information".

80 See clause 22, Appendix A.

I believe that our lower threshhold for 'misconduct' in this field will cause difficulties and should be elevated to the same standard as South Australia. This will be the major area of impact on private sector activities, and is in some ways the most difficult area to justify although the environment is indisputably a matter of great significance to the public. Clear breaches of law would already be covered under the heading of illegality, but one has to take care if extending encouragement of reporting beyond that. Definitions of environmental damage are, for a start, not that easy to come by. Perceptions of harm can be extremely subjective, depending on one's particular concerns. There are also commercial concerns at stake. It can take quite some time to improve standards, even where there is good will to do so in an organisation. Revelation of breaches of environmental standards in the interim could be extremely commercially damaging. This might be mitigated by having revelations made only to an independent authority which will maintain a certain level of confidentiality. Such an authority could keep tabs on what is going on in an organisation, and make sure that improvements are put in place as and when possible, while at the same time not damaging commercial interests unjustifiably. However, organisations will still be defensive if employees can report them for relatively minor environmental concerns. This could lead not so much to an improvement in conduct, as to a veil of secrecy within organisations, and an entirely counterproductive atmosphere of suspicion.

D. The Requirement of Good Faith

Although legislation tends to define what types of conduct will be the subject of a protected disclosure, rather than focus on the informant, the conduct of the whistleblower is important in one respect. If a whistleblower is to receive protection from victimisation at work for making the disclosure, that disclosure must be made in good faith.

This is not, however, just an extension of the "clean hands" principle. The actual motivations of the employee are in many ways irrelevant. A disgruntled employee who "turns Queen's Evidence", as it were, and reveals information about a matter which is clearly of public interest (as defined above), should be entitled to protection from victimisation which occurs purely as a result of that disclosure. If such information is to be encouraged, detailed enquiries into the motivations of employees will be counterproductive.

However, it cannot be said to be in the public interest to encourage people to tell lies in the hope of asserting some form of protection in their employment. Therefore, legislation usually excludes from protection those people who produce false information knowing that it is false, or without reasonable grounds to believe that it might be true.[81] This is what is generally referred to as acting in good faith in this area.

E. Conclusions

The level of activity overseas on whistleblower protection seems to indicate that this is an idea whose time has come. There are certain types of information which, in principle, it is in the public interest to reveal. Encouragement of such disclosures will not occur unless on-the-job protection is given to informants.

Any New Zealand legislation should, however, not simply be a knee-jerk reaction to one or two well-publicised cases here and a feeling of being left behind in the rush to enact legislation overseas. If legislation is to be introduced here, and especially if an expensive new authority is to be created or significant changes made to an existing one, whistleblower protection needs to be justified in terms of constitutional principles, recent changes in government and practical considerations. In the next section, I propose to show that encouragement of whistleblowers is a natural extension of several firmly established principles of New Zealand government and ideas of public interest.

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[81] Whistleblower Protection Act (South Australia) clause 5(2); Canadian Bill clause 2 and Whistleblowers Protection Act 1989 (USA) #1213 both refer to reasonable belief; Whistleblowers Protection Bill (NZ) mirrors exactly the SA Act.

PART III

A CASE FOR WHISTLEBLOWER PROTECTION IN NEW ZEALAND

A. Constitutional Principles

1. Open government

Since the Official Information Act was passed in 1982, principles of open government have been at the heart of the New Zealand government system. As the Danks Report stated, there is a compelling case for having open government as opposed to a regime of 'official secrets':[82]

> It [the case] rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can come only from an informed public.

It is vital, therefore, that the public should be able to scrutinise and be informed about government decision-making to a significant degree. Such openness leads to an increase in public confidence in the system, and keeps decision-makers on their toes. It enhances legitimacy, creating overtly higher standards, and making the governed more willing to be governed. As Sir Kenneth Keith has said:[83]

> Information is made available for some purposes, as Parliament in the Official Information Act ... also stress[es], to allow public participation in policy making, to enhance the accountability of those exercising public power, to explain decisions and policies, to help correct them ...

Once this was recognised, various structural changes were implemented to give effect to the principles of open government. The immediate result of the Danks Report was the passing of the Official Information Act 1982 [the OIA] itself. This creates the presumption that government information will be available to those who request it.[84] The office of the Ombudsman, which preceded the OIA by seven years, was given an extended jurisdiction to investigate complaints about access to official information.

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[82] The Committee on Official Information (chaired by Sir Alan Danks) *Towards Open Government* (Government Printer, Wellington, 1981) 14.

[83] KJ Keith "Open Government in New Zealand" (1987) 17 VUWLR 333 at 343.

[84] Section 5 Official Information Act.

The Ombudsman therefore provides the public with an easily-accessible avenue for scrutiny of executive action.

Later reforms are based on the same principles. These include the extension of the Select Committee process in 1987 to allow greater public participation, the creation of the Regulations Review Committee and increasing requirements that departments undertake substantial public consultation before making major decisions. This is particularly so in the areas of environmental policy and Maori affairs.

2. Withholding information

Open government, however, does not mean that all official information should be available to the public, and that we should be able to participate in every stage of the decision-making process. The public interest in participation must be balanced against the need (also in the public interest) for government to function smoothly and efficiently, for policies to be formed and goals achieved. The Official Information Act itself provides exceptions to the principle of availability, which address this need for efficient government.[85]

Other interests are also at stake beside that of administrative efficiency. Frequently, official information is also, at least partly, personal information, that is, information about an identifiable individual. Privacy concerns mean that that information should not be made available to anyone other than the person to whom it refers. Maintenance of personal privacy is also a matter of public interest, as a basic human right. The OIA addresses this concern by allowing information to be withheld if it is personal information[86]. Complaints over refusal to release official information for any reason, including that it is personal information, may be referred to the Ombudsman, who can investigate it without jeopardising the privacy of any party involved. The Privacy Act 1993 also provides that personal information shall not be disclosed, with some exceptions.[87] It is

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[85] These exceptions are contained in ss 6-9 of the Act.

[86] Section 9 (2)(a).

[87] See Information privacy principle 11, and the exceptions to it.

worth noting, however, that the information privacy principles do not apply to the news media, in relation to their news activities.[88]

Some exceptions to the principle of availability of official information are therefore fully justified, but they should not be made wider than is absolutely necessary. Nobody would claim that the system is perfect. Much information remains hidden without good cause. Ingenious record-keeping, or failure to keep full records are widespread practices.[89] In such circumstances, maladministration may not be easily brought to light. Full compliance with the Official Information regime is, no doubt, adminstratively awkward, but this is justified in the wider public interest.[90]

Allowing employees to come forward and expose performance which is significantly unsatisfactory (in terms of the discussion in Part II), might, therefore, be one way of filling in some of the gaps in knowledge about government activities or, at least, in lessening people's perceptions that there is something fishy going on. This should not be perceived as a threat to the integrity of the system. Increased accountability to the public, either directly, or through a watchdog such as the Ombudsman, should lead to higher standards in the way the state is administered. This in turn will ultimately lead to greater confidence, and greater legitimacy.

3. Bill of Rights Act

Section 14 of the New Zealand Bill of Rights Act [BORA] states that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form." In the case of whistleblowers, this right may be breached in a variety of ways. A public servant who is dismissed as a result of revealing information about his or her department is being punished for exercising the right of free speech. The harassment of whistleblowers may be calculated as a deterrent to other potential informants, preventing them from exercising the right.

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88 The news media are excluded from the definition of "agency" in section 2.

89 At least, my discussions with various friends in the public service indicate that this is so.

90 See RW Cole "The Public Sector: The Conflict Between Accountability and Efficiency" (1988) 47 Australian Journal of Public Administration 223.

Freedom of speech also captures the idea of the public's right to know what is going on.[91] This issue is, of course, at the heart of the debate on whistleblowing. Some types of information should not be allowed to remain hidden; encouraging whistleblowers could ensure that the public (or a neutral, independent authority as agent of the public) becomes aware of the problem. Prima facie, therefore, the penalties suffered by many whistleblowers in New Zealand at present would seem to indicate breaches of the Bill of Rights.

The right of freedom of expression, in the absence of any clearly inconsistent enactment,[92] is subject only to such limitations as are demonstrably justified in a free and democratic society.[93] Our free and democratic society, as noted above, has at its heart the principle of open government. This principle clearly supports the right of people to speak out about and actively participate in official matters, and for the public to know as much as possible about what is happening in government. Open government and the Bill of RIghts are therefore complementary.

Public authorities will have to be extremely careful what limitations they seek to impose upon their employees' freedom to speak out. General gagging clauses in employment contracts may well be in breach of the Bill of Rights. Such clauses would seem to be becoming more common in certain areas of government, such as the health sector.[94] The Public Service Code of Conduct is fairly explicit about what level of freedom is permitted to public servants.

> Generally, public servants have the same rights of free speech and independence in the conduct of their private affairs as other members of the public. However, they also have a duty not to compromise their employer by public criticism of, or comment on, policies with which they have been professionally involved or associated. Public servants should therefore ensure that their contribution to any public debate or discussion on such matters maintains the discretion appropriate to the position they hold, and is compatible with the need to maintain a politically neutral Public Service. Employees occupying senior positions or working closely with Ministers need to exercise particular care in this regard.

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91 *Police* v *O'Connor* [1992] 1NZLR 87, 98.

92 Section 4 BORA.

93 Section 5 BORA.

94 This was the indication, at least, from Dr Peter Roberts, Director of Intensive Care at Wellington Hospital and spokesperson for the Coalition on Public Health, at a recent lecture on whistleblowing at Wellington School of Medicine (31 August 1994).

Public servants are therefore not able to express their opinions about certain matters without fear of retribution. Restrictions on comment about a private company's policies are also common. Other well-established limitations on speech are connected with fiduciary relationships. Examples of this are duties of confidentiality between solicitor and client, doctor and patient, priest and penitent, or banker and client. Clearly, then, in New Zealand, the right to freedom of speech is subject to numerous limitations.

Since the passing of the Bill of Rights, however, the reasonableness of these limitations has to be questioned. Although the Bill of Rights is not higher law[95], its constitutional position, as a statement of commitment to supporting fundamental human rights, is extremely strong, and is treated as such by the courts.[96] Even long-established limitations on the right to speak out should not, therefore, escape scrutiny in this new era.

Obviously, there will be occasions on which confidentiality is a vital concern, which may well override an individual's right to freedom of speech, or the public's right to know. Instances of this in the official information regime are the need to preserve free and frank advice between Departments and Ministers, national security and so on. The reasonableness of the limitations on freedom of expression allowed under section 5 will be governed by the same types of consideration. By the same token, such areas as solicitor/client confidentiality involve principles about access to justice, and the necessity of placing trust and confidence in another. This should not be lightly undermined. Some, indeed, say that legal professional privilege should not be undermined at all, but should be expressly excluded from the ambit of the statute.[97]

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95 The Bill of Rights is in the form of an ordinary statute without any form of entrenchment Courts cannot strike down legislative provisions which are clearly incompatible with the BORA (setion 4).

96 *R.* v *Goodwin* [1993] 2 NZLR 153, particularly the judgment of Cooke P.

97 B. Slane "Views of the Privacy Commissioner Prepared for Hon Phil Goff on the Draft Whistleblowers Protection Bill" in *Privacy Act 1993: a selection of background materials on the Privacy Act 1993 and the Office of the Privacy Commissioner, July 1992-April 1994*, paragraph 4.

However, under the Bill of Rights, we are required to minimise inhibitions of freedom of speech. I do not believe that the requirements of confidentiality are absolute, any more than the right to speak out is absolute. The best way to protect all competing rights in this area, with the minimum of limitations on either, is to allow people to come forward with information, but ensure that they give that information to a specific neutral and independent authority, which will be able to preserve confidentiality as far as possible.[98] Also, the nature of the information given should relate to a serious matter, when breaching a confidence such as that required between doctor and patient. A whistleblowing agency should not provide an excuse for airing trivial grievances. Such information cannot be seen as an exercise of freedom of expression which will outweigh fiduciary principles.

4. The position of the media

It seems strange, however, to speak of a right to freedom of expression encompassing a public right to know what is going on, and of public participatory democracy and yet to discourage the transmission of public interest information directly to the public. The news media are commonly regarded as the public's representatives; their reporting is the only means by which the public in general can get to hear of what is going on in government and elsewhere. Investigative journalism has had a great deal to do with revelations of misconduct and illegality in the past. Yet, under the proposed scheme, and all the overseas legislation considered, a whistleblower who gives public interest information to the media is not protected by the anti-victimisation provisions of the statute.[99] How can legitimacy of government be increased when investigations are conducted by a governmental authority, in secret?

There is a danger, here, that any proposed authority will be seen as a means to cover up, rather than reveal and deter, government mismanagement, or detrimental behaviour by large corporations. Similar

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[98] The position of the media should also be considered, however, as discussed above. It may be seen as vital to true open government that much of the information given by whistleblowers is not kept secret by the investigating agency, but is brought to the public's attention via the media.

[99] Only "appropriate" disclosures of public interest information can be the source of legislative protection; "appropriate" is defined as information given (only) to the proposed Whistleblower Protection Authority. See Clause 6 (b), in Appendix A.

suspicions have been voiced lately by the fracas over the so-called "winebox" case, the alleged tax avoidance or evasion scandal involving companies banking in the Cook Islands. These suspicions must be allayed if a whistleblower authority is ever to have any real credibility.

Yet, there is a case to be made also for keeping investigations into alleged wrongdoing under wraps, at least until such wrongdoing is proved. Whistleblowers at present tend to leak information to the media, but this is not always the best way to further the public interest. Unsubstantiated allegations which are widely publicised through the news media, however genuine the motives of the informant, can cause irreparable damage to the organisations about which the information is given. The media are not always in the best position to come to a thorough understanding of the facts of the situation. Organisations are put on the defensive, and are reluctant to reveal further information to reporters. Part of the reason for this is the fear of misreporting. This, it must be said, is no idle fear; the case of Neil Pugmire, for instance, revealed some spectacular instances of misreporting by newspapers and broadcasters. The media also have a tendency to align the public interest with their own interests.[100] The two are not synonymous. Sometimes, sensationalism appears to overrule strict adherence to facts. When one is talking of issues which may be highly sensitive, commercially or otherwise, pre-investigation publication by the media is not always the best way to serve the public interest.

However, it cannot be denied that the media have an extremely important role to play in the matter of disseminating public interest information, and that this must be protected, while bearing in mind also the interests of other parties involved. It is unclear to what extent the Whistleblowers Protection Bill, in its present form, preserves this media role. For the reasons outlined above, I agree that whistleblowers should not be actively encouraged (by providing protection from victimisation) to go direct to the media. It should be expressly stated, however, that the public interest defence to such actions as breach of confidence remains, so that any whistleblower who chooses to take the risk of reprisal may still be able to

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[100] See *Lion Laboratories*, above note 54.

reveal information to the media. As it stands, it is uncertain whether the Bill is intended to codify the law relating to public interest information.[101]

Even if it does not, in assessing whether the defence is available, the courts are likely to have an eye to the statutory definition of public interest information This is no bad thing. However, they could also consider that, given that the legislation provides a clear "proper person" to whom to give information, the whistleblower would never be justified in going direct to the media. The legislation should contain a statement that the only difference blowing the whistle to the media should make is to create an inability to access the anti-victimisation provisions. A requirement that the whistleblower authority report publicly on cases of proven wrongdoing would also help to ensure a belief in the independence of the system. These amendments would preserve the right of freedom of speech to its fullest extent, given that the interests of the employer organisations or third parties need to be considered.

B. The Effects of State Restructuring

1. Institutional change

There are probably a variety of reasons for the sudden interest in the issue of officially protected disclosures of confidential information. The main impetus for change has probably occured, however, as a result of the vast changes which have taken place in the way the State is perceived, and the way it operates in practice. There have been huge changes which have taken place in the New Zealand public sector over the last decade. These have arguably had benefits in that the restructuring has, for example, provided a smaller, more focused state sector and clearer accounting systems. The reforms, however, have also had their detrimental effects upon the public's perception of government. The rapidity with which restructuring has occurred appear to have shaken public confidence both in the politicians and bureaucrats. The Chief Ombudsman has been quoted as saying:[102]

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[101] Although, since it is not expressed to be a code, the likelihood is that it would not be interpreted as such.

[102] "Chief Ombudsman to stand down" *The Dominion* Wellington July 26 1994, page 2.

> ... people's confidence in the way political decisions were made or the processes of government had been eroded with the speed of changes and there was an urgent need to restore public confidence. "We are working hard to get ministers to adjust to changes though we are not happy or satisfied that the objectives of the Freedom of Information Act have been properly met and we have to move fast to restore people's confidence ... The changes to state and local government were supposed to be for the better but I believe there is still considerable room for improvement."

One of the ways of restoring confidence in the system may well be to enhance people's ability to have complaints addressed. As already discussed, enabling whistleblowers to air their grievances through an adequate authority leads to a public perception that mistakes can come to light and be corrected.

Dismay at the changes may be unwarranted. It may be possible to paint a rosy picture of how state restructuring has increased accountability within the New Zealand government system. It may be clearer, for example, what the extent of ministerial responsibility to Parliament is. Chief executives are more visible than in the past, and are responsible for the day to day running of departments. The public knows who to blame for mistakes which are made and of whom to demand reparation. In the new, streamlined, ostensibly more efficient public sector, it is extremely important that errors or mismanagement should be brought to light and dealt with appropriately. Whistleblowers should be encouraged, as they enhance accountability further.

More specifically, other aspects of state restructuring are also relevant to the issue of whistleblowing. First is the creation of State Owned Enterprises (SOEs) and Crown Health Enterprises (CHEs), as state-owned but commercially-based entities. The nature of these bodies has had an effect upon principles about official information. When faced with requests for information, SOEs and CHEs frequently assert that it is not available, for reasons of commercial sensitivity.[103] However, not everything which is commercial would necessarily prejudice these organisations if it were made public.[104] As state entities, they are still subject to principles of open government and the public has a significant

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[103] This reason for withholding information under the Official Information Act is contained in section 9 (2) (b).

[104] As above note 102.

interest in knowing what is going on. The new atmosphere of secrecy in these areas of great public concern has to be combatted.

One way to do this might be to allow employees, with inside information, to come forward with their grievances to an appropriate authority which will give priority to the public interest. Such an authority should, however, also be able to protect the interests of the CHE, or the SOE, by preventing the divulgence of information which is truly commercially sensitive. At present, the Ombudsman clearly has the jurisdiction to deal with complaints both from concerned employees, and from people whose requests for information are refused. However, the Ombudsman cannot prevent whistleblower victimisation, and the incidence of reporting by employees of the commercial bodies themselves will not therefore be particularly high.

2. Public sector employment

The core state sector also underwent radical changes during the late 1980s. Departments were significantly scaled down, and geared more explicitly towards development of policy and monitoring activities of other organisations.[105] The introduction of the State Services Act in 1988 and the Public Finance Act in 1989 further altered both the employment relationship and the trails of accountability within government. Of particular relevance for whistleblowing is the former.

In place of a "career" public service, where employees had a good deal of job security, New Zealand now has state servants who are employed on a basis very like that in private, commercial organisations. The chief executive of a department, herself on a nominally fixed-term contract,[106] is responsible for the hiring and firing of employees.[107] The Employment Contracts Act regulates contracts in both private and public sector, and does not impose different obligations on the public sector employment

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105 John Martin *Public Service and the Public Servant: Administrative practice in a time of change* (State Services Commission, Wellington 1991) 5.

106 Section 38(1), State Sector Act 1988. A chief executive is appointed for a term of not more than 5 years. She is, however, eligible for reappointment from time to time (subsection 2).

107 Section 59 State Sector Act 1988. (2) provides that the chief executive shall have all the rights, duties and powers of an employer in respect of departmental staff for whom she is responsible.

relationship. The same terms of fidelity and confidentiality, for instance, will clearly be implied into the public service employment contract. On the face of it, then, it may seem that there is no difference between public and private sector employment.

However, the nature of the public servant's job is still different in one very important respect. State sector employees have duties both to the government, to enable it to act effectively, and to the public. As Jackson says, "[a]mbiguity therefore lies at the heart of the conception of public service".[108] This ambiguity is apparent from the long title to the State Sector Act, which states that it is (inter alia) an Act " (a) to ensure that employees in the State services are imbued with the spirit of service to the community". The Public Service Code of Conduct, however, focuses primarily on the principle that "[e]mployees should fulfil their lawful obligations to Government with professionalism and integrity."[109] The Code goes on to say that "the first priority for public servants is to carry out Government policy."[110] In doing so, they are to "act in a manner which will bear the closest public scrutiny," and also have to avoid conflicts of interest or integrity.[111] This is not a statement that public servants have a duty to consider the public interest as such, so much as an equation of the public interest with having the Government look good.

What, therefore, should a public servant do if he or she believes that his or her department is not acting in the public interest? This is a key question for many potential whistleblowers. The traditional response is "obey or resign". However, at present, some disgruntled public servants choose to leak information to the media, and hope that they will not be traced. A small minority of others prefer to make a public stand on the issue, and face the consequences.

Jackson seems to indicate that, where the Government is no longer acting in the public interest, then the duty to obey ceases. "The duty public servants owe to the government of the day is engaged only as long as the

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[108] MW Jackson "The Public Interest, Public Service and Democracy" (1988) 47 Australian Journal of Public Administration 241, 242.

[109] State Services Commission *Public Service Code of Conduct* (SSC, Wellington, 1990) 9.

[110] Ibid, page 10.

[111] Ibid, page 21.

government is acting in the public interest."[112] However, this still leaves the question as to who is to decide what the public interest is. Some would claim that the sole arbiter *is* the government of the day.[113] Others would say that each public servant must use his or her own conscience.

Each position has its problems. There will be some situations in which it is clear that the government, or the department, is acting contrary to the public interest. A public servant is often in a unique position to notice illegality, misleading of Parliament, and so on, and should be able to claim that the public interest requires disclosure of the information.[114] However, disagreements about matters of policy direction are more difficult. For example, a (presently unpublicised) government policy of selling off state housing may be totally contrary to my conception of what the public interest requires. But whether I am entitled to reveal that information ahead of time, so that public opinion may take its toll on the elected representatives is another matter.[115] The Code of Conduct indicates that revelations of such matters would be grounds for disciplinary action. I would suggest that, as a general rule, this is correct. Government cannot function efficiently if policies cannot be developed by the elected representatives of the public with a reasonable degree of secrecy. The public should be consulted as and when appropriate, but cannot be involved at every stage of what are frequently highly complicated processes. Revelations about unofficial policy debates could often be unnecessarily counterproductive. Such information is, no doubt, of interest to the public, but this does not equate with being "in the public interest".[116]

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[112] As above note 108, 247.

[113] Otherwise known as g.o.d. The Thatcher government argued this in the prosecution of Clive Ponting, and it was seemingly accepted by the court, although not by the jury, who acquitted Ponting of charges under the Official Secrets Act. See Jackson's comments, above note 108.

[114] Clive Ponting revealed that Government statements justifying the sinking of the Argentinian battle cruiser, the General Belgrano, were false. He was tried for breach of the Official Secrets Act. The Thatcher government attempted to argue that only the government could decide what the public interest was.

[115] Acceptance of such revelations could lead to people being what Uhr calls "bureaucratic guerrillas". J. Uhr "Ethics and Public Service" (1988) 47 Australian Journal of Public Administration, 109, 116.

[116] The distinction is drawn in *Lion Laboratories* v *Evans*, above note 54.

3. Conclusions

At the heart of the New Zealand democratic system lie the principles of accountability, open government and preservation of human rights. Encouragement of whistleblowers, within certain limits, would be perfectly in line with these principles, and would, in fact, enhance them. Legitimacy of government will be increased by encouraging people to disclose information in the public interest. Protecting informants from victimisation in their employment gives them more power over what happens in the workplace, and therefore a greater willingness to co-operate with the system when it is working well. Also, if the public feels that the government is encouraging people to speak out, instead of trying to hide information, then public perceptions of government will certainly improve.

There must be, however, limitations on protection for whistleblowers, so long as these are justified in a free and democratic society. The justification of these limitations is determined by reference to the need to balance a whistleblower's interests with the interests of others involved. The remaining issue which has to be considered here is potentially the most crucial to this balancing exercise, that is, determining which authority is best suited to investigating complaints and protecting whistleblowers.

PART IV

THE PROPER PERSON TO RECEIVE INFORMATION

Lord Denning, in *Initial Services v Putterill*, qualified his defence of disclosure in the public interest by stating that the disclosure had to be to a "proper person to receive the information".[117] This has a sound basis in common sense. Giving information to the correct authority may enable mistakes to be corrected quickly and efficiently, by those in the best position to do so. Also, the qualification may prevent unsubstantiated allegations from being widely broadcast by the media, or other agencies, to the detriment of the employer's reputation. Such damage can frequently be irreparable. It cannot be said to be in the public interest to reveal information with no foundation in truth. Also, as we have seen, the tendency of the news media to sensationalise matters which may be politically contentious, for example, may in fact hinder the public interest. Some limitations on who should receive information given by whistleblowers are therefore justified.

Any agency nominated as an appropriate recipient for whistleblowing complaints must have particular features:

- It must be able fully to investigate allegations made by whistleblowers. This should include power to demand documents, power to require the giving of evidence, and so on.

- If the agency discovers that the allegation is well-founded, it should be able to ensure that action is taken to correct errors, and ensure that the situation does not recur. This could take several forms. The authority could be given power to punish directly.[118] It should be able, where necessary, to refer the case to specialised authorities for enforcement such as the police, the Privacy Commissioner or the Serious Fraud Office. It should also make reports and recommendations to the organisation and, if nothing is done, to Parliament. Mandatory public reporting when an investigation reveals serious wrongdoing should also be considered.

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117 [1968] 1 QB 396, 405.

118 Such powers could include firing a miscreant, or enforcing repayment of sums misappropriated.

- The agency should be able to protect the whistleblower's anonymity. Where possible, his or her identity should be kept confidential to the agency. However, adequate investigation of complaints may often require the disclosure of the informant's identity, as this could affect the 'offending' organisation's right to be heard. How allegations are countered may depend on knowing the source of the information.

  Protection should take the form of ensuring that anti-victimisation provisions of whistleblower legislation are complied with. Even if the provisions are actually enforced by another body, such as the Human Rights Commission, the whistleblower agency should be aware of the proceedings, and be a contact point for the whistleblower. This will save confusion.

Considering these factors, therefore, along with the need to achieve a result which best represents all parties' interests, the options for whistleblower protection are set out below.

A. Internal Reporting Only

One option is not to have a separate, external agency, but to deal with whistleblowing matters in-house. It may well be possible to strengthen internal complaints procedures to deal with the concerns of many whistleblowers. This will be especially true if the information, while clearly public interest information, is of a fairly minor nature. As long as an organisation is seen to be taking such complaints seriously, and to be willing to take appropriate action, this would be a perfectly adequate way to deal with many employees' problems.

It would obviously be in the employer's interests to promote this option. Outside interference and unwarranted publicity would be avoided. The employer could, therefore, develop the most effective ways of dealing with such matters unhindered. Internal reporting would also be a cheap option for the state, as costs of investigation and remedy would be placed solely on the organisation involved.

The dangers with relying *purely* on the organisation itself to deal with whistleblower complaints, however, significantly outweigh the benefits. First, the employer may not in fact be prepared to act on any complaints.

When nothing happens, the whistleblower therefore needs somewhere else to go. Secondly, even if the employer is prepared to act in good faith, an internal complaints system may not be perceived by the employees as being neutral and effective. The temptation is very much to see the "company ombudsman" as being a servant of those about whom one is complaining. An employee is likely to assume that the company will protect its own interests, come what may. Thirdly, the person to whom complaints should be directed may be implicated in the wrongdoing. Where this occurs, the whistleblower clearly needs to be able to bypass internal channels, and give the information to an outside authority. Fourthly, only an external agency can deal with many cases of whistleblower victimisation, if the legislation is breached. It is unrealistic to assume that managers of organisations will often admit fault, and voluntarily reinstate or compensate an individual whom they themselves have harassed.

I believe that it is vital, both from the perspectives of efficiency and cost, to encourage organisations to develop adequate in-house complaints procedures, particularly as regards minor matters. It would accord with sound business sense to try to accommodate complaints internally, in as supportive an atmosphere as possible. This ensures that employees are better satisfied, and also that unsound management practices are quickly and effectively dealt with. The organisation will be able to function more efficiently as a result. Whistleblowing legislation may be just the prod which is needed to encourage more organisations to develop good internal procedures; those that do will have little to fear.[119]

Legislation in this area should, therefore, actively encourage organisations to voluntarily improve practices. The Whistleblowers' Protection Bill, as it stands at present, does not address this issue, however. In fact, as it stands, the legislation would probably discourage employees from pursuing internal channels of complaint. Protection from victimisation is only available to those making or intending to make "appropriate disclosures of public interest information".[120] The latter is defined in clause 6 as information which is disclosed to the Authority.

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[119] See "Whistleblowing: a curse on ineffective organisations", above note 25.

[120] Clause 29, Whistleblowers Protection Bill.

There would therefore be no protection for those who disclose public interest information internally, not wishing to go to an external authority, and who suffer promotional disadvantages, for example, as a result.[121] As we have seen, the primary deterrent to whistleblowers is fear of reprisal. Unless protection is afforded for those who use their internal channels, therefore, it will encourage people to bypass their organisation, and go straight to the external authority. Admittedly, under clause 22 (1) (d), the authority may refuse to investigate the complaint if the subject matter is trivial. A complainant would therefore have to use internal procedures. However, much that is not 'trivial' would be able to be dealt with at an organisational level also. The Bill should be amended to extend protection to those who blow the whistle more quietly.

Be that as it may, it is vital that whistleblower protection allows the informant to bypass internal channels in certain circumstances. Extremely serious complaints may not be adequately dealt with internally. There may be a lack, or perceived lack, of goodwill on the part of those who are nominated to hear complaints. They may even be involved themselves in the wrongdoing. Grievances about victimisation, contrary to any legislative provisions, should also be heard by an external agency, as indicated above. Whistleblower protection would, therefore, be inadequate without provision of an external authority to whom informants may turn where appropriate.

B. A New Authority

The proposal contained in the Whistleblowers' Protection Bill is to create a totally new authority, separate and independent, along the lines of the Privacy Commissioner's office. The office would be responsible to Parliament.

The authority's investigative and reporting powers would be broadly similar to those of the Ombudsman. Part IV of the Bill details the procedures for investigation, and much has been taken straight from the

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121 This contrasts with the Protected Disclosures Bill in New South Wales, for example. Clause 8 states that, to be protected by the Act, a disclosure must be made a) to an investigating 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 [public interest information].

Ombudsmen Act 1975.[122] Part V, however, which sets out the unlawful grounds of discrimination and provides remedies for injury, closely follows the Privacy Act 1993 in utilising the Human Rights Act 1993 procedures.

A totally new and separate authority would have considerable benefits as a means of protecting whistleblowers. First, it would be fairly easily identifiable as the channel through which to go, if one wished to make disclosures of public interest information.[123] Ease of access is essential to the success of the system. Potential whistleblowers who have until now been deterred from making disclosures of information will still not be prepared to act if significant barriers are placed in their way. Secondly, such an authority would be neutral. Provided that an adequate voice were left for the media, it would also be seen to be non-partisan. Perceived and actual neutrality is vital for whistleblowers to have confidence that something will be done and adequate protection will in fact be available. The organisation about which the complaint is made will also be much more prepared to co-operate with a non-partisan agency. Thirdly, a separate authority could easily be made to cover the private as well as the public sector. It could engage staff to specialise in particular areas of public interest information, for example the environment. It would then be irrelevant whether the source of the material were private or public sector. Fourthly, such an authority could build up specialised knowledge about problems peculiar to whistleblowing.[124]

The disadvantages, however, are also significant. First here is the cost of establishing such an authority.[125] It would probably need a similar size of staff and similar facilities to those of the Privacy Commissioner. An assessment of how much the Privacy Commissioner's office costs to run

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122 For example, clause 23 (requirement to inform the person to whom the investigation relates) is identical with s. 18 (1) of the Ombudsmen Act; the ability to summon people to give evidence on oath in clause 24 mirrors s. 19 (2); clause 27, dealing with powers of recommendation and report is very similar to s. 22.

123 This comment is, however, qualified slightly below, when considering the multiplication of small authorities recently.

124 For example, the difficulties inherent in proving that an employee suffered unlawful discrimination, in terms of clause 29 WPB, could be mitigated by specialised knowledge gained from dealing with such cases in the past.

125 The Privacy Commissioner, among others, has expressed concern at the cost of such an authority, and at the problem with overlapping jurisdictions. See above note 97

would therefore be fairly near the mark. Especially given the very recent creation of the latter body, I envisage that there will be a good deal of dissent about spending as much again for a similar unit.

Secondly, New Zealand already has several small authorities such as this, all operating more or less independently of one another. The problem with introducing yet another into the field is that the areas of jurisdiction of many of these authorities are in danger of overlapping. This could be confusing for potential clients of the agencies; for example, it may not be immediately obvious now whether to direct a grievance to the Privacy Commissioner or to the Ombudsman. Introducing a third possibility of the Whistleblower Protection Authority would only add to the confusion. It also causes problems for the investigating agencies themselves. Certain matters may in fact be better dealt with by a different authority with a specialisation in the area. Also, there is the danger of forum shopping by the complainant. If one authority does not produce the result that he or she wants, the temptation is to go on to an alternative authority, which could start the investigation again from scratch. If a different result is achieved, tension is created between the authorities, and the integrity of each is undermined. Even if the same result is achieved, the organisation about which the complaint is made has suffered a good deal of hassle, which may be out of proportion to the subject matter of the complaint.

The problems with a separate authority can be mitigated or challenged to some degree. The cost can be minimised by ensuring that people are encouraged to complain within their organisations first.[126] Also, if I am right, and encouragement of whistleblowing has positive effects on management standards particularly, then financial savings may be forthcoming. Direct financial benefits may arise if revelations are made about fraud or significant waste of public money, enabling undesirable drains on funds to be stopped. Overlapping jurisdictions need not be too difficult to handle if there is a reasonable amount of communication between the various agencies, and an ability in the legislation for each

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[126] See above

authority to refer the matter on to a more appropriate body where necessary. This ability is provided in the Bill. [127]

C. The Ombudsman

A likely alternative to establishing a separate authority to protect whistleblowers would be to extend the jurisdiction of the Ombudsman to cover investigation and protection of whistleblowers.[128] This would be cheaper than setting up a whole new office, although substantial resources would still be needed to enable the Ombudsman to fulfil this additional role. A separate section could be formed within the Ombudsman's office to deal with whistleblowers.

The Ombudsman already has the capacity to receive complaints from some whistleblowers within the public service. Section 13 of the Ombudsmen Act 1975 states that Ombudsmen are to:

> investigate any decision or recommendation made, or any act done or omitted ... relating to a matter of administration ... in or by any of the Departments or organisations named ... in Parts I and II of the First Schedule to this act, or by any committee ... or by any officer, employee, or member of any such Department or organisation in his capacity as such officer, employee or member.

Thus, a public servant may complain about matters in a government department, or a contractor working for an SOE may make disclosures about the company, provided that it relates to a "matter of administration". The scope of this proviso is rather unclear. It seems to have been accepted that it is impossible to draw a clear distinction between

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127 Clause 28 (2)(b) allows the Authority to refer the matter to an appropriate enforcement agency, once it has been established that the grievance relates to public interest information and has some substance to it. A non-exhaustive list of potentially appropriate agencies are included in subclause (6). As the Privacy Commissioner points out, this list will rapidly be outdated, and probably would be better placed in a Schedule to the Act (see above note 97) The role of the Authority after referral is a supervisory one. It would also be able to take action on any subsequent victimisation of the employee in question.

128 Another alternative which has been suggested is to use the Office of the Auditor-General. However, I have not considered this in detail. I believe that the Auditor-General's jurisdiction is too narrow at present to be a serious contender for the position. Information about financial matters may be appropriately referred to the Auditor-General for investigation, but the category of public information is not, and cannot be limited to fiscal concerns. It would, I suggest, be straying too far from his or her specialised role, for example, to require the Auditor-General to investigate complaints about toxic waste dumping by a private company.

administration and policy.[129] The Ombudsman therefore has a wide ability to investigate complaints, and may not be too inhibited by departments claiming that policy is at stake.

The Ombudsman's jurisdiction extends to decisions made about employment matters. Section 22 (1) (b) states that if the Ombudsman believes that a decision is unreasonable, unjust, oppressive or improperly discriminatory, he or she can recommend that the decision be cancelled or varied. This means that there are already some avenues available for some whistleblowers to challenge victimisation in the workplace. However, there are clearly limits to what the Ombudsman can achieve. First, the decisionmaker must be one to which the Act relates. Second, the Ombudsman's remedial powers are recommendatory only, although the recommendations carry a good deal of weight in practice. More substantive remedies may be deemed appropriate in some cases of whistleblower victimisation. However, these can be provided by using the Human Rights Act procedures, as envisaged by the Bill. Third, the grounds of "improper discrimination" do not, at present, include discrimination because one is a whistleblower. The proposed legislation would rectify this.

The greatest impediment to using the Ombudsman as the whistleblowers' authority, however, would be if the legislation covered both the private and the public sectors. This is the case as the Bill stands at present. Of course, the distinction between public and private sectors has become increasingly blurred, especially with state restructuring, and this trend looks likely to continue with more and more contracting out of service provision by the state. The Ombudsman already has dealings with state commercial entities, such as SOEs and CHEs, and is therefore familiar with the profit-making ethos. However, the relationship is not always an easy one. Also, the Ombudsman is perceived as inextricably linked with checks and balances on government. The concerns within the truly private sector are somewhat different. I suggest that it could undermine the present role of the Ombudsman if it were seen to be investigating the private sector in the same way as the public.

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[129] Sir George Laking "The Ombudsman in Transition" (1987) 17 VUWLR 309-310.

This concern may, however, not prove to be an insurmountable problem with whistleblowing. According to the Bill, as mentioned above, if the nominated Authority decides that the matter would be better investigated by a different body, it may refer it on. Many concerns which arise in the private sector would involve such issues as illegal conduct. There will frequently be other authorities, such as the police, to which the Ombudsman could refer the complaint for investigation. If a private firm has misused public funds, there is perhaps little reason why the Ombudsman, as a Parliamentary officer, should not be able to conduct an investigation and report as necessary.

Perhaps the main area of tension will be that of environmental damage by private organisations. However, this is an area of significant public interest, and one which the Government alone can adequately regulate. It may be that investigation by the Ombudsman would not be as difficult as it seems. It may even be that environmental matters would automatically be referred on to the Commissioner for the Environment.

D. Conclusions

Personally, I have a preference for the Ombudsman as the most appropriate authority to deal with whistleblowers. The reason is not particularly that of cost, as substantial resources will need to be allocated to whichever agency is empowered to deal with the issue. The Ombudsman, however, is a well-established and highly respected institution within the New Zealand governmental system. It is easily identifiable for whistleblowers, and easily accessible. The office is well used to dealing with matters concerning the public interest, and already have the capacity to deal with certain types of whistleblowers. Nominating the Ombudsman as the authority for whistleblowers would not require an impossible extension of its jurisdiction, although the application of the legislation to the private sector might cause a few problems at first. However, the office has become used to dealing with state commercial organisations over the last decade, and the territory should not be too unfamiliar. The creation of a new and separate Whistleblowers Protection Authority would seem to be unnecessary.

CONCLUSION

The concept of legislation to provide protection for whistleblowers is arousing a good deal of interest in New Zealand at present. Some of the immediate interest is, no doubt, a direct result of the case of Neil Pugmire, which is still fresh in people's minds. However, it is also growingly recognised that encouragement of whistleblowers might be a further way to increase the openness and accountability of government, and to address pressing social concerns such as environmental hazards. There is a growing number of examples of whistleblower legislation overseas to prompt serious consideration of the issue here. There are also good local justifications for protecting those who come forward with public interest information, and the Ombudsman is the most appropriate authority to provide that protection.

As John McMillan states:[130]

> Telling the truth should be neither difficult nor costly. Employment in an organisation should not require that a person accepts complicity in all activities which the employer has decided to pursue or to conceal. To accept that employees can be persecuted for honesty, loyalty, or upholding the public trust undermines some of the legal and moral principles on which a society is necessarily based.

We can no longer leave our whistleblowers to live on the edge.

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130 J. McMillan "Legal Protection of Whistleblowers" in S Prosser, R Wear and J Nethercote *Corruption and Reform: the Fitzgerald Vision* (University of Queensland Press, Brisbane, 1990) 203, 210.

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APPENDIX A

EXTRACTS FROM WHISTLEBLOWERS PROTECTION BILL 1994.

(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.

(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

28. 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.

(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.

APPENDIX B

EMPLOYMENT CONTRACTS ACT 1991

[27] 27. Personal grievance – (1) For the purposes of this Act, "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because of a claim –

(a) That the employee has been unjustifiably dismissed; or

(b) That the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment contract); or

(c) That the employee has been discriminated against in the employee's employment; or

(d) That the employee has been sexually harassed in the employee's employment; or

(e) That the employee has been subject to duress in the employee's employment in relation to membership or non-membership of an employees organisation.

(2) For the purposes of this Part of this Act, a "representative", in relation to an employer and in relation to an alleged personal grievance, means a person –

(a) Who is employed by that employer; and

(b) Who either –

(i) Has authority over the employee alleging the grievance; or

(ii) Is in a position of authority over other employees in the workplace of the employee alleging the grievance.

Cf 1987, No 77, s 210

[28] 28. Discrimination – (1) For the purposes of section 27(1)(c) of this Act, an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer –

(a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

[(b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) Retires that employee, or requires or causes that employee to retire or resign –]

by reason of the colour, race, ethnic or national origins, sex, marital status, [religious or ethical belief, or age] of that employee or by reason of that employee's involvement in the activities of an employees organisation.

r Sharp, Katrine
Folder Elisabeth
Sh Life on the edge