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BLOWING THE WHISTLE ON THE PROTECTED DISCLOSURES ACT 2000

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CONTENTS

ABSTRACT

The Protected Disclosures Act 2000 has the underlying social policy objective of ensuring that New Zealand government and non-government organisations have high standards of corporate governance. The existence of non-corrupt and accountable agencies that operate efficiently and effectively will increase the well being of the country by ensuring that resources are fairly and equitably distributed. In terms of the employer – employee relationship, it also has the objective of providing protection for employees who disclose wrongdoing.

However the writer believes that the achievement of these objectives is seriously undermined by jurisdictional and interpretative problems with the Act. A more focused statute, with effective limits on the nature of disclosures that qualify for protection, increased restrictions on the types of wrongdoings that can be disclosed, especially with regard to private sector organisations and finally more specific guidance as to circumstances when the protections of the Act are not available would have avoided many of the problems inherent with the Act in its current form.

Word Length

The text of this paper (excluding contents page and footnotes) comprises approximately 15300 words.

I. INTRODUCTION TO 'WHISTLEBLOWING'

Whistleblowing is defined in the *Oxford English Dictionary* as the bringing of an activity to a short conclusion as if by the blast of a whistle. The term originates from when policemen blew their whistles to summon help to apprehend a criminal. However from a legal perspective, a more useful definition of whistleblowing as[1]

> ...a person making a disclosure in breach of a confidential relationship, but which disclosure should, it is claimed, be nevertheless treated as legitimate, and in regard to which, it is also maintained that he should be protected by law from the retaliatory action by the body employing him, which or who has taken objection to the act of the whistleblowing.

Whistleblowing occurs when that person, usually an employee, notifies some other person (usually in authority) of an activity being undertaken by an organisation or by some individual within an organisation which breaches the law or constitutes a risk to 'specific interests'.[2] This activity is customarily disclosed because the person is concerned to have the activity stopped or to have the conduct of the organisation or individual concerned remedied either by the organisation itself or by some external body. This concern is what motivates the whistleblower to act and the courts have recognised that in some situations it is also in the public interest to have the activity stopped. This public interest character of certain disclosures is what gives them legitimacy and distinguishes them from what otherwise would be illegitimate acts in which confidential information is disclosed in breach of implied obligations of fidelity and good faith owed to the employer. Underlying the judicial acknowledgement that disclosures of confidential information are justified in certain circumstances is recognition that the obligation every employee has as a corporate citizen[3] to reveal "information that an employee reasonably believes is evidence of the

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[1] JG Starke "The Protection of Public Sector Whistleblowers" (1991) 65 ALJ 205, 207.
[2] The Ministry of State Services *Report of the Ministerial Review on Whistleblowing* (Wellington 1995), 4; identifies these interests as "such as a risk to public health or public safety, or to an individual's health or safety or the environment"
[3] See generally Gerald Vinten *"Whistleblowing—Subversion or corporate citizen?"* (St Martins Press, New York, 1994)

contravention of any law, rule, or regulation, code of practice, or professional statement, or that involves mismanagement, corruption, abuse of authority, or danger to public or worker health and safety"[4] outweighs the obligations to and the rights of the employer. These are rights such as to protect confidential, seemingly private information,[5] to expect fidelity from employees and for employees to always act in the best interests of the organisation.[6]

It follows that if it is in the public interest that the information be disclosed, that people who blow the whistle on such organisations need to be protected from the retaliatory acts of those organisations. Although there have been very few cases arising from such retaliation that have come before New Zealand courts, English cases reflect an essential problem with the protection provided by the common law, in that it only provides the ambulance at the bottom of the cliff. Whistleblower cases have only come before the courts, when the employer has taken a retaliatory action such as dismissal of the whistleblower and the whistleblower has then brought the matter before the courts seeking relief. Even if the whistleblower is successful, the consequences for the whistleblower have usually been substantial in terms of the whistleblower's career and future prospects.[7] Accordingly, the rationale of any statutory based whistleblowing protection scheme is that it attempts to be the fence at the top of the cliff, prohibiting the retaliatory action before it happens. By removing the threat of retaliatory action by the employer, employees will be encouraged to step forward and disclose wrongdoings.

However, it is important that any statutory protection scheme balances the need to provide protection for such whistleblowers against the rights of employers. Governments in many jurisdictions have enacted whistleblowing protection provisions that reveal different approaches to this dilemma. From specific legislation that allows a person who makes a claim that their employer is

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[4] Vinten, above n 3, 5.

[5] see *Faccenda Chicken Ltd v Fowler* [1987] Ch 117; [1986] 1 All ER 617 which sets out the type of information which can be protected by an employer during and after employment.

[6] See also Companies Act 1993 s131 that places a statutory duty on directors to act in the best interests of the company.

[7] See generally Vinten, above n 3, 5 –31 for selected case studies on the long-term effects on the career of whistleblowers in both the United Kingdom and the United States of America.

defrauding the government to receive a share of the damages payable by the employer,[8] to provisions that apply only to disclosure by public sector employees,[9] to broad-reaching statutes that apply to certain disclosures of all employees of both private and public sectors.[10] It is this last approach that is reflected in New Zealand's recently enacted Protected Disclosures Act 2000 (PDA).

The previous Government in bringing the Protected Disclosures Bill before the House in 1996 signalled, as a matter of social policy, state recognition of the role that whistleblowers have in ensuring we live in a safe, crime free and non corrupt society, and hence the need for statutory protection of those who blow the whistle in the public interest. It is also reflects a belief that it is a legitimate function of government to promote ethical standards of behavior for both workers and management. As the Hon Paul East stated in the House when the Protected Disclosure Bill was reported back from Select Committee:[11]

> ....[t]he purpose of the Bill is to establish a whistle-blower protection scheme that will promote the public interest by facilitating disclosure and investigation of matters of serious wrongdoing. Whistle-blowing protection schemes are designed to encourage and promote the expectation that employees will judge their own conduct as well as the conduct of others within that organisation by public interest standards and values.

However while these policies are laudable, the protection scheme created by the Act, does not fully achieve these policy goals and leaves businesses and organisations in New Zealand exposed to the risk of confidential information being disclosed outside of the organisation, without any corresponding gain to society. Part II of this paper outlines the background to the PDA and in Part III the writer considers the expectations and philosophies that have resulted in the statutory legitimacy now afforded to whistleblowing. It also suggests that ethical business practices will be achieved by a more holistic approach to business

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[8] False Claims Act (US). This Act dates back to the civil war and offers 10-30 per cent of the penalty as bounty for the client and attorney who successfully blow the whistle.
[9] The Protected Disclosures Act 1994 (NSW)
[10] Public Interests Disclosure Act 1988 (UK)
[11] (16 October 1997) NZPD, 4822.

operations, rather than simply regulating whistleblowing. Part IV introduces the basic structure of the Act including the stated purposes of the Act. In Part V the writer examines the Act in detail and argues that the PDA does not achieve a workable balance between protection for employees and the rights of employers, especially in the private sector.

II LEGISLATIVE HISTORY OF THE PROTECTED DISCLOSURES ACT 2000.

The PDA is New Zealand's first specifically targeted legislation to protect whistleblowers. The background to the Act originates in 1994 when a whistleblowing disciplinary action was taken against a Mr Neil Pugmire, a psychiatric nurse, by his employer who alleged Mr Pugmire breached his obligation of confidentiality in disclosing information about the release of a patient in his employer's care. As a consequence of the public debate, the then member of the opposition, the Hon P Goff introduced a private members bill known as Whistleblowers Protection Bill.

This Bill proposed that there be established a separate whistleblowing protection authority to receive information from employees and to investigate such disclosures. Subsequently in 1995 the Minister of State Services established a Ministerial Review to research the need for legislation in this area. The Review team found that there was no evidence that New Zealand did need an involved protection regime. For the Ministerial Review found only a low level of corruption in New Zealand and correspondingly only low incidents of whistleblowing and concluded, "there is certainly insufficient work to justify the establishment of new specialist agency".[12] Instead it recommended that the existing law be tightened up to protect employees in circumstances such as Mr Pugmire. These recommendations were three-fold.[13] Firstly to make any retaliatory action by an employer grounds for a personal grievance claim under the Employment Contracts Act 1991. Secondly to provide a remedy for

[12] Ministerial Review, above n2, 28.
[13] Ministerial Review, above n2, 27.

victimisation under the Human Rights Act 1993 and lastly to provide statutory immunity from criminal or civil liability for individuals who use the appropriate procedures and make public interest disclosures. These recommendations were incorporated in the Protected Disclosures Bill 1996[14] (the Bill) that resulted from the report and have survived all the various versions of Bill to be the cornerstones of the protection provided in the PDA.[15]

The Bill was introduced in 1996 and referred to the Government Administration Select Committee. This Committee reported back in 1997 and recommended, in accord with the views of the majority of the Committee, that the Bill[16] which then covered all public sector and private sector employees, be limited to all public sector employees and only such private sector employees who were engaged to carry out some function of the public sector, for example, if a contractor were contracted to a public sector organisation. The stated rationale behind the exclusion of all other private sector employees was that if the proposed legislation included the private sector, this would be an erosion of important 'constitutional distinctions' between public entities and private entities. Also it was viewed that there was a possibility of private sector employees using the Act to make baseless allegations about their employers and that as private sector organisations do not receive public funding or exercise public powers, it was recommended that the vast majority of private sector organisation should be excluded from the Act.[17] The amendments to the Bill as proposed by the majority of the Government Administration Committee were approved by the House of Representatives on 16 October 1997.[18]

After the Second Reading in October 1997, progress of the Bill through Parliament stalled until the change in government in November 1999. In 2000 following the introduction and debate on 28 March 2000 of a Supplementary Order Paper amending the Bill to include all private sector employees, the Third

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[14] Protected Disclosures Act 1996, no 208—1.
[15] Protected Disclosures Act 2000, ss 17, 18 and 25.
[16] Protected Disclosures Bill 1996, no 208—1
[17] Protected Disclosure Bill 1996, no 208—2, iv (the select committee reports)
[18] The parties who voted in favour of the Select Committees recommendations were New Zealand National, New Zealand First; Alliance, ACT and United with only Labour voting against the amendments.

Reading followed on 29 March 2000[19] and was assented to 3 April 2000. The Act commences on 1 January 2001.

The present Government in extending the PDA to cover all private sector employees ignored the recommendations of the Select Committee. The reasons for this change are unclear, although one of the main proponents of the Supplementary Order Paper when the House in committee debated the matter was the Hon P Goff, the original champion of Neil Pugmire. The government appears to have discredited the Select Committee report as being too representative of certain interest groups such as the Business Roundtable. As Janet Mackey stated when the House debated the Supplementary Order Paper "the crowning glory of the Business Roundtable's submission was that it quoted at great length from the then Controller and Auditor General, Jeff Chapman[20] in support of the fact that there was not much corruption and that this legislation should not cover the private sector".[21] This history of the private sector being included in the original Bill and then removed at the select committee stage and then included again by Supplementary Order paper, without wider consultation or review, may explain some of the substantial interpretative and jurisdictional difficulties that the writer believes are inherent in the Act in its current form. These difficulties are discussed in Part V of this paper.

III PROTECTION OF WHISTLEBLOWING – POLICY AND EXPECTATION

A Introduction

Few would question that freedom from corruption, from incompetence and from activities that place the public at risk are desirable social goals. For proponents of whistleblowing, it follows that the disclosing of situations that threaten these goals and place the public at risk should be encouraged and should be regarded as positive contributions to society. Indeed some have argued that people who

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[19] The vote for the Third Reading of the Bill was a party vote and was passed with 66 voting for the motion and 53 against. The Labour, Alliance and Green Parties voted in favour and New Zealand National, ACT, New Zealand First voted against.

[20] Jeff Chapman was subsequently dismissed from this position and also convicted for matters relating to fraud and dishonesty

[21] (28 March 2000) NZPD <http:/rangi. knowledge-basket.co.nz/hansard

are aware of certain illegal activities are under a form of civic duty to notify an appropriate authority.[22] In social policy theory, the protection of those who disclose wrongdoing, is based on a belief that if the agencies of the state and also private sector organisations operate ethically and effectively, this will increase the well-being of members of a society by ensuring that all members have fair and equitable access to the goods and resources of that society. The intervention of the state into the relationship between employer and employee, especially in the private sector, by providing statutory protection for employees who disclose wrongdoings, can also be seen in social policy terms as it affects the balance of power in that relationship. However for public and private sector organisations there are also specific policy considerations as discussed below.

B. Public Sector Organisations

Certainly with regard to public sector organisations in New Zealand, there has been in the last thirty years an increasing importance placed on the accountability of such organisations. Institutions of government can now legitimately be the subject of scrutiny and can be called upon to justify their actions and decisions. The establishment of offices such as the Commissioner for Children, the Health and Disability Commissioner, the enactment of the Privacy Act 1993, and the establishment of the Serious Fraud Office have collectively provided a check on excesses of institutions of government and also created an expectation that concerns raised by the public will be subject of independent scrutiny. These agencies as well as the State Services Commissioner and the Controller and Auditor-General play a role in check in ensuring that government agencies fulfil their statutory responsibilities. In probably the most significant innovation, the establishment of the Office of the Ombudsman "has been successfully adopted and implemented in the New Zealand Government environment to ensure that those who believe they have cause to complain about the performance of the of the Institutions of State can have those concerns assessed by independent persons

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[22] See RT De George *Business Ethics* (3rd ed, Macmillan Publishing Company, New York, 1990) 211-214.

of the highest personal credibility".[23]

Encouraging whistleblowing in the public sector by ensuring adequate protection of whistleblowers can be justified in a society that is moving towards a culture of openness and accountability in the operation of its government agencies. In fact, the Ministerial Review which investigated the need for statutory whistleblowing protection in New Zealand, reported that some of the people had indicated a belief that as a result of public sector restructuring of the last decade, this had led to an increased need for such protection. For these changes were seen to have reduced the status and function of traditional control agencies, as well as placing emphasis on financial outcomes and the achievement of defined outcomes and accordingly there was now even more justification for the implementation of a whistleblowing protection procedure to ensure unacceptable risks and practices do not become established in public sector institutions.[24] The recent disclosure of the high incidence of cervical cancer in certain parts of New Zealand, due in part to alleged inadequate supervision and management of those involved in the screening process as a result of the continual process of restructuring the health sector in the last decade, supports these submissions.

The need to ensure that state sector agencies, especially those involved in social services, health and education, deliver and continue to deliver effective and responsive services is in the interests of all New Zealanders. Gross mismanagement or the misuse of funds in the public sector, but especially in these areas directly affects the delivery of services and will likely disadvantage certain groups from access to the resources of our society. It may also reduce the likelihood of the achievement of social goals by such agencies and accordingly whistleblowing as one method to ensure gross mismanagement or corruption is exposed, is therefore justified in the public interest. This, it has been suggested, is especially the case for employees of governmental agencies as they have obligations not only as employees, but also as citizens. For the[25]

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[23] Ministerial Review, above n 2, 2.
[24] Ministerial Review, above n 2, 3.
[25] RT De George, above n 22, 201-202

> ...obligations one has to one's government are considerably different from obligations to nongovernmental employers. The reason is that government employees are related to their government both as citizens and as employees and the harm done by governmental employees may have effects not only on the particular division in which they are employed but also on the government and the country as whole.

Thus the Protected Disclosures Act 2000 can be viewed as statutory measure to ensure that the social policy objectives of government agencies are achieved. However the writer believes that it is not possible to make such a clear distinction between the civic responsibilities of public and private sector employees. Employees of privately run hospitals or privately owned public transport businesses that know that health or safety standards are not being maintained, face the same moral dilemma as their public sector counterparts.

C Private Sector Organisations

One of the foundations of the PDA is that first level disclosure of any alleged wrongdoing is required under the Act, except in limited circumstances, to be inside the organisation. This ensures that if adequate systems are in place, the wrongdoing can be addressed internally and without publicity. Thus the PDA encourages whistleblowing, but controls it by channelling the information through pre-stated guidelines. To "institutionalize and internalize whistleblowing"[26]has been described by one commentator critical of whistleblowing as the best approach to controlling it.[27]. It is therefore surprising that there has been and continues to be a high level of resistance from the private sector to the PDA. The Employer's Federation was reported as stating when the Bill was passed; "[s]ome provisions of the Protected Disclosures Act could allow a disaffected employee, motivated by malice, to cause create damage to a business".[28] The alleged costs of compliance with the new Act have also been publicised and used by those opposing the current government as further evidence that it is against business in New Zealand.[29] In fact under the PDA,

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[26] Vinten, above n 3, 13.
[27] See generally Vinten, above n 3.
[28] " Bill irks employees" The Press, Christchurch, New Zealand, 31 March 31 2000, 3.
[29] Editorial, The Dominion, Wellington, New Zealand, 17 Aug 2000, 10. -

private sector organisations have the option of establishing internal procedures, which are not mandatory, as is the case for public sector organisations. Although as the writer discusses later, those organisations that do adopt such procedures may in fact benefit. Private sector organisations should consider undertaking a cost–benefit analysis of the costs of establishing, promoting and publicising such procedures against the potential costs to the reputation of that organisation if the public become aware of some wrongdoing by that organisation. It is also been alleged that it will introduce a new era of uncertainty into the employee - employer relationship in light of the references to the Human Rights Act and creates uncertainty in terms of the employer's obligations under other legislation, such as the Privacy Act 1993 and will lead to more litigation between employers and employees. Thus the decision to include all private sector organisations within the PDA is one that is not fully supported, although the extent of the real opposition to this decision is difficult at this stage to determine. There have recently been some suggestions that New Zealand businesses are increasingly recognising the importance of business ethics at an operational level. In the February edition of *Management* magazine, Ian F Grant argues that business ethics in New Zealand are now given more credence than ten years ago. His evidence included that new Centre for Business Ethics at the Auckland University of Technology and the setting up New Zealand Businesses for Social Responsibility and Business Ethics category at the Top 200 awards. He quotes Gael McDonald, Professor of Business Ethics at UNITEC Institute of Technology in Auckland as stating there has been a "sea change in the attitude of many companies. 'I think there's a greater realisation of the power of consumer opinion and the fragility of reputations, an example being the Cooper Creek wine business, and companies are now wanting to talk about how to avoid these sort of situations' ".[30]

The terms of reference of the 1995 Ministerial Review[31] included that consideration needed to be given to the issue of the inclusion of the private sector in any statutory scheme. This Review found there was no consensus on this

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[30] Ian F Grant "Keepers of the Corporate Soul" (1999) 47/1 Management (Profile Publishing Auckland) 28.
[31] Ministerial Review, above n 2.

issue from the people consulted or interviewed. However it was clear that none of the private sector representatives were in favour of a separate new agency to investigate alleged whistleblowing, which was originally proposed in the private members Whistleblowing Protection Bill.[32] The Review concluded to exclude the private sector from the legislation would be to "send the wrong message to potential public interest disclosers in the private sector, and to their employers".[33] Further the review stated that "given the nature of the interests at issue, we do not think it is logical to limit the availability of remedies on the basis of the sector in which an employee works. For example serious malpractice is a proper matter of public interest whether it occurs in a private or public hospital".[34] The decision by the current government to include the private sector within the statutory regime reflects these findings.[35]

However the decision to extend the Act to the private sector also reflects a political view that there needs to be a cultural change in favour of people speaking out in all organisations.[36] The current Government rejected limiting the PDA to the public sector because it was claimed that it would be seen as an indicator that the Government expects different standards of ethical behaviour from the private and public sectors. Further rhetoric that "it [is] a responsibility of central government to provide clear leadership to give people the courage to raise issues that are of concern in their work place, regardless of whether it is in the public sector or the private sector"[37] was offered as justification for the change to the Bill. However moral justifications of whistleblowing aside, from a social policy perspective the intervention of government to ensure protection for those who blow the whistle on private sector employers, in terms of ensuring that such employees are not disadvantaged by their whistleblowing activities, is significant.

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[32] Ministerial Review, above n 2, 11
[33] Ministerial Review, above n 2, 12.
[34] Ministerial Review, above n 2, 12.
[35] But see Ministerial Review, above n 2, 13 where the Review Team did suggest that the range of matters that might be subject to disclosure in the private sector should be more limited that in the public sector in recognition of the private sector's right to order its own affairs in certain areas.
[36] The Hon Phil Goff, (28 March 2000) NZPD <http:/rangi. knowledge-basket.co.nz/hansard
[37] Ruth Dyson, (28 March 2000) NZPD <http:/rangi. knowledge-basket.co.nz/hansard

D. Whistleblowing Procedures

1. Code of Practice

It is the writer's view that although private sector employers may view the new legislation with a great deal of scepticism and as just another statute placing unnecessary obligations on businesses, companies that do adopt internal procedures and encourage a culture of openness of communication and trust will benefit. The institutionalising and internalising of employees' concerns by establishing effective internal channels for dealing with such concerns lessens the likelihood of those employees exposing the information externally. Wrongdoings are more likely to be dealt with efficiently, internally and most importantly without publicity. Further if internal procedures include codes of practice for whistleblowers, this may encourage employees to carefully consider their potential actions before they blow the whistle outside of the organisation. Codes of Practice have been developed by various writers in the area of business ethics. Such codes usually take the form of a series of questions or justifications that a potential whistleblower should consider in order to ensure that their actions are morally justifiable. For example Valasquez suggests a potential external whistleblower consider the following:[38]

1. There is clear, substantial and reasonably comprehensive evidence that the organization is engaged in some activity that is seriously wronging or will seriously wrong other parties.
2. Reasonably serious attempts to prevent the wrong through internal whistleblowing have been tried and have failed.
3. It is reasonably certain that external whistleblowing will prevent the wrong.
4. The wrong is serious enough to justify the injuries that external whistleblowing will probably inflict in oneself, one's family and other parties.

While having such guidelines in place, will not screen out all unjustifiable external whistleblowing activities, it may reduce such disclosures.

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[38] MG Velasquez Business *Ethics-concepts and cases* (3rd ed, Prentice Hall, New Jersey, 1992) 403.

2. *Organisational culture.*

However it is essential to the success of such procedures that they are implemented as one component of an overall ethical business philosophy. Good standards of corporate governance will not be solely achieved by the introduction of such a code implemented within the framework of the PDA. In fact as one writer states "whistleblowing is a symptom of an organisation that is, in some way out of control".[39] Robert De George, a writer on business ethics, suggests that need for moral heroes, being those who through a sense of moral obligation blow the whistle on their employers, shows the existence of a defective corporation. He continues, "it is more important to change the legal and corporate structures that make whistleblowing necessary than to convince people to be moral heroes".[40] For the best way to prevent whistleblowing is to ensure that the entire organisation shares and maintains ethical values. While it is recognised that there are no simple solutions to ensuring such an ethos is actually practised by an organisation, one suggestion is for the board of directors of a company to establish a clear expectation with the company's Chief Executive Officer, that it does not want any surprises and wants advance warning of bad news. "Meeting this expectation then becomes one of the objectives reviewed in the CEO's annual performance evaluation".[41]

3. *Communication outside of existing management structure.*

Ideally there should be sufficient trust and support within an organisation, that if an employee does have concerns about wrongdoings, there can be open communication of these. However in reality, whistleblowers often wish to and feel they must disclose anonymously or confidentially within an organisation. Under the PDA an organisation is required to ensure the confidentiality of the discloser.[42] Whatever procedure is implemented, it should be outside of the existing management hierarchy, either to someone who has the power to investigate the matter or directly to the head of the organisation itself. In either situation the disclosure of concerns operates as a safety valve as a line of

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[39] Peter Jackson, "Whistles and Safety Valves" (1999) 122/3 CA Magazine (Toronto Canada) 44
[40] De George, above n 22, 214
[41] Jackson, above n39, 44
[42] Protected Disclosures Act 2000, s 19.

communication from employees straight to the top.[43] It is essential that if an organisation implements a procedure for disclosing concerns inside of the organisation, that this is accepted and promoted as part of the culture of the organisation, instead of something that is set up to pay lip service to the concept. There have been many examples in New Zealand and the United Kingdom where tragedy could have been averted if the management did not have "closed ears" to the concerns of employees that safety issues were being ignored.[44]

Reference can also be made to codes of ethics that many businesses have adopted in recent years. In 1998 the Institute of Business Ethics in Britain surveyed 178 of Britains top 500 companies and found that more than half of the companies surveyed had a code of conduct on ethics, but in practice its content was unknown to staff, customers and other stakeholders. Thirty percent of those surveyed failed to give a copy of the code to staff.[45] Anecdotal evidence suggests that if such research were undertaken in New Zealand, similar results would be obtained. Many businesses in New Zealand have adopted, as part of their internal business structures, a code of ethics that sets out the ethical base lines for the organisation. However for many organisations these codes tend to languish unnoticed by employees and management alike. Employees are not aware of the code or the pathways available if the code is not met. Education and the involvement of the work force require a commitment by management, otherwise the potential of internal whistleblowing as an internal corporate safety net may suffer the same fate.

As discussed there is an apparent belief that the PDA will have a negative impact on private sector businesses in terms of compliance costs and the imposition of further procedural requirements on management. Paradoxically it is only

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[43] Peter Jackson, above n 39, 44.

[44] In 1987, a car ferry, Herald of Free Enterprise, sank off the coast of Belgium, resulting in the loss if 193 lives. The subsequent inquiry found that on five occasions, staff had warned management about ferries sailing with the bow doors still open after loading. In New Zealand the inquiry into the accident to Morgan Jones, a passenger on a Coastal Pacific Train that fell after a handrail between carriages became unhooked. In the subsequent inquiry staff said they had told of their concerns to management and had been ignored.

[45] Susan Mayne "Whistleblowing—Protection at last" (1999) 10/11 ICCLR 325, 327

organisations that have nothing to hide, that may legitimately be able to complain about compliance costs and government interference in business.

IV THE ACT- PURPOSE AND STRUCTURE

A. Protection of the Whistleblower

The Act has a stated two-fold purpose.[46] First it is to protect people who disclose serious wrongdoings.[47] This is achieved by the inclusion of the cornerstone protection provisions referred to above. However although the Act will establish legal protection for persons who make public interest disclosures, the consequences for a whistleblower within a workplace can be devastating in other ways. This arises from the common perception the act of whistleblowing is a betrayal, that starts in the school playground with people who tell tales being labelled 'snitches' or people who 'rat' on their friends. Often people who know of some wrongdoing do not disclose it or do so anonymously, not only through fear of losing their jobs or some other retaliatory action by their employer, but also due to this attitude that one does not 'shop' one's colleagues. Accordingly protecting people who blow the whistle may reduce the legal consequences of dismissal or other retaliatory act by the employer, but is unlikely to reduce the hostility of other workers, unless there is overall a change in attitude. Therefore promotion of whistleblowing needs to occur as well as protection.

B Promotion of Whistleblowing

This fact is recognised by including a second purpose to the Act of encouraging and promoting in the public interest the disclosure of serious wrongdoing. As discussed above, to encourage employees to speak out will require to some extent an entire cultural change and it is difficult to change attitudes by legislation. Under the PDA public sector organisations are required to promote disclosure by establishing procedures whereby employees can disclose their concerns, although for the Act to be effective, all organisations need to ensure employee concerns are taken seriously. As stated there is substantial evidence

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[46] Protected Disclosures Act 2000, s 5.
[47] Protected Disclosures Act 2000, s 5(b).

available of incidents when employees have reported concerns about safety issues that have been lost in middle management or have simply been ignored.[48] If an organisation is to have effective and accepted channels for disclosure; this is more likely to happen as part of an organisation with high standards of ethical management. This is not going to be achieved by whistleblowing procedures alone.

The PDA, in line with other whistleblowing protection legislation in other countries, promotes whistleblowing by setting out clear guidelines for a potential whistleblower in order for that person to be able to determine, before they blow the whistle, the likely legal consequences of their actions. This is in contrast to a whistleblower's position under the common law. Currently if an employee blows the whistle on an employer, the consequences for the employee will depend on firstly if the employer implements any retaliatory action and secondly if the particular disclosure is accepted by the courts as one that is in the public interest, then the employee may be able to obtain relief from such retaliation. Under a statutory scheme, a whistleblower should be able to minimise the potential uncertainty caused by the disclosure, at least in terms of the legal consequences, by choosing to do so using the predetermined statutory procedure. Whether the PDA achieves this certainty is examined in Part V of this paper.

C. *Procedures of the Protected Disclosures Act 2000.*

The PDA provides that an employee[49] of an organisation, being defined as a body or persons compromising one employer and one or more employees,[50] may make a protected disclosures about serious wrongdoing in or by that organisation.

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[48] See above n 44.

[49] Protected Disclosures Act s3 defines an employee of an organisation as including a former employee, a home worker, a person seconded to the organisation, any person under a contract for services working for the organisation, management and finally with relation to New Zealand's Defence Forces, any member of the armed forces.

[50] Protected Disclosures Act s3 defines "organisation" as a body of persons, whether corporate or unincorporate, and whether in the public sector or in the private sector; and includes a body of persons comprising 1 employer and 1 or more employees.

As stated initial or first level disclosure must be made internally within the organisation and must be made in accordance with internal procedures established by and published by that organisation. Only public sector organisations[51] are required to have internal procedures in operation. Employees disclose to the head or deputy head of the organisation if there are no internal procedures in place.

If the employee believes that the head of the organisation is involved or on the basis of urgency or some other exceptional circumstance or if the employee has already disclosed within the organisation and no action has resulted within 20 days,[52] then the employee can disclose at the second level. This is disclosure outside of the organisation to "appropriate authorities".[53] Appropriate authorities are the heads of various public sector organisations.

The PDA also provides a third level of disclosure.[54] This is when an employee has made a first or second level disclosure and the employee believes that on reasonable grounds that the matter will not be investigated or will not be investigated within a reasonable time or if the matter is investigated that no action will result and the employee continues to believe that the information disclosed is true or likely to be true. Disclosure at the third level is to a Minister of the Crown or to the Ombudsman.

For information to be protected by the PDA it must be about a 'serious wrongdoing' as that term is defined and also must satisfy certain requirements such as the employee believes the information to be true or likely to be true.[55] If all these requirements are met, then the discloser is protected from any personal grievance action from the employer[56] and also given immunity from criminal and civil proceedings.[57]

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[51] Protected Disclosures Act 2000, s3.
[52] Protected Disclosures Act 2000, s9.
[53] Protected Disclosures Act 2000, s9 (1).
[54] Protected Disclosures Act 2000, s10.
[55] Protected Disclosures Act 2000, s 6.
[56] Protected Disclosures Act 2000, s17.
[57] Protected Disclosures Act 2000, s18.

Employees can of course still disclose outside the boundaries of the Act, for example direct to the media or to politicians but then the protection provided by the Act would not be available.

Finally the 1995 Ministerial Review considered that the term 'whistleblowing' has a pejorative context and instead preferred to use the phrase "public interest disclosure"[58] to describe this activity. While the writer does not necessarily agree with this view, the writer uses the term 'qualifying disclosure' to describe a disclosure of information in accord with the PDA. The word 'whistleblowing is used to describe the activity generally.

V APPLICATION OF THE ACT—ISSUES OF INTERPRETATION

A. Who is protected by the Act?

The meaning of 'employee' is central to the operation of the PDA as the statutory protection of the Act is only afforded to 'employees'. The definition in the Act extends the ordinary meaning of 'employee' to include former employees; homeworkers as that term is defined in the Employment Contracts Act 1991; contractors and persons on secondment; persons involved in the management of an organisation and military personnel. Before discussing these extended meanings, it is worth considering the ordinary meaning of 'employee'. In the Employment Contracts Act 1991, an employee is stated as

> (a) means any person of any age employed by an employer to do any work for hire or reward; and
>
> (b) includes---
>
> (i) a homeworker; or a
>
> (ii) A person intending to work

[58] Protected Disclosures Act 2000, s6(2)

The essential element of this definition is that a person must be employed for hire or reward. A similar definition can be found in the State Sector Act 1988. It provides that an employee is a person who is "paid by salary, wages, or otherwise..."[59] The definition was the subject of judicial comment in *NZEI v Director General of Education.*[60] The Court of Appeal stated that an employee is someone who performs services in return for consideration and therefore a trainee teacher was not an employee under the State Sector Act 1988. The courts took a similar approach to the status of an unpaid worker under the Employment Contracts Act 1991, when it held that a worker who received no wages for her employment in a shop, but received bed and board and had an expectation of a share in the business was not an employee.[61] This issue has now been clarified by definition of 'employee' in the Employment Relations Act 2000, which commences on 2 October 2000. For a volunteer who does not expect to be rewarded for work to be performed as a volunteer and receives no reward for that work is specifically excluded from the statutory definition of 'employee'.[62]

Therefore if a person is a volunteer or works for the organisation in an unpaid capacity, that person is unlikely to receive the protection of the PDA in whistleblowing situation. While on policy grounds as volunteers do not receive payment, it is justifiable that they are unable to bring personal grievance actions, however the fact that volunteers will not receive immunity from prosecution is less defensible. If a volunteer discloses information that satisfies all criteria for a protected disclosure under the PDA, then it is inequitable that a volunteer could be sued for defamation or breach of confidence, but a person who is in paid employment who revealed the same information would be immune from prosecution. It is arguable that volunteers should be treated like former employees who are expressly stated to be employees for the purposes of the Act. Although the ability of a former employee to bring a personal grievance on the grounds of a former employer's retaliatory act is specifically provided for in the Act, in reality the circumstances in which a former employer could retaliate are

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[59] State Sector Act 1988 s2.
[60] *NZEI v Director-General of Education* [1981] 1 NZLR 538(CA)
[61] *MacGillivray v Jones* [1992] 2 ERNZ 382
[62] Employment Relations Act 2000, s6.

limited. However the immunity from prosecution and protection from victimisation provisions will be important to protect former employees from other forms of retaliation and it is unjust that these protections are not available for volunteers. A similar argument may face non executive directors of private sector businesses who may not fall within the general definition of employee for this reason, although a non-executive director as someone arguably concerned in the management of the organisation, may be covered by the extended definition of 'employee' in the PDA.

As stated an employee under the PDA in relation to an organisation also includes a person who is seconded to the organisation, and an individual 'engaged or contracted under a contract for services to do work for the organisation'. This clearly covers contractors who are engaged to work for an organisation from time to time. However the section does not specifically require that the contract for services has to be one directly with the organisation. The question that arises is whether someone like an auditor or a legal adviser who is employed by an independent firm that is contracted to provide auditing or legal services to the organisation would also fall within the definition in the PDA. Arguably the work done is only indirectly for the organisation as that person's primary duty is to work for the employer, namely the specific audit or legal firm. This may need to be clarified in the contract between the organisation and the employer.

Finally a homeworker is defined in the Employment Contracts Act 1991 as including someone who is engaged, employed or contracted to do work for another person in a dwellinghouse. The definition of homeworker in the Employment Relations Act 2000 maintains this definition.

B Information about what kind of activity may be disclosed?

1. Serious Wrongdoing—the definition

Before a disclosure qualifies for protection under the PDA, the disclosed information must relate to a 'serious wrongdoing'. The PDA provides:[63]

[63] Protected Disclosures Act 2000, s3.

serious wrongdoing includes any serious wrongdoing of any of the following types:

(a) an unlawful, corrupt, or irregular use of public funds or any public resources; or

(b) an act, omission, or course of conduct that constitutes a serious risk to public health or public safety of the environment; or

(c) an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or

(d) an act, omission, or course of conduct that constitutes an offence; or

(e) an act, omission of course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement, --

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

The definition therefore encompasses a wide range of circumstances applying to most wrongful acts that whistleblowers have disclosed in the past. Generally, there is no requirement that the information about the malpractice be confidential although this will be the case in most situations. More significantly there is no requirement that the wrongful activity is against the public good and correspondingly that disclosure, especially when it is outside of the organisation, is in the public interest. This omission significantly widens the types of information that will be protected by the Act.

2. *Public Sector Activities—misuse of funds, improper or negligent conduct.*
Clearly certain of the prohibited activities will only apply to public sector organisations that use or have access to public funds and resources[64] or involves the acts or omissions of public officials[65] and disclosure of such wrongdoings

[64] S.3 definition of "public funds or public resources" provides these include the money and stores of government agencies, local authorities, state owned enterprises, crown entities, LATE, airport , port and energy companies, any energy supply operation , the New Zealand Local Government Association and any company or organisation controlled by that Association and

[65] Protected Disclosures Act 2000, s3 states "public official" means an employee of a public sector organisation (this phrase is also defined in section 3 and includes amongst others the Office of the Clerk if the House of Representatives, the Parliamentary Service, an intelligence and security agency and LATE) or is someone that is concerned in the management of a public sector organisations.

will usually be in the public interest. It is accepted that actions of public officials that use and deal with public funds should be open to public scrutiny. Indeed the Code of Conduct of Public Servants[66] requires that all public servants to show "reasonable care, and neither use, nor allow the use of departmental property, resources, or funds for anything other than authorised purposes"[67] and at all times " public servants must therefore observe the principles of fairness and impartiality in all official dealings".[68] Employees of State Owned Enterprises (SOE) and other commercially focused organisations such as Local Authority Trading Enterprises (LATE) are covered by this code of conduct. This fact was used by the Government Administration Committee to recommend the inclusion of both SOE and LATE as (public sector) organisations subject to Bill. The original draft of the Bill had not included such organisations within the public sector category and instead they were treated in a similar way to their private sector counterparts. It was argued that the statutory regime should not apply to them as they are under a legal obligation to operate as successful businesses. The Select Committee while not disagreeing with this submission preferred to include SOE and LATE within the definition of public sector organisation for reasons of consistency[69] and that they are publicly owned.

3. Serious risk to public health, public safety and maintenance of law.

This category of wrongdoing, the writer suggests, involves activities of both private and public sector organisations that would have a substantial and detrimental impact on the health and safety of New Zealanders, for the example the dumping of toxic chemicals. An interpretation of "serious risk" in this manner is preferable in terms of limiting the protection of the PDA to serious malfeasance. For the alternative interpretation of 'serious risk' as meaning a risk that has a substantial or high likelihood of occurring, could result in an

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[66] State Sector Act 1988 s57 provides for the State Services Commission to prescribe the minimum standards of integrity and conduct that are to apply to the public service and apply to public servants by virtue of the State Sector Act 1988

[67] State Services Commission, Code of Conduct, Second Principle, .www.ssc.govt.nz/documents/code_of_conduct/code4.html (page 1 of 3)

[68] State Services Commission, Code of Conduct, Second Principle, www.ssc.govt.nz/documents/code_of_conduct/code4.html (page 2 of 3)

[69] Protected Disclosures Bill 1996, no 208—2, vi (the select committee report).

activity that has minor public health and safety consequences falling within the PDA scheme.

The terms 'public health' or 'public safety' are not defined by the Act, although the writer suggests that the terms would cover activities that affect the health and safety of all people of New Zealand or a community or section of such people.[70] Particular communities or sections could be those in a specific geographic area, or even those patients at a particular hospital. For example in the Neil Pugmire case, the disclosure concerned the release of recidivist paedophiles into the community. The particular sector of the community would be the youth of Wanganui.[71]

This requirement that the risk be to public safety or public health arguably means that if the risk were to only one person, for instance a specific employee in a factory, then this would not be a risk within the context of the PDA. This interpretation is supported by the fact that in other legislation where it is intended that an activity cover both public safety and the safety of an individual, this is specifically stated. For instance in Part II of the Dangerous Goods Act 1974 that requires that a licence be issued for dangerous goods in light "of the interests of public safety or the safety of any person..."[72]Finally similar arguments can also be made in interpreting the ambit of the phrase 'serious risk' in relation to the maintenance of the law.

4. Offences.

The fourth type of serious wrongdoing concerning the commission of offences is likely to have the greatest impact on private sector organisations. The Legislature in amending the PDA to again include the private sector appears to have overlooked the fundamentally different interests of the private sector. The

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[70] See Health and Disability Services Act 1993, s2 which provides a statutory definition of 'public health' as the health of all people of New Zealand or a community or section of such people.

[71] Neil Pugmire did not assert that the employer, Good Health Wanganui, had committed an offence or even was involved in mismanagement. His concern was that as result of the implementation of government policy that repeated sex offenders were being returned to the community.

[72] Dangerous Goods Act 1974, s 9(4)(b).

question that must be asked is whether it is in the public interest that minor offences of private sector businesses or of the senior management of those businesses should attract the protection of the PDA? For the Act does not restrict this category of wrongdoing to either serious offences or at least those offences that relate in some degree to the public interest and although the title of the section is "serious wrongdoings", it is unlikely this, by itself, will allow the courts to restrict the interpretation of offences to only serious offences.

For as stated one of the purposes of the PDA[73] is to promote the public interest, by facilitating the disclosure of wrongdoing. However for a disclosure to qualify as a protected disclosure under section 6, the Act does not require that the wrongdoing must be against the public interest. Accordingly it appears that the underlying policy of the PDA is that any wrongdoing is bad and therefore regardless of the triviality of an offence, it is in the public interest that an employee can disclose it and in certain situations do so outside of the organisation.

Further when the Government Administration Committee considered whether the Bill should be amended to exclude trivial offences, the Committee rejected restricting the definition to "an act, omission or course of conduct that constitutes a serious offence".[74] This option it was considered would create a far higher threshold than considered appropriate and would place a burden of knowledge of what is a serious offence on the discloser. The report continues "[f]ixing an arbitrary cut off line also gives rise to difficulties where there is an important nexus between the type of offending and the functions and duties of the public official or organisation concerned".[75] This rationale may have some merit when the Bill was limited in application to the public sector, but as the PDA encompasses all private sector organisations, the absence of a proviso restricting disclosures to offences of a more serious nature or those that should be disclosed in the public interest substantially increases the scope of the Act. For instance

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[73] Protected Disclosures Act 2000, s5 (a).
[74] Protected Disclosures Bill 1996, no 208—2, ix (the select committer reports) referred to this definition and also to the definition of serious offence in The Crimes Act s 257A as an offence punishable by imprisonment for a terms of 5 years of more.
[75] Protected Disclosures Bill 1996, no 208—2, ix (the select committee reports)

minor offences relating to regulatory requirements of for example the Companies Act 1993, that essentially are of no interest to any one other than the company involved,[76] can legitimately be the subject of protected disclosures under the Act.

The writer believes that given the stated purpose of the Act and the deliberate statements of the Select Committee, any submission that there should be implied into the definition of 'offence' a requirement that the information should be disclosed in the public interest is unlikely to be successful. Therefore although disclosures of minor and essentially trivial offences could potentially be harassment of an employer, as long as the employee does not make a false allegation or otherwise acts in bad faith, the disclosure will be protected under the PDA. Other than employers ensuring that workplaces have effective procedures for whistleblowers, which may reduce the number of disclosures outside the organisation by current employees, with regard to former employees, the only potential remedy against an employee who blows the whistle on some trivial offence will be if the courts in considering if a discloser is 'otherwise in bad faith' under section 20, takes into account the seriousness of the matter disclosed and also the public interest content of that subject matter. The application of section 20 is discussed later in this paper.

As stated section 6 establishes the elements that must be present before a disclosure is protected by the Act and provides that the serious wrongdoing must 'in or by that organisation'. This phrase indicates that it will not be necessary for the courts to apply the legal principles developed to attribute the actions of certain senior officers and directors of an organisation, as the actions of the organisation itself. However if as a result of a disclosure, an organisation was the subject of a civil action or criminal charges, the rules of attribution stated in

[76] The Registrar of Companies is not stated to be an Appropriate Authority in the Act, although the definition is not exhaustive. However the Registrar of Companies has the power to investigate if any company is failed to comply with the Companies Act 1993 or the Financial Reporting Act 1993 under Companies Act 1993, s 365.

Meridian Global Funds Management Asia Ltd v Securities Commission[77] may need to be applied.

A wrongdoing 'in an organisation' could be activity of a certain officer alone and this may be sufficient to satisfy section 6, without having to prove it is a wrongdoing by that organisation. Although it is not specifically required, the writer suggests that if a wrongdoing 'in an organisation', is in fact the activities of one individual, then for the Act to apply, the wrongdoing must relate in some way to that individual's activities on behalf of the organisation.

5. Inclusive Definition

Finally the list of serious wrongdoing is stated to "include" the above activities. Therefore it is the intention of the Legislature that activities beyond this list could be the subject of protected disclosures, although it is difficult to imagine such a case. However the fact that there is potential for protected disclosure of other activities leaves all organisations in a state of some uncertainty.

C. Qualifying Disclosures.

1. Definition

Before an employee can disclose any public interest information under the PDA, whether internally or externally, that employee must satisfy the requirements of section 6 of the Act:

> **6 Disclosures to which Act applies**
>
> (1) An employee of an organisation may disclose information in the manner provided by this Act if—

[77] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413. In this judgment the Privy Council set out the rules of attribution that should be applied when determining if the actions of individuals within a company are the acts of the company instead of applying the earlier principles based in identifying if the activities are of those people who can be classified as the directing mind and will of the company developed in *Tesco Supermarkets v Nattrass* [1971] 2 All ER 127.

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

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

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

(d) the employee wishes the disclosure to be protected.

(2) Any disclosure made in accordance with subsection (1) is a protected disclosure of information for the purpose of this Act.

As indicated above, one of the major difficulties of the Act arises because there is no express requirement that the employee believes that the information should be disclosed as it is in the public interest, before that disclosure is protected. The absence of this requirement potentially leaves organisations vulnerable to a wide range of disclosures and is in conflict with the current common law position.

2. *Common Law position*

It is well accepted at common law, that if an employee blows the whistle in the public interest, then the employee may be protected from a charge of breach of confidence on the basis of just cause or excuse. One rationale is the "disclosure was under a compulsion of law, that there was express or implied consent of the person to whom the duty [of confidence] is owed to make disclosure or where disclosure is in the public interest".[78] However analysis of case law indicates that while judges have upheld this principle, where the line is drawn between balancing the duty of confidence and the public interest has been the subject of some dispute. In *Initial Services Limited v Putterill*[79], Lord Denning stated the doctrine extends 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..."[80] This can be compared to *Lion Laboratories Limited v Evans*[81] when the narrow formulation of the defence

[78] J Bowers, J Mitchell, and J Lewis *Whistleblowing the New Law* (Sweet & Maxwell, London, 1999) 59.
[79] *Initial Services Ltd v Putterill* [1968] 1 QB 396 (CA)
[80] *Initial Services Ltd v Putterill* [1968] 1 QB 396 (CA), 406-406
[81] *Lion Laboratories Limited v Evans* [1985] 1 QB 526 (CA)

as one that is limited to the existence of iniquity was rejected. O'Connor LJ stated "everything depends on the facts of the case; this the court will not restrain the exposure of fraud, criminal conduct, iniquity; but these are only examples of situations..."[82]

Accordingly the extent of the defence is unclear. But proving that disclosure was in the public interest is the starting point to obtaining relief from any retaliatory action by the employer. In New Zealand after the whistleblowing incident that prompted the PDA, Mr Pugmire brought a personal grievance claim under section 27 of the Employment Contracts Act 1991 in response to the disciplinary action against him by Good Health Wanganui for disclosing information about the release of a dangerous patient. While the matter was resolved by an out of court confidential settlement in favour of Mr Pugmire, Castle J in *Pugmire v Good Health Wanganui,*[83] indicated an implicit support for the principle that a personal grievance claim could be upheld against an employer who retaliated against a bona fide whistleblower acting in the public interest on these factors.[84]

Therefore it is difficult to reconcile the common law and statutory positions with regard to the requirement that the information be in the public interest as the PDA distinguishes cases of whistleblowing not on the merits of the information being disclosed, but who is the choice of recipient for the information. It also creates the situation that if an employee discloses confidential information about an employer to the media, this would not be protected by the Act, but that employee may still be able to obtain relief at common law, if it was in the public interest that the information be disclosed. The Act is not stated to be a code and arguably the common law rules will still apply when the disclosure is outside of the scheme of the Act. The extent that the existing case law will be useful as precedent to determine if a disclosure is protected by the Act is however doubtful.

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[82] *Lion Laboratories Limited v Evans* [1985] 1 QB 526, (CA)
[83] *Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174.
[84] See also *Lion Laboratories Limited v Evans* [1985] 1 QB 526 where 2 ex-employees wanted to disclose information about a former employer as to inaccuracies in equipment made by that employer. The Court of Appeal held that it was not necessary in such circumstances to find wrongdoing, it was sufficient that the information should be disclosed in the public interest.

3. True or likely to be true.

An essential requirement of a qualifying disclosure is that the employee must believe on reasonable grounds that the information about some serious wrongdoing 'is true or likely to be true'. The Act does not require that the employee have any evidence or proof of wrongdoing, although one would imagine there normally would need to be some evidence to support a claim of wrongdoing, especially when it is disclosed externally. The employee is not subject to any penalty if the subject matter of the disclosure is not proven, although if an allegation is proven to be made by a person knowing that it is false or otherwise in bad faith, then the protection of the Act will not apply.[85] However there is vast grey area between disclosures that are made in bad faith and disclosures by responsible corporate citizens who make a fully informed decision to disclose protected information in the public interest. The problem when whistleblowing occurs outside of the organisation is that for disclosed information to be shown is untrue, it will in many cases first need to be investigated. The fact that a whistleblower may not be fully informed of all relevant facts may not be obvious to an appropriate authority or the Ombudsmen or relevant Minister. The risk that external bodies may investigate and inadvertently disclose confidential and essentially private matters is legitimately a concern to the private sector, but as discussed, it is a business risk that can be reduced by adopting effective internal procedures that keep the information within the organisation.

However one of the grounds on which a disgruntled employee can disclose externally at the second level is when there has been no action or recommended action on the matter following disclosure by that employee at the first level within 20 working days.[86] There is no guidance in the PDA as to what would be sufficient 'action' to counter this right and the writer questions how would the external authority know if any action had been taken or not until they investigated the matter. The head of an organisation may have taken no action, because after investigating a matter, the allegation of wrongdoing was not

[85] Protected Disclosures Act 2000, s 20.
[86] Protected Disclosures Act 2000, s9(c).

proven. Would an employee who was dissatisfied by the decision to take no action in such circumstance still be entitled to disclose the matter externally?

4. Intention of the Discloser

The third and fourth requirements for a qualifying discloser refer to the wishes of an employee; namely that the employee wishes to disclose the information so that the serious wrongdoing can be investigated and secondly that the employee wishes the disclosure to be protected. The second of these requirements is likely to be the subject of little comment. The first requirement that the employee wishes that a wrongdoing be investigated appears at first glance to be more notable as seems to provide some guidance as the requisite purpose of that employee. However a desire to have a wrongdoing investigated could be motivated by a range of factors from a belief that it is in the public interest to do so, to a desire, prompted by malice, that having the organisation or individual in an organisation investigated, will bring the subject of the investigation into disrepute. In either situation providing that the end result was to cause the employee to wish to have a serious wrongdoing investigated, the resulting disclosure of information about that wrongdoing, as long the employee believed it to be true or likely to be true, would attract the protection of the Act.

In conclusion the writer believes the absence in section 6 of any effective safe guard to screen disclosures of minor offences and those motivated by other than good faith objectives is of critical importance to the success of the Act.

D. Natural Justice and the Obligation of Confidentiality

Public sector organisations are required under the PDA to establish internal procedures for receiving and dealing with information about serious wrongdoing. These procedures must refer to the effects of section 8 (disclosures to the head of an organisation) section 9 (disclosures to appropriate authorities) and section 10 (disclosure to a Minister or the Ombudsman). The internal procedures are required to identify the persons in the organisation to whom disclosures may be made and comply with the 'principles of natural justice'. The Privacy

Commissioner in his submission to the Select Committee in 1997[87] recorded some concern regarding the natural justice requirement, in that the initial inquiries of an organisation following a wrongdoing may be investigative, rather than administrative in nature. The right to a fair unbiased hearing and that a person must be given full information about an accusation are the basic tenets of procedural requirements of natural justice. It is the second of these inherent rights that may counter the ability of an organisation to effectively investigate an alleged wrongdoing. An investigative inquiry may need to initially proceed with a degree of secrecy not to just protect the whistleblower, but also in order to prevent a suspected wrongdoer disposing of evidence of that wrongdoing. It is difficult to imagine how in such a circumstance a public sector organisation, that is required to comply with the principles of natural justice, could conduct an investigation without leaving itself open to later accusations of procedural impropriety. This argument does not deny the place of natural justice procedures being implemented in any later hearing. For if the preliminary investigation reveals prima facie evidence of wrongdoing, then "if the relevant circumstances are ones in which natural justice would normally be involved (for example, if a matter gives rise to a formal disciplinary process) the natural justice obligations would need to be reflected in internal guidelines in any case".[88]

As discussed the concept of natural justice, while difficult to precisely define, includes concepts such as the obligations to act fairly, the right to be given advance knowledge of the opposing case, including in some circumstances a right to know who is your accuser. Joseph *in Constitutional and Administrative Law in New Zealand* stated "[t]here is a prima facie breach of natural justice if all relevant evidential material is not disclosed".[89] Joseph identifies exceptions to this general rule are when the disclosure is in breach of confidence or is injurious to public interest. The PDA in section 19 places a statutory responsibility on the person who receives a protected disclosure, to use their best endeavours to keep

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[87] Office of the Privacy Commissioner " Report by the Privacy Commissioner to the Minister of Justice on the Protected Disclosures Bill" 13 May 1997 (www.privacy.org.nz/people/pdisc.html
[88] Office of the Privacy Commissioner, above n 87, para 4.5.4
[89] P Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co, Sydney, 1993) 726.

the identity of the discloser confidential, other than in exceptional cases. These exceptions include if the whistleblower consents to being identified or it is reasonably believed by the person receiving the disclosure as essential having regard to the principles of natural justice. It may be difficult for organisations to reconcile the references in sections 15 and 19 to the principles of natural justice against the requirements to maintain the secrecy of the discloser's identity. Therefore the requirements of natural justice will likely impact on the implementation of a successful whistleblowing scheme in two ways. Firstly it may inhibit a successful investigation of an alleged wrongdoing and secondly the requirements that the identity of the discloser be protected are eroded by a strict application of the procedural requirements of natural justice.

New Zealand courts have been very reluctant to allow the suppression of the identity of witnesses in criminal cases, for example when intimidation has been alleged, on the basis that the right to know the identity of an accuser is a fundamental principle of natural law.[90] While rigidity to the concept of procedural fairness may be justifiable in criminal prosecutions, the courts have observed that procedural as well as substantive fairness must also be observed in employment law situations.[91] In personal grievance actions resulting from the dismissal of employees, in part, due to complaints from colleagues whose identities were kept confidential, the courts have observed that the persons dismissed had a right to full information of all matters surrounding the dismissal. The fact that dismissed employees did not know the identity of the complainants, meant that the employees could not review the reliability of the complaints and thus raised the issue of procedural unfairness.[92]

Further under the common law, when a whistleblower has revealed information about an employer and later it is proved that the requisite 'public interest'

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[90] See *R v Hines* [1997] 3 NZLR 529 (CA) in which the Court of Appeal by a majority of 3-2 refused to review its previous finding in *R v Hughes* [1986] 2 NZLR 129 (CA) that an undercover policeman was required to disclose his true name, address and occupation.
[91] *Nelson Air Ltd v NZALPZ* [1994] ERNZ 665 (CA)
[92] See *Spotless Services (NZ) Ltd v Parker* 17/2/98 Palmer J CEC 7/98 and *Dallas v Wellington Newspapers Ltd* 2/4/98 Goddard CJ WEC 24/8.

standard is not met, the employer if it does not know the identity of the whistleblower, can succeed in discovering the whistleblower's identity from the recipient of the information.[93] The PDA is silent as to whether an organisation can discover the identity of a discloser, if it is shown that discloser made a false allegation or acted otherwise in bad faith. Section 20 provides that protections conferred by the Act will not apply in such circumstances and arguable the right to keep ones identity secret is a protection provided by the Act. In many cases the issue will be irrelevant as the organisation will have discovered the identity of the discloser, in order to show that the particular employee knew the information was false or was motivated by malice or ill will. If the organisation had yet to discover the identity of the whistleblower, the common law rules may apply to assist an organisation in such circumstances.

Finally the principles of the Privacy Act may also be in conflict with these natural justice considerations which require the disclosure of personal information about the alleged wrongdoer and also about any third party involved in the alleged actions.

E. Second Level Disclosures

1. Appropriate Authorities

As stated employees of organisations under the PDA have the right pursuant to section 9 to disclose information about their employer outside of the organisation to appropriate authorities if certain requirements are satisfied. As a result authorities such as the Commissioner of Police, the Controller and Auditor-General, the Ombudsmen, or the head of the Serious Fraud Office among others, as appropriate authorities, may be told confidential sensitive information about an organisation without those organisations having any opportunity to review or comment on what is being disclosed or even the opportunity to defend itself prior to the disclosure. However of more concern to the effectiveness of the PDA as a

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[93] P Bartlett and others (ed) *Employment Contracts* (Brooker's, Wellington 1991) Common Law, para 16.1.07(8), (updated 2 February 1998).

weapon to facilitate the investigation of serious wrongdoing, is the failure of the Act to provide bodies, that do not have any existing authority to operate in the private sector, with statutory authority to investigate wrongdoings when the alleged wrongdoing is within a private sector organisation. This point is discussed further under constitutional issues.

2. *Constitutional issue*

The Select Committee Report identified this issue as one that had been raised by the Ombudsman that the original Bill required public sector officials to exercise jurisdiction in the private sector. The Report stated that the Ombudsman for this reason had made a submission that it would be preferable to channel complaints arising from the private sector to specific officials in the public sector. The Select Committee Report did not see the need to consider this issue as the Bill (in 1997) had been amended to exclude the private sector. "We note that it is not the policy of the bill to extend jurisdiction of public sector officials into the private sector".[94] The committee then concluded " if coverage is extended to the private sector (in the future)....the issue may need to be considered further at that point".[95]

Unfortunately although the PDA has now been extended to the private sector, this issue was ignored. For while the Act contains a provision empowering the Ombudsman to have the same powers in relation to investigating a disclosure of information under that Act as in relation to a complaint under the Ombudsman Act 1975[96], there is no statutory power given to any other public sector official who may receive a disclosure of information about a private sector organisation to investigate that disclosure. Curiously under section 23, authority is given to the Ombudsmen to investigate the disclosure of information, but no power to investigate the wrongdoing. One may lead to the other, as the Ombudsman to investigate a disclosure will usually have to investigate whether there was a wrongdoing that precipitated the information, in order for the disclosure to be

[94] Protected Disclosures Bill 1996, no 208—2, viii (the select committee reports)
[95] Protected Disclosures Bill 1996, no 208—2, viii (the select committee reports)
[96] Protected Disclosures Act 2000, s 23

protected. But as one of the stated aims of the Act is to investigate wrongdoing, this should be the primary power, rather than a power to investigate the disclosure itself. Accordingly even the Ombudsman has no express power to investigate a wrongdoing, other than incidentally to an investigation of the disclosure of information.

The only express authority given to "appropriate authorities" as the recipients of second level disclosures in the PDA is the power to refer disclosures that can be more suitably and conveniently investigated by another authority, to that authority[97]. For example, if the State Services Commissioner receives a disclosure of information about a wrongdoing by a private sector organisation, then if it was about a criminal matter, pursuant to section 16, the matter could be referred to the Commissioner of Police who would then have authority to investigate the matter under the Crimes Act 1961 or other such statute. Similarly if the matter was about the environment or serious fraud then the matter could be referred to the Parliamentary Commissioner for the Environment or the Serious Fraud Office. However as the Commission of State Services is solely a creation of statute law, for the Commission itself to be able to investigate a serious wrongdoing in the private sector, this function and corresponding power to so operate, must also be derived from statute. The Commission was established by the State Sector Act 1988, which provides that the "Commission has all such powers as are reasonably necessary or expedient to enable it to carry out its functions and duties under this Act or any other enactment". The State Sector Act 1988 does not give the Commission power to investigate any activity in the private sector and the PDA, as the only other enactment that could be a source of such power, is also silent. In section 9 of the PDA it is stated that appropriate authorities, like the State Services Commissioner, may receive second level disclosures, however the Act does not specify in this section or elsewhere what such a body is required to do with the information once it has been received. Thus the failure of the PDA to empower or even require appropriate authorities to investigate an alleged wrongdoing, let alone require a private sector

[97] Protected Disclosures Act 2000, s16.

organisation to disclose information to it, is fundamental and one that need to be urgently addressed if the Act is to achieve its stated objectives.

3. *Linking of information to appropriate authorities*

One method that could be used to avoid this constitutional problem would be to link the sort of information being disclosed to an appropriate external authority. as this would ensure information concerning wrongdoings is directly disclosed to those authorities that have the jurisdiction and authority to investigate the particular matter. This was suggested by the Privacy Commissioner in 1997[98] in his submission to the Select Committee. This submission was rejected as it was argued that this would create a confusing scheme for whistleblowers. The alternative that we face is that an authority that receives a protected disclosure of information and believes that the information can be more suitably investigated by another authority may refer that information on to that other authority.[99] This clearly increases the risk of an inadvertent 'leak' of information.

The United Kingdom passed the Public Interest Disclosure Act (PIDA) in 1998, which commenced July 2 1999 and introduced new provisions into the Employment Rights Act 1996. The PIDA defines a qualifying disclosure as one which in the reasonable belief of the worker tends to show a criminal offence, a failure to comply with any legal obligation, a miscarriage of justice, the endangerment of health and the safety of any individual, damage to the environment or the concealment of any information showing any of the above actions. Under the PIDA there are six ways in which a worker can make a qualifying disclosure. Importantly if the information is to be disclosed outside of the organisation, there is requirement that it be disclosed, except in exceptionally serious cases, to a 'prescribed person'. A prescribed person is a person or body who the Secretary of State prescribes for the purpose of receiving disclosures about certain matters.[100] The writer suggests the failure of the PDA to link the

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[98] Office of the Privacy Commissioner, above n 87.
[99] Protected Disclosures Act 2000, s16.
[100] See The Public Interest Disclosure (Prescribed Persons) Order 1999 (UK)

subject matter of external disclosures to 'appropriate authorities' also increases privacy and confidentiality concerns of the Act

4. Disclosure to the Media

As well as linking the subject matter of disclosures to specified authorities, the PIDA differs from the PDA in that it provides in certain circumstances a protected disclosure may be made to the media. The PDA does not include the media in the list of 'appropriate authorities' and as "they are clearly dissimilar enough from those listed that it would be exceptionally hard to argue, on basic principles of statutory interpretation, that they should be deemed appropriate".[101] Proceeding on the basis that disclosure to the media is excluded from the protection of the PDA and this assumption is supported by the Select Committee report that stated that the Committee "consider [ed] that journalists should not be included within the definition of appropriate authority" as the "bill sets out a system that will discourage whistleblowers from making public their concerns about the serious wrongdoings in their work place".[102] This attitude can be compared with the PIDA[103] when what is described as 'second level external disclosures" can be made to external bodies including the media. In 'Whistleblowing: the New Law' the authors state:[104]

> Under section 43G...disclosures must meet three quite stringent tests in order to be protected. The first of these (section 43G(1)(a)-(c) deals in general terms with the good faith or other motives of the whistleblower. The second (section 43G(2)) sets out three preconditions, one of which must be met if the disclosure is to be capable of protection. Finally, to be protected the disclosure must be reasonable in all the circumstances (section 43G(1)(e) and (3)).

Importantly the PIDA specifies what factors the court must have regard to when considering all the circumstances and includes the identity of the person to whom

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[101] Katrine Evans "Protecting Insiders"(2000) 542 Law Talk, 19.
[102] Protected Disclosures Bill 1996, 208-2, viii (the select committee reports)
[103] Public Interest Disclosures Act 1998 (UK), note this Act in fact amended the Employment Rights Act 199 6(UK) by inserting a new Part IVA, being new sections ss 43A to 43H of the 1996 Act
[104] J Bowers, J Mitchell and J Lewis, above n 78, 34.

the disclosure is made, the seriousness of the relevant failure, whether the failure is likely to happen again in the future, if the matter had already been disclosed to an employer, what the employer had done and finally in certain circumstances whether the worker had followed the correct procedure laid down by the employer.

In light of these considerations it is unlikely that the media would at first instance be an appropriate body to whom a qualifying disclosure is made.[105] While the PIDA has been criticised as establishing a system for disclosure that is complex and potentially confusing for any one wishing to blow the whistle on organisational wrongdoing, it does direct the court to clearly examine the motives of the whistleblower and in certain prescribed circumstances to allow disclosure to the media. This the writer submits is a preferable position to excluding the media entirely from the PDA as it "overlook[s] the important role of newspapers in a free society"[106]and would "reduce the personal risk for disclosers in situations which may provide the greatest ease of reporting for those who wish to get something effective done about their concerns".[107]

However with the PDA in its present form, it is probably a valuable protection for organisations that disclosures to the media are not encouraged by qualifying as protected disclosures under the Act. There have also been numerous cases where information has been leaked to Members of Parliament, usually in an opposition party, who use that information to ask questions in Parliament in the purported interests of the public. This type of disclosure is also not covered by the PDA as Members of Parliament are specifically excluded from the list of appropriate authorities.

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[105] Mayne, above n 45, 327.
[106] "Whistleblower law a concern" The Press, Christchurch, New Zealand, 22 March 2000, 42.
[107] Evans, above n101, 19.

F False Allegations

1. Definition

A further issue will be the ambit of section 20, which establishes when the protections provided by the Act are to be withdrawn. It provides that when a person 'makes an allegation known to that person to be false or otherwise acts in bad faith' then the statutory protections against victimisation will not apply.

2. Allegations that are known to be false.

As previously discussed one of the criteria of section 6 for a disclosure to qualify for protection is that the employee must have reasonable grounds to believe that the information is 'true or likely to be true'. This probably objective requirement will need to be kept in mind when the courts decide on whom the burden of proof falls when applying section 20. Logically it would need to be the same party for both sections. However it is likely that it will be up to the organisation that wishes to bring an action against a discloser to produce evidence that the employee knew the information was not true or not likely to be true. The writer acknowledges there is a distinction in law as to the standard of proof required to show that someone did not in fact believe information to be 'true or likely to be true' compared to proving that someone knew information to be false. However for an employer to prove that an employee had no reasonable grounds to believe information to be true, may often result in the employer proving that the employee knew that it was false. Therefore the two tests may in fact be very similar.

3. Allegations that are otherwise in bad faith

However the second exception of when an employee acts 'otherwise in bad faith' causes more difficulties as it raises the question that if an employee who believes information to be true, but discloses it for reasons of malice or revenge, will the protection of the Act be lost? Further as discussed there are problems with the interpretation of section 6 as there is no express requirement that the discloser must believe the information should be available in the public interest and it may be difficult to convince the courts that such a public interest requirement should be implied. If the courts take a broad approach to what is a disclosure 'otherwise

in bad faith' as including situations when a discloser is motivated by reasons other than the public interest, then this potentially is be a backdoor method of restricting the application of the Act. Therefore one of the critical issues of the Act will be the width afforded to this phrase by the courts.

Applying the principles of statutory interpretation, there are several possible approaches that the courts may take. Firstly in the Act itself there is some guidance. Section 20 is headed "false allegations" and pursuant to section 5 of the Interpretation Act 1999, the meaning of an enactment may be considering in light of the headings to a section. Accordingly an action that is "otherwise in bad faith" may arguably be limited to situations analogous to disclosing information knowing that it is false, such as being reckless to the truth of a matter or disregarding the truth. This may even extend to a situation when someone intentionally discloses only part of certain information or discloses it in such a manner as to create a misleading understanding of the actions of an organisation. The information that is disclosed may be true and therefore would not literally be a false allegation, but it does create a false impression that can be as damaging and is likely to be classed as otherwise in bad faith

This argument is supported by the Government Administration Committee Report that indicates that the Committee was not anticipating protection being withdrawn on grounds other than for people who make false complaints. "We note that while the bill does not include penal provisions against employees who make false complaints, it does not provide protection for such employees. False allegations are specifically excluded from protection by clause 17 of the bill".[108] Clause 17 of the Bill has been restated without amendment in section 20 of the Act.

However the Minister of State Services, the Hon Trevor Mallard, stated during the Third Reading of the Bill if "people act in bad faith, if they are making up

[108]Protected Disclosures Bill 1996, no 208—2, x (the select committee reports)

something, if they are being malicious, then this legislation will not protect them.... they will be gone".[109] This statement supports an interpretation of the bad faith as extending to when a person discloses information, that is known to be true, but for reasons of spite or ill will. There is a strong argument that as a matter of statutory interpretation that "otherwise in bad faith" should extend to cover this sort of situation because by its inclusion in the Act, the Legislature has indicated that protection can be withdrawn in situations other than false allegations. Otherwise the phrase has no meaning. Such an interpretation may address concerns that an employee who is solely motivated by grounds of malice can be protected as long as it can be proven on reasonable grounds that the information disclosed is likely to be true. However would evidence of the existence of ill will alone be sufficient to lose the protection of the Act? What if it was proven that a discloser was partly motivated by reasons of malice and partly for public interest factors?

The writer suggests that one approach that the courts may use to answer these questions is to use by analogy the principles that the courts have developed in interpreting section 19 of the Defamation Act 1992. For both provisions operate to withdraw the statutory protection against the legal effects of disclosure of information in certain circumstances. Section 19 of the Defamation Act 1992 sets out the circumstances when the defence of qualified privilege against a claim for defamation is rebutted. The foundation of the defence of qualified privilege is "an acceptance that there are situations in which one may have a duty to tell the truth as one sees it without being liable to a damages claim if one is mistaken".[110] It is essential to the privilege that the maker of the statement has a duty to make it, but also that the recipient of the information has a duty or interest in receiving it. The parallels with the making of a protected disclosure are evident. The Defamation Act 1992 section 19 provides as follows:

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[109] (29 Mar 2000) NZPD http:/rangi/knowledge-basket.co.nz/hansard/

[110] New Zealand Law Commission *Defaming Politicians – A response to Lange v Atkinson: R64* (Wellington, 2000) 1.

19 Rebuttal of Qualified Privilege

(1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will toward the plaintiff, or otherwise took improper advantage of the occasion of the publication.

(2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

Accordingly a determination by the courts of the degree that ill will was the motivating factor is essential to the loss of a qualified privilege defence. Although in the Defamation Act 1992 the term 'malice' has been abandoned in favour or the above statutory test, previous case law is still relevant as it is highly unlikely that behaviour that is malicious will not fall within the section 19.[111] In terms of section 19, existence of ill will alone will not defeat a claim of privilege.[112] This only will occur when "the defendant's animosity is his or her sole reason for publishing that way".[113] The burden of proving ill will is on the plaintiff although it recognised that it can be a difficult to establish a defendant's motives for publication. Clearly if it can be shown that the defendant did not believe what was published that this is clear evidence of ill will. Generally the privilege is only to be withdrawn when the reason that the report was published or the statement made goes beyond the original reason for the privilege, namely that it was in the public interest that certain information be published. While there has been much legal debate and discussion about the nature of the public interest when the privilege is claimed by newspapers and publishers of general circulation, the extent of qualified privilege in regard to commentary on our political worthies is well beyond the scope of this paper. Indeed the nature of statements in those circumstances clearly falls outside of disclosures protected by the PDA. However the more traditional view of qualified privilege applies also to such things as references given by an employer, or an entry in ship's logbook

[111] J Burrows and U Cheer *Media Law in New Zealand* (4th ed, Oxford University Press, Auckland, 1999) 83.
[112] J Burrows and U Cheer, above n 111, 83.
[113] J Burrows and U Cheer, above n 111, 83.

and requires the courts to find a "common and corresponding duty or interest between the person who makes the communication and the person who receives it".[114] However to rebut the defence in a defamation proceedings express or actual malice, which at common law meant ill will or spite towards the plaintiff, or any indirect or improper motive must be proven by the plaintiff. At common law it had to be shown that such malice existed at the time of publication and that this was the defendant's sole or dominant motive for publishing the words in question. In terms of proving the existence of ill will, use of excessive language within a privilege occasion may be evidence of ill will. Further in the absence of any intrinsic evidence of good will, judges have allowed evidence to be presented to juries of extrinsic evidence of ill will, such as what the defendant did or said, before, at the time of or after the publication, including if the defendant has made other defamatory statements or if there is evidence of previous disputes.[115] Therefore if the phrase 'otherwise in bad faith' is interpreted by analogy with rules governing the loss of privilege, then the existence of malice and ill will, if this is the motivating reason behind the disclosure, may cause the discloser to lose the protection of the PDA.

One criticism of a wide interpretation of 'otherwise in bad faith' is that it will discourage an employee from disclosing a wrongdoing. If someone has in the past had a disagreement with an employer, can this be used as evidence of bad faith? In *Whistleblowing- Subversion or Corporate Citizenship?*, the editor refers to the catch 22 predicament of whistleblowers.[116]

> "If they do not exhaust internal channels, their deed seems irresponsible; they do harm without being able to show that it was necessary. Yet if they do exhaust all internal channels, they must have acquired grouses against their employers – if they do not have them already – since their employers have failed to heed their appeals.

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[114] *The Laws of New Zealand* (Butterworths, Wellington, 1994) vol 10, Defamation, para 98.
[115] Laws of New Zealand, above n 114, para 124
[116] Vinten, above n3, 13.

If the courts interpret 'otherwise in bad faith' as including when the whistleblowers action is motivated by other than public duty, this is likely to discourage employees blowing the whistle, especially outside of the organisation. The purpose of the PDA is to encourage the activity in prescribed situations. This can be achieved by clear guidelines as to when a disclosure is protected and when it will not be, so a prospective whistleblower can predict the likely effect of their actions, at least in terms of the employment relationship. If uncertainty exists, and a potential whistleblower has to consider the past relationship with the employer and other circumstances that may be interpreted as bad faith to an employer, then the meaning given to this section will seriously impact on the success of the statutory protection scheme.

The writer suggests the PDA would more successfully achieve a balance between the rights of employers and encouraging employees to disclose serious wrongdoing if the Act contained tighter limits of the types of activities that qualify as protected disclosures and secondly if the circumstances when the protection of the Act are withdrawn were drafted using more definite and precise language. Restricting section 20 to when a person knows information to be false or misleading or when a person is reckless to the truth of information would avoid much of this uncertainty. In Australia some of the states have enacted whistleblowing legislation. The Australian Capital Territories enacted the Public Interest Disclosure Act 1994 that applies to offences and misconduct of public officials. In the equivalent provision to section 20, a person is prohibited from knowingly or reckless making a false or misleading statement with the intention that it be acted on a public interest disclosure. Infringement of the section is a criminal offence. Similarly in Queensland, the Whistleblowers Protections Act 1994 provides that it is an offence to intentionally give information that is false or misleading in a material particular.[117] The writer suggests that either of these approaches is preferable to the wording of the current section 20.

[117] Whistleblowers Protection Act 1994, s 56 (Queensland)

If the courts take a broad approach to actions that are otherwise in bad faith, employees who lose the protection of the Act, may still have a remedy under the common law. Analysis of the common law cases provides that protection has been available in certain situations where public interest factors so demand, but questions of the motive of the whistleblower have not been the focus of the court's inquiry in such cases. As stated the Protected Disclosure Act is not stated to be a code and section 21 of the Act provides that any protections, privileges, immunity or defence, statutory or otherwise, relating to the disclosure of information are not limited by the Act. Therefore a person who loses protection under section 20, may still gain relief from any retaliatory action of the employer if the disclosure falls within the public interest categories recognised and protected by the common law.

G Other Issues

1 Immunity

As discussed employees who make protected disclosure of information are given immunity from any civil or criminal proceeding or from any disciplinary proceeding by reason of that disclosure. One issue is when the employees have themselves been involved in the wrongdoing. A lower level employee might rightly be able to claim, that he or she had no choice, but should a senior manager who may have even instigated the wrongdoing be afforded the same protection? Is the benefit to the public interest so great that having a wrongdoing disclosed in itself is sufficient to grant immunity to the whistleblower, regardless of all other factors? Clearly the Legislature believes this is so and declined to restrict immunity for those involved in the wrongdoing. This section of the PDA can be compared to the New South Wales Protected Disclosures Act 1994, which only applies to public sector employees. It provides that if a disclosure is made solely or substantially with the motive of avoiding dismissal or other disciplinary action, it is not a protected disclosure under that Act.[118] Under the PDA, as there is no such provision, there is a possibility of pre-emptive disclosures in accord with the Act being misused by senior employees and managers to avoid dismissal

[118] Protected Disclosures Act 1994, s 18 (NSW)

or censure. If an organisation did dismiss or censure an employee in this situation, claiming that it was not because of the disclosure, but because of previous activities of the employee, apart from issues of evidence and proof, the PDA provides little protection for the employer. Section 17 provides that where an employee who makes a protected disclosure under the Act claims to have suffered retaliatory action from his or her employer or former employer, that employee has a right to personal grievances under the Employment Contract Act 1991. The PDA does not expressly define "retaliatory action" and does not specifically provide that there has to be direct causative link between the disclosure and the "retaliatory action". This may of course be implicit in the use of the word 'retaliatory" but increases the uncertainty of an employer's rights in this situation.

2. Illegal disclosures

In the United Kingdom the PIDA clearly provides that if it is illegal for someone to make a disclosure, for instance if an employee has agreed to keep secret state and official information received as part of his or her position, then disclosure in accord with the PIDA will not qualify as a protected disclosure under that Act. This means that if someone discloses in this circumstance it would still be an offence. The PDA is silent on this issue, although it is clear that the PDA covers the armed forces and those that deal with intelligence and security matters.[119] Sections 12 to 14 set out special procedures for employees of intelligence and security agencies to disclose wrongdoings. Briefly such employees must disclose only to those persons with appropriate security clearance at the first level or at the second level to the Inspector-General of Intelligence and Security or the relevant Minister or Prime Minister. The general immunity given to a whistleblower under section 18 covers any criminal proceedings or disciplinary action and therefore a whistleblower who for example breaches the Armed Forces Discipline Act 1971 or the Intelligence and Security Committee Act 1996,

[119] Protected Disclosures Act 2000, s 3 states that phrase "intelligence and security agency" has the meaning given to it be section 2(1) of the Inspector General of Intelligence and Security Act 1996, namely being the New Zealand Security Intelligence Service, the Government Communications Security Bureau and any other agency declared by the Governor General to be an intelligence and security agency.

will be protected as long as the disclosure in accord with the sections of the PDA.

3 Promotion of the Act

Under the Act, the Ombudsman is statutorily empowered to provide information and guidance to an employee who has or is considering making a protected disclosure.[120] However the role of the Ombudsman is limited to providing information when an employee has approached that office seeking guidance. There is no community education role given to that office or any other body, which the writer submits is necessary to ensure that employees especially in private sector organisations are aware of the existence of procedures and protections of the Act.

VI CONCLUSION

The Protected Disclosures Act 2000 section 21 provides that the Minister of State Services, not sooner than 2 years after the commencement of the Act shall ensure a report be prepared on the operation of the Act and whether any amendments to the scope and operation of the Act are necessary or desirable. Paradoxically by 2003 there may be very little evidence of the operation of the Act. For if organisations have implemented effective internal procedures as part of a holistic approach to establishing ethical business practices, then there may be very little evidence of whistleblowing to an external observer. Disclosures are dealt with effectively and confidentially inside an organisation, ensuring that a whistleblower has no cause or justification to disclose outside of the organisation. Alternatively if an organisations does not have effective internal procedures or indeed any procedures at all, then a employee who may be considering disclosing outside of an organisation may be unwilling to do so due to uncertainty as to the consequences. For if an employer is able to show some disagreement in the past as evidence of ill will that can be used to rebut the protection of the Act, that whistleblower may remain silent rather than risk any reprisals.

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[120] Protected Disclosures Act 2000 s 15.

In conclusion private sector concerns about the increased opportunity afforded by the legislation for embittered ex-employees to cause havoc against former private sector organisations were raised before the Select Committee. It remains unclear given the uncertainties in the Act and the jurisdictional issues whether the Act will increase the level of whistleblowing in such circumstances or indeed whether it will increase at all. Therefore the writer believes that although the Act may have some effect on public sector agencies, as they are required to comply with the Act, there needs to be a great deal of publicity to educate the private sector of the benefits of institutionalised whistleblowing. Until this is undertaken and the inherent problems with the Act are resolved, it is unlikely in the writer's opinion, that the underlying social objectives of the Act will be achieved.