E.4

REVIEW OF THE OPERATION OF

THE PROTECTED DISCLOSURES ACT 2000

REPORT TO THE MINISTER OF STATE SERVICES

Presented by the Minister of State Services pursuant to section 24(3) of the Protected Disclosures Act 2000

CONTENTS

1. EXECUTIVE SUMMARY

1.1 The purpose of the Protected Disclosures Act 2000 is to facilitate the disclosure and investigation of serious wrongdoing within both public and private sector organisations, and to protect those who bring that information forward in accordance with procedures under the Act.

1.2 This review has considered the operation of the Act since it came into force on 1 January 2001, in light of submissions received and discussions held with a range of organisations and interested people.

1.3 There is limited information available. It appears the Act has had only limited use and some of that has been inappropriate. No significant issues were raised by the major employer and employee groups.

1.4 However, there were a number of important themes which emerged from the submissions. There was evidence of an inconsistent application of the Act, a number of issues arising out of the range of "appropriate authorities" provided for under the Act, and a strong perception, possibly a reality, that it was unlikely that the identity of a person making a protected disclosure would remain confidential. This appeared to have implications for employee confidence in the process and consequently the effectiveness of the Act in achieving its purposes.

1.5 It also appeared to me that, where the provisions of the Act had been incorporated into an organisation's culture of risk management and its institutions relating to appropriate ethical conduct, the procedures worked well.

1.6 The main parts of this report comprise a summary of information from various agencies and interested persons (Part 3 of this report); an analysis of whether the Act is operating to serve its purposes as intended (Part 4); and an outline of the issues and recommendations (Part 5). Those issues are discussed in more detail in Parts 6 to 10 of the report. The significant issue of the confidential nature of the identity of persons who make

protected disclosures, balanced against the rights to natural justice of those who are the subject of investigation, is explored in **Appendix 5**.

1.7 I conclude that, while it is early days, there are some signs that the Act would benefit in particular from a greater involvement by a body such as the Office of the Ombudsmen, if that is appropriate, to assist and support those wishing to make protected disclosures, to co-ordinate the referral of matters to appropriate agencies and to monitor the operation of the Act. While a number of amendments are proposed, this in my view would provide the most value in resolving the issues which were raised and in promoting the purposes of this legislation.

2. INTRODUCTION: TERMS OF REFERENCE AND OUTLINE OF THE ACT

2.1 This review of the Protected Disclosures Act 2000 is in accordance with Terms of Reference received from the Minister of State Services in June 2003. A copy of the Terms of Reference is **Appendix 1** to this report.

2.2 This review is required by s.24 of the Act. Section 24(1) provides:

> "*The Minister of State Services must, not sooner than 2 years after the commencement of this Act, cause a report to be prepared on –*
>
> *(a) the operation of this Act since its commencement; and*
>
> *(b) whether any amendments to the scope and contents of this Act are necessary or desirable, including an amendment to require further periodic reports to the House of Representatives on the operation of this Act."*

2.3 The Act also requires the Minister to present a copy of the report to the House of Representatives not later than three years after the commencement of the Act; s.24(3).

2.4 A brief summary of the process followed in conducting this review is **Appendix 2** to this report.

The Protected Disclosures Act 2000 – a brief summary

2.5 The Protected Disclosures Act was first introduced in Parliament as a Bill in 1996 and considered by the Government Administration Select Committee in 1997. It completed its path through Parliament in March 2000 and received the Royal Assent on 3 April 2000 . The Act came into force on 1 January 2001[1].

2.6 In broad summary, the Act protects an employee (including a former employee) of an organisation who discloses, in accordance with the Act, "serious wrongdoing" in that organisation from retaliatory action from the employer and from civil and criminal suit in relation to the making of the disclosure. "Serious wrongdoing" is limited to serious matters such

as criminal acts; corrupt or irregular use of funds or resources of a public sector organisation; acts which are a serious risk to public health or safety, to the environment, or to the maintenance of law; and acts by public officials that are oppressive, improperly discriminatory, grossly negligent or constitute gross mismanagement.[2]

2.7 The Act applies to employees in organisations in both the public and private sectors[3], and the definition of "an employee" includes a former employee, a person seconded to the organisation and an individual working for the organisation under a contract for services.

2.8 The general approach the legislation takes is to require disclosures to be made first within the organisation concerned, so that the organisation will deal with the serious wrongdoing. If the organisation fails to deal with the matter, or the employee is not satisfied with the way it has been dealt with, then the employee can take it to an authority best placed to deal with it - such as the Police, Serious Fraud Office or, in the public sector, examples are the Ombudsman or Controller and Auditor-General (referred to in the Act as "appropriate authorities"[4]).

2.9 The Act does not establish a special agency to deal with disclosures – it relies on existing agencies. Nor does it confer any special powers on existing agencies to deal with the matters disclosed under the Act – again, it relies on their existing functions and powers, the nature of which determines the "appropriateness" of the agency to investigate the disclosure. However, the Office of the Ombudsman is explicitly given the role of providing "information and guidance" to persons considering making, or making, a protected disclosure.[5]

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1 Protected Disclosures Act (PDA) s.2
2 PDA s.3
3 Refer definition of "organisation" in PDA s.3 and s.6
4 PDA s.9 and definition of "appropriate authority" in s.3
5 PDA s.15

3. HOW IS THE PROTECTED DISCLOSURES ACT 2000 OPERATING?

Introduction

3.1 In this part I summarise the experience of various organisations, groups and individuals as to how the Act is operating, as gleaned from their submissions, various documents provided and our interviews and discussions. It is important to note the context of a limited number of submissions, and many with very limited experiences of the Act. It is fair to conclude, in my view, that it is still "early days" in the operation of the Act.

3.2 In the first part I report in summary on the submissions and information received from five agencies, three of which are "appropriate authorities" under s.3 of the Act; Ministers of the Crown being a "last resort" authority for protected disclosures under s.10; and the Human Rights Commission as an "enforcement" agency where victimisation is alleged to follow a protected disclosure.[6] In the second part I review the position of employer, employee and special interests groups. The third part considers central government agencies. The fourth, local agencies and authorities. Fifthly, I refer to the position advanced by representatives of the media. Sixthly, I review the submissions of third party organisations or persons who have been involved in investigating protected disclosures. Seventhly, I review submissions from employment law practitioners; and finally submissions received from those who have attempted to utilise the Act to make a protected disclosure.

3.3 Given the confidential nature of much of the information, I am not able to give detailed examples of individual cases.

3.4 This part is considered under the following sub-headings:

A. "Appropriate authorities" and responsible agencies under the Act:

(i) The Office of the Ombudsman

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6 PDA s.25

(ii) The Human Rights Commission

(iii) Office of the Controller and Auditor General

(iv) Institute of Chartered Accountants

(v) Ministers of the Crown (Cabinet Office)

B. Employer, employee and special interest groups:

(i) Employer representative groups

(ii) Employee representative groups

(iii) Special interest groups

C. Central Government agencies:

(i) Agency A

(ii) Agency B

D. Local agencies and authorities:

(i) Local Authority

(ii) Primary School

E. Media

F. Third party persons or organisations involved in investigations of protected disclosures:

(i) Investigator C

(ii) Investigator D

G. Employment law practitioners:

(i) Practitioner E

(ii) Practitioner F

H. Submissions from "disclosers":

(i) Discloser G

(ii) Discloser H

A. "Appropriate authorities" and responsible agencies under the Act

(i) *The Office of the Ombudsmen*

3.5 I held an extensive and useful interview with the former Chief Ombudsman, Sir Brian Elwood, and a key member of the Office with special responsibilities under the Act. All references to the Chief Ombudsman in this section of the report are to Sir Brian Elwood.

3.6 The Office of the Ombudsmen has a critical role under the legislation. The Office is the provider of "information and guidance" to persons considering making a protected disclosure, from the public or private sector,[7] an "appropriate authority" for investigating matters within its jurisdiction[8] and a "last resort" body where a disclosure relates to a public sector organisation.[9] It is also the only body which can receive disclosures relating to certain matters of intelligence, security and/or international relations.[10]

3.7 The Chief Ombudsman noted that there is no comprehensive data on the extent of the overall use made of the Act as there is no particular organisation or person having any central control or oversight of the legislation. He did, however, observe two "surprising" features of the operation of the Act being:

3.7.1 It has not resulted in a significant volume of protected disclosures of serious wrongdoing; and

3.7.2 There appears to be considerable lack of knowledge of the terms of the Act and how the Act should be applied.

3.8 In very general terms, the Office would receive about 24 calls or contacts over a year, 75% of which are simply queries and would come under the "information and guidance" role of the Ombudsman. The Office has prepared a pamphlet on the Act, and also a collation of "notes" on the Act, which it will usually provide to those who call for advice. A copy of the most recent version of those notes is reproduced as **Appendix 3** to this

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7 PDA s.15
8 PDA s.9 and definition in s.3
9 PDA s.10
10 PDA s.13(f)

report. They usefully include a description of the broad role of (and contact details for) various "appropriate authorities", and a description of the protections provided by the Act, including under the Human Rights Act 1993.

3.9 So far as the Office can tell, perhaps up to 20% of inquiries are from employees in the private sector. The Office has had no express inquiries or disclosure under s.13 of the Act (relating to international relations, intelligence and security).

3.10 The Chief Ombudsman gave some examples of employers not recognising that a disclosure is a *"protected disclosure"* within the Act, and where the identity of the discloser has been revealed without consideration being given to the obligations of confidentiality under the Act. In the Chief Ombudsman's view this indicates inadequate processes and a lack of understanding of the legislation. It has the consequence of making the protections appear to be ineffective. One reason for the limited use of the Act could be that those who might disclose do not feel secure enough.

3.11 The Chief Ombudsman (correctly, in my view) considers the jurisdiction of the Office to investigate a protected disclosure is limited to the jurisdiction vested in the Office by the Ombudsmen Act 1975, i.e. to matters of administration affecting persons in their personal capacity and relating to the bodies listed in Schedule 1 of the Act. These are limited to central and local government agencies. Although the private sector is subject to the Protected Disclosures Act, private organisations are not within the Ombudsmen's general jurisdiction. Accordingly where there is no jurisdiction for an Ombudsman to investigate the subject matter of the protected disclosure, he will seek to refer matters to those agencies who have jurisdiction to deal with the particular issue. However the Chief Ombudsman referred to one particular longstanding complaint which apparently raised very significant and complex issues and where jurisdiction ranged over different bodies. This has resulted in no one agency considering itself able to grasp the whole issue, which has remained outstanding now for a very long time.

3.12 Very recently the Office has embarked on a joint investigation with another appropriate authority. This is not expressly envisaged by the Act but would seem sensible.

3.13 The Office has received complaints directly from Ministers in circumstances where Ministers have not personally taken any steps and where it would not appear appropriate that they do. Ministers are expressly not an "appropriate authority", but s.10(1) does give them a role, and there is a question as to whether they are effectively able to fulfil that role, and whether it should remain.

3.14 The Office has not had an influx of complaints that might be considered to be "inappropriate", vexatious or improperly motivated. One complaint was referred to where the Ombudsman, after investigation, concluded there was no "serious wrongdoing" under the Act but observed that, had the complaint been made by a person affected by the actions complained about under the Ombudsmen Act, then there were genuine matters of administration an Ombudsman might have addressed.

3.15 The Chief Ombudsman referred to the Ombudsmen's extensive experience of sitting and talking through issues with persons making complaints; the significant unsung role of the Office in defusing incidents and events. He considered it was important that the person dealing with a "complaint" was a good listener as the unburdening process was often particularly important. Although the Office had been surprised by the paucity of complaints under the Act during the first two and a half years, those it received had been quite time consuming.

(ii) *The Human Rights Commission*

3.16 The Human Rights Commission is responsible for dealing with complaints of victimisation that arise or are alleged to arise as a result of a person having made a protected disclosure. Section 66 of the Human Rights Act 1993 was extended by the Protected Disclosures Act to include redress for people who had been so victimised. Remedies under that Act may include damages and other forms of compensation.

3.17 The Commission advised it had yet to receive a complaint relating to the Act. It considered that this could partly be a result of the difficulty interpreting what it saw as a difficult and fragmented piece of legislation, and the resulting lack of understanding of the Commission's role. It suggested it was possible that persons wishing to act in the public interest by making a disclosure may find that the means by which they can claim protection is overly complicated or not strong enough to adequately protect them. The Commission noted that would seem to defeat the purpose of the Act.

(iii) *Office of the Controller and Auditor-General*

3.18 The Office of the Controller and Auditor-General (which I shall refer to as the Auditor-General) advised that the Office had also experienced comparatively little use of the Act. A reasonably significant number of people have approached the Office to discuss possible disclosures, but they do not necessarily want to use the Act. This indicates to the Office that perhaps the Act has as much usefulness as a part of the framework of legislation around public sector accountability as it does as a vehicle for making actual disclosures. Recorded statistics show the Office has received six protected disclosures as an "appropriate authority", three of which were multiple disclosures by the same person in respect of the same entity.

3.19 The Auditor-General provided some useful information relating to public sector compliance. Auditors had become aware of only a few protected disclosures under the Act. The general assessment was that the Act is more useful as a safeguard than something to be used frequently. They reported that the only significant compliance issue for public sector organisations under the Act is the need to have internal policies under s.11. Audit New Zealand developed template or model procedures, which it had then sold to public sector clients. The Auditor-General observed these seemed to have flowed through to a number of organisations.

3.20 The clear feedback from State sector auditors was that most organisations had appropriate internal procedures in operation. Of those that did not, the auditors were aware of only one organisation (a small Crown entity) that had failed to achieve compliance after having the matter drawn to its attention. I was advised that, as far as auditors could ascertain, most internal policies appeared in broad terms to meet the requirements in s.11(2) including compliance with the principles of natural justice, identifying persons to whom disclosures may be made and referring to circumstances where disclosures might be made to the head of an organisation, an appropriate authority or Minister of the Crown/Ombudsman. The auditors referred to s.11(3), that is the obligation on public sector agencies to publish, and re-publish at regular intervals, the existence of the internal procedures and adequate information on how to use the procedures, widely within the organisation. Compliance was difficult to gauge, and there seemed to be no clear standard as to what "regular intervals" means, but auditors had noted that organisations were likely to re-circulate their policies if reminded to do so.

3.21 Auditors noted that the Act's infrequent use might give rise to concern that a public sector organisation's internal policies will become an object of necessary legislative compliance rather than something of inherent significance. Indeed a "compliance" mentality had already been observed by some auditors. In correspondence with a number of public sector organisations about this, the Auditor-General has stressed the need for internal policies to move beyond strict compliance and instead seek to give effect to the objects and purposes of the Act, i.e. to facilitate disclosure and investigation of allegations of serious wrongdoing, and to afford protection to those who make disclosures.

3.22 Auditors have not reported any other issues arising out of the Protected Disclosures Act.

3.23 In his submission and in discussion with me, the Auditor-General raised a number of issues which are discussed later in this report. These were:

3.23.1 Who is the "head … of the organisation" (s.8(1))?

3.23.2 The appropriateness of the wide scope of the "appropriate authority" class;

3.23.3 Whether disclosures made anonymously are or should be protected; and

3.23.4 The scope of the restriction in respect of legal professional privilege under s.22.

3.24 Reference was made to the Auditor-General's report, Certain Matters Arising from the Allegations of Impropriety at Transend Worldwide Limited[11]. This inquiry and report followed an investigation by the Board of New Zealand Post into some disclosures not expressly made under the Protected Disclosures Act. It is notable for its record of the process that was followed, and the critique of that process. In that case the disclosures were made anonymously.

3.25 One of the issues raised by the Auditor-General and which appears to be significant is what might be referred to as an "enforcement gap". In some cases there can be doubt about whether particular conduct meets the test of "serious wrongdoing". It if does not, there is no legislated course to follow and no protection. In other cases, it can be particularly difficult to work out who is the "appropriate authority" where the organisation the subject of the complaint is essentially a private sector organisation, but is delivering public services on contract to a public sector organisation or using a grant of public funds. Public and political expectations are that, because public funds are involved, agencies of public accountability will have jurisdiction to investigate the complaint. In many cases, however, an appropriate authority with jurisdiction to investigate is hard to find. On some occasions, for example where a private body has access to public funds, the Auditor-General has a limited jurisdiction to follow the funds. In similar vein, the Ombudsmen's jurisdiction is limited to matters of administration involving a public sector organisation (i.e. the funding

[11] December 2002, ISBN 0-478-18103-5

body) that touch on the interests of the "complainant". If the matter falls short of fraud then the Police or SFO will not likely be interested. There are a number of examples, some cited by the Auditor-General and some by the Ombudsman, where persons wishing to make disclosures have encountered significant difficulty identifying the appropriate authority, and then with no certainty that the identified authority will actually deal with the matter. In the absence of any public law remedy, the only recourse may be to the funding organisation to enforce the terms of the funding contract.

3.26 In summary, the Office of the Controller and Auditor-General saw the legislation as an important part of the legal and ethical framework, particularly for the public sector. It is still a very recent piece of legislation and has not yet had close consideration in the Courts. Finally the Auditor-General commented, *"you wouldn't necessarily expect there to be a huge amount* [of disclosures of serious wrongdoing] *because New Zealand fundamentally isn't a highly corrupt society"*.

(iv) *Institute of Chartered Accountants*

3.27 The Institute of Chartered Accountants provided a very valuable submission. It is an "appropriate authority" within the definition of the Act, being "a private sector body which comprises members of a particular profession or calling and which has the power to discipline its members"[12].

3.28 The Institute considered that the provisions of the Act appeared to provide the necessary protections to facilitate disclosures. However it was not much used and the perception was that it was *"difficult to access"*. This could mean a simple lack of information and clear procedures which encouraged employees to take appropriate steps. A lack of awareness may also be a factor, together with the availability of other effective mechanisms for dealing with serious wrongdoing.

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12 PDA s.3(c)

3.29 The Institute observed that the lack of outward signs of the Act's operation did not mean it was not effective: for example, one would not expect to hear about protected disclosures if there was no retaliation.

3.30 The Institute indicated that the Act did not work well for the Accountants' disciplinary processes where confidentiality is difficult to maintain. It is usually fairly clear, where a complaint or disclosure is received, who the complainant is. If an employee is complaining about an employer or another employee (for example an accountant has made a staff member falsify some records) one would expect such a disclosure to be made to the employer organisation rather than the Institute. The Institute found that its obligations when receiving disclosures as an "appropriate authority" are unclear, especially where it was difficult to tell if the employee had followed the correct procedures under the Act.

3.31 The Institute referred to a KPMG survey published in 2002 on fraud in Australia and New Zealand (which included credit card fraud) which gave an indication of how important reports by employees are in detecting fraud.[13] The survey attracted 341 respondents from Australia and 20 from New Zealand (across the "largest private and public sector organisations"). Fifty five percent reported the detection of at least one fraud incident in the period (October 1999 to September 2001) at an average loss of $1.4 million per organisation. The survey found that employees identified and notified 25% of frauds. A further 23% were detected through internal controls.

3.32 The Institute considered that the Act encouraged private businesses to adopt internal processes so that they could control the way disclosures were made. However it noted that the KPMG survey did not find any increase from 1999 to 2002 in the number of organisations with formal reporting procedures (but note that the survey covered both New Zealand and Australian organisations)[14].

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13 KPMG Fraud Survey 2002: www.kpmg.co.nz

14 KPMG survey

3.33 The Institute reported that in October 2002 it constituted a specialist working group to review corporate reporting in New Zealand. The need for the review arose from recent reporting failures in the United States and Australia. The working group's report was presented to the Minister of Commerce in early May 2003. In the course of its investigations, the working group considered how best to facilitate the detection of fraud and other reporting-related offences. Within this context, it considered the provisions of the Protected Disclosures Act.

3.34 It considered that, at face value, the provisions appeared to provide the necessary protections to facilitate employees coming forward where they uncover *"serious wrongdoing"* in the course of their work. In the usual situation, such reporting will be made internally, ie within the organisation (in accordance with s.7). It expressed some concern that s.7 might discourage legitimate disclosures. The Institute considers the provisions of the legislation ought to provide a clear pathway for employees and others, including professional advisers, to make protected disclosures about wrongdoing.

(v) *Ministers of the Crown (Cabinet Office)*

3.35 Ministers of the Crown are expressly not "appropriate authorities" under s.3 of the Act. However, they have a role as the "last resort" port of call under s.10(1). For disclosures within private sector organisations, where the Office of the Ombudsman has no jurisdiction, a Minister is the sole "last resort" authority.

3.36 The Cabinet Office has had cause to provide advice to a Minister's office in the process of dealing with a disclosure under the Act and this highlighted a number of issues that have been the subject of a submission by the (former) Secretary of the Cabinet, Marie Shroff. The issues raised are considered under Part 5 of this report.

B. Employer, employee and special interest groups

(i) *Employer Representative Groups*

3.37 Submissions from and interviews with the key employer and business representative groups (Business New Zealand, and the New Zealand Business Roundtable), both indicated they had little if any experience to report, positive or negative, with the Act. The State Services Commission effectively made the same comment. Issues had not been raised with them, despite Business New Zealand carrying out a recent major survey of employers on compliance issues.

3.38 Both Business New Zealand and the Business Roundtable held to their submissions made when the Bill was before the Select Committee in 1997. In summary they submitted:

3.38.1 That the legislation was not necessary, there being adequate provisions and protections in the existing law; and

3.38.2 If the legislative measure was seen as necessary, there was no justification for it covering the private sector. In particular, concerns of unnecessary compliance costs without commensurate benefits were raised.

3.39 However there was no feedback about specific concerns with compliance issues, nor were any experiences of abuse of the Act reported.

3.40 Asked whether it considered the community was appropriately informed of the existence of the Act and its protections, Business New Zealand responded that it would be surprised if that was not so. However the view was expressed that it was probably only likely to be used at the high end of misconduct because such behaviour would seriously affect a company's ongoing viability.

(ii) *Employee Representative Groups*

3.41 Employee groups reflected the submission of employers; they too were not aware of any significant use of the Act by union members. The New

Zealand CTU saw this as a indication that the Act was largely serving its purpose, particularly in the public sector. It had received no comment at all from private sector unions. It considered it was too early to gain an accurate understanding of the effectiveness of the Act. It was aware of a number of issues arising, such as a concern about the inability to protect those making protected disclosures, but considered that insufficient use had been made of, for example, the s.17 (personal grievance) protections to demonstrate whether or not they were adequate.

3.42 The PSA indicated it was not aware of any successful efforts by members to use the Act and asked the question – why not? One example was given which raised concerns about the procedures and responsiveness of appropriate authorities but noted it would be unreasonable to draw firm conclusions from such evidence. It noted that there have been a number of instances of "leaks" (unauthorised disclosures) to the media by public servants on matters to do with their organisations and made the point that it would seem that people are not using the legislation when it is available to them. I note, however, that "leaks" are not necessarily about matters which amount to "serious wrongdoing" under the Act.

3.43 These comments from the PSA's submission are of particular relevance:

> *" … The Act is no substitute for ethical public service standards and good general procedures, and such measures should not undermine good information handling practice or core values such as the political neutrality of the public service. It is worth noting that the Public Service Code of Conduct sets out the government's expectations of the standards of behaviour and conduct for the public service, including these matters.*
>
> *The PSA believes that the Act reinforces both public confidence in the values and honesty of the New Zealand public service, and the ability of our members to carry out their work with integrity. While it has not been widely utilised, members see value in its existence as a last resort for disclosures of serious wrongdoing in their organisations. It reinforces the ethos of a good public service operating under principles of transparency and fairness and, arguably, signals a strong deterrent effect to avert wrongdoing. The fact that few disclosures are made also adds force to our belief that the public service is functioning according to the principles laid down in the Code of Conduct."*

3.44 The Association of Salaried Medical Specialists (ASMS) raised a concern about what it saw as the misuse of the legislation on two occasions where employees sought the protection of anonymity when making complaints about colleagues. The ASMS saw this as an inappropriate use of the legislation which, it argued, resulted in a breakdown of trust within the working environment.

3.45 The ASMS did not consider there to be a threat or realistic prospect of retribution, and was also concerned about natural justice considerations; in these situations the persons should know their accuser. They also raised concerns about the definition of "serious wrongdoing" in the public health environment.

(iii) *Special Interest Groups*

3.46 One of the interest groups to make submissions, the National Council of Women, observed that few people appeared to be making use of the Act and expressed concern that this was particularly so where private employers had not set up internal procedures for dealing with protected disclosures.

3.47 The New Zealand Law Society Employment Law Committee also had very little feedback to report from its members. It noted that there had been very few cases testing the legislation before the Employment Court. However one view was expressed that the Act may be overly complex, too bureaucratic and largely ineffective when measured against its goals. This view was largely based on media reports of several high profile cases, rather than the experience of practitioners.

3.48 There was also a body of opinion that considered the Act was unnecessary given existing processes and structures, and another view that internal procedures could be used by employers to (perhaps inappropriately) limit the ability of an employee to make a complaint outside of the employer's systems.

C. Central government agencies

3.49 Only two large core government agencies expressed an interest in making submissions or participating in this review. However, they provided a stark contrast. Both were large organisations, one with policy and compliance functions, the other essentially a policy agency dealing with a large number of related entities within a significant "social sector".

3.50 While this was a very small sample of central agencies, the range of experiences between them, together with submissions received and interviews with other persons and bodies with experiences of other public sector bodies, leads me to the tentative view that these two central government agencies reflect a range of typical experiences with the Act across cored government.

(i) *Agency A*

3.51 The first central government agency ("Agency A") interviewed was a very large organisation with offices around New Zealand. I spoke with the senior manager responsible for administering the Act (among other risk and assurance strategies). I will refer to him as the co-ordinating manager. He explained how the organisation had developed a policy and guidelines for staff, plus an implementation and communication strategy, prior to the Protected Disclosures Act coming into force at the beginning of 2001. Provisions relating to serious wrongdoing were included in the organisation's Code of Conduct. The Code of Conduct covered wrongdoing at any level and this agency encouraged disclosure of wrongdoing at any level. The policy relating to "serious wrongdoing" under the Protected Disclosures Act became an extension or "front end" to the previously existing policy. This approach appears to have assisted in dealing with any confusion or lack of clarity over what particular behaviours or acts fall within the definitions of "serious wrongdoing" and, in particular, "gross mal-administration". Agency A investigates all wrongdoing in any event and advises that the protections in place are largely the same.

3.52 Agency A expected significant use of the Act given the level of interest prior to its coming into effect. Accordingly, the very limited use to which it has been put has been somewhat of a surprise. The co-ordinating manager intuitively puts it down to human nature and a reluctance to come forward in certain circumstances, together with some concern over the practical ability to maintain the confidentiality of the identity of the person making the disclosure.

3.53 Agency A has received and dealt with six protected disclosures since the legislation came into effect, plus four others which ultimately did not meet the criteria of serious wrongdoing. There have also been a significant number of requests or approaches for confidential advice under the agency's policy. This is a particular part of the process which appears to work well. Employees are encouraged to seek advice on a confidential basis. The agency undertakes that employees will not be questioned, there would be no attempt to force them to disclose the wrongdoing and the discussion will be entirely confidential.

3.54 Another issue dealt with in Agency A's internal process policy was to ensure that the person to whom the disclosure is made actually does something about it. The policy requires the recipient of the disclosure to report the matter to the co-ordinating manager within five working days and the report will be confirmed to the person who made the disclosure. If that does not occur, then the person who made the disclosure is expected, under the policy, to report the matter directly to the co-ordinating manager.

3.55 The issue of confidentiality is an important one. The agency understands the ability to provide full confidentiality to somebody disclosing wrongdoing is almost non-existent and considers it to be a fundamental problem for staff. The guidelines relating to natural justice include reference to a person being entitled to know the identity of their accuser. I was nevertheless advised that the agency's policy is that the identity of any person making a protected disclosure is not to be disclosed to any other party without the express permission of the person who made the disclosure, or authorisation by the co-ordinating manager. The co-

ordinating manager's approach is to keep the identity confidential until such time as he is ordered by a Court to do otherwise. That approach has not yet been tested.

3.56 Agency A acknowledges that it is often apparent that the information being disclosed could only have come from one person. However, there have been several instances where there has been some distance between the people involved and the process has worked well with confidentiality of the discloser maintained.

3.57 I was advised that, without doubt, some very, very serious matters would not have been disclosed (and subsequently dealt with) had it not been for the existence of this legislation. It appeared to provide a degree of comfort that would otherwise not have been there.

3.58 I was advised that Agency A's approach was to try to diminish some of the negative attitudes associated with making a disclosure:

> *"We try to reinforce the concept of disclosure in the context of the integrity of the organisation and the behaviour of its people. We are faced with people who feel bad about what they have done* [i.e. making the disclosure] *and try to emphasise that it is a good thing, it has integrity, the person is standing up and being counted and we try to sell it as a plus; a protection for people who feel motivated enough to come forward. Disclosures are, of course, fed into the risk management processes of the organisation."*

3.59 Issues have arisen for Agency A in respect of anonymous disclosures. The agency's view is that these are not covered by the legislation – the protections cannot be provided to persons whose identity is not known and as you do not know whether the person is an "employee" within the Act you do not know whether the Act covers them.

3.60 The agency has not received any vexatious or frivolous complaints nor any that have become tied up in employment or personal grievance disputes. The policy makes clear that that would not be appropriate in any event. Similarly, it has not had any difficulties with people identifying the appropriate avenue for particular issues, e.g. the Privacy Commissioner, Ombudsman, etc.

3.61 The process adopted for complaints generally is also helpful because external complaints about actions of staff members are subject to investigation in a similar way, but without the protections and procedures of the Protected Disclosures Act as the person making the disclosure is not an employee. I noted the policies and guidelines of the agency appear to provide very thorough guidance and are available to all employees at induction, in the course of various training modules and are on the agency's intranet.

(ii) *Agency B*

3.62 The experience of another central government agency ("Agency B") was quite different. This agency faced a significant challenge dealing with large numbers of related entities. These included "public sector organisations" within the definition of the Act, and many private and community organisations involved in the sector.

3.63 Those responsible for implementing the legislation and overseeing disclosures described a level of confusion surrounding the legislation. It was variously described as not user friendly, being difficult for lay people to understand and often difficult to apply given the diversity of organisations within the sector, all of which are covered to some extent by the Act.

3.64 The primary issues surrounded definitions and jurisdiction. Confusion had been experienced about who could make a disclosure about what, and from what type of organisation. The issue particularly arose where public money was in the hands of private bodies removed from the centre, or where private bodies, such as incorporated societies or trusts, were carrying out public functions (generally using public funds to do so). The issues were not necessarily solely related to expenditure but included grievances with management or concerns about the actions of management within such organisations.

3.65 Issues had been identified surrounding the role of a sector Minister in the process. Disclosures made to the Minister inevitably result in the matter

being referred to the central government agencies supporting the Minister in the particular area.

3.66 The definition of "serious wrongdoing" had caused some problems for Agency B. Issues were also raised about the extent of the protections for the discloser where a matter was subsequently not found to qualify as a "protected disclosure", or where the proper processes/procedures had not been followed. A question was raised as to who should monitor whether internal policies were in place. Agency B encouraged internal policies in the relevant sector, but was aware that many organisations within the sector did not have internal policies. It did not have a role in auditing compliance.

3.67 Agency B had received six formal protected disclosures that have been the subject of some form of inquiry or investigation although, at the end of the day, none of these were considered to qualify as "serious wrongdoing" under the legislation. All but one involved related entities, not Agency B itself. Accordingly, Agency B was acting as an "appropriate authority" in those cases. This sample included a group of employees concerned at the performance of management in a private organisation. In some cases there were personal grievances outstanding between individual employees and management on behalf of the employer. In another case, an unsuccessful tenderer (and former "employee") made a disclosure which effectively challenged the outcome of the tender process on the grounds that the successful tenderer was not the best provider of those services. The tender process itself was reviewed by the agency and some lessons learned. The "disclosure" had been formulated in terms of a public health and safety risk which was not supported by any evidence.

3.68 In another case where a group of employees in another entity wished to anonymously air some grievances, it was clear that their concerns were about practices that did not meet the definition of "serious wrongdoing". The issue for that group was maintaining anonymity. In another case, the persons making the protected disclosure did not refer specifically to the legislation. However, the process they followed and the concerns they

were airing, plus the request for confidentiality, had all the hallmarks of a disclosure under the legislation. This created confusion.

3.69 Arguments have been made by persons involved in a protected disclosure process to Agency B that "serious wrongdoing" could be in the eye of the beholder (similar to harassment). However, the view expressed by Agency B was that it ought to in fact have a fairly high threshold because there were other means of dealing with many of the issues that concerned people within organisations. Examples were provided where the Protected Disclosures Act processes were inappropriately triggered. Those matters were eventually referred to the appropriate body (such as the Privacy Commissioner).

3.70 In terms of timeframes, one disclosure was still being investigated over seven months after the disclosure was made.

3.71 Agency B has distributed guidelines to various related entities noting that they must develop their own policies and attaching an example of a statement of policy and procedures. However, a number of organisations do not have procedures in place and Agency B has found it confusing in dealing with disclosures to sort out the proper processes to be followed.

3.72 Concerns were also expressed about when it was appropriate for a complaint from a private organisation that is a participant in the particular sector to be referred to and dealt with by Agency B as an appropriate authority (this issue could apply across, in particular, the health, education and social welfare sectors).

3.73 The Act also was said to give no guidance when a discloser makes a protected disclosure which the discloser believes has not been satisfactorily dealt with. It was acknowledged that while the legislation gives a person a broad range of appropriate authorities to choose from and the ability to transfer between appropriate authorities, no one authority is obliged to accept, investigate and deal with a matter.

D. Local agencies and authorities

(i) *Local Authority*

3.74 A submission was received from one local authority. It raised the issue of application of the Act to anonymous disclosures, submitting it was inappropriate for the Act to require organisations to accept such disclosures. It was submitted in such cases that there was no need for protection to guard against harassment or dismissal, and anonymous disclosures could compromise the application of natural justice to the person who was the subject of the disclosure.

3.75 The local authority was opposed to a requirement to increase obligations on organisations to make its employees aware of the requirement of the Act given the additional costs in terms of officer time and other compliance costs. It submitted it was better to concentrate on training and implementing tools to prevent and avoid serious wrongdoing. It also submitted that the exception to disclosure under the Official Information Act 1982 in s.19(2) should be extended to the Local Government Official Information and Meetings Act 1987. That is correct; this appears to be an oversight.

3.76 Finally, it raised the issue of whether elected members of local authorities, such as the mayor and councillors, came within the definition of "employee". The local authority submitted that elected representatives were not "concerned with management" at the detailed level of the organisation. Rather, they made up the governing body. It considered concerns by elected representatives could be considered directly by the Auditor-General or the Ombudsman.

(ii) *Primary School*

3.77 I was provided with a policy from a primary school together with a short submission from a representative of the Board of Trustees. They advised the Board was told it had to develop a policy. It had available to it a circular containing guidelines on the Act published by the Ministry of Education and including an example of a statement of policy and

procedures. The circular indicated that the School Trustees Association was issuing specific administrative advice on Board procedures and responsibilities under the Act. However, I was advised that the Board was simply told it had to tailor the policy to its individual circumstances, and the Board did not find this to be especially helpful.

E. Media

3.78 A submission was received from the Press Freedom Committee of the Commonwealth Press Union (New Zealand Section). The Committee Members include the editors of most of the significant daily newspapers, representatives of the Magazine Publishers' Association, the Newspapers Publishers' Association and senior representatives of radio and television.

3.79 The Press Union had argued before the Select Committee that the legislation would have a negative effect on freedom of expression in New Zealand and therefore a negative impact on the press, and not succeed in achieving its apparent intention to enhance public confidence in public institutions. This was because the Act set out a system that the Press Union believed would "systematically and powerfully discourage whistleblowers from making public their concerns about apparent wrongdoings". The Press Union also said it would make it more difficult for the press to carry out its important functions of "monitoring and making public apparent wrongdoings in public and private sector organisations".

3.80 The Press Union has advised it had no reason to change its views although it accepted that the Act was, in precedent terms, still in its infancy.

3.81 However, the Press Union considers that the requirement to follow a series of procedures in fact muzzles public whistle blowing and places it instead in a bureaucracy that the public might not even know about, let alone be able to react to appropriately. It submitted the Act actively encouraged employees to use procedures that impinged on their freedom of expression. The result was the encouraging of secrecy. It concluded it

was *"highly likely that the public is getting less knowledge of* ***potential*** *wrong-doings"* (my emphasis).

3.82 The Press Union consider that journalists should be classed as "appropriate authorities". Knowing a "whistle" might be blown in the news media acts as a powerful discipline in public and private sector organisations in terms of probity and professionalism. It submitted that the press generally goes about its reporting responsibly, usually not publishing information that might indicate dishonesty or malpractice unless and until it has independent corroboration. In some circumstances it keeps confidential the identity of the source of the information to ensure that the freedom of expression of the individual is not fettered by fear of reprisals from those about whom the accusation is made, or by anybody else. It commented, "anonymity is a natural defence sought by those who see no protection offered by this Act".

F. Third party organisations or persons involved in investigations of protected disclosures

3.83 I received some submissions and interviewed persons and organisations involved in carrying out investigations into serious wrongdoing on behalf of organisations as a result of receiving a protected disclosure. Two of these were with persons or bodies independent of the organisation itself.

(i) *Investigator C*

3.84 One organisation, which had been involved in a number of investigations ("Investigator C"), submitted that a common theme was that organisations do not have in place adequate procedures for the handling of protected disclosures. Two particular areas of concern were identified. First, that most private companies were not aware of the existence of the Act and have no procedures in place for handling protected disclosures at all; and secondly, those organisations that are aware of the Act either have no procedures in place or the procedures they do have are inadequate and poorly advertised to the staff concerned.

3.85 As a consequence, submissions were made that the requirement to have a procedure be extended to private sector organisations. It was said that the

benefit to both the informant employee, by way of protection from reprisal, and to the organisation itself, by way of better communication and reputation with the staff, would outweigh the compliance burden. (Note this was not accepted by Business New Zealand.)

3.86 Investigator C also submitted that the ability of the person receiving the protected disclosure to decide to reveal the informant's identity did not provide the level of certainty that was required and should be tightened up. Finally, it submitted that a national advertising campaign could improve public knowledge about the Act and highlight the damage caused to an organisation, and the country as a whole, by serious wrongdoing and the protection that the Act provides for persons prepared to act.

(ii) *Investigator D*

3.87 Another person who has carried out several investigations ("Investigator D") provided me with their impression of the processes. In one, there was a particular concern to keep the protected disclosure separate from matters touching on an employment dispute between the employer and the person who made the protected disclosure. The concern was that the employment dispute might be deferred or constrained as a result of the disclosure, and actions taken in its course seen as retaliatory. Accordingly, to the extent possible the issues were "ring-fenced".

3.88 There was a view that the matter raised was not a protected disclosure of "serious wrongdoing" within the terms of the Act, but it was decided that the matter would be treated as such and investigated first. There was a concern that, if the view was taken at an early stage that the matter was not governed by the Protected Disclosures Act, that determination would be the subject of an application for judicial review in the High Court. Because of the context in which the disclosure was made, in that case, the internal procedures were closely followed by the employer even though the matter might have been dealt with more appropriately, and quicker, following a different process. The nature of the misconduct alleged meant that it took some time for the investigative process to be

established. In the meantime, those subject to accusations about their behaviour could not be advised of anything other than the fact of the complaint, which created an unfortunate climate of mistrust and fear.

3.89 The investigation was thorough and found no misconduct had occurred. However, the delays involved were unhelpful.

3.90 There was an issue about disclosing the final report to the person who had made the disclosure and who considered that they had a right to see it.

3.91 Investigator D considered that new and different arguments were subsequently made by the discloser to the Ombudsman together with a complaint about the way the disclosure was dealt with. The personal opinion proffered by Investigator D was that this was a vexatious use of the Act given the same issues were before the Employment Court. In any event, the ability to make fresh allegations to the "appropriate authority" when they had not been the subject of a disclosure to the organisation involved, and subsequent investigation, is unsatisfactory. The absence of a requirement for feedback to the complainant is another weakness.

3.92 The second investigation carried out by Investigator D also arose in an employment context. In that case, an investigation was carried out within and over a very short period of time, the detailed report was provided in draft for comment to the person who made the disclosure and, while no serious wrongdoing was ultimately found, the matter was disposed of completely.

3.93 Investigator D confirmed that the cost of dealing with both matters was significant as a result of the use of the Protected Disclosures Act.

3.94 Investigator D also provided an example of a process of dealing with a confidential disclosure of an allegation of serious misconduct outside of the Act. In that situation, the discloser was concerned to have the matter sorted out in a way that ensured personalities were not relevant to any consideration of the complaint; to simply have the matter rectified if it was a problem and ensure systems were put in place to prevent it occurring again. Investigator D acted as an intermediary, taking the

matter to an appropriate authority with jurisdiction to investigate while protecting the anonymity of the informant. The matter was investigated, found to be established and action was taken. The benefits of that model were that the discloser was in fact better protected because the discloser's identity could not be revealed, and the risk that the discloser's motivations would have been misunderstood was avoided.

3.95 Investigator D observed that the requirement to use internal procedures certainly has superficial attraction. However, these can be so convoluted, technical and bureaucratic that people cannot effectively use them. Who to disclose to can be a particularly difficult issue and those considering such an action are generally not confident that their identity will be protected using those processes. Investigator D also considered that there was poor general knowledge of the Act and no one with a mandate to make the Act and its procedures known. They also considered that separate internal procedures to each organisation were not necessarily required – common codes could be appropriate.

G. Employment law practitioners

3.96 I have spoken to solicitors acting on both sides of employment disputes, in the course of which the employee has made a protected disclosure which, in the employee's view, reveals serious wrongdoing and which also vindicates the employee's position in the employment dispute. From the employer's perspective, the disclosures reveal no wrongdoing, and are seen as a defensive measure in the employment dispute. A concern is raised about use of the Act as part of an overall strategy for litigation, particularly where work-related stress is involved.

3.97 Both sides of the dispute have concerns about the operation of the Act in these circumstances.

(i) *Practitioner E*

3.98 I received a submission from, and spoke with, one experienced employment law practitioner ("Practitioner E") who has acted in three disputes involving protected disclosures. One worked particularly well

where there was a complaint genuinely made, a very quick but fair inquiry and, while no serious wrongdoing was found, the discloser was satisfied that the matter had been properly inquired into.

3.99 The second matter was made in the context of, and became entangled with, a difficult employment dispute. The investigation took several months and this delay created particular difficulties within the organisation. The employer saw the disclosure as a defensive measure and part of the employee's litigation strategy, but the employer was very careful to attempt to follow the procedures set out for the organisation in dealing with protected disclosures. The results of the investigation did not satisfy the discloser, who, on the face of it, had a significant personal interest in the outcome. One of the difficulties raised with me were the complications in trying to settle the employment dispute given the outstanding issues relating to the protected disclosure. On the one hand, the employer wants all matters resolved and settled; on the other the employee feels they are being subject to improper pressure to withdraw what they see as legitimate concerns. This is exacerbated further where the employee has invested considerable resources in pursuing the protected disclosure.

3.100 In the third example an investigation into certain protected disclosures could not fairly be completed because of the ill health of the person subject to the allegations. That person's employment was terminated for health reasons, but an employment-related grievance became difficult to resolve because of concerns about the prospect of publicity relating to the unresolved complaints, for example if relevant information was made available under the Official Information Act.

(ii) *Practitioner F*

3.101 Another employment law practitioner ("Practitioner F") raised a number of significant issues they had faced in an attempt to pursue a protected disclosure on behalf of their client. They found the legislation particularly complex and difficult to apply. They did not feel that they

were able to either protect their client or get to the bottom of the alleged serious wrongdoing. They were concerned with aspects of the investigative process. In particular, they consider the discloser ought to have been consulted about the investigative process to be undertaken, including the terms of reference, given an opportunity to comment on the draft report, and given a copy of the final report.

3.102 They found it difficult to prove that retaliation was a motive for employment actions taken against the discloser. They were dissatisfied with the process of referring the matter to an "appropriate authority" and the to-ing and fro-ing over who had jurisdiction, whether the matter met the threshold for consideration, and then with the actions of the appropriate authority once someone with jurisdiction had taken the matter up. In that case the Office of the Ombudsmen, in their view, simply reviewed the investigation carried out by the organisation involved when it ought to have carried out its own investigation.

3.103 Practitioner F also found it difficult to persuade the Office of the Ombudsmen that the matter raised questions of public interest rather than purely private interests, which were properly for the employment jurisdiction. They particularly raised concerns about what they saw as an inevitable overlap between employment issues and the Protected Disclosures Act where an "employee" raises a "serious wrongdoing" within the definition of s.3(e): "an Act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement".

3.104 Practitioner F strongly disputed the suggestion that employees misused the Act for advancing employment disputes. They were of the view that an employee has no personal remedies under the Act. They pointed to anecdotal evidence that it is the whistleblower who suffers and that, despite the alleged confidential nature of the process, inevitably the complainant is identified as a consequence of the investigative process.

3.105 They agreed that the perception that "investigations" on matters of public interest were being carried out behind closed doors in a secretive manner

was true and that matters which might be better debated in Parliament or through the media were not coming to light.

3.106 They advised that they would not recommend any prospective client in future to use the Act. Their reasons, in summary, were:

- The process is secretive and non-transparent;
- A lack of accountability by the investigator;
- Identity will never be confidential;
- The process is cumbersome and time consuming;
- Retaliatory action will occur but in some other form and will be difficult to relate back to s.17;
- Whilst a complainant only has to have a reasonable belief of a wrongdoing, in reality much more is imposed on that person to provide a higher standard of proof before jurisdiction is exercised;
- In obtaining professional assistance the cost to the discloser can be prohibitive;
- Lack of protection to professional advisors (other than lawyers);
- Making a disclosure can come at a high cost which can adversely affect a person's personal life and health. Inevitably it seems the employee finishes the process unemployed.

3.107 Finally the submission was made:

> *"New Zealand is a country with a small public service compared to other similar jurisdictions. To this extent informal personal networks are very close. In order to avoid perceptions of self-judgment by peers in a service which the public must have confidence within at all times, an independent Protected Disclosures Panel may be required to administer the Act".*

H. Submissions from "disclosers"

3.108 I received a number of confidential submissions from persons who had attempted to make protected disclosures. There are obvious dangers in treating this small sample as representative of the common experience of disclosers. Other information would indicate it is not. Their experiences, nevertheless, were instructive. And they were all negative.

3.109 The majority took place within the context of employment grievances where it was not possible for me to judge the rights and wrongs of what had occurred. Nevertheless their sense of frustration at what they saw as the impotence of the legislation to offer them any real protection was plain. They unanimously were of the view that the internal processes had worked against them and the legislation did not achieve its aims. Two fairly typical examples follow.

(i) *Discloser G*

3.110 One person ("Discloser G") who has pursued a protected disclosure for several years raised issues surrounding the following:

- The need for support and advice for the person making the disclosure;
- The likely lack of any anonymity for the discloser;
- The lack of clear definitions and procedures in the legislation and in internal organisational procedures;
- The difficulty in finding the "appropriate authority" (in this case no fewer than six appropriate authorities were approached for assistance);
- The lack of clarity about the responsibilities and respective jurisdictions of "appropriate authorities", issues of resourcing and the appropriateness of Ministers being "last resort" authorities given the limits on what they can do, and related concerns about confidentiality issues where ministerial correspondence is subject to consideration and response by departmental officials;

- The delays experienced under the Act. Discloser G reiterated the view, heard in other cases, that going to the media or opposition Members of Parliament[15] was "professional suicide" for somebody working within a public agency.

3.111 There was an indication that Discloser G's pursuit of their protected disclosure had adverse consequences, if not for their position in the organisation, then for the type of work they were assigned. They described their experience as that of somebody who has witnessed a murder and could see the body but would not find anyone prepared to admit that someone is dead and that it should be investigated.

(ii) *Discloser H*

3.112 Another person who had struggled with the experience of making a protected disclosure about what they saw as fairly shocking evidence of gross mismanagement ("Discloser H") felt that the process had mistreated them. They maintained all they wanted to do was get the particular facts of the matter off their chest to somebody independent of the organisation they worked for. They found accessing the Act extremely complex and were passed around between several appropriate authorities. Discloser H said they wanted someone to sit down, look at what they had to say and form a view of whether it was serious, or were they just over-reacting. They realised they were emotionally involved in the issue and needed to have someone look at it objectively. However what confronted and confounded them were the procedural hoops they were required to jump through. The main concern of the various appropriate authorities appeared to Discloser H to be whether they had properly followed the internal procedures.

3.113 Discloser H ended up feeling guilty about trying to disclose information and felt they (and not the alleged wrongdoer) were punished as a result. They consider that internal procedures result in, or seem to result in, "in-house white washes" where important matters never see the light of day.

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15 I.e. making a disclosure outside of the Act and consequently open to the usual legal remedies and any available common law public interest defence.

3.114 Discloser H reported that a meeting was arranged with the responsible Minister, and that they were not warned that this would include representatives from a number of organisations, including that which was the subject of the disclosure.

3.115 Again, the personal toll on Discloser H was apparent.

4. IS THE ACT OPERATING AS INTENDED?

Introduction and summary

4.1 This part of the report considers how the Act was intended to operate, and identifies three key themes, being facilitating the disclosure of serious wrongdoing, facilitating its investigation, and protecting employees who make disclosures in accordance with the provisions of the Act.

4.2 It then considers how the Act is in fact operating against these three key themes or purposes. In the context of limited use and experience of the Act to date, I nevertheless conclude that the purpose of protection of the identity of the discloser does not appear to be working as intended, and that this has a potentially significant impact on the purposes of facilitating, reporting and investigation of serious wrongdoing. The remaining protections have not been adequately tested to date.

4.3 It further concludes that there is a level of confusion over the operation of the Act and its procedures, and limited knowledge and use of the Ombudsmen's role of providing information and guidance.

4.4 Finally, I note there are very good examples of the Act operating as intended. The apparent hallmarks of these, and the signs of difficulties with the Act, are noted.

How was the Act intended to operate?

4.5 The primary legislative intention is found in the purpose stated in s.5 of the Act as follows:

> "*The purpose of this Act is to promote the public interest –*
>
> *(a) by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation; and*
>
> *(b) by protecting employees who, in accordance with this Act make disclosures of information about serious wrongdoing in or by an organisation."*

4.6 Three key themes are evident in this purpose provision, which are carried through into the provisions of the Act:

(i) Facilitating the disclosure of serious wrongdoing;

(ii) Facilitating the investigation of serious wrongdoing; and

(iii) Protecting "employees" (as defined) who make disclosures in accordance with the Act.

These themes were emphasised by the Minister of State Services when the Bill was debated in the House in its ultimate form[16].

4.7 The Minister identified the purpose of the new law and some of the reasoning behind it during the Committee stages of the debate. He referred to it as:

> *"… an attempt to improve accountability in New Zealand, both in business and in the public sector. It is really important that we reinforce the ethical values and the standards. … We have to contribute to the management of risk in the Public Service …"*

4.8 He went on to stress the intention to offer a significant degree of protection to employees, while acknowledging they would always be in a vulnerable position. However, the protection offered was nevertheless intended to facilitate disclosure and thereby deter wrongdoing:

> *"What this legislation also does, and what is really its main purpose, is to protect employees. It states the people who do blow the whistle will have a degree of protection. I say that it is probably not enough protection. Given human nature, whistleblowers will always be in a vulnerable position. But this legislation gives a significant amount of protection to employees and encourages them to be straight forward. It will strengthen the organisational cultures, especially within the Public Service. The knowledge that this legislation exists means that people have to ensure that wrongdoing is minimised."*[17]

4.9 The Minister emphasised the importance of confidentiality in protecting an employee, and the expectation that there would be appropriate systems

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16 See in particular the debates in Committee; NZPD (Hansard) Vol.582 pp.1417-1440, 28 March 2000, and 3rd reading NZPD Vol.582 pp.1488-1508, 29 March 2000

17 NZPD Vol.582 pp.1418-9, 28 March 2000

in place to ensure that. He linked this to the ability to have the matter appropriately investigated:

> *"It is important that we have confidentiality and privacy in this area. There must be an ability to blow the whistle privately and in a confidential sense. There must be the ability to go to an appropriate person and blow the whistle. In some cases it might be the Commissioner of Police; in other cases it might be the Controller and Auditor-General; it might be the Chief Executive of a particular department; it might be one of Parliament's commissioners, but it is very important that confidential approach can be made. It is important that when people do that they are protected, that they get support from their management, and that those systems are in place. We have to make sure that employees are confident in that area."*[18]

4.10 He noted the changes anticipated:

> *"Public Service agencies will have to look carefully at their practices and their systems because this legislation creates an onus on both the employers and the employees. What they will do is focus on their own systems and processes. They will clarify responsibility and they will also be required to be proactive and positive. I hope one of the results will be a rebuilding of trust within the Public Service and within the private sector between employers and employees. … this Bill will promote integrity from within.*
>
> *… What will happen in practice? I think we will have a number of changes. I think there will be some systemic changes. … I think that … Public Service organisations will build up systems so that the reactions are appropriate at the appropriate level.*
>
> *There is real potential in this Bill. I think that it can ripple out and make a difference to New Zealand's culture. We can make a difference to recruitments and retention in the Public Service. We can make a difference to the culture in the private sector. …*
>
> *I think there will be increased transparency in the Public Sector."*[19]

4.11 In moving that the Bill be read a third time, the Minister referred to its background and the need to offer employees who disclosed matters of serious wrongdoing a greater degree of protection and reduce impediments to such disclosure. The Minister stated:

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18 NZPD Vol.582 p.1419, 28 March 2000

19 NZPD Vol.582 p.1419, 28 March 2000

> "*The Bill remedies this situation. The purpose of the Bill is to establish a protection scheme that will promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing."*

4.12 The improved protections for employees were intended to be the foundations on which the objectives of promoting the public interest by facilitating disclosure and investigation were built. Their importance was emphasised.

4.13 The Minister noted the protection rights as "clear and comprehensive". These were the ability to bring personal grievances in respect of any retaliatory action by their employers (s.17), immunity from civil, criminal, or disciplinary proceedings by reason of having made or referred the disclosure of information (s.18) and the obligation on a person to whom a protected disclosure is made or referred to use his or her best endeavours not to disclose information that might identify the person who made the protected disclosure, unless certain conditions apply (s.19). Section 66(1)(a) of the Human Rights Act 1993 was also amended to bring within that jurisdiction an offence of victimisation on the basis of a person making use of their rights to make a disclosure or give information in relation to a disclosure under the Act (s.25). Other legal protections available were preserved (s.21).

4.14 The Minister emphasised that the protections were not available when a person making a disclosure makes the allegation knowing it to be false or otherwise acting in bad faith (s.20). Legally privileged information was intended to be outside of the Act (s.22).

4.15 Importantly, in my view, the Minister noted that:

> *"…the Office of the Ombudsmen will provide information and guidance for employees making disclosures."*

This is provided for in s.15 of the Act. Section 15 requires an Ombudsman to provide information and guidance to an employee disclosing or considering the disclosure of information under the Act on a number of specified matters, including the kinds of disclosures that are protected, the way information may be disclosed, the person to whom

information may be disclosed, the broad role of each appropriate authority, the protections and remedies available to the person and how particular information disclosed to one appropriate authority might be referred to another appropriate authority. Clearly it was intended that the Office would be a point of reference for persons in both the public and private sector who might seek to access the protections of the Act.

4.16 The Act was given a lead-in time of nine months to allow agencies to prepare for its implementation and for public sector organisations to establish internal procedures.[20]

Is the Act operating as intended?

4.17 The general consensus among major employer and employee groups, together with key appropriate authorities under the Act, was that these were early days and there was insufficient information available and very little case law to be able to judge at this stage the success or otherwise of the Act. The indications were that, generally, it did not seem well used and that any problems that arose were likely to be teething problems while the legislation "beds in".

4.18 Several different possibilities were advanced as reasons why there was little information and apparently little use of the legislation:

(i) It could be assumed that the Act is operating as intended and that organisations are properly investigating and dealing with serious wrongdoing as matters are brought to their attention and so matters go no further;

(ii) Serious wrongdoing is narrowly defined and its occurrence will be rare;

(iii) A lack of information about, and knowledge of, the legislation may be responsible for its lack of use;

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[20] Hon. Trevor Mallard, Minister of State Services NZPD Vol.582p.1489, 29 March 2000

(iv) Concern about its accessibility and the robustness of its protections may be such that people do not feel safe disclosing under the Act;

(v) People are just not comfortable disclosing information about the activities of other people.

4.19 In my view, there is some evidence of all of these reasons influencing or contributing to the apparently limited use of the Act. Such information as is available is discussed in relation to each of the three identified purposes or themes of the legislation, being:

(i) Promoting the public interest by protecting persons who use the Act to disclose serious wrongdoing;

(ii) Promoting the public interest by facilitating disclosure of serious wrongdoing; and

(iii) Promoting the public interest by facilitating the investigation of serious wrongdoing.

(i) *First Purpose of the Act: The Purpose of Protection*

4.20 The purpose of protecting persons who use the Act to disclose serious wrongdoing was described by the Minister as the "main purpose"[21] of the Act. He observed that:

> *'*[The] *purpose of the Bill is to establish a protection scheme that will promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing'*[22].

Thus by protecting persons, one achieves the secondary purposes of facilitating disclosures and their investigation.

4.21 There are essentially four types of protection under the legislation:

- Confidentiality and privacy;

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21 NZPD Vol. 582 p.1418, 28 March 2000
22 NZPD Vol. 582 p.1489, 29 March 2000

- Personal grievance against retaliatory action under the Employment Relations Act 2000;
- Immunity from civil and criminal proceedings;
- Remedies for victimisation under the Human Rights Act 1993.

(a) *Confidentiality and privacy*

4.22 Perhaps the most significant protection is that of confidentiality. This was emphasised by the Minister[23]. However, the legislation offers only a qualified protection to a discloser's identity. Section 19(1) provides as follows:

> "*Every person to whom a protected disclosure is made or referred must use his or her best endeavours not to disclose information that might identify the person who made the protected disclosure unless –*
>
> *(a) that person consents in writing to the disclosure of that information; or*
>
> *(b) the person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of identifying information –*
>
> *(i) is essential to the effective investigation of the allegations in the protected disclosure; or*
>
> *(ii) is essential to prevent risk to public health or public safety or the environment; or*
>
> *(iii) is essential having regard to the principals of natural justice"*[24]

4.23 The obligation is that "best endeavours" are made to ensure protection of identity. A "best endeavours" obligation is well understood at law,[25] it carries a significant burden and requires conscientious effort to do all that is reasonable to preserve confidentiality. Apart from circumstances where the discloser consents, their identity may be disclosed in one of

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23 NZPD Vol. 582 p.1419, 28 March 2000 (refer para.4.8 above)

24 PDA s.19(1)

25 See, for example, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 64-5

three identified situations, but in each case only if the person holding that identifying information "reasonably believes" disclosure to be "essential".

4.24 This is an important area where I consider the legislation is not working as intended. There appears to be a significant body of opinion that the identity of the "accuser" must, as a matter of natural justice, be disclosed to the person accused. In my view that is not always so as a matter of law, and there are a number of steps which can be taken (and should be taken under the "best endeavours" obligation) to ensure that both natural justice is met and confidentiality of identity maintained. This is discussed further in Part 8 of this report and in **Appendix 5**. Nevertheless, it is certainly a widely held belief, and is included in some internal procedures, and argued in a number of employment law publications[26].

4.25 There is also evidence of disclosure through simple mistake and/or inadequate processes. The person or organisation responsible for unreasonably breaching the obligation to protect is not liable to any direct penalty. The only avenues of possible redress are a complaint to the Ombudsman and/or Human Rights Commission where the consequences could be investigated and if necessary addressed. In relation to the Ombudsman, this would be in a non-dispositive way.

(b) *Personal grievance; and*
(c) *Immunity from civil and criminal proceedings*

4.26 The second protection offered by the Act is the ability for an employee to bring a personal grievance under the Employment Relations Act 2000 if the employee has suffered retaliatory action as a result of making a protected disclosure[27].

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26 For example Natural Justice and the protection of identity under the Protected Disclosures Act 2000, Nicola Whittfield, Employment Law Bulletin (5) July 2001: 90-92

27 PDA s.17

4.27 The third protection offered is immunity from any civil or criminal proceedings as a result of making a protected disclosure or referring a protected disclosure to an appropriate authority[28].

4.28 It is difficult to judge the extent the Act is working given the paucity of cases. The four cases where there has been some discussion of the Act are summarised in **Appendix 4** of this report. Only one was before the High Court and the comments made were not directed to any issue before the Court[29]. I agree with the submission of the CTU that insufficient use has been made of these protections to demonstrate whether or not they are adequate.

(d) *Protection against victimisation*

4.29 The fourth protection under the Act is provided by an amendment to the Human Rights Act 1993 to enable a complaint to the Human Rights Review Tribunal where a person claims he or she has been victimised because of matters relating to the making of a protected disclosure.[30]

4.30 The Human Rights Commission has no record of any complaints for victimisation on this basis. I was given a number of confidential examples by persons who had made disclosures which might have given cause for such a complaint. However, I was not able to judge the merits of the examples, having heard only one side of the story.

(e) *Limits to the protections*

4.31 These protections have limits. The intention of the Act is that its protections are only afforded to those who make protected disclosures, believing them to be true and in good faith. It is not intended to be, in the words of the Minister of State Services:

> *" … a charter for malicious employees, people on the skids, or people who make things up"*[31]

Thus s.20 expressly provides that:

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28 PDA s.18

29 *Neuronz Ltd v. Tran & Ors* (refer **Appendix 4** Case 3)

30 PDA s.25, amending s.66(1)(a) of the Human Rights Act 1993

31 NZPD Vol.582 p.1489, 29 March 2000

"False allegations -

The protections offered by this Act and by s.66(1)(a) of the Human Rights Act 1993 do not apply where the person who makes a disclosure of information makes an allegation known to that person to be false or otherwise acts in bad faith".

4.32 There were no examples provided to me of false allegations under the Act. One opinion was advanced that use of the legislation in the course of an employment dispute was tactical and in bad faith, but the issue was not tested before the Court. It does not appear that there is a difficulty with false allegations or allegations made in bad faith.

4.33 The other implicit limit to the Act is that the protections only apply where a disclosure is made "in the manner provided by this Act". If, for example, the wrongdoing is not "serious wrongdoing", then it appears the protections of the Act will not apply. While the existing law should protect an employee, who discloses information in good faith, from retaliation or victimisation, this is not a desirable situation given the definition of "serious wrongdoing" is reasonably open to interpretation. The position is even more ambiguous if the procedures set out in the Act are not strictly followed. This issue is also discussed in Part 5 of this report.

(ii) *Second Purpose of the Act: The Purpose of Facilitating Disclosure*

4.34 Apart from offering protections to those who wish to disclose serious wrongdoing, the legislation meets the objective of facilitating disclosure of "serious wrongdoing" by different methods, depending on whether the organisation in which the wrongdoing is occurring is a public or private body.

4.35 The Act requires "public sector organisations" to establish internal procedures for receiving and dealing with information about serious wrongdoing (s.11).

4.36 A "public sector organisation" is defined in s.3 and includes the organisations named in Schedule 1 of the Ombudsman Act 1975 and Schedule 1 of the Official Information Act 1982, and Local Authorities or

Public Bodies named in Schedule 1 of the Local Government Official Information and Meetings Act 1987.

4.37 The definition also covers local authority trading enterprises, intelligence and security agencies, Parliamentary Service and the Office of the Clerk of the House. Special rules are set out in relation to intelligence and security and international relations matters[32].

4.38 As for organisations outside that definition, which is all of the private sector and some public sector bodies such as the Office of the Controller and Auditor-General itself, it is up to them whether they put internal procedures in place. If internal procedures exist then an employee must follow them (s.7). If there are no internal procedures then the disclosure may be made to the "head or deputy head of the organisation"[33] and, if the employee reasonably believes that the head of the organisation is or may be involved, then to an "appropriate authority"[34].

4.39 The other means by which the legislation facilitates disclosure is by providing in s.15 for an Ombudsman to provide "information and guidance" to any person (in the private or public sector) who has disclosed or is considering the disclosure of information under the Act[35].

4.40 To facilitate disclosure the Act also requires information about the existence of the internal procedures, and adequate information on how to use them, to be published widely in the organisation and re-published at regular intervals[36]. This of course applies only to public sector organisations. While private sector organisations may or may not have internal procedures they are only required to be "published" and not necessarily re-published from time to time[37]. There is accordingly a significant prospect that employees in private organisations will have very limited, if any, knowledge of the legislation and how it might work in their particular organisation. In this regard, the Ombudsmen's Office

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32 PDA ss. 12-14
33 PDA s.8(1)(a)
34 PDA s.9(1)(a)
35 PDA s.15
36 PDA s.11(3)

is able to assist in providing information and guidance. The Office reports it has not received many inquiries from private sector employees and in any event is limited as to how it can assist, as the Office has no jurisdiction to seek copies of procedures from private sector organisations etc.

4.41 If the legislation were operating as intended, one might expect to see:

(i) Clear procedures existing for all public sector organisations;

(ii) A reasonable level of publicity and education within public sector organisations about the operation of the Act;

(iii) A level of confidence about the protections offered in both the public and private sector.

4.42 It was encouraging to see that Audit New Zealand was able to report reasonable compliance with s.11. However, from the sample I have seen, there appears to be a broad range of procedures throughout public sector organisations. They range in clarity from extremely good to very poor. Some organisations report finding the legislation confusing and uncertain and this can be reflected in their procedures. I would not be surprised if those seeking to follow them found them unsatisfactory.

4.43 There also seems to be a level of confusion as to how the Act is to operate to facilitate disclosures by employees in the private sector. First, the employee, if he or she knows about the Act, has to find out whether the organisation has any internal procedures that they are obliged to follow. This applies to former employees also. If there are no procedures, then the first point for disclosure is to the "head" or "deputy head" of the organisation (which can itself be ambiguous)[38]. Beyond that, an employee has to locate an "appropriate authority" and/or go directly to the authority of last resort – a Minister of the Crown under s.10.[39] Given the limited jurisdictions of the Offices of the Ombudsmen and Auditor-

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37 PDA ss.7(1) and 8(1)(a) which refer to the "internal procedures established … and published"

38 PDA s.8(1)(a)

39 PDA s.9

General, there are few obvious places to turn. The appropriateness and ability of a Minister to investigate in the circumstances is likely to be limited.

4.44 For employees in private sector organisations, which have access to public funds, there is some confusion. I heard of employees who approached the sector Minister, the head of the sector Ministry, the Auditor-General and the Ombudsman before finding a body to accept jurisdiction. Locating an appropriate authority with both the jurisdiction and resources to investigate can be problematic.

4.45 It appears that the legislation and internal procedures, if any, are not well publicised, known and understood. One indication to me was that the high cost to an organisation of dealing with such matters deters education in the procedures. However, in another organisation, the high cost of **not** dealing with such wrongdoing was at the forefront of the organisation's approach. In the latter organisation, clear procedures and an apparently healthy management culture of encouragement and support for disclosers have resulted in an impressive integration of procedures for complaints generally. I considered this to positively facilitate disclosure.

4.46 The Office of the Ombudsmen has observed that there had been a level of publicity of the Act through professional publications, particularly those dealing with employment law. However, I was particularly disappointed to note that the Ombudsmen's role under s.15 to provide information and guidance to those contemplating, or making, a disclosure under the Act does not appear to be well known or utilised. The Office reported a limited number of inquiries[40].

4.47 Some of the public sector organisation policies I saw did not refer at all to the ability for a person considering making a protected disclosure to approach the Ombudsmen's office for guidance and information. Those which did refer to the provision generally put it at the very end of the policy and procedures, almost as an "oh and by the way", and where it is likely to have had little impact. Some policies only referred to the

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[40] Ombudsmen Quarterly Review, Vol. 8 issue 4, December 2002, p.1

Ombudsmen's role in assisting to determine the appropriate "appropriate authority" once the circumstances listed in s.9 had arisen (a belief that the head of the organisation is or may be involved in the wrongdoing; urgency or exceptional circumstances; or no action within 20 working days).

4.48 In my view, a golden opportunity to steer persons in the right direction has been lost by not emphasising this role upfront. The Office of the Ombudsmen is well able to assist persons in determining whether the Act applies to them, and how to proceed. It can also provide a much-needed "diffusing" role, and where appropriate can point people in other more relevant or helpful directions.

(iii) *Third Purpose of the Act: The purpose of facilitating investigation*

4.49 The relevant provisions in the Act relating to investigations can be summarised as follows:

(a) *Public sector organisations:*

(i) The public sector must have clear procedures for receiving and dealing with information (s.11).

(ii) The Act requires that those procedures must:

(a) Comply with the principles of natural justice;

(b) Identify a person to whom the disclosure may be made; and

(c) Include a reference to the effect of ss.8-10. Sections 8 to 10 relate to when a disclosure may be made to the "head or deputy head of the organisation", when it may be made an appropriate authority and when it might be made to a Minister of the Crown or Ombudsman; i.e. the circumstances in which, and persons or bodies to which, a disclosure might be escalated.

(iii) Public sector organisations must widely publish within the organisation at regular intervals, information about the existence of the procedures and how to use them (s.11(3)).

(iv) Requests for information under the Official Information Act 1982, which might identify the discloser, may be refused as contrary to the Act (s.19(2)).

(b) Public and private sector organisations:

(v) There is no obligation on an organisation to investigate. However, if no action (or no recommended action) is taken within 20 working days from the date of disclosure then the matter can be escalated to an appropriate authority (s.9(1)(c)).

(vi) The Act permits an employee to go outside any internal procedures in limited circumstances and provides a means of further escalating the disclosure where there is no progress or unsatisfactory progress, including where an organisation decides to take no action (ss.9 and 10).

(vii) The Act provides for information to be investigated by the appropriate authority which can most "suitably and conveniently" investigate the matter by permitting referral between appropriate authorities (s.16).

(viii) Where a person involved in investigating a protected disclosure reasonably believes that (notwithstanding their best endeavours) it is essential to the effective investigation of the allegations, or to prevent serious health and safety or environmental risk, or having regard to the principles of natural justice, to disclose information identifying the person who made the protected disclosure, then that information can be disclosed (s.19(1)(b)). It can also be disclosed to a member of the Police for the purpose of investigating an offence (s.19(2)). These provisions are intended to facilitate investigation.

4.50 Notably there is no obligation to investigate under the legislation. Conceivably a person could make a disclosure and have it effectively ignored by the discloser's employer, an appropriate authority and a Minister. I have seen no example of this and do not perceive it to be a current issue. However, it is possible that disclosures may not be investigated, or investigated fully, because of the limited resources and other priorities of the appropriate authority. One could expect a sufficiently serious allegation of wrongdoing would attract the necessary resources, but that may not be so. A discloser always has the alternative choice of making an unprotected disclosure to the media and/or an Opposition MP in these circumstances, and in a sufficiently serious case it is likely to qualify for the limited protections of the common law.

4.51 I have also considered a number of examples of successful investigation of matters which would (if proved) likely amount to "serious wrongdoing" but without using the Protected Disclosures Act. Arguably the Transend example referred to by the Auditor-General and the example given by Investigator D[41], were more successful than many investigations under the Act as the anonymity of the disclosers was carefully and systematically protected.

Conclusion

4.52 There are good examples available of the Act working as intended. The hallmarks of good procedures for facilitating the making and investigation of protected disclosures under the Act appear to be as follows:

(i) The existence of clear, well-publicised and understood procedures, possibly integrated with other organisational procedures (for example investigations of any alleged wrongdoing, and so largely avoiding definitional problems and complex, separate procedures);

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41 Refer para.3.94 above

(ii) Anonymity is protected where that is sought. A discloser will not always seek anonymity. Often his or her identity is, or will be, readily apparent by the nature of the disclosure, and this is usually understood by the discloser;

(iii) Clear separation of investigation into a protected disclosure from any ongoing employment-related dispute with the discloser;

(iv) The discloser is supported by the organisation and "kept in the loop" about the investigation and resolution of the matter to the extent that is reasonable;

(v) Prompt investigation and outcome.

4.53 Those examples I was presented with, and which appeared to run into problems not intended by the legislation, invariably offended two or more of the above identified hallmarks. The legislation did not appear to be working as intended in circumstances marked by:

(i) A lack of knowledge about the Act itself;

(ii) A level of confusion about the various definitions and procedures in the Act;

(iii) A lack of appreciation that the Office of the Ombudsman could assist;

(iv) A lack of confidentiality and protection of the identity of persons disclosing information;

(v) Lengthy timeframes involved in dealing with issues;

(vi) Lack of communication with the discloser;

(vii) Difficulties identifying the "appropriate authority" and issues relating to the extent of their jurisdiction.

4.54 My conclusion is that it is too early to identify with precision any significant concerns in the way the Act is operating. Nevertheless there

are sufficient indications, in my view, of deficiencies in the way the Act is interpreted and/or implemented which impede the purpose of facilitating disclosure and investigation of serious wrongdoing. In my view it would be appropriate to monitor these matters as the legislation matures, dealing with recognised issues as the opportunity to amend the Act arises. Particular issues are discussed, and recommendations made, in parts 6 to 10 of this report, and summarised in part 5.

5. PROBLEMS WITH THE OPERATION OF THE ACT: THE ISSUES AND RECOMMENDATIONS

Issues

5.1 The issues that have arisen in the course of my consultations and consideration of the legislation are discussed over the following five parts. I consider the extent to which these issues might be "problems" with the operation of the Act and make recommendations where appropriate. Once again I emphasise that one must keep in mind the limited experience available to date with the operation of the Act. Nevertheless some clear issues appear to be emerging

5.2 The issues are approached under the following headings:

A. Co-ordinating disclosures and providing guidance and support for the discloser (Part 6).

B. "Appropriate authority" issues (Part 7):

B1. Which authority is the "appropriate authority"?

B2. Disclosure to Ministers of the Crown under s.10;

B3. Should disclosure to the media be protected?

C. Confidential identity of the discloser (Part 8):

C1. Adequacy of the s.19 protection;

C2. Anonymous disclosures.

D. Issues surrounding internal procedures (Part 9):

D1. Obligation to establish internal procedures;

D2. Obligation to follow internal procedures;

D3. Circumstances where protection may be lost.

E. Definitional issues (Part 10):

E1. Who is the "head" of an organisation?

E2. Legal professional privilege.

Recommendations

5.3 The following recommendations are made:

(a) The Ombudsmen's Office and functions under s.15 be extended, or an alternative co-ordinating and support agency be established, to assume a role of guidance, support and active assistance for those considering making, or actually making, disclosures under the Act. This role will include:

- Assisting a potential discloser to identify the appropriate means (if any) of pursuing the matter of concern (which may not be via the Act);
- Assisting a potential discloser to identify the internal procedures, if any, of the relevant organisation, including obtaining that information from the organisation without identifying the potential discloser;
- Assisting a discloser to "escalate" a matter where appropriate under s.9 or s.10, including liasing with potential "appropriate authorities", Ombudsman and/or Minister to identify jurisdiction etc.

(b) Reference to the co-ordinating and support agency's confidential advice, counselling and facilitating role be one of the first matters to be set out in internal procedures, with the recommendation that persons considering making a protected disclosure should feel free to contact that agency in the first instance or at any time.

(c) The co-ordinating and support agency assume responsibility for referring all protected disclosures that are not resolved within the

relevant public or private sector organisation to the appropriate authority or authorities with relevant jurisdiction to investigate the protected disclosure.

(d) Consideration be given to the same agency having a role in monitoring the progress of the investigation, receiving reports on its outcome, liasing with the discloser and reporting to Parliament on the number of inquiries and investigations it has facilitated, and their outcome in broad terms. This role could also extend to private sector bodies to the extent that the disclosure relates to public money or the provision of some public service.

(e) The Act should be amended to provide that a discloser may refer a protected disclosure to a Minister of the Crown **only** after the matter has been referred to an appropriate authority (preferably in accordance with the information and guidance of the co-ordinating and support agency – refer recommendation (c)). The other requirements of s.10 relating to disclosure to a Minister should remain.

(f) Guidelines for dealing with protected disclosures to Ministers (in particular to ensure the protections to be afforded under the Act are not compromised) should be prepared and included in an appropriate publication, such as the Cabinet Office Manual.

(g) Guidelines be developed and made available to organisations, which emphasise their obligations to keep confidential the identity of the discloser except in very limited circumstances when other alternatives for meeting the requirements of natural justice are not realistically open.

(h) The co-ordinating and support agency be empowered to assist investigating agencies to protect the identity of the discloser as part of its role of supporting the discloser and facilitating investigation.

(i) The effective protection of the identity of the discloser be monitored with a view to strengthening the protection afforded by the Act if organisations and/or the Courts adopt an approach which does not offer effective protection.

(j) The remedies available where there is inappropriate disclosure of a discloser's identity be emphasised to organisations and monitored for their effectiveness.

(k) That the Act be amended to expressly permit anonymous disclosures, possibly by requiring internal procedures to permit disclosures to be made through a third party or anonymously in the first instance, but recognising that, unless sufficient information is available, there may be difficulties progressing the investigation.

(l) That model or template procedures be developed and made available by the co-ordinating and support agency, with consideration to regulating for these to be mandatory if necessary.

(m) That the Act be amended (if necessary) to provide that an otherwise protected disclosure will not lose its protection in the following circumstances:

- Where the discloser reasonably believed the information was about a "serious wrongdoing" but where, upon investigation, the matter is found not to constitute "serious wrongdoing";

- Where there is not strict compliance with the procedural requirements of ss.7-10 of the Act by the discloser but there is nevertheless substantial compliance;

- Where the discloser does not refer to the Act but it is plain that the substance of the disclosure in fact merits protection and it is appropriate to apply those protections.

(n) That the Audit Office check, as a matter of compliance, that the internal procedures of public sector organisations ensure that an appropriate person or persons is identified who meets the requirements of s.8.

(o) That s.22 be amended to clarify the extent of the exclusion of legally privileged information from the scope of the Act.

(p) The Act be amended to extend appropriate protections to those who provide information in the course of an investigation or in support of a protected disclosure by another individual.

6. ISSUES PART A: CO-ORDINATING DISCLOSURES AND PROVIDING GUIDANCE AND SUPPORT FOR DISCLOSER

Issue

6.1 The mix of possible procedures for making a disclosure, together with the range of appropriate authorities, issues surrounding jurisdiction and the complexities of the "escalation" process are some of the issues which create actual or perceived impediments to disclosure, which in turn frustrates the statutory objective of facilitating the disclosure and investigation of serious wrongdoing. The role of the Office of the Ombudsmen to provide information and guidance under s.15 of the Act is neither well publicised nor utilised. A more active and well-promoted facilitation/co-ordination/support role could mitigate or remedy many of the issues raised in the course of this review.

Discussion

6.2 Information, guidance and support for a person considering making a protected disclosure is critical. There is much literature to support the view that people will be deterred from reporting serious wrongdoing because of concerns for the personal consequences[42]. In a New South Wales survey of over 1,300 public servants for the Independent Commission Against Corruption[43], almost 75% agreed or strongly agreed with the statement *"people who report corruption are likely to suffer for it"*[44]. Officials recognised that the price of disclosure is usually high, and the protection mechanisms can be insufficient to the situation[45].

6.3 Other issues relevant to this discussion are broad-ranging and include:

6.3.1 The potential for difficulties in accessing the proper procedures under the Act;

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42 E.g. Alan Lovell, The Enduring Phenomenon of Moral Muteness – Suppressed Whistleblowing, Public Integrity, Summer 2003, Vol 5 No 3 pp.187-204.

43 Zipparo, Encouraging Public Sector Employees to Report Workplace Corruption (1999) 58 Aust J Public Administration, p.85

44 Zipparo, p.17

45 Issues Paper, 28 February 1994, p.8

6.3.2 Confusion surrounding the relevant appropriate authority or body to deal with a particular matter;

6.3.3 Uncertainty in defining "serious wrongdoing";

6.3.4 Lack of any obligation to investigate a protected disclosure and limited reporting requirements.

6.4 The Report of the Ministerial Review on Whistleblowing ("the Ministerial Review"), which provided the broad policy foundation for the ultimate legislation, envisaged a role of counsellor and "clearing house" for the Office of the Ombudsmen[46].

6.5 It was of the view that a separate agency or authority to receive, investigate and deal with public interest disclosures was not necessary but recommended that the Office of the Ombudsmen be the recipient of notification where a discloser was unsure where to turn:

> *"We anticipate the role of the Ombudsman* [in relation to organisations with any element of public ownership] *primarily to be that of a counsellor and 'clearing house', rather than necessarily carrying out a full investigation. The Ombudsman's role would be to counsel the discloser as to mechanisms available within the organisation for that person to use, prior to recourse to any external agency. This may be as simple as advising the discloser that the organisation has designated a 'mentor' for the purpose of assisting employees to have the matter heard. The Ombudsmen may then refer appropriate matters to another agency for investigation, and receive a report from that agency, to enable feedback to be given to the discloser.*
>
> *The Ombudsmen may also have a screening role, involving the exercise of a judgment that a matter is more clearly a grievance between employer/employee that would appropriately be dealt with by the* [relevant employment authority]. *"*[47]

On this latter point of a "screening role", the Ministerial Review also observed:

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46 Report of the Ministerial Review on Whistleblowing, 20 October 1995 ("Ministerial Review Report)", e.g. p.4

47 Ministerial Review Report, Annex 1, pp.7-8

> *"The Ombudsmen would also be able to conduct initial screening to determine whether the nature of the complaint was such as to warrant referral."*[48]

6.6 The Ministerial Review accurately predicted the potential for confusion on the part of the potential discloser as to which law enforcement agency, regulatory authority or watchdog would have the authority (or jurisdiction) to investigate and address the particular concern. It also anticipated uncertainty over whether the discloser's concern was actually unlawful activity (or "serious wrongdoing" under the 2000 Act). It saw the Office of the Ombudsmen as well capable of assisting the discloser to resolve these issues[49].

6.7 After noting the jurisdictions of a number of "appropriate authorities", the Ministerial Review noted that:

> *"No single agency currently has a clear perceived role of providing advice and counselling to individuals considering making disclosures outside their employing organisation."*

It noted there were gaps in the jurisdiction between these authorities, and there was:

> *"… a need to maintain and develop the co-ordination and transfer of referral between authorities to ensure those existing resources are used effectively."*[50]

6.8 One of the key planks of the legislative framework ultimately recommended by the Ministerial Review, which draws existing processes and organisations together, was a counselling and "clearing house" role for the Ombudsmen. The Ministerial Review did not see a separate authority as necessary, but noted that it was important that there be:

> *"… continued co-ordination between agencies and provision made for counselling and facilitating disclosure."*[51]

It also noted that a greater degree of public information about the functions of the various agencies was appropriate[52].

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48 Ministerial Review Report, p.30
49 Ministerial Review Report, p.15
50 Ministerial Review Report, p.19
51 Ministerial Review Report, p.30

6.9 The Ministerial Review noted the complementary nature of the Ombudsmen's existing role and procedures, high public standing and staff with relevant skills and experience[53]. It considered the Office would be a very appropriate point of contact with which disclosers could raise concerns. Its primary role should be to offer counselling and support, and referral. It did not envisage that the Office would be involved in much investigation, although it would at times.

6.10 It considered the Ombudsmen's constitutional position and function, that is to promote the accountability of the Executive to Parliament, and noted that broadening the Office's responsibility to also have a degree of oversight over the activities of private sector organisations might not be appropriate. However, it was of the view that a separate oversight organisation would be unnecessarily cumbersome[54]. The Ministerial Review ultimately considered it was not appropriate to extend the Office's role into the private sector. Rather it considered agencies or authorities receiving disclosures from private sector employees:

> *"… must be prepared to adopt appropriate investigative procedures including the provision of counselling and referral services and the relevant legislation may need to be reviewed to ensure that this happens."*[55]

However, the Act does in fact give the Ombudsmen the role of providing information and guidance to anyone contemplating or making a protected disclosure, irrespective of whether the disclosure relates to a public or private sector organisation.

6.11 Nevertheless, the full extent of the role as anticipated by the Ministerial Review has not eventuated. In my view, this is to the overall detriment of the effectiveness of the Act.

6.12 It appears to me that the Office of the Ombudsmen is indeed well capable of fulfilling these functions for both public and private sector employees and that it is sensible to have one place of contact. However, I have

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52 Ministerial Review Report, p.4
53 Ministerial Review Report, pp.15-16
54 Ministerial Review Report, p.13
55 Ministerial Review Report, p.32

concerns about the appropriateness of that Office taking on an enhanced and strengthened role under the Act. The difficulty is in ensuring that the Office's constitutional position and its independence is not perceived to be compromised. If the enhanced role is perceived as conflicting with the Ombudsmen's broader constitutional position (a matter others are best placed to judge), then a separate office or body may be appropriate.

6.13 I note the particular wording of s.15 was selected with some care to avoid any suggestion of compromising or diminishing the investigative role of the Office[56].

6.14 The Office of the Ombudsmen advises that its first response to receiving an inquiry about the Act is to send people a copy of notes prepared on the Act[57]. It reports that only a few people seek further assistance. A senior member of staff will be made available to discuss the issue with the person and then counsel as to the appropriate course – whether under the Protected Disclosures Act or some other avenue.

6.15 In my view, this is a critical function to the successful operation of the Act. Persons considering making a protected disclosure require support. They are more likely to feel supported if an independent body provides that role. The Ombudsmen's Office is also well placed and experienced to counsel those who might seek to use the Act inappropriately, and to guide people to the more appropriate channels. The raising of inappropriate or non-qualifying matters under the Protected Disclosures Act was a feature of many of the submissions received.

6.16 Perhaps more significantly, the acute sense of isolation and frustration expressed by those who had attempted to use the legislation is cause for concern. This was in marked contrast to those who had followed alternative procedures via an intermediary, and where anonymity was

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56 In a Memorandum to Government Administration Select Committee from the Office Solicitor, State Services Commission (23 September 1997), a suggestion that the Ombudsmen be given a statutory duty to "promote a public ethic of whistleblowing" on this basis was resisted.

57 Latest version is **Appendix 3** to this Report.

maintained.

6.17 I would also recommend the Office (or other appropriate body) be able to take an active role in assisting a person to make a protected disclosure, including protecting that person's identity where appropriate, at least at the outset of the disclosure, and having an active advisory role in the decision to disclose the identity of the discloser[58].

6.18 Managing the referral of disclosures to the relevant "appropriate authority" (or authorities – joint investigations would seem appropriate where jurisdiction potentially straddles several organisations) is another role which was envisaged by the Ministerial Review and which would, in my view, enhance the operation of the Act[59].

6.19 A limited monitoring and reporting role may also be useful, as envisaged by the Ministerial Review. Given there is no "obligation" to investigate any disclosure, and most if not all bodies exercise discretion based on priorities and resourcing issues, a central agency with a (voluntary) clearing-house role and which is able to report to Parliament in a general way the number of inquiries relating to disclosures that it dealt with, and their outcomes, would provide some check on the effectiveness of the Act in facilitating investigation. However, I am not persuaded that it is necessary or desirable for all protected disclosures to be required to be made through, or reported to, the Ombudsmen's Office (or separate agency). The objective of creating a climate in which organisations possess the managerial willingness and internal capacity to ensure they conform to their own publicly stated ethical and professional standards should not be unnecessarily undermined.

Recommendations

(a) The Ombudsmen's Office and functions under s.15 be extended, or an alternative co-ordinating and support agency be established, to assume a role of guidance, support and active assistance for

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58 Refer discussion on s.19 in Part 8 and **Appendix 5**.

59 Refer discussion in Part 7.

those considering making, or actually making, disclosures under the Act[60]. This role will include:

- Assisting a potential discloser to identify the appropriate means (if any) of pursuing the matter of concern (which may not be via the Act);
- Assisting a potential discloser to identify the internal procedures, if any, of the relevant organisation, including obtaining that information from the organisation without identifying the potential discloser;
- Assisting a discloser to "escalate" a matter where appropriate under s.9 or s.10, including liasing with potential "appropriate authorities", Ombudsman and/or Minister to identify jurisdiction etc.

(b) Reference to the co-ordinating and support agency's confidential advice, counselling and facilitating role be one of the first matters to be set out in internal procedures, with the recommendation that persons considering making a protected disclosure should feel free to contact that agency in the first instance or at any time.

(c) The co-ordinating and support agency assume responsibility for referring all protected disclosures that are not resolved within the relevant public or private sector organisation to the appropriate authority or authorities with relevant jurisdiction to investigate the protected disclosure.

(d) Consideration be given to the same agency having a role in monitoring the progress of the investigation, receiving reports on its outcome, liasing with the discloser and reporting to Parliament on the number of inquiries and investigations it has facilitated, and their outcome in broad terms. This role could also extend to private sector bodies to the extent that the disclosure relates to public money or the provision of some public service.

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[60] Refer issue D1, Part 9 of this report

7. ISSUES PART B: ISSUES RELATED TO "APPROPRIATE AUTHORITY"

(B1) Which authority is the "appropriate" authority?

Issue

7.1 There is a wide range of "appropriate authorities" under the Act including the heads of regulatory authorities which would fall within s.3(b) such as the Chairs of the Securities Commission, Civil Aviation Authority and Environmental Risk Management Authority. Identifying the relevant body with jurisdiction can be difficult. Concerns have been raised as to when, whether and/or how any particular appropriate authority should deal with a disclosure. In particular, the head of a public sector organisation may receive a protected disclosure from employees of another public or private sector organisation in circumstances where it is not clear whether he or she can or ought to take any action. Difficult examples arise, in particular, when private organisations providing public services and/or receiving public funds are the subject of a protected disclosure.

Discussion

7.2 The Act envisages that an "appropriate authority" becomes involved when the organisation within which the serious wrongdoing is alleged to have occurred has either failed to deal with the matter at all, or to the satisfaction of the discloser, or it is inappropriate to make the protected disclosure within the organisation because of the potential involvement of the head of the organisation, or some other exceptional circumstance: s.9.

7.3 The legislation leaves it to the person making the protected disclosure to choose the "appropriate authority". However, the Act provides that one appropriate authority may refer a protected disclosure to another appropriate authority where, after consulting with that other appropriate authority, it considers the protected disclosure can be "more suitably and conveniently investigated" by the other appropriate authority: s.16(1). This would indicate that there is a responsibility on the appropriate

authority that receives the information to ensure it ends up at the right place.

7.4 However, that is not necessarily straightforward. There can be overlapping jurisdictions, for example. At the practical level, an appropriate authority can only deal with a disclosure if to do so is consistent with, and carried out in accordance with, its general functions and powers (i.e. under its governing legislation or constitution). The Act does not confer any additional investigative or other powers on appropriate authorities.

7.5 Furthermore, there is no express obligation on an appropriate authority to investigate, and the only "sanction" for failing to investigate, or to make reasonable progress, is escalation of the matter by the discloser to the "last resort" appropriate authorities. These are the Ombudsman (if a public sector organisation is involved) or a Minister of the Crown under s.10. The Ombudsman is expressly not obliged to investigate a disclosure: s.23(2), and in some cases may not, simply due to limitation on its jurisdiction[61].

7.6 In my view the difficulties that arise support the need for a central "clearing house" for protected disclosures which are not adequately dealt with by the particular organisation. As discussed, that central clearing house might be within the Office of the Ombudsmen. The Office would be responsible for identifying the relevant appropriate authority, or authorities, with I suggest an ongoing monitoring and oversight role. With a responsible and central "clearing house" it should not matter that there is such a broad range of potential "appropriate authorities" under the Act.

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[61] Similar points were made by the South Australian Supreme Court in relation to the broadly similar South Australian Whistleblowers Protection Act 1993: *King v State of South Australia*; *Sutton v State of South Australia* (1996) 189 Law Society Judgment Scheme 127.

Recommendations

- Refer recommendations (a), (c) and (d)[62].

(B2) Disclosure to Ministers of the Crown under s.10

Issue

7.7 Ministers of the Crown are explicitly not within the definition of "appropriate authority" (s.3(d)(i)) yet s.10 is drafted in such a way that an employee, having followed the organisation's internal procedures but received no resolution of the matter, may disclose the information directly to a Minister as an alternative to disclosing it to an appropriate authority, even though the Minister is not an appropriate authority. This is because subsection (1)(a) requires prior disclosure in accordance with s.7 (internal procedures) **or** s.8 (head of organisation) **or** s.9 (appropriate authority).

7.8 Section 10 also provides for disclosure to the Minister where an appropriate authority has considered the matter (under s.9) and, in that case, the Minister (or an Ombudsman where a public sector organisation is concerned) is the point of last resort.

7.9 The question arises whether it is appropriate to disclose information to a Minister, either instead of an appropriate authority or at all, given the practical constraints upon a Minister to effectively investigate a matter.

Discussion

7.10 A role for a Minister was not mentioned in the Ministerial Review Report, but formed part of the proposed right of review in the Bill itself. The Select Committee received several expressions of concern about the role of the Minister.[63] The first noted that a complaint to a Minister in

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62 Refer Parts 5 and 6 of this Report.

63 Report of the State Services Commission on the Protected Disclosures Bill to the Chairperson, Government Administration Select Committee, 9 September 1997, pp.16-17

charge of an organisation often results in the complaint being referred back down the chain of command – i.e. to those with a vested interest in not showing the organisation in a bad light. The suggestion was made that one Minister take responsibility for investigating disclosures under the Act.

7.11 As for disclosures relating to the private sector, the concern was that commercially sensitive and confidential information may be made public through the political process. The question was also raised whether the receipt of such information might compromise the position of Ministers when exercising their other official functions. The Report simply noted that, if coverage was to be restricted to the public sector (as was ultimately recommended by the Government Administration Select Committee), then the private sector concerns were addressed – otherwise it consider Ministers should not be excluded from issues involving the public sector.

7.12 The Bill was not, however, dealt with until March 2000, by which stage the Government had decided to promote a Supplementary Order Paper to extend coverage of the Bill to the private sector. The role of the Minister did not appear to receive further consideration.

7.13 In my view, it is not appropriate for a Minister to become involved before an appropriate authority has considered the matter. The legislation does not expressly enable the Minister to refer the matter to somebody else (disclosure to a Minister is not covered by the s.16 ability to refer the matter to a more appropriate body) nor does it state what the Minister is to do with the disclosure.

7.14 The Cabinet Office makes the point that disclosures received by Ministers may relate to a very operational aspect of a department and would more appropriately be investigated by an Ombudsman or other authority with the appropriate jurisdiction, than by a Minister. For a Minister to conduct an investigation, an independent person would almost certainly need to be commissioned to investigate on the Minister's behalf.

7.15 Accordingly, I consider a Minister should be treated very much as the "last resort" point when a discloser believes he or she has had no satisfaction from the various bodies with jurisdiction to investigate the matter. I do not consider it necessary for there to be any particular legislated obligations or constraints on a Minister as to the appropriate response; that will depend on the particular circumstances.

Recommendations

(e) The Act should be amended to provide that a discloser may refer a protected disclosure to a Minister of the Crown **only** after the matter has been referred to an appropriate authority (preferably in accordance with the information and guidance of the co-ordinating and support agency – refer recommendation (c)[64]). The other requirements of s.10 relating to disclosure to a Minister should remain.

(f) Guidelines for dealing with protected disclosures to Ministers (in particular to ensure the protections to be afforded under the Act are not compromised) should be prepared and included in an appropriate publication such as the Cabinet Office Manual.

(B3) Should disclosure to the media be protected?

Issue

7.16 The New Zealand section of the Commonwealth Press Union submitted that protections under the Act should be extended to disclosures made to the media (and Members of Parliament). It submitted this would enhance public confidence in the institutions of government. The Act makes it very difficult to "blow whistles" in a practical sense – for example, if an employee is required to disclosure internally then the public may never know that a serious wrongdoing has occurred. This, it was submitted, would not be in the public interest.

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64 See Parts 5 and 6 of this report.

Discussion

7.17 The legislation envisages that serious wrongdoing will be investigated and dealt with in accordance with the usual framework of internal investigations within an organisation/appropriate authority. The usual rights of access to information by the media/public will apply, save for the added protections of confidentiality around the identity of the discloser.

7.18 Investigations into employee misconduct within organisations are usually confidential and not subject to media scrutiny as a matter of course. Similarly, investigations by the Police, Serious Fraud Office, Auditor General and Ombudsman are all subject to appropriate measures to keep matters out of the public eye so as not to prejudice certain interests. Once an investigation is completed and, for example, a person is subject to prosecution in the courts, then there is a higher degree of public scrutiny, subject in that case to the court's control.

7.19 It is a central feature of the Act that disclosures are to be communicated through confidential investigatory channels, thus protecting the organisation and those subject to investigation from premature and potentially damaging publicity. It is designed to encourage and facilitate organisations dealing with matters internally in an honest, confidential and fair manner. Much of this report focuses on ensuring disclosers are adequately supported and protected in that process. If they are not, it is unlikely they will risk the personal consequences of disclosure. However, there is a delicate balance to be achieved.

7.20 The media cannot effectively investigate a matter itself. It relies on publicity and public pressure to ensure the appropriate authorities adequately investigate matters. The Act gives a very complete protection against all legal action. Serious wrongdoing could be alleged without foundation and without consequences for the discloser. In this situation, there is a risk of misreporting, sensationalism and public disclosure of commercially sensitive matters and damage to the reputations of innocent persons. It could undermine the integrity and morale of the public sector

by subjecting organisations to repeated and unwarranted demands to defend themselves in the media. It may put at risk the justifiable confidentiality that attaches to many political, social or commercial aspects of their work. It would bring an unwarranted risk into the private business of private organisations if its employees could disclose, for example, commercially confidential matters to the media without risk of reprisal in circumstances where the concerns may be quite misplaced.

7.21 Obviously there is nothing to prevent an "unprotected" disclosure outside of the Act and this continues to occur, notwithstanding the legislation. In the absence of any examples of significant matters of public interest being effectively buried by the procedures under the Act, I am unpersuaded that any change is necessary or appropriate.

Recommendation

None

8. ISSUES PART C : CONFIDENTIAL IDENTITY OF THE DISCLOSER

(C1) Adequacy of the s.19 protection

Issue

8.1 Although not the only protection under the Act, the confidentiality of the identity of the discloser is an important one. As noted earlier, the statutory purpose of protection of the person making a disclosure provides the foundation of the Act. It is acknowledged that effective protection will promote the public interest by facilitating disclosure. However, it was a reasonably common theme throughout submissions that this protection was either not effective (e.g. New Zealand Law Society Employment Committee) or not perceived to be effective. There is a significant body of opinion that, as this obligation is subject to the principles of natural justice, in most cases the requirements of natural justice will require the disclosure of the identity of the person who provides the information[65].

Discussion

8.2 In my opinion, s.19 is a much stronger obligation than has been credited. It is an appropriate obligation to place on those carrying out investigations. They are required to ensure, so far as is reasonably possible given the countervailing public interests in the preservation of rights of natural justice and the importance of effectively investigating serious wrongdoing, that the identity of the person who made the disclosure remains confidential.

8.3 However the obligation is a complex one and not readily understood. I did not see any internal procedures that adequately dealt with the process for making decisions in relation to disclosure of the identity of the discloser in accordance with s.19. I am unsurprised that persons considering making protected disclosures appear to be concerned about

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[65] The obligation for internal procedures to comply with the principles of natural justice is stated in PDA, s.11

issues of confidentiality. In my view it is important that this protection be given more emphasis.

8.4 While the confidentiality of the identity of the discloser is an important protection, those investigating a disclosure are not under an absolute obligation to maintain the protection. Section 19 expressly recognises that the protection is limited in three ways[66]:

8.4.1 The obligation is to use "best endeavours" to protect the anonymity of the discloser;

8.4.2 The obligation is subject to the "reasonable belief" of the person with the information that disclosure of the identity is essential for at least one of three purposes, being:

- The effective investigation of the allegations;
- The prevention of serious risk to public health or public safety or the environment; or
- Having regard to the principles of natural justice.

8.5 Importantly, the obligation to protect a discloser's identity is one of "best endeavours". While this is not an absolute obligation on those who receive the information to protect the person's identity, it is nevertheless a significant one, which places a burden on the person with the information.

8.6 It is a positive obligation or burden, when read with paragraph (b) of s.19(1), to **actively seek to ensure** that the anonymity is, so far as possible, protected. It is only where the person holding the information "reasonably believes" that disclosure of the identity of the discloser is "essential" that such disclosure is permitted under s.19(1)(b). A "belief" cannot be supported as "reasonable" if that person has not made "best endeavours" to pursue alternative methods reasonably open to him or her

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66 For the purposes of this discussion, I do not take into account the situation where a person has consented in writing to the disclosure of their identity: s.19(1)(a).

to meet the requirements of natural justice, to effectively investigate the allegations and/or to prevent a serious risk to public health or safety or the environment.

8.7 The recipient of the information must seek ways to effectively investigate the allegations that do not require identification, if that can be achieved. In my view, there are often various alternatives open. The same analysis applies to the "natural justice" limitation on the protection. Section 19 imposes a positive obligation on a person who knows the identity of the discloser to seek alternative ways of ensuring natural justice requirements are met, if that is reasonably possible.

8.8 The formulation of the obligation of confidentiality in this way reflects the complexities of balancing the competing public interests. On the one hand is the very important public interest in protecting the identity of persons who are prepared to make protected disclosures, which is recognised as part of the necessary foundation of the Act. On the other are the three public interests identified in s.19(1)(b), i.e.:

(i) Effective investigation of the allegations;

(ii) Prevention of serious public or environmental risk; and

(iii) Upholding the principles of natural justice.

The focus will usually be on the first and third of those. While the principles are the same for the second, difficult balancing issues are less likely to arise.

8.9 Issues surrounding s.19 and this balancing of public interests are discussed further in a separate paper – see **Appendix 5**. I also provide my views on the ways natural justice and the effective investigation of disclosures of serious wrongdoing may be met without revealing the identity of the discloser.

8.10 In summary, while the particular circumstances will always be important, I consider that in most cases it is possible to effectively investigate a disclosure, and meet the obligations of natural justice, without disclosing

the identity of the person who made the protected disclosure unless the information which came directly from the discloser is critical to the truth of the allegation, or the credibility of the discloser is a real issue. Even then, it still may be possible to protect the fact of disclosing by re-interviewing the discloser on the record as part of the investigative process, without identifying him or her as the discloser.

8.11 The balancing considerations discussed in **Appendix 5** are not easy for organisations to apply. Even senior Judges come to different views of the balance of the countervailing public interests[67]. I suggest that guidelines be developed and made available to organisations who are required to investigate allegations of serious wrongdoing, which emphasise their obligations to keep confidential the identity of the discloser except in those very limited circumstances when other alternatives are not realistically open. The Office of the Ombudsmen (or other co-ordinating and support agency) may be able to assist those investigating to protect the identity of the discloser as part of its role of supporting the discloser and facilitating investigation. The matter should be monitored with a view to strengthening the protection in the Act if organisations and/or the Courts adopt an approach to protection that is not effective.

8.12 This matter is, in my view, important to promote confidence for those contemplating making a protected disclosure. This confidence is quite possibly undermined by the examples of failure to apply the s.19 protections through ignorance or through a popular belief that natural justice for the alleged wrongdoer requires disclosure. While no penalties are expressly provided for inappropriate identification of a person who made a protected disclosure, organisations should bear in mind that such disclosure the matter could potentially be the subject of a grievance under the Employment Relations Act 2000, complaint to and investigation by the Ombudsmen and/or investigation and penalty under the Human Rights Act.

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67 *CIB v Squibb* (1992) 14 NZTC 9,146 (discussed in **Appendix 5**)

Recommendations

(g) Guidelines be developed and made available to organisations which emphasise their obligations to keep confidential the identity of the discloser except in very limited circumstances when other alternatives for meeting the requirements of natural justice are not realistically open;

(h) The co-ordinating and support agency be empowered to assist investigating agencies to protect the identity of the discloser as part of its role of supporting the discloser and facilitating investigation;

(i) The effective protection of the identity of the discloser be monitored with a view to strengthening the protection afforded by the Act if organisations and/or the Courts adopt an approach which does not offer effective protection;

(j) The remedies available where inappropriate disclosure of a discloser's identity be emphasised to organisations and monitored for their effectiveness.

(C2) Anonymous Disclosures

Issue

8.13 The Act is silent on whether anonymous disclosures can be made. The Controller and Auditor-General advised that, in auditing internal policies, Audit New Zealand has challenged those policies that have required people making a protected disclosure to identify themselves. This has resulted in a degree of debate about whether someone can complain anonymously under the Act.

Discussion

8.14 The policy of the Act is to protect employees who make a disclosure about serious wrongdoing from the adverse consequences of making that disclosure, to facilitate disclosure and proper investigation of serious

wrongdoing. Only employees or former employees can make protected disclosures under the Act. If the discloser is anonymous, it will not be clear that the person is, or was an employee – and therefore it will be unclear whether the Act and its protections apply. The employee can be protected from retaliatory action only if the employer or appropriate authority knows who they are.

8.15 Furthermore, it has been argued that anonymous disclosures compromise natural justice and make it impossible to hold a complainant accountable for vexatious or false accusations.

8.16 From a practical perspective, one would expect an organisation that receives information alleging serious wrongdoing will want to investigate it, with a view to stopping the wrongdoing, regardless of the identity of the discloser or whether the disclosure is in fact covered by the Act. Obviously if the investigation is compromised by the anonymity of the discloser (for example, information cannot be adequately checked) then the matter may not be able to be pursued. The same applies in relation to obligations of natural justice/fair process for the alleged wrongdoer; if these cannot be met then the matter may not be able to be pursued[68].

8.17 However, in my view, the purposes of the Act are frustrated if a person who is afraid to identify themselves initially makes a disclosure through the right channels under the Act, is subsequently identified and subject to retaliation but denied the protections of the Act for failing to identify themselves at the outset. I consider the Audit Office is right to challenge internal policies that do not provide for anonymous disclosures. However, internal policies which do not permit a disclosure to be made anonymously will disqualify such disclosures from protection under the Act because s.6 applies the Act to disclosures made "in the manner

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[68] As discussed in **Appendix 5**, in most cases natural justice is satisfied by the wrongdoer knowing the substance of the accusation, not who has accused them.

provided by this Act", and s.7(1) requires disclosure "in the manner provided by internal procedures". This is unsatisfactory[69].

8.18 I have emphasised the importance of protection for the discloser and the real or perceived concerns surrounding the consequences for a person who discloses serious wrongdoing. In my view, expressly permitting disclosures to be made anonymously, or through the Office of the Ombudsmen or another co-ordinating and support agency is likely to promote the purpose of facilitating such disclosures.

8.19 In my view, anonymous disclosures and disclosures made confidentially through a third party will promote the overall purposes and objectives of the legislation.

Recommendation

(k) That the Act be amended to expressly permit anonymous disclosures, possibly by requiring internal procedures to permit disclosures to be made through a third party or anonymously in the first instance, but recognising that, unless sufficient information is available, there may be difficulties progressing the investigation[70].

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69 The Employment Relations Authority has also taken the view that anonymous disclosures do not qualify under the Act: refer *Hill v Housing New Zealand* **Appendix 4**, case 2.

70 The Public Interest Disclosure Act 1994 (ACT) provides, in s.16, that if a person making a public interest disclosure does not identify himself or herself, then the Act does not require the proper authorities to investigate the matter.

9. ISSUES PART D: ISSUES SURROUNDING INTERNAL PROCEDURES

(D1) Obligation to establish internal procedures

Issues

9.1 Public sector organisations are required to establish internal procedures for dealing with protected disclosures: s.11. This is not a mandatory requirement for private sector bodies.

9.2 A number of issues arise in this context:

9.2.1 The fact that different public sector organisations have different procedures can be confusing;

9.2.2 The fact that private organisations are not required to (but many nevertheless choose to) have internal procedures can be confusing. It can be difficult for an ex-employee (for example) to know whether there are or are not internal procedures and, if so, what they are;

9.2.3 Given that procedures can be confusing to identify and follow, disclosers may be deterred from providing information;

9.2.4 Smaller organisations such as schools may find it expensive to produce their own individual procedures (i.e. compliance costs issues).

Discussion

9.3 The concern about confusion in internal procedures, including knowledge of the existence of, and access to, internal procedures, should readily be able to be overcome. An "employee", including a former employee, ought to be able to access any procedures. If he or she were to approach the head of an organisation, one would expect the position to be made clear. However, in practice it may not be so simple.

9.4 Assisting a person to access the appropriate internal procedures would, in my view, be an appropriate role for the Office of the Ombudsmen (or other co-ordinating and support agency). The Office could contact the (public or private sector) organisation to access the applicable procedures.

9.5 It arguably runs contrary to the policy of including private sector organisations under the Act to maintain that private sector bodies need not have internal procedures in place. One reason for bringing the private sector within its ambit was to ensure private sector employees enjoyed the same protections as public sector employees. Under the legislation as it stands, because private sector organisations are not required to have internal procedures, they also do not have to have procedures which meet the requirements of s.11 (i.e. the procedures must comply with natural justice and advise about the effects of ss.8 to 10). There is, therefore, a risk that any procedures will not adequately inform employees of the processes and their protection.

9.6 Nevertheless, I note there were very persuasive arguments made relating to the obligations to be imposed on the private sector. Again I consider the matter ought to be capable of remedy if the proposed co-ordinating and support agency is given the sorts of powers envisaged. The agency could contact the organisation to ascertain the applicable procedures. This would also protect the identity of the person considering making a disclosure.

9.7 In summary, I am not persuaded it is necessary or desirable to require all bodies to have internal procedures. It is better in my view to ensure a greater level of guidance and support for the discloser in dealing with the organisation.

9.8 The wide variety of possible internal procedures means unduly complex or unclear procedures may dissuade rather than encourage a potential discloser from acting. There also seems to be a clear case for model procedures being more readily available. (I note the Audit Office prepared model procedures, which have been offered to its clients.) I recommend consideration be given to introducing “template” or model

procedures, perhaps through regulation. It appears that issues surrounding the permitting of anonymous disclosures, dealing with confidentiality and fair process, and highlighting the availability of external support for a discloser are not getting appropriate and uniform treatment.

9.9 "Template" procedures could also assist in reducing the cost of compliance, particularly for small organisations. It is difficult to see why an organisation such as a primary school is not provided with guidelines and a template identifying matters for its discretion.

Recommendations

(l) That model or template procedures be developed and made available by the co-ordinating and support agency, with consideration to regulating for these to be mandatory if necessary.

(D2) Obligation to follow internal procedures

Issues

9.10 Where internal procedures exist, disclosures must be made "in the manner provided by" internal procedures: s.7. Where an organisation has no internal procedures then the Act simply provides that the disclosure may be made to the head or deputy head of the organisation.

9.11 A number of issues arise in this context:

9.11.1 The suggestion has been made that the obligation to make disclosures in accordance with internal procedures can deter disclosures;

9.11.2 Internal procedures can be used to "control" the disclosure, keeping it underground.

Discussion

9.12 The Act is designed to put in place an authorised channel or channels for making a disclosure. It intends for organisations to face up to and deal

with serious wrongdoing but, where that does not occur or is not appropriate for reasons set out in the Act, the matter may be referred to an appropriate external agency. Appropriate authorities do not include the media or Opposition MPs, who will not be in a position to investigate a matter and, in the case of Opposition MPs, could use protected information to undermine or compromise the integrity of the Government. The Act seeks to channel the disclosure to where it can be most appropriately investigated and the matter remedied.

9.13 As discussed, there was a deliberate policy choice to require that matters be raised internally first. That appears to be generally workable, in some cases showing very positive impacts on organisational culture and risk management.

9.14 However, other organisations appeared to view the legislation as an unnecessary burden given the very wide range of monitoring processes and transparency requirements they were already subject to. Anecdotal reports were that disclosures were "not to be encouraged" in another organisation. The Audit Office reported a degree of "compliance" mentality among the wider central government sector, i.e. internal policies being an object of necessary legislative compliance rather than something of inherent significance.

9.15 There is a legitimate question over whether the legislation adds anything to existing procedures. However, there are clear examples of it operating positively so as to indicate, at this early stage, it is contributing to and can contribute to improving, organisational integrity.

9.16 The requirement to disclose first to the organisation, where the organisation is a public sector body, does not mean that serious wrongdoing will necessarily be "hidden" from the public. Appropriate reporting and monitoring mechanisms within the public sector should reveal any serious matters which have not otherwise been reported to the Police or other agency.

9.17 There is a legitimate public interest to be weighed between knowing when wrongdoing occurs within public organisations as a matter of

accountability, and ensuring it is in fact uncovered in the first place, properly dealt with and any lessons learned.

9.18 Another comment was made that organisations can seek to "control" the process of disclosure by its internal procedures. I have seen no evidence of this, but consider any risks would be minimised by the existence of a strong active co-ordinating and support agency.

9.19 In any event, the Act provides the means by which a disclosure can be "escalated" out of the organisation concerned and into the hands of an appropriate authority. Once again, to ensure the Act works properly, it would be helpful if the discloser were assisted through the process, including escalation to an appropriate authority under s.9, or the Ombudsman/Minister under s.10, where proper grounds exist.

Recommendations

Refer recommendations (a), (b), (c) and (d) in Parts 5 and 6.

(D3) Circumstances where protection may be lost

Issues

9.20 Section 6 defines protected disclosures as being disclosures of information "about serious wrongdoing" and made in the manner provided by the Act[71]. The definition also requires a reasonable belief in the truth or likely truth of the information[72] and the motivation must be to have the serious wrongdoing investigated[73]. Accordingly, to qualify for protection, as well as good faith and a reasonable belief in the truth of the information, the information itself must qualify as being about a "serious wrongdoing" as (non-exhaustively) defined in s.3. It must also be disclosed in the manner provided by the Act.

9.21 There are three situations then which arguably unreasonably result in a disclosure not securing the protections of the Act. The first is when the

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71 PDA s.6(1)(a)
72 PDA s.6(1)(b)
73 PDA s.6(1)(c)

behaviour that is the subject of the disclosure does not come within the definition of "serious wrongdoing". The second is when the procedures required to be followed under the Act are in fact not strictly adhered to. The third is where the discloser does not refer to the Act but it is plain that the substance of the disclosure in facts merits protection.

Discussion

9.22 Section 20 expressly provides that the protections do not apply where a disclosure includes an allegation known to be false or the discloser otherwise acts in bad faith. Section 21 preserves existing common law protections, which may assist a person acting in good faith but outside the definition of "serious wrongdoing" or in technical breach of the procedures to be followed. The question is whether it is reasonable for disclosers in that position to have to fall back on common law protections.

9.23 The purposes of the Act specifically aim to facilitate disclosure of serious wrongdoing and protect those who disclose it: s.3. But if there are legitimate ambiguities about whether a disclosure qualifies or not, perhaps simply to the extent that it will depend on further investigation, then the purposes of the Act will not be promoted by penalising those who bring information to light.

9.24 In many of the examples provided it was difficult to know whether the alleged impropriety fell within the "serious wrongdoing" definition without first investigating the matter. In others, it appeared not to but some action nevertheless was considered to be appropriate. In those circumstances, a person who makes the disclosure in good faith and who reasonably believes the wrongdoing to fall within the definition should retain the protections of the Act. Again, I see a role for a support and co-ordinating agency which could offer advice as to whether the particular matter reasonably falls within the definition or not. This would appear to come within the current role of the Office of the Ombudsmen under s.15(a). Advice to that effect could provide prima facie evidence of the reasonableness of the discloser's view. Where the matter does not, in the

Ombudsmen's view, come within the definition, then the Office may be able to counsel the person in a more appropriate direction.

9.25 The Australian and UK Acts have approached this issue in different ways. For example, in Queensland, to be eligible for protection, the discloser must "honestly believe on reasonable grounds" that the information to be disclosed "tends to show" a matter of illegality etc[74]. In South Australia, the person disclosing must "believe on reasonable grounds" that the information is true or that it "may be true and is of sufficient significance to justify disclosure so that its truth may be investigated"[75].

9.26 The Public Interest Disclosures Act 1998 (UK) affords protection if the discloser acts in good faith, reasonably and reasonably believes in the truth of the allegation[76]. A subsequent provision refers to whether "in all the circumstances" it was "reasonable to make the disclosure"[77]. The UK legislation lists a number of factors for determining "reasonableness" in the circumstances. I do not suggest such a detailed provision is necessary in the New Zealand context.

9.27 Similarly where procedures are not followed as a result of some technical error or innocent difficulty identifying the appropriate procedures, I do not consider the protections should be lost.

9.28 One purpose of requiring disclosures to be made in accordance with the procedures set out in the Act is to channel the disclosure appropriately, and thereby to promote ethical integrity and risk management while protecting the need for a politically impartial public service to keep some matters confidential, and not to undermine the integrity and corporate ethos of a private sector organisation and put at risk justifiable commercial and industrial confidentiality. That purpose should not be undermined if protections were maintained in the face of a technical failure to follow the legislated procedures, particularly where they may be complex and difficult to identify. There were a number of examples

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74 Whistleblowers Protection Act 1994 (Qld) e.g. s.14(2)
75 Whistleblowers' Protection Act 1993 (SA) s.5
76 Public Interest Disclosures Act 1998 (UK) ("PIDA"), s.43G.
77 PIDA, s.43H

provided to me where procedures under the Act or under internal procedures had not been properly followed, but the matter has quite properly continued to be dealt with as if it qualified as a protected disclosure under the Act.

9.29 Lastly there are examples of disclosures made without identifying that they are made under the Act. Where the subject matter or substance of the disclosure clearly merits protection that should be afforded. It may be that the process has inadvertently defeated some of the protections (for example the right to have the identity of the discloser kept confidential). Consideration should be given to ensuring that, in proper cases, a failure to comply with the Act applied, should not be penalised.

Recommendations

(m) That the Act be amended (if necessary) to provide that an otherwise protected disclosure will not lose its protection in the following circumstances:

- Where the discloser reasonably believed the information was about a "serious wrongdoing" but where, upon investigation, the matter is found not to constitute "serious wrongdoing";
- Where there is not strict compliance with the procedural requirements of ss.7-10 of the Act by the discloser but there is nevertheless substantial compliance;
- Where the discloser does not refer to the Act but it is plain that the substance of the disclosure in fact merits protection and it is appropriate to apply those protections.

10. ISSUES PART E: DEFINITIONAL ISSUES

(E1) Who is the "head" of the organisation?

Issue

10.1 Under s.8 of the Act, an initial disclosure may be made to the "head" or a "deputy head" of the organisation in certain circumstances. This provision relates to both public and private sector organisations and applies if the organisation has no internal procedures established and published, or other nominated reasons exist such as the discloser holding a reasonable belief that the person to whom the wrongdoing should be reported in accordance with internal procedures may be involved in the serious wrongdoing.

10.2 However, it is not clear who the "head" of an organisation would be, particularly if the organisation has both a chief executive and a chairperson or presiding member.

Discussion

10.3 In most cases involving companies, the chief executive, as the head of the company, would be the "head of the organisation" for the purposes of the Act. The Board itself is separate from the company. However, in cases where the organisation itself is a board (and the board employs a chief executive and general staff) the chairperson of the board may be its "head". Examples might be statutory boards and authorities such as Transit New Zealand, Civil Aviation Authority, the Environmental Risk Management Authority. In the context of the State Services Commissioner exercising any of the powers or functions of a body, s.11(4) of the State Sector Act 1988 refers to the "head" of any part of the State Services. In that context, it has been interpreted to mean the chairperson of a statutory board or authority[78].

10.4 While this can be confusing, it ought to be able to be resolved within particular organisations and in particular circumstances in a way that best

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78 Advice from State Services Commissioner

ensures the protected disclosure is appropriately made and resolved. Internal procedures required of public sector organisations are required to include reference to the effect of ss.8 to 10 of the Act[79] and so should make the position explicit for the particular organisation.

10.5 Accordingly, it is my view that this matter should be able to be clarified by internal procedures and/or with the assistance of the Ombudsmen or other co-ordinating or support agency.

Recommendations

(n) That the Audit Office check, as a matter of compliance, that the internal procedures of public sector organisations ensure that an appropriate person or persons is identified who meets the requirements of s.8.

(E2) Extent of legal professional privilege

Issue

10.6 The Act does not protect a person who discloses information that is protected by legal professional privilege (s.22). It is not clear whether this restriction applies only to those people (i.e. legal advisers) who are bound by privilege, or whether the Act is intended to prohibit disclosure by **any person** of information that is subject to legal privilege.

Discussion

10.7 The reference in s.22 to a "person" would appear to cover people other than legal advisers, i.e. it would cover "any employee" and any other person (including a legal adviser).

10.8 It appears to me that s.22 was only intended to prevent legal advisers from breaching their clients' privilege, although it is not clear how far

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79 PDA s.11(2)

this is to extend[80]. However, it is drafted in potentially much broader terms. It is possible that an organisation might place information that evidences serious wrongdoing under the umbrella of legal professional privilege simply to ensure no one may disclose it under the Act. That is a legitimate view of the effect of s.22.

Recommendation

(o) That s.22 be amended to clarify the extent of the exclusion of legally privileged information from the scope of the Act.

(E3) Protections for witnesses

Issue

10.9 The position of a person who assists the discloser by making otherwise confidential information available is not addressed in the Act.

Discussion

10.10 Where a person is prepared to come forward in support of a discloser, for example with supporting information that is otherwise confidential, the protections of the Act do not apply to that person.

10.11 Some protections are afforded where the investigating body is, for example, the Ombudsman (s.19 of the Ombudsmen Act), but the same is not true for most organisations when investigating a protected disclosure.

Recommendation

(p) The Act be amended to extend appropriate protections to those who provide information in the course of an investigation or in support of a protected disclosure by another individual.

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80 Cf s.43(4) Employment Rights Act 1996 (UK) which enables employees to seek legal advice about their concerns and reveal to the adviser the issues about which a disclosure may be made. In these circumstances, the legal adviser is bound by professional privilege and cannot make a protected disclosure

11. CONCLUSION

11.1 The first three questions raised in the Minister's Terms of Reference are answered in Parts 3 to 10 of this report, i.e.:

11.1.1 How is the Act operating? (Part 3)

11.1.2 Is the Act operating as intended? (Part 4)

11.1.3 What, if any, problems have arisen in relation to its operation? (Part 5; expanded in Parts 6 to 10).

11.2 The Terms of Reference also ask whether any amendments are necessary or desirable in relation, first, to the scope of the Act and, second, to its contents. My recommendations, listed in Part 5 of this report, relate to the effective operation of the Act rather than its scope. Some will require amendments to the contents of the Act, others may not. This will depend on the approach taken in response to a particular recommendation. I expect many issues to be resolved through an appropriately empowered central co-ordination and support agency. I doubt that the current provisions of s.15 are broad enough to support this.

11.3 Finally, the Terms of Reference ask whether the Act should require further reports to the House on its operation. I consider the operation and effectiveness of the legislation should continue to be monitored. There is a wide range of legislative options for advancing the purposes expressed in this Act, as can be seen from a range of Australian legislated responses to issues of serious wrongdoing. In my view, this monitoring is best done by a central agency, which reports to the House annually, rather than through ad hoc independent reviews.

Mary T Scholtens QC
12 December 2003

Review of Protected Disclosures Act 2000 - Terms of Reference

Background

The Protected Disclosures Act 2000 came into force on 1 January 2001. Section 24 of the Act says:

> "(1) The Minister of State Services must, not sooner than 2 years after the commencement of this Act, cause a report to be prepared on –
> (a) the operation of this Act since its commencement; and
> (b) whether any amendments to the scope and contents of this Act are necessary or desirable, including an amendment to require further periodic reports to the House of Representatives on the operation of this Act."

I must table a report on the review not later than three years after the commencement of the Act – that is, before the end of 2003.

Terms of reference

The reviewer will inquire into and report on the following matters:

- How is the Protected Disclosures Act ("the Act") operating?
- Is the Act operating as intended?
- What, if any, problems have arisen in relation to its operation?
- Are any amendments necessary or desirable in relation to the scope of the Act?
- Are any amendments necessary or desirable in relation to the contents of the Act?
- Should the Act require further reports to the House on operation?

Reviewer

The review will be carried out by Mary Scholtens QC.

Form of review

The reviewer will conduct the review by consulting with interested organisations and officials including:

- The Council of Trade Unions
- Business New Zealand
- New Zealand Law Society
- The Public Service Association

- The Ombudsmen
- The Controller and Auditor-General
- The State Services Commissioner.

The reviewer will also call for written submissions from interested members of the public.

Timing

The reviewer will report to me by 31 October 2003.

Hon Trevor Mallard
Minister of State Services

June 2003

PROCESS FOLLOWED BY THE REVIEWER

The Terms of Reference dated June 2003 required consultation with interested organisations and officials including

- The Council of Trade Unions
- Business New Zealand
- New Zealand Law Society
- The Public Service Association
- The Ombudsmen
- The Controller and Auditor-General
- The State Services Commissioner

The reviewer was also required to call for written submissions from interested members of the public.

The fact of the review and a call for submissions was published in the major national daily newspapers (the New Zealand Herald, Dominion Post, Christchurch Press and Otago Daily Times) on Saturday 7 June 2003. The call for submissions was also published in "Law Talk", the fortnightly publication by the New Zealand Law Society, which is distributed to all practicing barristers and solicitors, on 2 June 2003. The Terms of Reference and call for submissions were also made available on the State Services Commission website. Submissions were sought before 11 July 2003.

The State Services Commission also circulated core government agencies with a request for those with experience of the Act to get in touch.

Eighteen written submissions were received from various persons and organisations. Fourteen interviews were held with various organisations and persons, some of whom had submitted a written submission and some who had not. A number of confidential submissions were received, and confidential

interviews were held with several people who had attempted to make protected disclosures under the Act. Because of the confidential nature of much of those submissions, a schedule of submissions received or interviews held is not included. However, the various submissions received are summarised in Part 3 of this report.

Where questions arose, the reviewer also contacted persons who had made written submissions by telephone or email to clarify those matters.

Where the reviewer considered a summary of her discussions with individuals might benefit from doing so, a confidential draft of that summary was referred to them for comment.

PROTECTED DISCLOSURES ACT 2000

PROTECTED DISCLOSURES ACT

NOTES

IF YOU WANT TO MAKE

A PROTECTED DISCLOSURE

THESE NOTES ARE FOR YOU

PUBLISHED BY THE OFFICE OF THE OMBUDSMEN
pursuant to the Protected Disclosures Act 2000 s.15
October 2003

Ombudsmen: John Belgrave, Chief Ombudsman

Anand Satyanand, Ombudsman

Mel Smith, Ombudsman

The Office of the Ombudsmen has three offices:

Wellington

Level 14
70 The Terrace
P O Box 10 152
Telephone: (04) 473 9533
Facsimile: (04) 471 2254
Contact: Keith Robinson

Auckland

Level 5
17 Albert Street
Telephone: (09) 379 6102
Facsimile: (09) 377 6537
Contact: Richard Fisher

Christchurch

Level 6
764 Colombo Street
P O Box 13 482
Telephone: (03) 366 8556
Facsimile: (03) 365 7935
Contact: Christopher Littlewood

Freephone: 0800 802 602

Website: http://www.ombudsmen.govt.nz

GENERAL INFORMATION AND GUIDANCE FOR EMPLOYEES MAKING OR CONSIDERING THE DISCLOSURE OF INFORMATION UNDER THE ACT

If you are concerned about serious wrongdoing in, or by, your organisation, and you are in doubt about how to proceed, the Ombudsmen, and senior members of the staff of their Office are authorised to assist you. Contact details are stated on page 2 of these Notes.

The Protected Disclosures Act 2000, came into force on 1 January 2001. It is about disclosure in the public interest of serious wrongdoing - sometimes called *"whistleblowing"* – and identifies procedures to be followed in making disclosures, and the protections available to those who make disclosures.

The Purpose of the Act

> ***"The purpose of this Act is to promote the public interest -***
>
> ***by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation; and***
>
> ***(b) by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organisation".*** (s.5)

For the Act to apply, you must be an employee of an organisation as defined by the Act. An *"organisation"* must comprise at least one employer, and at least one employee

You are an employee of an organisation if –

- You receive wages or salary from the organisation
- You are a former employee of the organisation
- You are a homeworker
- You are seconded to the organisation
- You are an individual contracted to do work for an organisation
- You are concerned in the management of the organisation
- The organisation is the New Zealand Defence Force, and you are a member of the Armed Forces.

If you are in any of these classes, you can make a protected disclosure about serious wrongdoing in, or by, the organisation.

What is serious wrongdoing?

It includes, but may not be limited to –

- Significant misuse of funds and resources of a public sector organisation
- Conduct which poses a serious risk to public health, public safety, or the environment
- Conduct posing a serious risk to maintenance of the law
- An offence
- Gross misuse of authority, or gross mismanagement, by a public official.

Threshold to disclosure

You may disclose information about serious wrongdoing in, or by, your organisation if –

- You believe on reasonable grounds that the information is true, or likely to be true
- You wish to have the serious wrongdoing investigated
- You want your disclosure to be protected.

Warning

If you know the information is false, or you are acting in bad faith, or the information is protected by legal professional privilege, the disclosure is not protected by the Act.

Disclosure – How? - To whom?

If your organisation is a public sector organisation, it is required to have in operation by 1 January, 2000, procedures for receiving and dealing with information about serious wrongdoing.

A public sector organisation is virtually every organisation which is part of, or is funded by, central or local government, including the various Crown entities.

If your organisation, whether public or private, has procedures established, and published, for receiving and dealing with information about serious wrongdoing – you should, normally, follow those procedures.

Where there are no published procedures, or you think on reasonable grounds that following them, or going to the head of the organisation would be unproductive or inadvisable, there are a number of people, called *"an Appropriate Authority"* to whom you may turn. Their titles, together with their special areas of responsibility, are listed below under the heading *Appropriate Authority*. It would be wise to choose the Appropriate Authority whose responsibilities involve, or are akin to, the subject matter of your concern. If you are in doubt, remember that the Ombudsmen are there to assist you.

While disclosures do not have to be made initially in writing, at some stage a written and signed statement will be a practical necessity for anyone investigating the matter.

Appropriate Authorities are empowered to refer information between themselves where that will aid investigation of the matters in issue.

Special situations

Certain disclosures are intended to be made only to certain specified Appropriate Authorities. Disclosures relating to an intelligence and security agency should go only to the Inspector-General of Intelligence and Security. Those arising within the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence, or the New Zealand Defence Force, where they relate to the international relations of the Government, or to intelligence and security matters, should be made only to an Ombudsman.

Where previous attempts at disclosure in accordance with the Act appear to have failed, further disclosure may be made to an Ombudsman (in respect of a public sector organisation) or otherwise to a Minister of the Crown, except in the cases mentioned in the paragraph immediately above.

Protection for you?

The disclosure of information that others would prefer to have kept secret is likely to attract their hostility. So far as is known, only the Police have witness protection facilities. Their availability in any particular situation would be a matter for the Police to decide.

Those to whom a protected disclosure is made must be careful to protect the identity of the maker of the disclosure, unless he or she consents to the release of that information, or for other special reasons, the prevention of grave risk to public health, for example, it is essential to release it.

Experience elsewhere suggests that identification of the person disclosing information happens most often through the maker of the disclosure drawing attention to him or herself.

The Act does, however, provide a number of statutory protections –

- No civil, criminal, or disciplinary proceedings may be taken against anyone who makes, or refers, a protected disclosure
- All other legal protections remain in place
- If you are an *"employee"* within the terms of the Employment Relations Act 2000, you may take personal grievance proceedings against retaliatory action by your employer or former employer.

Human Rights Act 1993

Additionally, the quite extensive anti-victimisation provisions of the Human Rights Act 1993, are specifically applied to the Protected Disclosures Act by s.25 of the Act. Section 66(1)(a) of the 1993 Act now states:

> ***"It shall be unlawful for any person to treat or threaten to treat any other person less favourably than he or she would treat other persons in the same or substantially similar circumstances –***
>
> *(a)* ***on the ground that that person, or any relative or associate of that person,—***
>
> **(i)** ***intends to make use of his or her rights under this Act or to make a disclosure under the Protected Disclosures Act 2000; or***
>
> **(ii)** ***has made use of his or her rights, or promoted the rights of some other person, under this Act, or has made a disclosure, or has encouraged disclosure by some other person, under the Protected Disclosures Act 2000; or `***
>
> **(iii)** ***has given information or evidence in relation to any complaint, investigation, or proceeding under this Act or arising out of a disclosure under the Protected Disclosures Act 2000; or***
>
> **(iv)** ***has declined to do an act that would contravene this Act; or***
>
> **(v)** ***has otherwise done anything under or by reference to this Act".***

Summarised, the rights under the Act may include the right to damages and other forms of compensation. To avoid time limits under the Human Rights Act, proceedings may have to be commenced promptly. It may be necessary to make a choice between proceedings under the Employment Relations Act or the Human Rights Act; both remedies may not always be available.

More fully, the Human Rights Commission views the position as follows:

Complaints Procedure

The Commission anticipates that the procedures relating to complaints of victimisation under the Protected Disclosures Act will be the same as those relating to complaints of unlawful discrimination.

From the outset, it is important to note that section **76(2)(a) of the Human Rights Act** provides that the Complaints Division of the Commission may decide not to investigate a complaint if it relates to a matter which the complainant knew about for more than 12 months before the complaint was received by the Commission. It is important that this is brought to the attention of complainants when they approach the Office of the Ombudsmen.

Under s.75(a) of the Human Rights Act, in most cases, where a person makes a complaint of victimisation in relation to a protected disclosure, the Complaints Division will be obliged to receive the complaint, as this may be a breach of Part II of the Act.

However, under the Protected Disclosures Act, some disclosures are restricted to the Ombudsmen or to the Inspector-General of Intelligence and Security only. There appears to be no provision for the Commission to be party to such disclosures. It therefore appears that the Commission may not have jurisdiction to investigate such matters as it cannot be told of the circumstances of the original complaint.

In relation to other complaints, in the first instance a staff member of the Complaints Division known as a Complaints Resolution Officer may attempt to conciliate the complaint. If it **cannot be settled quickly, an investigation will take place.** After completing the investigation, the Complaints Resolution Officer will produce a report which will be considered by the Complaints Division to determine if the complaint has substance.

Where a complaint is found to have substance, another staff member will try to settle the complaint. If it cannot be settled, the matter may be referred to the Proceedings Commissioner for a decision on whether to institute proceedings in the Complaints Review Tribunal.

If the Complaints Division has not found substance, or, the Proceedings Commissioner decides not to take the complaint to the Tribunal, a complainant may do so at his or her own cost.

Where proceedings are brought before the Complaints Review Tribunal, section 86 of the Human Rights Act provides that one or more of the following remedies may be ordered.

(a) A declaration that the defendant has committed a breach of the Act;

(b) An order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to

engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order;

(c) Damages in accordance with section 88 of this Act;

(d) An order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach;

(e) A declaration that any contract entered into or performed in contravention of any of the provisions of Part II of this Act is an illegal contract;

(f) Relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties;

(g) Such other relief as the Tribunal thinks fit.

Section 88 of the Human Rights Act provides that one or more of the following types of damages may be ordered:

(a) Pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction or activity out of which the breach arose;

(b) Loss of any benefit, whether or not of a monetary kind, which the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach;

(c) Humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.

Choice of Procedures

Currently, both the Human Rights Act and Employment Relations Act 2000 provide that where there are circumstances that give rise to either a personal grievance under the Employment Relations Act, or making a complaint to the Human Rights Commission in relation to the same matter, a complainant must make a choice of which procedure to invoke.

The Protected Disclosures Act impacts on current provisions relating to a choice of procedures. It appears that situations may arise where a person may be able to make either a complaint to the Commission of victimisation, or raise a personal grievance of retaliation in relation to the same set of circumstances.

While the Protected Disclosures Act makes no reference to a choice of procedures, it appears that the existing choice of procedures provisions in the Employment Relations Act and Human Rights Act may apply. This means that a person may be obliged to make a choice between complaining to the Commission or taking a personal grievance. This is consistent with the general legal principle that a person cannot receive two remedies in relation to the same problem.

The position appears to be that from 2 October 2000, once a person has applied to the Employment Relations Authority for the resolution of a personal grievance based on retaliation, they may be prevented from subsequently complaining to the Commission of victimisation if it relates to the same matter. Similarly, once a complaint of victimisation is accepted for conciliation or investigation by the Commission, a person may be prevented from applying to the Employment Relations Authority for the resolution of a personal grievance based on retaliation if it relates to the same matter. Much will depend on the facts of the particular case concerned and remains to be judicially tested.

Appropriate Authorities

Commissioner of Police

Office of the Commissioner
180 Molesworth Street, P O Box 3017, Wellington
Telephone: (04) 474 9499, Facsimile: (04) 498 7400, SX 11149
http://www.police.govt.nz

Broad Role

The role of the New Zealand Police is to serve the community by reducing the incidence and effects of crime, detecting and apprehending offenders, maintaining law and order and enhancing public safety.

The Police General Instructions make special provision for whistleblowers from within the Police ranks.

Controller and Auditor – General

Office of the Controller and Auditor-General
Level 5, 48 Mulgrave Street, P O Box 3928, Wellington
Telephone: (04) 917 1500, Facsimile: (04) 917 1549

Broad Role

The role of the Controller and Auditor-General is to assist Parliament to strengthen the effectiveness, efficiency and accountability of public sector organisations (including local government organisations).

The Controller and Auditor-General is independent of the Government, and has power to make inquiries and report to Parliament.

Director of the Serious Fraud Office

Level 2, Duthie Whyte Building,
Cnr Mayoral Drive and Wakefield Street, Auckland

Postal Address: P O Box 7124, Wellesley Street, Auckland

Telephone: (09) 303 0121, Fax: (09) 303 0142
Freephone: 0800 109 800
Email: sfo@.sfo.govt.nz

(The Serious Fraud Office has no regional offices.)

Broad Role

The Serious Fraud Office is an operational department whose purpose is to detect and investigate cases of serious or complex fraud offending, and where appropriate prosecute offenders.

The Director of the Serious Fraud Office is required under the legislation to act independently in all matters relating to any decision to investigate any suspected case of serious or complex fraud, and any decision to prosecute such alleged offending. It is not possible to be specific as to the cases that will be investigated and prosecuted by the Serious Fraud Office. However, the following criteria are generally considered:

All fraud involving over $500,000;
All fraud perpetrated by complex means;
Any other complaint of fraudulent offending which is, or is likely to be, of major public interest or concern;
Persons should contact the Complaints Officer at the Serious Fraud Office in the first instance.

Inspector – General of Intelligence and Security

Office: Level 5, Reserve Bank Building, No 2 The Terrace, Wellington
Postal Address: Executive Wing, Parliament Buildings, Wellington
Telephone: (04) 471 9571, Fax: (04) 473 2789

Broad Role

The Inspector-General of Intelligence and Security is an independent office established by Act of Parliament.

The principal function of the office is to assist the Minister responsible for the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) in the oversight and review of those intelligence agencies. Secondary functions include inquiry into:

- any matter that relates to compliance by an intelligence agency with the law of New Zealand
- any complaint by any New Zealand person or an employee or former employee of an intelligence agency that has or may have been adversely affected by any act or omission of that agency
- any review of the decision to make a security risk certificate under Part IVA Immigration Act 1987.

The Ombudsmen

For contact information, see inside front cover of these Notes

The Ombudsmen have roles under the following legislation:

- Ombudsmen Act 1975
- Official Information Act 1982
- Local Government Official Information and Meetings Act 1987
- Protected Disclosures Act 2000

Broad Role

The Ombudsmen have four distinct roles under the PDA:

- As suppliers of information and guidance, on request, to any potential discloser of information
- As an *"Appropriate Authority"* (other than for an intelligence and security agency**)**
- As recipients of "second disclosures", but in respect of public sector organisations only
- As the only *"Appropriate Authority"* for disclosures from the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence, and the New Zealand Defence Force

While an approach to the Ombudsmen is not a necessary threshold to making a protected disclosure, the Act has identified the Ombudsmen as providers of information and guidance regarding the use of the Act. The Ombudsmen have produced this document for that purpose.

An Ombudsman is an appropriate authority to whom an initial disclosure may be made, other than by an employee of an intelligence and security agency.

Where an employee of a public sector organisation is dissatisfied with progress in dealing with a disclosure, the employee may repeat it to an Ombudsman, unless the initial disclosure was to an Ombudsman; in which event the further disclosure should be to a Minister of the Crown.

An Ombudsman (excluding an Ombudsman's delegate) is the **only** appropriate authority in respect of disclosures concerning the international relations of the Government, or intelligence and security matters, by an employee of the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence, and the New Zealand Defence Force.

For the purposes of the Protected Disclosures Act, employee includes, as well as an existing employee:

- a former employee
- a homeworker
- an individual independent contractor doing work for an organisation
- a person concerned in the management of an organisation
- in relation to in the NZDF, a member of the Armed Forces.

The Ombudsmen's wide powers of investigation under the Ombudsmen Act, apply to the investigation of a disclosure of information.

Parliamentary Commissioner for the Environment

11th Floor, Reserve Bank Building, 2 The Terrace, P O Box 10 241, Wellington.
Telephone: (04) 471 1669, Fax: (04) 495 8350
Website: http://www.pce.govt.nz Email: pce@pce.govt.nz

Broad Role

The Environment Act 1986 confers on the Parliamentary Commissioner for the Environment (PCE) the principal functions of:

- Reviewing the systems of agencies and processes set up by Government to manage the allocation, use, and preservation of natural and physical resources.
- Investigating the effectiveness of public authority environmental planning and management.
- Investigating any matter where the environment has been or may be adversely affected (matters can be brought to the PCE's attention by any citizen).
- Responding to requests from Parliament to report on any petition, Bill or other matter which may have a significant effect on the environment.
- Providing advice on remedial actions and preventative measures for the protection of the environment.

In carrying out these functions the PCE is free from ministerial direction and has discretion in determining what matters to investigate except where he is requested by Parliament to report on any petition or Bill, or inquire into any matter that has had or may have a substantial and damaging effect on the environment.

Police Complaints Authority

9th Floor, 89 The Terrace, P O Box 5025, Wellington

Telephone: (04) 499 2050, Facsimile: (04) 499 2053
Freephone: 0800 503 728

Broad Role

The broad role of the Authority is to consider complaints of misconduct or neglect of duty by any member of the Police, or concerning any practice, policy or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity.

The Authority is not authorised to investigate any matter relating to the terms and conditions of service of any person as a member of the Police.

Solicitor General

Crown Law Office, St Pauls Square, 45 Pipitea Street, Wellington. P O Box 5012, Wellington. DX SP 20208 Wellington
Telephone: (04) 472 1719, Facsimile: (04) 473 3482

Broad Role

The Solicitor-General is the Chief Executive of the Crown Law Office. The Crown Law Office is a Department of State and exists to provide legal advice and representation to the Government. The office also has responsibilities under the criminal law in its relationships with the Police and Crown Solicitors, and the conduct of criminal appeals.

Independently the Solicitor-General can exercise a number of public interest functions which may arise out of the common law or be conferred by statute. The role of *"appropriate authority"* falls into this category.

The Crown Law Office is not however an investigatory body. In practice, while the Solicitor-.General may be well placed to co-ordinate a response, most protected disclosures will be referred to another more appropriate agency.

State Services Commissioner

100, Molesworth Street, P O Box 329, Wellington.
Telephone: (04) 495 6600, Fax: (04) 472 5979
www.ssc.govt.nz

Broad Role

The State Services Commissioner appoints and develops public service chief executives, and advises the government on the performance of public service departments and agencies. The Commissioner promulgates values and standards of behaviour for the Public Service,

and provides assurance to the Government that the Public Service has the capability to deliver the Government's objectives.

However, under the State Sector Act 1988, chief executives of Public Service departments are responsible to their Minister for carrying out the functions and duties of their department, and for the general conduct of their department. In matters relating to decisions on individual employees, the chief executive of a department must act independently. Accordingly, in those matters the State Services Commissioner usually cannot intervene - sections 32 and 33 of the State Sector Act 1988 refer.

Health and Disability Commissioner

Level 13, Vogel Building, Aitken Street, P 0 Box 12 299, Wellington.
Telephone: TTY (04) 494 7900, Fax: (04) 494 7901
Freephone: 0800 112 233. www.hdc.org.nz

Broad Role

The role of the Health and Disability Commissioner is to investigate complaints against persons or bodies who provide health care or disability services. The Commissioner may investigate single or discrete incidents where a provider has acted or omitted to act, as well as any policy or practice that may breach the rights contained within the Code of Health and Disability Services Consumers' Rights.

The Commissioner can make public statements and publish reports on any matter affecting the rights of health and disability consumers and can bring matters that impact on the public interest, particularly public safety, to the attention of any appropriate persons.

Additional Appropriate Authorities

In addition to the Authorities named above, every head of a public sector organisation is an Appropriate Authority. Some of them have statutory powers of investigation.

Private sector bodies having disciplinary powers over members of a profession or calling are also Appropriate Authorities.

CASES WITH REFERENCES TO PROTECTED DISCLOSURES ACT 2000

1. *Bone & Ors v Telecom (NZ) Limited & Ors* (Employment Relations Authority, 11 April 2003, AA96/03)

Five employees of Telecom were made redundant as a result of the disestablishment of the Consulting Group, which was within Telecom's Advanced Solutions Group. They claimed they had been unjustifiably dismissed in that the redundancies were not commercially justified and were accompanied by unfair process. Two of those former employees further alleged that their terminations arose as a result of retaliatory action by Telecom because they had made serious allegations against senior Telecom managers. They submitted they were entitled to the protection of the Protected Disclosures Act 2000 in respect of those allegations. The allegations raised serious issues in respect of corporate governance, project governance, gross mismanagement, conflict of interest, product quality, and theft or misappropriation of intellectual and commercial property.

The Authority found that the Protected Disclosures Act had no application because the purpose of the Act is to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing, and the allegations in this case did not raise issues that were required to be investigated in the public interest (p.16). The Authority also noted that:

(a) the allegations were made after the restructuring proposals were advised and on investigation were determined to be unfounded; and

(b) in any event, the two former employees were not disadvantaged by the finding that the Act has no application because their rights

to have their alleged grievances heard and dealt with was assured by the provisions of the Employment Relations Act 2000.

2. *Hill v Housing New Zealand* (Employment Relations Authority, 14 May 2001, AA47/01)

Hill, an employee of Housing New Zealand, sent an anonymous letter to the CEO of Housing New Zealand alleging, amongst other things, inappropriate sexual behaviour by an Area Manager who was to be given an additional and significant area of responsibility. Housing New Zealand became aware of information that suggested Hill had written the letter. However, even when this information was put to her, she continued to deny that she had written the letter. Hill was then suspended on full pay while Housing New Zealand considered the matter further. Hill then admitted she had written the letter. She was ultimately summarily dismissed on the basis that the content of the letter, especially the wide range of criticisms contained in it, and the denials as to the authorship of it over a six-month period, were such that Housing New Zealand considered it had lost trust and confidence in Hill. Hill challenged the lawfulness of the suspension and the dismissal.

In considering the lawfulness of the dismissal, the Authority considered the fact that "*Housing New Zealand now has a procedure for making protected disclosures of information about serious wrongdoing, following the coming into force of the Whistleblowers* [sic] *Act 2000*", and the coming into existence at a similar time of a procedure for the anonymous provision by email of "free and frank views and opinions" during a restructuring of Housing New Zealand. Hill said that, had such procedures been available at the time she wrote the letter, she might have felt safer. In rejecting that assertion as not being reliable, the Authority said (at p 9):

> *"For example, the procedure for making protected disclosures has a clearly underlying assumption that the employee making the disclosure will identify him or herself. The procedure does not address anonymous disclosures, and although it allows the person to whom a disclosure is made to prevent the release of information identifying the informant, this can in turn be overridden in the*

interests of ensuring the effective investigation of allegations or to comply with the principles of natural justice. Ms Hill was so overwhelmingly reluctant to identify herself as a complainant, that I find it difficult to see how such a procedure would make her feel safe."

3. ***Neuronz Limited v Tran & Ors*** **(unreported, High Court Auckland, CP 623-SW01, 23 May 2002, Williams J)**

The plaintiff applied for an order holding two of the defendants in contempt of Court for breaching an Anton Pillar order and undertakings given to the Court. One of the defendants, Mr Tran, was employed as a consultant to the plaintiff, primarily to assist the plaintiff in obtaining approval to market one of its drugs. During the course of his work, Mr Tran became concerned that the plaintiff's proposed drug was dangerous and ought not to be trialled. He was concerned that, in issuing proceedings against him, the plaintiff was attempting to prevent him from disclosing his concerns about the proposed drug. Mr Tran did not attend the hearing of the contempt application. In explaining his absence, his counsel put before the Court a facsimile from Mr Tran saying that he had asked the Ministry of Health to extend to him the protection to be obtained by compliance with the procedures set out in the Protected Disclosures Act 2000 and that he would not be returning to New Zealand until he received that protection. There was also before the Court a letter from the Ministry of Health advising Mr Tran of the procedure to be followed under the Protected Disclosures Act.

The Court held (at para 86) that it was unnecessary to consider the issue of the procedure under the Protected Disclosures Act because "*counsel were agreed that the Act did not apply in the circumstances of this matter, there having been no attempt to comply with its procedures and it being doubtful that its provisions extended to alleged breaches of Court orders (despite s.18) or that Mr Tran was an "employee" within the meaning of the Act*".

4. *D v Chief Executive of Department of Corrections* (Employment Tribunal Adjudication Jurisdiction, 26 July 2002, DT 8/02)

The applicant was dismissed for serious misconduct for making a malicious allegation about her supervisor. The applicant claimed she had been unjustifiably dismissed. In considering the meaning of "malicious" the Adjudicator commented that there are "*very important public policy implications and reasons why the threshold test for maliciousness in such circumstances is high enough to deter false and mischievous allegations but low enough so as not to act as a deterrent to those who wished to express reasonable concerns about another person in the workplace*" (para 63). The Adjudicator then said:

> *"[65] I note that the only bar to protection to an employee making a claim under the Protected Disclosures Act 2000 is where the:*
>
> > *… person who makes a disclosure of information makes an allegation known to that person to be false or otherwise acts in bad faith. [s.20]*
>
> *[66] Given the above immediately–cited statutory provision and the related provision in the Human Rights Act 1993, it seems to me that any restriction or impediment to internal complaints within the respondent's organisation should be consistent and intrinsically compatible."*

In that case, the Adjudicator determined that no reasonable employer in the respondent's shoes could have reasonably concluded that the applicant had made a malicious complaint about her supervisor.

SECTION 19 – CONFIDENTIALITY OF IDENTITY v NATURAL JUSTICE & EFFECTIVE INVESTIGATION[1]

Index to Appendix 5

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[1] The reviewer acknowledges the significant assistance of David Woodnorth LLM (Hons) BA, Barrister, in the preparation of this paper.

Introduction and Summary

1. In this paper I discuss the particular difficulties of assessing when it may be "essential having regard to the principles of natural justice" for a person who receives a protected disclosure to identify the person who made that disclosure[2]. The assertion is made by some employment law practitioners and commentators[3], and reflected in some internal procedures established under s.11 of the Protected Disclosures Act, that it is a fundamental requirement of natural justice that an "accused person" know the identity of his or her "accuser" – or, put another way, that natural justice requires the disclosure of the identity of the complainant.

2. This is not necessarily so, in the reviewer's view. However, the balancing process to be undertaken by the recipient of the disclosure between the interests of natural justice and fairness to the "accused", and the right of the discloser to protection of his or her identify, is not a simple one. This paper considers a number of approaches and analogies, and makes some suggestions in that context:

Background to section 19

3. The 1995 *Report of the Ministerial Review on Whistle Blowing*[4] recorded the view that protection can be properly provided to any individual who discloses information by *"keeping identities confidential to the fullest extent possible;"*[5]. The Ministerial Review did not elaborate upon the phrase "to the fullest extent possible" in this regard.

4. The wording of s.19 is the same as that contained in the confidentiality clause of the Protected Disclosures Bill when it was first introduced in 1996.

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2 Refer s.19(1)(b)(iii)

3 For example, Natural Justice and the protection of identity under the Protected Disclosures Act 2000, Nicola Whittfield, Employment Law Bulletin (5)July 2001: 90-92

4 John Edwards, John Gray and Ian Miller, "The Ministerial Review" 20 October 1995

5 Page 6, Appendix I. Other measures identified were providing an agency to investigate complaints of disadvantage, providing for personal grievance and discrimination causes of action, and providing statutory immunity from criminal and civil liability

There was no comment on this aspect of the Bill in the Select Committee's report back, and little elaboration or comment during the parliamentary debates on the Bill. The most specific comment was made by Hon Trevor Mallard, Minister of State Services, during the debate on the Supplementary Order Paper the day before the Bill's third reading:

> *"It is important that we have confidentiality and privacy in this area. There must be the ability to blow the whistle privately and in a confidential sense. There must be the ability to go to an appropriate person and blow the whistle. In some cases it might be the Commissioner of Police; in other cases it might be the Controller and Auditor-General; it might be the chief executive of a particular department; it might be one of Parliament's commissioners, but it is very important that the confidential approach can be made. It is important that when people do that they are protected, and they get support from their management, and that those systems are in place. We have to make sure that employees are confident in that area."*[6]

Comparable provisions in Australian/UK legislation

5. A brief survey of the comparable provisions in the Australian and UK legislation indicates where the New Zealand position sits on the spectrum of options.

South Australia – Whistleblowers Protection Act 1993

6. This was the first enacted of the Australian protected disclosure Acts[7]. This Act covers public sector maladministration, mismanagement of public money and resources, risk to public health and safety, and illegal activity by any adult or corporation (see section 4 definition of public interest information).

7. Section 7 provides statutory protection of the identity of a person making an "appropriate disclosure of public interest information", but is subject to the condition that this protection applies except so far as may be necessary to ensure that the matters to which the disclosure relates are properly

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6 NZPD [*Hansard*] Vol 582 at p.1419, 28 March 2000

7 Save for the Whistleblowers (Interim Protection) and Miscellaneous Amendment Acts 1990 (Qld), which was an interim measure.

investigated (s.7(1)). The obligation to maintain confidentiality applies *"despite any other statutory provision, or a common law rule, to the contrary"* (s.7(2))[8].

8. This appears to be a very powerful protection. However, the effect of it is probably equivalent to New Zealand's s.19 given the condition that disclosure of the discloser's identity is permitted *"to ensure that the matters … are properly investigated"*. Where, for example, the rules of natural justice require disclosure, then disclosure will be authorised, as the matter could not otherwise be "properly" investigated. A careful exercise of judgement will be required in the circumstances.

9. Note also s.6 of the South Australian Act imposes an obligation on a person making a protected disclosure to assist with an official investigation into the matters to which the disclosure relates (except where the investigation is undertaken by the organisation to which the disclosure relates).

10. While the protection in the South Australian statute is unlikely to offer a stronger level of protection for the bona fide discloser than the New Zealand Protected Disclosures Act, it is perhaps worded in a way which gives stronger emphasis to the obligation. This might result in a higher level of caution from those dealing with disclosures, and so may give more comfort to a potential discloser.

Queensland - Whistleblowers Protection Act 1994

11. Section 55 of the Whistleblowers Protection Act 1994 (Queensland) imposes a confidentiality regime similar to s.19 of the New Zealand Act. The confidentiality obligation is subject to disclosure for the purposes of conducting an investigation into the matters that are the subject of the public interest disclosure to an appropriate entity. Subsections 55(4) and (5) state the natural justice exception in the following terms:

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[8] Compare with the Queensland and ACT Acts which make the duty of confidentiality subject to any authorisation to release under other Acts (s.55(3)(d) Whistleblower Protection Act 1994 (Qld) and s.33(2)(b) Public Interest Disclosure Act 1994 (ACT).

> *55 Preservation of confidentiality*
>
> *…*
>
> *(4) This section does not affect an obligation a person may have under the law about natural justice to disclose information to a person whose rights would otherwise be detrimentally affected.*
>
> *(5) Subsection (4) applies to information disclosing, or likely to disclose, the identity of a person who makes a public interest disclosure only if it is –*
>
> *(a) essential to do so under the law about natural justice; and*
>
> *(b) unlikely a reprisal will be taken against the person because of the disclosure.*

12. The primary distinction with the New Zealand provision is the fact that, even if it is essential to disclose in the interests of natural justice, if reprisals are likely then disclosure is not authorised. Hence the public interest balance is more in favour of protecting identity than preserving natural justice rights.

13. Note that the "principal object" of the Queensland Act is stated as being *"to promote the public interest by protecting persons who disclose…"* (wrongdoing). This compares with the dual public interest purposes of facilitating the disclosure and investigation of serious matters, and protecting those who make disclosures, which are features of the South Australian and New Zealand Acts.

ACT – Public Interest Disclosure Act 1994

14. Section 33 of the ACT Act makes it an offence to wilfully disclose confidential information without "reasonable excuse". A "reasonable excuse" is likely to include situations where natural justice obligations would require disclosure. Under s.33, a public official shall not,

> *"…without reasonable excuse, … wilfully disclose … confidential information [including information about the identity of the discloser"*

unless it is:

> *"(a) to another person for this Act; or*
>
> *(b) to another person, if expressly authorised under another Territory law; or*
>
> *(c) for the purposes of a proceeding in a court or tribunal."*[9]

15. Note too that s.16 of this Act states that if the person making a public interest disclosure does not identify himself or herself, then the Act does not oblige the proper authority to investigate the matter.

New South Wales – Protected Disclosures Act 1994

16. Section 22 of the NSW Act on its face most closely resembles s.19 of New Zealand's Protected Disclosures Act. However the prohibition on disclosure is stated in definite terms, rather than using the "best endeavours" terminology of the New Zealand Act.

17. The provision, ambiguously entitled "Confidentiality guideline", requires the recipient of a protected disclosure:

> *"… not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:*
>
> *(a)* … [they consent in writing]*;*
>
> *(b) it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern, or*
>
> *(c) the investigating authority* [etc] *… is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively …"*

18. This provision appears in Part 3 of the Act, "Protections". Like New Zealand, but unlike the other Australian Acts, wrongful disclosure of information does not appear to be subject to criminal sanctions.

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9 Public Interest Disclosure Act 1994 (ACT) s.33(2)

Victoria – Whistleblowers Protection Act 2001

19. The protection of the identity of the discloser is almost absolute in Victoria. Section 22 makes it an offence to disclose information received as a result of a protected disclosure, or as a result of the investigation of a protected disclosure, except for the purposes set out (which are not relevant). Under subsection (2) the Ombudsman or a public body is prohibited from disclosing particulars in their reports under the Act that are likely to lead to the identification of the discloser (or person against whom the disclosure is made).

United Kingdom – Public Interest Disclosure Act 1998

20. This Act inserts a new Part IVA into the Employment Rights Act 1996. It does not appear to contain any provision relating to the confidentiality of information about the person making a protected disclosure. However, s.47B(1) provides that the discloser has a right not to be subjected to any "detriment".

The requirements of natural justice v. preservation of witness anonymity in the public interest – discussion

21. As a matter of general principle all relevant information must be disclosed to an "accused person" to allow him or her an opportunity to controvert or to correct the information in issue[10]. The principle is simple – the decision-maker (eg employer, jury) will be influenced by the information in deciding the consequences for the "accused person" and so that information should be known to and be able to be properly tested or refuted by the affected party. However, there also may be a countervailing public interest justifying the withholding of information from a party whose rights could be affected by a decision. This immunity from disclosure is often referred to as one form of "public interest immunity".

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[10] See Phillip A P Joseph, Constitutional and Administrative Law in New Zealand, Brookers Ltd, Wellington (2nd ed) 2001, para.23.4.2

22. The cases dealing with public interest immunity are instructive when considering whether or not the requirements of natural justice might require disclosure of information, which would otherwise be subject to the confidentiality imposed by s.19 of the PD Act, in that a balancing exercise of the competing public interests is undertaken. In *R v Hughes* [1986] 2 NZLR 129 (CA), at p 154 McMullin J cited the following passage from *Conway v Rimmer* [1968] AC 910 (HL), at 987. He stated that a Judge conducting the balancing exercise necessitated by a claim of public interest immunity needs to know:

> *"…whether the documents in question are of much or little weight in the litigation, whether their absence will result in a complete or partial denial of justice to one or other of the parties or perhaps both, and what is the importance of the particular litigation to the parties and to the public. All these matters should be considered if the Court is to decide where the public interest lies."*[11]

Statutory tests for maintaining witness anonymity

23. Section 35 of the Evidence Amendment Act (No 2) 1980 gives the Courts a statutory power to excuse witnesses from breaching a confidence, where the witness is an informer to a body other than the Police. The authors of Adams on Criminal Law suggest that arguments for the exclusion of evidence may be made with reference to public interest immunity or s.35 with no difference in the ultimate result[12]. The test to be applied by the Court in exercising its discretion is set out in s.35(2) and discussed below, together with other Evidence Act tests applicable to maintenance of witness anonymity.

24. Section 35 of the Evidence Amendment Act (No 2) 1980 applies generally where the disclosure of information would be a breach by the witness of a confidence, which should not be breached. It is similar to the position under the Protected Disclosures Act where the discloser's identity is to be protected unless there is some essential matter requiring its release. However, the test

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11 See further *Attorney-General v. Powerbeat International Ltd* (1986) 16 CRNZ 555; *Tipene v Apperley* [1978] 1 NZLR 761 (CA); *R v Turner* [1995] 3 All ER 432; and *R v Mason* (2000) 77 SASR 105.

12 Adams, Criminal Law Ch 2.19.15(3)(b)

is, in my view, more weighted against disclosure (in favour of protection) under the Protected Disclosures Act: the disclosure **must be essential** to the effective protection of natural justice, or the effective investigation of the serious wrongdoing etc.

25. In exercising its discretion under s.35, the Court considers whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of such confidences and the encouragement of free communication between such persons, having regard to the following matters (s.35(2)):

> *"(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:*
>
> *(b) The nature of the confidence and of the special relationship between the confidant and the witness:*
>
> *(c) The likely effect of the disclosure on the confidant or any other person."*

26. In *R v Hughes* [1986] 2 NZLR 129 (CA) a majority of the Court of Appeal refused to permit an undercover police officer to testify without revealing his true identity. Parliament responded to *Hughes* by enacting s.13A Evidence Act 1908. Similarly, when a majority of the Court of Appeal in *R v Hines* (1997) 15 CRNZ 158 (CA) would not agree that a lay witness in a criminal case could testify without revealing his or her identity, the legislature responded by enacting ss.13B-13J of the Evidence Act 1908 by which witness anonymity may be preserved in the prosecution of an indictable offence.

27. Section 13A of the Evidence Act provides for the protection of the true identities of witnesses who are undercover police officers. The Commissioner of Police must certify that the officer concerned has not been convicted of any offence or misconduct[13] or that he or she has been the subject of adverse comment by a Judge or person whom before proceedings were conducted. Where the procedural requirements of s 13A are met and

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[13] Evidence Act 1908, s.13A(3)

protection granted, no evidence shall be given, or questions asked, as to the true identity of the undercover police officer except by leave of the Judge[14]. The Judge shall not grant such leave unless satisfied[15]:

> *"(a) That there is some evidence before the Judge that, if believed by the jury, could call into question the credibility of the witness; and*
>
> *(b) That it is necessary in the interests of justice that the accused be enabled to test properly the credibility of the witness; and*
>
> *(c) That it would be impracticable for the accused to test properly the credibility of the witness if the accused were not informed of the true name or the true address of the witness.*

28. These are all aspects of the entitlements of a person who is charged with an offence to natural justice and a fair trial. The position is analogous to the Protected Disclosures Act and whether the person accused of the serious wrongdoing is properly and fairly able to test the witness, if the credibility of that witness is an issue. This will not necessarily be the case.

29. Section 13B provides for the making of pre-trial witness anonymity orders in indictable cases. The criteria for a decision on such an application are as follows[16]:

> *"(4) The Judge may make the order if he or she believes on reasonable grounds that –*
>
> *(a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed prior to the trial; and*
>
> *(b) Withholding the witness's identity until the trial would not be contrary to the interests of justice.*
>
> *(5) Without limiting subsection (4), in considering the application, the Judge must have regard to –*
>
> *(a) The general right of an accused to know the identity of witnesses; and*

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14 Evidence Act 1908, s.13A(6)(d)
15 Evidence Act 1908, s.13A(7)
16 Evidence Act 1908, ss.13B(4) and (5)

> *(b) The principle that witness anonymity orders are justified only in exceptional circumstances; and*
>
> *(c) The gravity of the offence; and*
>
> *(d) The importance of the witness's evidence to the case of the party who wishes to call the witness; and*
>
> *(e) Whether it is practical for the witness to be protected prior to the trial by any other means; and*
>
> *(f) Whether there is other evidence which corroborates the witness's evidence."*

30. Section 13C provides for the making of a witness anonymity order for the purpose of a High Court trial (including District Court cases subject to an application for transfer to the High Court). The criteria for the Judge's decisions on an application under s.13C are set out in ss.13C(4) and (5), and are similar, but not identical, to those contained in ss.13B(4) and (5). The focus is upon:

- Safety of the witness or any other person, or serious damage to property if there is disclosure; and
- Credibility of the secret witness; and
- Ensuring the accused is assured of fair trial.

31. Section 13E establishes a procedure by which a Judge to whom an application under s.13C is made, can appoint independent counsel to assist the Judge by inquiring into the matters referred to in ss.13C(4)(a) and (b) (i.e. safety of persons or property, and the secret witness's credibility).

32. In its 1999 report, the Law Commission[17] discusses its proposed regime for informants who make disclosures to enforcement agencies and the general overriding discretion as to confidential information provided for in a proposed new s.67, currently protected by s.35 of the Evidence Act. The proposed matters to which a Judge would have regard in exercising the

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[17] *Evidence – Reform of the Law* Report 55 – Volume One (August 1999, Wellington), paras.296 to 300

general discretion are broadly similar to those found currently in ss.13B and 13C of the Evidence Act[18].

An alternative approach to the protection of persons making disclosures under the Protected Disclosures Act – statutory secrecy under the Tax Administration Act?

33. Information received from an informant and held by officers of the Inland Revenue Department becomes subject to statutory secrecy[19]. However, the Court of Appeal has held that when engaged in litigation, the Commissioner should comply with the ordinary obligations of a litigant to make discovery.

34. In *CIR v Squibb*[20] the defendant was seeking discovery of the identity of a person, suspected to be a former employee of the defendant, who had provided relevant information to the Commissioner. The Commissioner had deposed that informant material was used, but not relied upon in carrying out the investigation of any taxpayer, and that the Department had established the liability of the taxpayer by its own investigation. Richardson J accepted the Commissioner's submissions and concluded that:

> *"Information about taxpayers from sources independent of those taxpayers is essential to the functioning of the tax system. Those sources include informants…. The sole ground and purpose of the claim to privilege against non-disclosure is to protect the identity of informants. It is not to prevent disclosure of the information they provide. That has to stand on its own apart from the informant."* (at p.9,162)

35. It is notable that Richardson J assessed the obligation to disclose by reference to High Court Rule 312 (p.9,163). Hardie Boys J stated that as the ordinary obligations of discovery applied to the Commissioner when engaged in litigation: *"…this case falls for determination on the principles applicable to informers generally."* (p.9,163). He went on to refer to the principles set out by the House of Lords in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, where the rule that the identity of police

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18 Refer pp.174 to 176 of Vol 2 of Report 55

19 Refer s.81 Tax Administration Act 1994

20 *CIR v. Squibb* (1992) 14 NZTC 9,146, per Richardson at p 9,157 and Hardie Boys J at p.9,163. See also *Knight v CIR* [1991] 2 NZLR 30, per Cooke P at p 35 and Richardson J at p.42.

informers will be protected unless disclosure could help to show the accused's innocence was extended to the respondent society.

36. In upholding the Commissioner's refusal to disclose the identity of the informant in *Squibb* Richardson J concluded at p.9,162:

> *"But here Squibb is seeking the added value of the Commissioner's confirmation of what it believes it knows* [i.e. the identity of the informer] *and it is that which is protected by the privilege. In that regard it is not determinative that the informant may not have specifically sought to have the Commissioner protect his identity. The Commissioner's duty of non-disclosure is a public interest responsibility which is owed to the general body of taxpayers, and the whole community, not simply the particular informant. …"*

37. Hardie Boys J concluded at p 9,163:

> *"In the present case the Commissioner very properly does not resist the production of documentary material supplied by the informer, subject to removal of anything that might identify him. It is on the validity of that material that the Commissioner must rely, and that validity must obviously be able to be tested independently of the identity of its source. The case is not one where the recognised exception to confidentiality applies."*

38. *Heiber v CIR*[21] was a similar case to *Squibb* in that the taxpayer was seeking from the Commissioner confirmation of the identity of the original informant or informants who provided information to the Commissioner, in circumstances where subsequently the persons the taxpayer suspected were the informers became involved in the Commissioner's investigation in a manner which resulted in their identification as informers or probable informers.

39. The High Court concluded that the subsequent involvement of an informer in the investigative process did not result in the loss of the immunity against disclosure of the fact that he or she was indeed an informer. At p.9 the Master said:

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21 (Unreported High Court, 31 January 2002, Master Kennedy-Grant)

> *"What is protected by the immunity is the fact of informing, not the content of the information. Informers trigger the commencement, renewal or redirection of the investigative process by giving the information to the relevant authority in the first place. It is the fact that they were the persons who triggered the investigative process that is protected by the immunity. If the immunity were to be lost by reason of mere involvement of an informant in the subsequent investigative process in a manner which identifies that person as an informer or probable informer, the effectiveness of the immunity as an encouragement to informers would be substantially weakened."*

40. Of course the comment by the Master that the content of the information disclosed is not protected by the privilege, is to be caveated with the important point, made by the Court of Appeal in *Squibb*, that such information will only be disclosed to the extent that it does not identify the informant.

41. If there is one criticism which could be made of the decision in *Heiber* it is that the High Court appeared to adopt a formulaic application of the test for privilege based on the outcome in *Squibb*, and because of this appears to have failed to turn its mind to the important question of whether refusal to disclose the information sought, in the circumstances of the particular case, could result in injustice to the party seeking disclosure. This is the balancing of public interests referred to by Lord Diplock in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 218. In *Squibb*, although the majority disagreed with the Chief Justice's outcome in the High Court, there was no criticism of the way in which he had formulated the relevant test, as cited by Richardson J at p.9,161:

> *"In weighing the balance, the Chief Justice said, the Court should consider the significance of the documents in relation to their likely effect on the decision in the case and whether their absence would result in a complete or partial denial of justice to one or other of the parties, or to both, and in relation to the importance of the particular litigation to the parties and the public."*

42. The Chief Justice had concluded that if Squibb was not able to know the identity of the informant an injustice could result from the situation of the plaintiff being unable to test the credibility of the informant. However, the

majority of the Court of Appeal (4:1 Cooke P dissenting) reached the opposite conclusion because the Commissioner had established the liability of the taxpayer through his own investigation. This combined with the fact that the proper focus of the proceedings being brought by Squibb would be on the **quality** of the information in the possession of the Commissioner relating to the income tax liability of Squibb.

43. In my view, the test applied by the Court of Appeal in *Squibb* is in substance very similar to the net effect of s.19 of the Protected Disclosures Act. A public interest obligation to keep an informant's identity confidential, subject to the necessity of ensuring that non-disclosure does not work an injustice against the party about whom the disclosure was made – in other words disclosure will be required if essential having regard to the principles of natural justice.

44. In my opinion the analysis in *Squibb* is helpful in its drawing of a distinction between the confidential act of informing, and the status of information which is to be used in determining the liability of the third party. The privilege was upheld because the Commissioner was able to depose that the identity of the informant was of limited relevance. The act of confidential disclosure was only relied upon to the extent that it triggered (and no doubt set the direction of) the investigation. However, the determining of liability was on the basis of information obtained during the investigation.

45. The approach set out in *Squibb* could inform a confidentiality of disclosure regime whereby the act of making a protected disclosure is treated as simply **initiating** an investigation (or requirement for some kind of action). It does not itself form part of the investigation. Where the protected disclosure information is only used in this way (i.e. to initiate an investigation and perhaps to define the terms of reference for the investigation), and does not form a part of the information gathered by the investigation itself, the prospect of non-disclosure of this information causing an injustice or breach of natural justice to the accused person would be minimal.

46. In the context of such a process the evidence of the "informant" could then be sought during the normal course of the investigation, without any need to reveal to anybody the fact that that particular witness was the person who originally made the protected disclosure. Of course, there may still be compelling reasons to be able to grant confidentiality to witnesses who are interviewed during the course of the investigation, and the normal immunity tests would apply.

Anonymity of complainants in the employment jurisdiction; contrary to natural justice?

47. In an article *"Natural justice and the protection of identity under the Protected Disclosures Act 2000"*[22] the author argues that the Act has changed little in terms of the likelihood of an employer being obliged to disclose the identity of a confidential complainant. Decisions in the employment law context have emphasised the application of the principles of natural justice.

48. The cases considered below illustrate the difficulties encountered by employers receiving confidential complaints where assurances of confidentiality have been given.

Leilua v Glovers Food Processors Ltd[23]

49. In *Leilua v Glovers Food Processors Ltd* certain staff members made written allegations stating they had seen the appellants, also employees, taking money. The allegations were put in writing only after the informants received a promise from the employer that their identities would not be revealed at any time in the future. In that case, Goddard CJ held that the employer had no right to dismiss for theft *"because the evidence that it had gathered did not support a conclusion that the appellants had stolen anything"* [p. 219]. The Chief Judge did not go so far as to say that the employer should have revealed the identities of the informants, but he was critical of the investigation process undertaken by the employer. The employer had failed to investigate an explanation offered by the accused

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22 Nicola Whittfield, Employment Law Bulletin (5) July 2001:90-92

employees, and a contention by them that the allegation of theft was malicious and inspired by ethnic rivalries.

50. I suggest it would have been very difficult for the employer in *Leilua v Glovers Food Processors Ltd* to satisfy the Chief Judge's expectations of a fair process while maintaining the confidentiality promised to the informant employees because of the process adopted. In a case such as this involving ongoing minor theft (of money from the pool table), the employer might have used the information provided to instigate a confidential process to gather independent evidence of the wrongdoing – for example surveillance of the scene at the time the informants said they had observed the thefts occurring.

Dallas v Wellington Newspapers Ltd[24]

51. In *Dallas v Wellington Newspapers Ltd* an inquiry on behalf of the employer into a complaint of sexual harassment had received confidential statements from two witnesses whose identities remained unknown to the plaintiff. The judgment was on the plaintiff's application for an interim injunction reinstating him to the role from which he had been shifted as an outcome of the sexual harassment inquiry. Although the injunction was refused on balance of convenience considerations, the Chief Judge had found that there was an arguable case and that in particular Wellington Newspapers would have to justify several matters. The first of these was:

> *"…the reception by the inquiry and through it by the defendant of information from so-called secret witnesses. I question the wisdom of the reception of such information. It cannot effectively be put to the plaintiff for reply and therefore cannot be relied upon in the decision-making process. It has the effect of prejudicing the inquiry against the plaintiff unless it puts the evidence out of its mind. It also gives the witnesses coming forward in this way a guarantee that what they say will not be contradicted, which enables them to say whatever they like."* [p 466]

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23 [1998] 3 ERNZ 211

24 [1998] 2 ERNZ 456

52. In circumstances like this, confidentiality could not fairly be maintained if the evidence is relevant and relied on. However, there may be ways of protecting the **fact** that a particular witness made an "unprovoked" disclosure by treating them as witnesses who were or may have been identified as having relevant information by someone else.

Spotless Services (New Zealand) Ltd v Parker[25]

53. The decision in *Spotless* concerned an appeal against orders for discovery made in the Employment Tribunal on the basis that the employer sought to withhold the identity of the complainants on the grounds of confidentiality and possible victimisation.

54. The dismissed employee, Parker, alleged that the refusal to disclose to him the identities of his accusers was procedurally unfair. At this stage, importantly, the Court was dealing with the issue of discovery of documents relevant to that issue, not the issue itself. It was not a ruling on whether or not the employer should have disclosed the information during the investigation process.

55. The natural justice issue in *Spotless* was firmly on the aggrieved employee's right before the Employment Tribunal to:

> *"…be able to fully explore, test and present his contended grievance with the advantage of full discovery and inspection of the complaints made against him in their complete and unexpurgated form, extending to the identity of the complainants. …It seems to me - contrary to Mr Sharp's contention – the Adjudicator in his reliance upon the reasoned approach followed by Colgan J in Talbot v Air New Zealand … was aware of the need to weigh in balance through an appropriate evaluation whether the professed public interest exclusionary considerations, comprising the alleged assured privacy concerns of those complaining to Spotless regarding the respondent's management of the company's restaurant, exceeded Mr Parker's entitlement to be told who his accusers were as to the serious complaints of misconduct made against him."* [p 11]

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[25] Unreported, Employment Court, Christchurch Registry, Palmer J, 17 February 1998

56. The Chief Judge observed that whilst in the case before him the issues were distinctly and markedly different to those of the criminal law setting in *R v Hine*[26]:

> *"…certain features of Mr Taylor's argument as to why the interests of justice demand that Mr Parker should know, through discovery and inspection, who his actual accusers are, echoes in principle – at a fundamental level – what was said by the Court of Appeal in R v Hughes [1986] 2 NZLR 129, which was approvingly cited by the President in Hines case at pp.540-542."* [pp.11, 12]

57. The substantive case between Parker and Spotless was determined in the Employment Tribunal in July 1998[27]. The Tribunal upheld Mr Parker's claim that he was unjustifiably dismissed. There was no finding that the employer was under a duty to disclose to the employee the identity of the confidential complainants. However, the decision does highlight a number of the difficulties an employer needs to overcome in order to achieve procedural fairness when investigating allegations of misconduct initiated by a confidential disclosure. Examples include:

57.1 Lack of specificity in the complaints (e.g. see p.24):

> *"To summarise Ms T K's* [confidential complainant] *allegation in the form it was made was so vague that Spotless was either not in position to put it to Mr Parker in that form or, if it chose to do so, it was in no position to disbelieve his denial he was indulging in such a practice. At that point it had two choices, either drop the matter or to question Ms T K further with a view to obtaining more details of the allegation to allow Mr Parker a proper opportunity to explain what he had allegedly done…"*[28];

57.2 Issues about the credibility of a complainant once identity was revealed during the grievance proceedings[29];

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26 [1997] 3 NZLR 529 (CA)

27 *Parker v Spotless Services (New Zealand) Ltd,* Unreported Employment Tribunal, Christchurch Registry, Mr D S Miller, 2 July 1998

28 *Spotless,* above, p.25

29 *Spotless,* above, top p.25, and mid p.29

57.3 The need to re-interview the complainants (presumably on the record) to try and resolve the vagaries of the initial disclosures[30];

57.4 Inability to rely on secret interviews:

> *"It is true there were several indirect references to Mr Wytze-Kuiper interviewing some staff. However in the absence of any good evidence about who was interviewed, and what they said to him, I must approach matters on the basis no such interviews were carried out."*[31]

58. The Tribunal observed that:

> *"One of the features of this case was the anonymity of the complainants. I have said little about that so far and I do not intend to say very much more. It seems to me the real problem in this case was the vagueness of some of the complaints and the inconsistency in relation to some others, not the fact that the complainant's identities were not revealed."*[32]

Porter v The Board of Trustees of Westlake Girls' High School[33]

59. The case of *Porter v The Board of Trustees of Westlake Girls' High School* involved the dismissal of Ms Porter, a cleaning supervisor, in reliance upon evidence provided by students whose identities were not disclosed to Ms Porter during the disciplinary investigation. The Employment Court found that the dismissal of Ms Porter was unfair because the employer in reaching its decision to dismiss had relied very much on the evidence of the confidential informers, and failed to disclose to Ms Porter additional complaints and evidence provided to the employer during its investigation, including evidence that two, and possibly more, of the student complainants had lied[34].

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30 *Spotless,* above, top p.29

31 *Spotless,* above, p.29

32 *Spotless,* above, foot p.30

33 [1998] 1 ERNZ 377

34 Note that Colgan J took the unusual step of declaring unjustified dismissal but without remedies on the basis that any entitlement of the employee to remedies was clearly vitiated by the proven facts in the Tribunal: *"...whilst the unfairness of the employer's inquiries into serious misconduct cause the resultant dismissal to be unjustified, so too does the depth and*

60. Colgan J at p.387 summarised five earlier employment cases which had dealt with issues of complainant confidentiality and, in what is probably the best attempt in the New Zealand cases to state as a matter of principle the correct approach to the issue of confidential informants in employment cases, said:

> *"What can be said of these cases is that an analysis of the particular circumstances of each dictates whether, in them, the deliberate and considered withholding of relevant information including the identity of complainants amounts to an unfairness going to determination of whether the resulting dismissal was unjustified.*
>
> *In general a fair inquiry into serious allegations against an employee will require full and fair disclosure to the employee of material evidence. Generally, also the identity of the person or persons making the complaint of serious misconduct will be a very material fact without which an employee will be at an unfair disadvantage in, first, knowing of the allegation and, second, in having an opportunity to respond to it. There may, however, be circumstances in which, although unfair to the employee, an employer is nevertheless justified in then withholding identity for good reason. This case was, on the evidence, I think one falling into that exceptional category. But the question is not simply one of disclosure or non-disclosure per se. If the identities of the complainants are justifiably to be withheld, it was incumbent on the employer, acting fairly and reasonably as it was obliged to, to have ensured that the process was fair in other respects."*[p 388]

61. In *Porter* and the other cases referred to, the approach was to assess first whether in the circumstances of each particular case the decision to withhold identity was justified, and if so, given that such information was not being provided to the accused employee, was the investigation otherwise fair? The cases reveal the difficulties in achieving procedural fairness when employers withhold such information.

62. This is not true to say that, in the employment arena, the accused has a *"right"* to know the identity of their accuser. Colgan J referred not to a *"right"* of access to this information, but rather to the reality that generally the identity of the complainant will be a very material fact without which the employee will be at an unfair disadvantage [p.389], and which will therefore

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multiplicity of misconduct by Ms Porter disqualify her, in equity and good conscience, from any remedy other than bare declaration."[p 393]

require the Court to inquire into whether the decision to withhold was justified in the circumstances, and if so, that the disciplinary process was otherwise fair.

63. In *Porter*, having reviewed the investigation process in detail, Judge Colgan concluded that:

> *"Applying the* Unilever *criteria of a fair inquiry as the Tribunal purported to, I have, however, come clearly to the opposite conclusion to that of the adjudicator. Ms Porter was not on notice of many of the specific allegations of serious misconduct that I am satisfied were relied upon to dismiss her. She had no real opportunity for explanation of them …."* [p.393]

NZ Food and Textile Workers Union v Bay Milk Products Ltd[35]

64. The case of *NZ Food and Textile Workers Union v Bay Milk Products Ltd*, provides a good example of the type of two stage approach (later) set out by Colgan J in *Porter* – namely, was the withholding of the witness's identity justified and fair? If so, did the employer act fairly and reasonably to ensure that, notwithstanding the withholding of identity, the disciplinary process was fair in other respects? The Employment Court held that the managers who decided to withhold the witness's identity held a genuine and reasonable protective view concerning the witness, that there could be *"intimidatory or harassing reprisals"* and that *"elements of the work force could undertake unfortunate retaliatory action against* [the witness]*"*[36], particularly if the investigation resulted in dismissal of the employee who was the subject of the investigation.

65. Having concluded that the decision to withhold the witness's identity was justified, the Court went on to *"three particular facets of this non-disclosure"* which supported the Court's conclusion that the non-disclosure of witness

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35 [1991] 2 ERNZ 231

36 P.245

identity did not result in disadvantage or unfairness to the accused employee. The three factors were[37]:

65.1 The witness had not requested anonymity, supporting the conclusion that he *"had nothing to hide"*;

65.2 The employee under investigation, or his union, *'probably knew, and/or could very readily ascertain, the identity of the so-called "secret witness"*;

65.3 No disadvantage accrued to the accused employee because of the non-disclosure of identity, the evidence established that the secret witness had a friendly relationship with the accused employee, there was no *"score to settle"*, he was simply a witness providing verification of what had been said to a primary witness by the accused (a threat), and the accused knew the substance of what the secret witness had said.

McEvoy v Northland Co-operative Dairy Company Ltd[38]

66. In *McEvoy v Northland Co-operative Dairy Company Ltd* the employer had maintained the confidentially of two witnesses to an alleged assault by the employee under investigation, Mr McEvoy. The Tribunal adopted the approach outlined in *NZ Food and Textile Workers Union v Bay Milk Products Ltd*, and *Porter v The Board of Trustees of Westlake Girls' High School*, and held:

> *"I have concluded, therefore, taking into account s.96 of the Employment Contracts Act 1991, cases decided under that Act, s.17 of the Evidence Amendment Act (No.2) 1980, and relevant provisions of the Privacy Act 1993, that the Tribunal should, in equity and good conscience, take account of Mr Biddle's account of his interview with Witnesses "A" and "B". I also conclude that it was appropriate for the Company to decline to give the names of "A" and "B" to Mr McEvoy and his representatives and it was appropriate for*

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37 P.246

38 Unreported Employment Tribunal, 3 March 2000, Mr W M Hodge

> *the Company to take on board the information it got from interviewing "A" and "B".*
>
> *These were not secret allegations, McEvoy knew exactly what the five complaints were and he was not unfairly disadvantaged in not knowing those names. He was not handicapped in making a response."*[39]

Latu v Wesley Wellington Mission[40]

67. In *Latu v Wesley Wellington Mission*, the employee Latu was dismissed for allegedly hitting a patient. The identity of the complainant and witness to the alleged assault was withheld from Latu during the investigation process. The Tribunal held that the decision not to disclose the identity of the complainant, in circumstances where *"…the honesty of that person was crucial to the decision to dismiss…"* contributed to the procedural unfairness of the process.[41]

68. The Tribunal stated *"the right to know your 'accuser' is a fundamental principle of natural justice"* [p.10]. However, the only authority referred to by the Tribunal in this regard is the decision of the Employment Court in *Dallas v Wellington Newspapers,* in which Goddard CJ in an obiter statement questioned the wisdom of any employer receiving confidential information in the context of allegations of wrongdoing. Having said that, even applying the tests articulated in the *NZ Food and Textile Workers Union v Bay Milk Products Ltd*, and *Porter v The Board of Trustees of Westlake Girls' High School* decisions, it seems likely that on the facts in *Latu* a proper conclusion would have been that the decision to withhold the complaint's identity in the circumstances was not fair, and that having decided to withhold this information the employer had adopted an unfair investigation process.

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39 Foot p.13

40 Unreported, Employment Tribunal, 17 August 1998, F E Morran

41 P.12

A policy choice – greater encouragement of disclosure vs natural justice in investigations and proceedings?

69. The author of an article *"Once more unto the breach…"*[42] argues, from a behavioural science perspective, the interdependency of the two public interest objectives of s.5 of the Protected Disclosures Act:

> *"In particular, it is asserted that the adequate protection of employees (the first objective) is a necessary prerequisite to serving the interests of the public (the second objective), as suspicions of misconduct must be encouraged to reach the surface in order for an investigation to be triggered and research suggests that whistle blowers (except in exceptional circumstances) will bring such information to the surface only if protective conditions are in place…"*[43]

70. Taylor then discusses the realities of employee motivations when contemplating making disclosures of wrongdoing by reference to research and writings of industrial and organizational psychologists and management specialists. A key finding of this research is that those who do witness wrongdoing but do not report it are generally concerned about, and unwilling to jeopardise, their career. Taylor then argues that an informed policy maker, understanding the thesis of "expectancy theory of workplace motivation":

> *"…will enact policy which will make employees aware of their rights to blow the whistle in certain circumstances, trust that the concerns they disclose will be fully and fairly investigated, including the imposition of sanctions and remedies where appropriate, and value the outcomes of whistle blowing more than they value the outcomes of not blowing the whistle.*
>
> *Sadly the Protected Disclosures Act fails to connect with this information. A few examples may help to illustrate this point.*
>
> - *Section 19 provides employees who disclose information with a "best endeavours" assurance of confidentiality. History shows that whistle blowers, once identified, are not treated well by their employers and co-workers so anything less than a guarantee of anonymity will impact heavily on an employee's calculation of negative valence* [relative value of

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42 Louise Taylor, [2002] NZLJ 225

43 Taylor, above, p.225

> the outcome], *thereby reducing their motivation to blow the whistle.…"*[44]

71. Taylor referred the low numbers of employees contacting the Ombudsmen in relation to the Protected Disclosures Act as evidence of employees' reluctance to engage with the Protected Disclosures Act mechanisms because of the Act's inability to achieve its objective of protecting employees: *"This has not been achieved because the Act does not accurately map the decision making processes of employees considering whistle blowing. …"*[45].

72. In "*Whistle-blowers and the Ombudsman*"[46] the author writes:

> *"Whilst no one can deny the importance of protecting, as far as possible, employees who "blow the whistle", it is obvious that the greater public interest is served by the ultimate investigation of the matters brought to attention by whistle blowers."*

73. It is possible that there could be distilled from the tests found in ss.13A-13J of the Evidence Act and s.35 of the Evidence Amendment Act (No 2), and the cases referred to, appropriate criteria for better defining either in the Act or in "template" procedures the considerations to be weighed by those in receipt of a protected disclosure when considering whether the disclosure of the identity of the person who made the protected disclosure is essential to the effective investigation of the allegations and/or essential to ensure the process complies with natural justice.

Balancing confidentiality and the countervailing public interests under section 19

74. In part 5 of this Report, I refer to the "best endeavours" obligation in s.19 as imposing a positive obligation on a person who knows the identity of the discloser to seek alternative ways of ensuring natural justice requirements are met, if reasonably possible. I noted that the formulation of the obligation of confidentiality in this way reflects the complexities of balancing the competing public interests. On the one hand is the very important public interest in protecting the identity of persons who are prepared to make

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44 Taylor, above, p.226

45 Taylor, above, p.225

protected disclosures, which is recognised as part of the necessary foundation of the Act. On the other are the three public interests identified in s.19(1)(b), ie:

(i) Effective investigation of the allegations;

(ii) Prevention of serious public or environmental risk; and

(iii) Upholding the principles of natural justice.

The focus is on the first and third of those. While the principles are the same for the second, difficult balancing issues are less likely to arise.

75. The first is the public interest in ensuring matters of serious wrongdoing are properly and effectively investigated. The Act recognises that, **if there is no other reasonable option open to the employer/investigator**, then the balance comes down in favour of investigation, not protection. The second is the public interest in ensuring that the investigation and any subsequent processes (such as dismissal from employment, or criminal prosecution) are fair to the person accused (i.e. that they comply with whatever the principles of natural justice might require in the particular circumstances).

76. With this second public interest consideration of natural justice, it is important to keep in mind that the content of natural justice depends very much on the circumstances. There are some reasonably universal statements that can be made. In particular[47]:

76.1 A person is entitled to have their case considered by someone who is "disinterested", being free from actual or apparent bias against them; and

76.2 An accused person is entitled to know the content of the case against him or her, and have a reasonable opportunity to respond to it.

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46 Ghan Gunasekara [2002] NZLJ 11

47 These other two pervasive principles of natural justice: *nemo judex in causa sua and audi alteram partem*. refer Phillip A Joseph, Constitutional and Administrative Law in New Zealand, (2nd ed.), Brooker's Ltd, Wellington, 2001, para. 23.1

77. This latter requirement does not mean there is any entitlement to know who initially brought the matter to the attention of the "authority". It is a right to know what the particular allegations are that concern the investigator. This will generally follow a preliminary investigation into the content of the disclosure, which will have confirmed that there is a matter to further investigate.

78. Identifying the discloser is not necessary if the content of the allegations sufficiently informs the alleged wrongdoer of the case he or she has to meet. However, where there are suggestions of improper motivation (malice/racism/sexism/retribution/jealousy), which might "infect" the allegations (and therefore the credibility of the person who made the disclosure becomes an issue), an accused person should be allowed to test credibility as part of the truth of the allegations. An example of a situation where the content of the allegations was sufficient and there was no need to identify the informant was *CIR v Squibb*[48], discussed above.

79. It will also be unnecessary to disclose the identity of the discloser if the protected disclosure was only the catalyst for the investigation, irrespective of motivation. Where the alleged serious wrongdoing is the subject of independent investigation which confirms or verifies the allegation it is unlikely to be necessary to rely on the original disclosure.

80. So in what circumstances will the need to effectively investigate, and/or the obligations of natural justice make it essential to disclose the identity of the discloser?

81. The cases discussed in the criminal, taxation and employment areas provide some examples of the approach taken by the Courts to the balancing of the competing public interests in different situations.

82. An example of a case where disclosure of the identity may be essential is where the discloser's information is critical to the truth or otherwise of the

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48 (1992) 14 NZTC, 9,146 (CA)

allegation. This may arise when the discloser is personally affected by the behaviour. The credibility of the discloser may be important in such an instance, and the person who is the subject of allegations may be entitled to challenge that credibility. An example might be where the discloser alleges they are the victim of sexual assault. The alleged wrongdoer will always be entitled to know who it is that he or she is alleged to have assaulted, with all relevant details of the alleged behaviour, in order to fairly respond to the allegations.

83. However even in this type of case it may be possible to keep the fact that the alleged victim of the offence was also the initial discloser of information confidential, without compromising the alleged wrongdoer's right to fair process. For example, information about possible assault is received and prompts an investigation. In the course of the investigation, "X" (the unidentified original discloser), "Y" and "Z" are interviewed and "X" provides information (independent from the original protected disclosure), which is then relied on in support of the allegations. "X" is identified, but as a relevant witness, not as the original discloser. In such a case the alleged wrongdoer has all the relevant information to enable him or her to respond to the allegations, without being explicitly made aware that the alleged victim of the harassing behaviour was the person who made the original disclosure to the organisation.

84. Another example could be a situation where an employee observes and reports another employee involved in ongoing theft. Rather than simply rely on that information and seek the "accused" employee's response, the investigator could use the information to gather independent evidence of the wrongdoing – for example surveillance of the scene at the time the discloser said he or she had observed the thefts occurring, recovery of relevant electronic records, etc. The identity of the source of the original disclosure then may be irrelevant.

85. In summary, I consider that it is only necessary to disclose the identity of the person who made the protected disclosure if the information that came

directly from the discloser is critical to the truth of the allegation, or the credibility of the discloser is a real issue. Even then, it still may be possible to protect the fact of disclosing by re-interviewing the discloser on the record as part of the investigative process, without identifying him or her as the discloser. The person in receipt of the information has an obligation to use "best endeavours" (that is, to take all reasonable steps in the circumstances) to protect the identity of the discloser. That identity can only be disclosed if one of the conditions in s.19 is met; for example, it is "**essential** having regard to the principles of natural justice".

86. As noted above, I consider there could be distilled from the tests found in ss.13A-13J of the Evidence Act and s.35 of the Evidence Amendment Act (No 2), and the cases referred to, appropriate criteria for better defining either in the Act or in "template" procedures the considerations to be weighed by those in receipt of a protected disclosure when considering whether the disclosure of the identity of the person who made the protected disclosure is essential to the effective investigation of the allegations and/or essential to ensure the process complies with natural justice.

Mary T Scholtens QC
December 2003