

Copyright is owned by the Author of the thesis. Permission is given for a copy to be downloaded by an individual for the purpose of research and private study only. The thesis may not be reproduced elsewhere without the permission of the Author.

Massey University Library
New Zealand & Pacific Collection

The Emergence of Whistleblower Protection in New Zealand: An Exploratory Study

A thesis presented in partial fulfilment of the requirements for the degree
of Master of Business Studies in Human Resource Management
at Massey University, New Zealand.

Vincent Gerard McErlane

1995

342 93068028
MCE

X20

ABSTRACT

The address of wrongdoing in society is seen as an important goal of government. Yet uncertainty exists as to the most effective and appropriate means to achieve this goal. One recent method that is believed to assist in this is the encouragement of whistleblowing through protective legislation.

Leading this development has been the United States of America, with more recent legislation enacted in various jurisdictions in Australia. As a result of recent events here in New Zealand, whistleblower legislation has been proposed.

In the present study, a broad examination of the research literature on whistleblowing is presented. This examination provides a foundation whereby legal mechanisms of whistleblower protection in the United States and Australia are examined. Having identified these jurisdictions' more notable points, the New Zealand Bill is considered.

Analysis of New Zealand's existing and proposed mechanisms of protection are highlighted and compared with overseas' protections. Findings from this comparison identify significant strengths and weaknesses inherent to the Bill. In particular, this study finds that the New Zealand Bill is likely to suffer from the same shortcomings as those experienced in the United States and Australia. In response to these shortcomings, the study turns to focus on internal mechanisms that may be employed at the organisational level.

This exploratory study provides a solid frame of reference in analysing the emergence of whistleblower protection in New Zealand, and lays the foundation for more extensive research to be conducted in the future.

PREFACE

*It is necessary only for the good man [sic] to do nothing
for evil to triumph.*

(Burke, cited in Partington, 1992, p. 160)

ACKNOWLEDGEMENTS

Where does one start? No work of this type or at this level is ever done in isolation without the help, advice and encouragement of the people who make it all worthwhile. First and foremost I would like to thank my supervisor Bev Marshall for her continued support and assistance throughout the year. The many times that I have sought answers to my queries and have received both sound and common sense replies has not been forgotten. I would also like to thank my advisor Professor Philip Dewe for his humour and guidance in producing a 'seminal' piece of work as he so often puts it.

Special thanks are also due to my secondary advisors Fiona Stenhouse and Glyn Jeffrey for guiding a blind man through the legal minefield of employment law issues. Many thanks are also owed to Dr Andrew Brien of Massey's Philosophy Department who unselfishly spent a great deal of time with me explaining the philosophical issues and implications behind the subject area. I would also like to acknowledge all of the staff in the Department of Human Resource Management at Massey University, especially Nicole, Jacqui and Karlos for their unfailing support and numerous remarks about the non-existence of my love and social life. Their jokes and tricks will be long remembered as I embark on life in the 'real world'.

I would also like to thank the many 'expert' contributions and conversations I've had with practitioners and academics. They have given credibility and substance to my work and are especially recognised in Appendix A at the back of this study.

Thanks also to all of my flatmates who have put up with my clunking round in the wee hours of the morning in an effort to dowse my insatiable hunger. An amazing support crew that have been with me from go to whoa on this one. I

won't forget it! Thanks are also due to my extended whanau of friends from the Valley, the Bay, Town, and of course Palmy. You've all clarified in my mind the true meaning of what 'good friends' are. To my proof reader extraordinaire, Merie, your patience has been my saviour.

In review, the task that lay before me was indeed a difficult one, not only because of the nature of the subject area, or its recency and unresearched state in Aotearoa/New Zealand, but also due to the difficulty of obtaining information for comparison of which much lay overseas. This challenge felt extremely off-putting on many occasions, but if I can subserviently borrow from the words of my favourite poet, Robert Frost, 'taking the road less travelled by has made all the difference'.

Lastly I would like to show my appreciation for the tremendous support that my family has given me, especially my father and mother. The last few years have been difficult ones and having someone help and show you how to carry your own cross has provided a hidden strength in me I didn't know existed - thank you.

However I would like to dedicate this work to our society's victims. Blowing the whistle takes great courage whether protected or not. Reform is never easy but neither is anything that's worthwhile. So in order to change the injustices of the world we must first change ourselves.

TABLE OF CONTENTS

Abstract	i
Preface	ii
Acknowledgements	iii
Table of Contents	v
List of Abbreviations	viii
List of Tables	ix
List of Figures	x
Chapter One: Introduction	1
Chapter Two: Whistleblowing: Its Theoretical Foundation	5
2.1 Introduction	5
2.2 Definition of Whistleblowing	7
2.3 The Legal Approach to Defining Whistleblowing	10
2.4 The Employment Relationship	12
2.5 Forms of Whistleblowing	14
2.6 A Model of Whistleblowing	15
2.7 The Status of New Zealand's Research Base on Ethics	26
2.8 Justification of Analysis	28
Chapter Three: New Zealand's Historical and Contemporary Ethical	
Context	32
3.1 Introduction	32
3.2 Historical Overview	32
3.3 The Contemporary Context	37
3.4 Cases of New Zealand Ethical Misadventure and Whistleblowing	40
3.5 The Neil Pugmire Episode	45
3.6 Identification and Analysis of the Main Ethical and Whistleblowing Issues to Emerge	48

Chapter Four: Why Protect Whistleblowers? Issues of Retaliation, Intimidation and Harassment	52
4.1 Introduction	52
4.2 Consequences of Whistleblowing	54
 Chapter Five: Whistleblower Protection in the United States of America	65
5.1 Introduction	65
5.2 The Federal Approach	67
5.3 The State Approach	73
5.4 Alternative Approaches to Whistleblower Protection in the United States	78
5.5 Conclusion on the Legal Protection offered to Whistleblowers in the United States	82
 Chapter Six: Whistleblower Protection in Australia	88
6.1 Introduction	88
6.1.1 Recent Australian Cases	89
6.2 The Contemporary Context	92
6.3 Legislative Activity	95
6.3.1 Legislative Activity at the Federal Level	97
6.3.2 Whistleblower Protection in Queensland - Interim Provisions	100
6.3.3 South Australia - Whistleblowers Protection Act of 1993	107
6.3.4 Protection in the Australian Capital Territory - Latest Developments	115
6.4 Conclusion of the Legal Protection offered to Whistleblowers in Australia	117

Chapter Seven: The New Zealand Approach to Whistleblower Protection	120
7.1 Introduction	120
7.2 Legislative Activity	121
7.3 Address of Information Disclosure	125
7.4 Is There a Need for Whistleblower Protection?	130
7.4.1 The Call for Whistleblower Protection	147
7.5 Review of the Whistleblowers Protection Bill	149
7.5.1 Part I -Preliminary Provisions	149
7.5.2 Part II -Disclosure of Public Interest Information	152
7.5.3 Part III -Whistleblowers Protection Authority ..	157
7.5.4 Part IV -Procedures	159
7.5.5 Part V -Remedies for Injury to Protected Informants	162
7.5.6 Part VI -Miscellaneous Provisions	166
7.6 Conclusion on the Whistleblowers Protection Bill	167
 Chapter Eight: Alternative Approaches to Whistleblower Protection ...	172
8.1 Introduction	172
8.2 Legal Considerations	174
8.3 The Environment, Culture and Climate for Whistleblowing ..	179
8.4 Internal Mechanisms of Whistleblowing	184
 Chapter Nine: Conclusion	192
9.1 Summary	192
9.2 Directions for Future Research	199
 References	201
 Appendices	222
Appendix A: Personal Communication for Study	222
Appendix B: The Whistleblowers Protection Bill 1994	224

LIST OF ABBREVIATIONS

ACEA	Association of Consulting Engineers Australia (Australia)
CHE	Crown Health Enterprise (NZ)
EARC	Electoral and Administrative Review Commission (Queensland, Australia)
EEC	European Economic Community
FM	Focal Member
IDPP	Internal Disclosure Policies/Procedures
MSPB	Merit Systems Protection Board (United States of America)
OECD	Organisation for Economic Cooperation and Development
OSC	Office of Special Counsel (United States of America)
PBA	Political Behaviour Alternative
PEARC	Parliamentary Committee for Electoral and Administrative Review (Queensland, Australia)
QC	Queen's Counsel
RDH	Royal Darwin Hospital (Northern Territory, Australia)
US	United States (United States of America)
WPA	Whistleblowers Protection Act

LIST OF TABLES

Table Name	Page
4-1 Potential Costs and Benefits of Whistleblowing and Inaction	57

LIST OF FIGURES

Figure Name	Page
2-1 A Model of Whistleblowing	17, 18
2-2 Stage Two of the Whistleblowing Process	21
4-1 Short-term and Long-term Outcomes of Whistleblowing	56

1. INTRODUCTION

Nothing, it is often said, focuses the mind like a hanging (Johnson cited in Partington, 1992). Similarly, the plight of whistleblower Neil Pugmire and the retaliation he experienced for acting in the public interest, has opened a Pandora's box of issues in need of address in this country. Issues such as loyalty, confidentiality, accountability and public interest are now being discussed in a manner that has never received such concentration before. However, nothing from this episode has focused the attention more than the need for whistleblower protection.

Broadly defined, whistleblowing is an act performed by a current or former member of an organisation who brings to the attention of the public the illegal or harmful activities of their employer. Whistleblowers have been branded as both heroes and heretics (Harris, 1994), although research tends to indicate that whistleblowers are not attention seekers but merely employees more concerned with 'expected effectiveness' (Miceli & Near, 1992), or rather having their concerns addressed. Unfortunately, all too often employers respond to such action by retaliating via employment termination or discipline (Malin, 1982). As a result, employees are often left with no recourse against their employer's actions.

In an effort to eradicate the harmful effects of organisational misconduct or wrongdoing, both the United States and Australia have enacted legal mechanisms that aim to protect whistleblowers who disclose public interest information. Yet despite these endeavours, legal mechanisms have met with limited success and have developed in only some areas through the experiences of trial and error.

As a direct result of the Pugmire case, protective legislation for whistleblowers has been proposed here in New Zealand. Instrumental in this development has

been the Honourable Phil Goff MP. Proponent and discloser of Pugmire's public interest concerns, Goff has proposed a private member's bill entitled the 'Whistleblowers Protection Bill'. It affirms that:

public accountability and the ethic of openness are essential elements of a democratic society and for promoting the wellbeing of the community. It is similarly affirmed that informants (or "whistleblowers") who act in accordance with the legislation should be recognised as having acted responsibly and in the public interest" (Whistleblowers Protection Bill 1994).

In particular, the Bill provides whistleblowers (both public and private sector workers) protection from victimisation and immunity from criminal or civil prosecution, while also containing a provision for offering advice and counselling. Those that would disclose public interest information would do so to a Whistleblowers Protection Authority invested with the power to investigate public interest disclosures. The Bill defines public interest information as conduct or activity relating to the unlawful, corrupt, or unauthorised use of public funds or resources; that which is otherwise unlawful; or that which may constitute a health, safety, or environmental risk, or would otherwise relate to the maintenance of the law and justice (Whistleblowers Protection Bill, 1992).

In light of Phil Goff's proposal to protect whistleblowers in New Zealand, questions arise concerning what lessons have been learnt from the literature on whistleblowing as well as from American and Australian experiences, and what lessons may still need to be learnt. In order to address these questions, the current study is structured to draw together pieces from the limited body of literature that exists on whistleblowing.

Following this introductory chapter, chapter two establishes the theoretical foundation from which whistleblowing research derives. In particular, it defines

whistleblowing and examines its process through the use of a model. It looks at the focus of whistleblowing research both overseas and in New Zealand, and proposes this study's research question. Chapter three addresses New Zealand's historical and contemporary ethical context. It highlights the influences that have shaped New Zealander's current values and attitudes, while recounting the Neil Pugmire episode and the main issues that have emerged from it. Chapter four examines why there is a need to protect whistleblowers and highlights the consequences of both blowing the whistle and inaction. The exploration of whistleblower legislation in the United States is then considered in chapter five. This chapter considers various legal approaches to protection taken in the United States and the general historical development of legislation to the contemporary setting. Chapter six then follows with an address of recently proposed and enacted legislation in Australia.

Having therefore established a sound foundation for comparison, chapter seven examines the New Zealand approach to whistleblower protection. This chapter particularly examines the mechanisms and authoritative bodies currently in place and identifies the gap between the status quo and what can be offered by the proposed legislation. The analysis of the Bill is conducted section by section highlighting the more prominent and noteworthy propositions and their implications. These propositions are then compared with overseas jurisdictions, ending with a conclusion on the Bill's affirmation.

Chapter eight extends the exploration of whistleblower protection from focusing specifically on external legal mechanisms, to the benefits of internal organisational mechanisms through alternative approaches. This holistic view offers a further dimension to the protection of whistleblowers by highlighting areas that organisations can adopt to be more encouraging and receptive to internal whistleblowing. Having taken both external and internal mechanisms of whistleblower protection into account, the study puts forward conclusion and directions for future research.

Having identified the structure and path this study will take, it is important to clarify the objectives, namely:

- (1) to highlight the main issues that surround whistleblowing and whistleblower;
- (2) to examine the protective legislation that has been enacted in the United States and Australia and to assess the usefulness of such legislation;
- (3) to evaluate the major themes of the proposed Whistleblowers Protection Bill, making comparisons between the three countries' legal mechanisms (ie, the United States, Australia, and New Zealand); and
- (4) to provide an assessment of the issues and concerns pertaining to the New Zealand situation so as to add to the foundation of whistleblowing research in this country and to help identify areas that may prompt future research.

It should be noted that this study is not an exhaustive examination of whistleblowing nor a detailed critique of legal issues or mechanisms of protection. This would in effect be premature and inappropriate considering the Bill's status before the Justice and Law Reform Committee at the time of this study's completion, and the inevitable modification that is awaiting. Rather it should be seen as an exploratory address highlighting prominent themes in whistleblower protection, primarily designed to open the issue for constructive debate and research.

2. WHISTLEBLOWING: ITS THEORETICAL FOUNDATION

2.1 Introduction

Having introduced the subject area in chapter one, chapter two establishes the theoretical foundation on whistleblowing and provides both a frame of reference and a context for analysis. To address this basic requirement, it is imperative that whistleblowing first be defined, in this case, from both academic and legal perspectives. Analysis of these perspectives reveals the emergence of two separate and distinct streams of thought. Given these definitions, the natural extension is to place whistleblowing in the most appropriate context in which it most often occurs, the employment relationship. In this context, the various forms of whistleblowing that may occur are broken down and depicted through a model of whistleblowing. Having then illustrated the whistleblowing process, the chapter draws upon the wider ethical context of business ethics through an overview of overseas and New Zealand literature. Analysis of the New Zealand ethics research base identifies the paucity of research, especially on whistleblowing. In light of this deficiency, and the advent of proposed whistleblower legislation, the study of whistleblower protection is prompted. In consideration of these points, this study's justification is forwarded, and its research question proposed.

Despite the more recent interest in the subject, the topic of ethics in society has been a consistently debated issue since the beginning of time. Argued by some of the world's great philosophers such as Kant, Marx, Aristotle and Plato, exponents of philosophy have tended to vigorously extol their personal ideologies. Be that as it may, visiting American scholar and philosopher Bob Solomon contends that the aim of ethics is not "to teach the difference between right and wrong but to make people more comfortable facing moral complexity" (Solomon, 1992, p. 4). However to take an Aristotelian approach, it was the

coexistence "between business and the rest of life that so infuriated Aristotle, for whom life was supposed to fit together in a coherent whole, [of which] is the same holistic idea - that business people and corporations are first of all part of a larger community - that drives business ethics today" (Solomon, 1992, p. 102). However much to Aristotle's disappointment, the current ethics of business appears to be increasingly driving the direction of the community. Unfortunately in some cases, it is the particular method of the drive employed by business that is at times questionable.

As a result of this method, ethics in the workplace has become a prominent topic in recent years as tough times have increasingly exposed the temptation for managers to 'cut ethical corners' (Labich, 1992). Keenan and Krueger (1992) contend that the pressures of competition both national and international, new laws and regulations, and a more sophisticated and demanding consumer and workforce, has placed pressure on employees and managers to attain higher levels of performance. As a result of this pressure, many have been negligent, ruthless or sometimes just plain greedy. This leads to the question of, who, then, is policing and identifying such wrongdoing?

Separate and distinctly different from those with the *legitimate* authority to expose unethical or illegal practices, for example the police or special types of auditors, has been the vigilance of whistleblowers. The origin of the term whistleblower is unknown, although the act of whistleblowing is often associated with the role played by a referee or umpire who uses this control to "pierce the background noise" (Bok, 1982, p. 213) in order to call attention to some indiscretion. However as Westin (1981) notes, such persons have the legally invested authority, whereas those who often alert the authorities to wrongdoing, for example employees, lack such sanctioned authority. Indeed whistleblowing has received so much publicity in the media overseas, and of late in New Zealand, that its definition has become somewhat confused. Instead of providing a clear and accepted definition, whistleblowing has been used as

a catch-all term that has tended to be broad and unspecific. Hence, various definitions attributed to whistleblowing will be explored.

2.2 Definition of Whistleblowing

The difficulty of defining anything in the realm of ethics or the broader sphere of philosophy is one of personal opinion. A whistleblower, or the act of whistleblowing may in fact hold a variety of different meanings for different people. For ethics, like beauty, is also perceived through the eye of the beholder.

The definition of what is ethical, is diverse and complex. Near and Miceli (1987) highlight the lack of agreement in the literature regarding the precise definition of whistleblowing. For example, some academics consider only external disclosures to parties outside of the organisation as true whistleblowing (Farrell & Petersen, 1982), whereas others consider both internal and external disclosures to be part of the same process (Near & Miceli, 1987).

One of the first to advocate a definition of whistleblowing was consumer activist Ralph Nader, who was himself victimised for whistleblowing. He proposes that whistleblowing is:

an act of a man or a woman who believing in the public overrides the interest of the organisation he [sic] serves, and publicly blows the whistle if the organisation is involved in corrupt, illegal, fraudulent or harmful activity (Nader, 1972, p. 1).

James (1980) follows the same line as Nader in confining whistleblowing to the actions of an employee disclosing wrongdoing by his or her employer, for example:

[w]histleblowing is an attempt by a member or former member of an organization to bring illegal or socially harmful activities of the organization to the attention of the public (p. 99).

On the other hand, whistleblowing research headed by Frederick Elliston concluded that an act of whistleblowing occurs when:

- 1) an individual performs an action or series of actions intended to make information public;
- 2) the information is made a matter of public record;
- 3) the information is about possible or actual, non-trivial wrongdoing in an organisation;
- 4) the individual who performs the action is a member or former member of the organisation (Elliston, Keenan, Lockhart & van Schaick, 1985, p. 15).

Analysis of these definitions reveals similar themes or slight variations of these themes. The first involves an organisational member (either former or current) who commits an act of disclosure. Second, this disclosure is based on organisational wrongdoing, and third, the wrongdoing is directed to an audience, namely the public in these cases.

However, the most commonly accepted definition of whistleblowing used in the literature is proposed by Near and Miceli (1985) as:

the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action (p. 4).

This is quite a broad definition that includes the disclosure of information to both internal and external parties. However closer examination brings into question who is classed as being able to 'effect action'. For it can be argued that disclosures need not be directed to an 'action party' for someone to be seen as a whistleblower or to be victimised as one.

Bok (1982) on the other hand contends that whistleblowing is not to be confused with 'leaking'. She ambiguously defines leaking as the disclosure of "information from within done covertly, unlike the whistleblower or the official who resigns in protest . . . [and are] generally directed to the public via an intermediary, whereas informing is meant for the authorities" (p. 216).

In contrast to leaking, Bok (1982) defines whistleblowing as a recent label for those who "make revelations meant to call attention to negligence, abuses, or dangers that threaten the public interest" (p. 211). She differentiates between the two on a number of occasions. For example, how leaking need not concern danger, negligence or abuse, and that when internal leaks do concern misconduct, it can be a variant of whistleblowing, "undertaken surreptitiously because the revealer cannot or does not want to be known as its source" (p. 217).

However when compared to Near and Miceli's 1985 definition of whistleblowing, Bok's 1982 definition of leaking is encompassed and becomes void. In light of this, leaking may be better defined as a disclosure to persons or organisations **unable** to effect **direct** action, but may **redirect** the disclosure to those who can.

For the purposes of this study we will adopt Near and Miceli's (1985) definition for a number of reasons. First, its broad scope encompasses a wide range of disclosure actions concerning organisational wrongdoing. This in effect recognises the full continuum of wrongdoing from the most subtle to the most severe. Second, it recognises both former and current organisational members.

In this sense, the definition acknowledges internal disclosures of current organisational members as well as external ones. This is important because internal disclosures (whether role prescribed or not) may also attract forms of retaliation even though they may remain within the confines of the organisation. An example of this being when a subordinate is victimised for going 'over the head' of a superior to make a complaint. Third, it establishes the locus of control, concerning the wrongdoing, to reside with the employer who, in effect, has the authority to take action. Finally, it provides a clearer focus of the audience the whistleblower is targeting. Definitions that classify disclosing information solely to the public do not recognise the reasons or motives for blowing the whistle, that is 'expected effectiveness' or the expectation that their concern will be addressed (Miceli & Near, 1992). Near and Miceli's definition recognises this point and acknowledges that the whistleblower discloses information so as to prompt action from bodies or persons that may be able to directly help. However from a legal viewpoint, defining whistleblowing has tended to be avoided. Yet by the same token, legislatures have focused on the more specific actions regarding retaliation.

2.3 The Legal Approach to Defining Whistleblowing

From a legal perspective, Westman (1991) states that "most legal protections for employees who are popularly thought of as whistleblowers do not contain any definition of the term, but instead define the circumstances under which employees will be protected from retaliation by employers" (p. 19). This adopted stance is particularly evident in the Queensland (Interim), South Australian and Australian Capital Territory Acts in Australia, as well as the Whistleblowers Protection Bill proposed here in New Zealand.

A review of New Zealand's Whistleblowers Protection Bill confirms Westman's observation in this case. In the explanatory note that precedes the Bill, it states

that "[t]he disclosure of information relating to such conduct or activity (in the Bill known as "public interest information") is generally known as 'whistleblowing'" (Whistleblowers Protection Bill 1994). While public interest information is defined in clause 2, in no other area of the Bill does the term 'whistleblowing' appear with meaning to persons. In fact this Bill provides a noteworthy landmark in New Zealand for proposing a definition of public interest information, or legitimate whistleblowing in this case, by listing what conduct or activity is in the public interest. While the interpretation of public interest information has been broadly addressed in some statute law (eg: the Official Information Act 1982; and the Local Government Official Information and Meetings Act 1987), never before has public interest conduct or activity been addressed in this manner. Instead, this interpretation has been left to judicial review under common law.

Analysis of both academic and legal approaches to defining whistleblowing (or protected circumstances), reveals two separate and distinct streams of thought. The academic approach is extremely broad and addresses the position and powers of the parties, and the action involved in the disclosure of broadly defined practices. In comparison, the legal approach has tended to focus on the transgression of lawful conduct, the facilitation of disclosure, and the specified coverage of protection. This dichotomy in defining whistleblowing highlights that legal approaches are actually altering the definition of what whistleblowing should be as defined by Near and Miceli. For example, where Near and Miceli have identified whistleblowers as only former or current organisation members, the New Zealand Whistleblowers Protection Bill has broadened this scope to include all persons whether members of an organisation or not. Similarly, where the academic version has defined disclosures as either illegal, immoral or illegitimate practices, the New Zealand Bill has specifically identified such practices under its public interest information provision. Furthermore due to the extended scope of coverage made under the Bill, there may not necessarily be a direct organisational relationship between a whistleblower and an employee.

With regard to the persons or organisations that may receive disclosures under Near and Miceli's definition, the Bill specifies that this be the Whistleblowers Protection Authority. Lastly, where the academic definition broadly states that persons or organisations may be able to effect action, the Bill specifically states what action will be provided.

Although only briefly addressed here, these themes will begin to emerge in greater frequency and clarity throughout the study. For the purposes of this study's address, Near and Miceli's (1985) definition will be adopted. Therefore provided with these definitions, it is now necessary to analyse the context in which they most often occur, the employment relationship.

2.4 The Employment Relationship

The nature of the employment relationship establishes that certain rights and obligations are incumbent on both employee and employer if the relationship is to be successful. This 'contract of employment' requires that employers agree to provide financial compensation on both agreed wages and any expenses incurred on the job, work (in certain circumstances), a safe system of work, and to be trustworthy and cooperative. In return, employees agree to be present at work, obey all 'lawful and reasonable' orders, exercise reasonable skill and care, and to work honestly and faithfully (Deeks, Parker, & Ryan, 1994).

Given these responsibilities it is reasonable to assume that in certain circumstances there will exist the potential for conflicts of interest to occur. Such conflicts may be of an ethical or legal concern. The often confusing dilemma presented by the employment relationship is of one's duties of obedience, loyalty, and confidentiality to oneself, a client or customer, the public (and others), and to one's organisation. However as Westman notes, "employees do not necessarily forfeit rights or duties as citizens by merely accepting

employment with an organization" (1991, p. 22). Nor is there any requirement or duty for those who witness or have proof of wrongdoing to disclose that information, unless under oath in a court of law.

The organisational pressures to conform and uphold obedience, loyalty and confidentiality to the employment relationship can be extremely powerful and far reaching. Although not the most popular form of social influence (Yukl & Falbe, 1990), pressure can in many cases (where a person's or organisation's reputation and ethical standing is on the line) be aggressive and threatening. However strong these organisational ties may be, they do not legitimise such actions as retaliation.

While there may be many supporters of whistleblowing who advocate free speech in light of the public interest, there are also those who vociferously condemn such action. James Roache, the former president of General Motors in a now infamous quote in 1971 said:

[s]ome critics are now busy eroding another support of free enterprise - the loyalty of a management team, with its unifying values and cooperative work. Some of the enemies of business now encourage an employee to be *disloyal* to the enterprise. They want to create suspicion and disharmony, and pry into the proprietary interests of the business. However this is labelled - industrial espionage, whistleblowing, or professional responsibility - it is another tactic for spreading disunity and creating conflict (cited in Duska, 1988, p. 299).

Unpalatable as this view may be, Roache does highlight the importance of organisational expectations with regard to loyalty and commitment. Without these virtues, organisations cannot operate effectively. This further highlights the point that if organisations are to conduct business without suspicion, that is good ethics being good business, then they should not fear the possibility of

whistleblowing as there would be no cause for concern. In Roache's case, one could assume that further indiscretions lie beyond the bounds of commercially sensitive information. Instead it would appear that Roache seems to be more concerned that there should be no encroachment into management's right to manage. Overall, there are obligations of good faith for all parties to uphold, and that 'issues of confidence' over the contractual duties between parties in the employment relationship may at times be raised. It is then *how* these issues are raised that are of concern for both the employer and employee, which in turn leads to the various forms of whistleblowing that may take place.

2.5 Forms of Whistleblowing

To help in the understanding of academic and legal approaches to whistleblowing, it may be helpful to apply Westman's (1991) categorisation of the various forms that may take place. He refers to the first category of whistleblowers as passive whistleblowers. These are persons who do not actively volunteer their information, but may simply respond to lawful requests from government authorities. Employees who refuse to carry out illegal instructions, but do not publicly disclose such instructions, may also be classed as passive whistleblowers.

Westman categorises the second group of whistleblowers as active whistleblowers. These persons actively voice their concerns regarding their employer's illegal or unethical conduct to either internal or external parties.

Finally, the third category are embryonic whistleblowers. Embryonic whistleblowers may be either passive or active and are classed as having already been terminated from their employment prior to their disclosure, ostensibly due to the employer's suspicion that their actions would be actively opposed.

Whether passive, aggressive or embryonic, it has been argued that the act of whistleblowing follows a particular sequence or process while being influenced, and in turn influencing a variety of parties. Given this general context in which whistleblowing has been argued to operate, various models have been constructed in an attempt to breakdown and depict this extremely complex process.

2.6 A Model of Whistleblowing

In an attempt to further understand the phenomenon of whistleblowing, Graham (1986) extended the traditional focus on whistleblowing from analysing individual cases, to the collation of similar themes in a variety of cases. Through the application of behavioural theory from the social sciences and existing research findings on whistleblowing, Graham developed a model of 'principled dissent'. In particular, Graham's (1986) model identifies individual, group, and situational variables thought to affect the whistleblowing process. One of the more notable points of Graham's model is that she fails to view the reporting of wrongdoing through channels to be whistleblowing. Instead, only those directed outside the organisation are considered as whistleblowing. Furthermore, Graham's model proposes that following an insufficient response to reporting, the individual would blow the whistle. While this appears quite reasonable, no empirical research yet exists to support this claim. A final point worth noting under Graham's model is that the sequence of events may not occur as specified (Miceli & Near, 1992). An example being where someone blows the whistle externally at approximately the same time as someone within channels is notified.

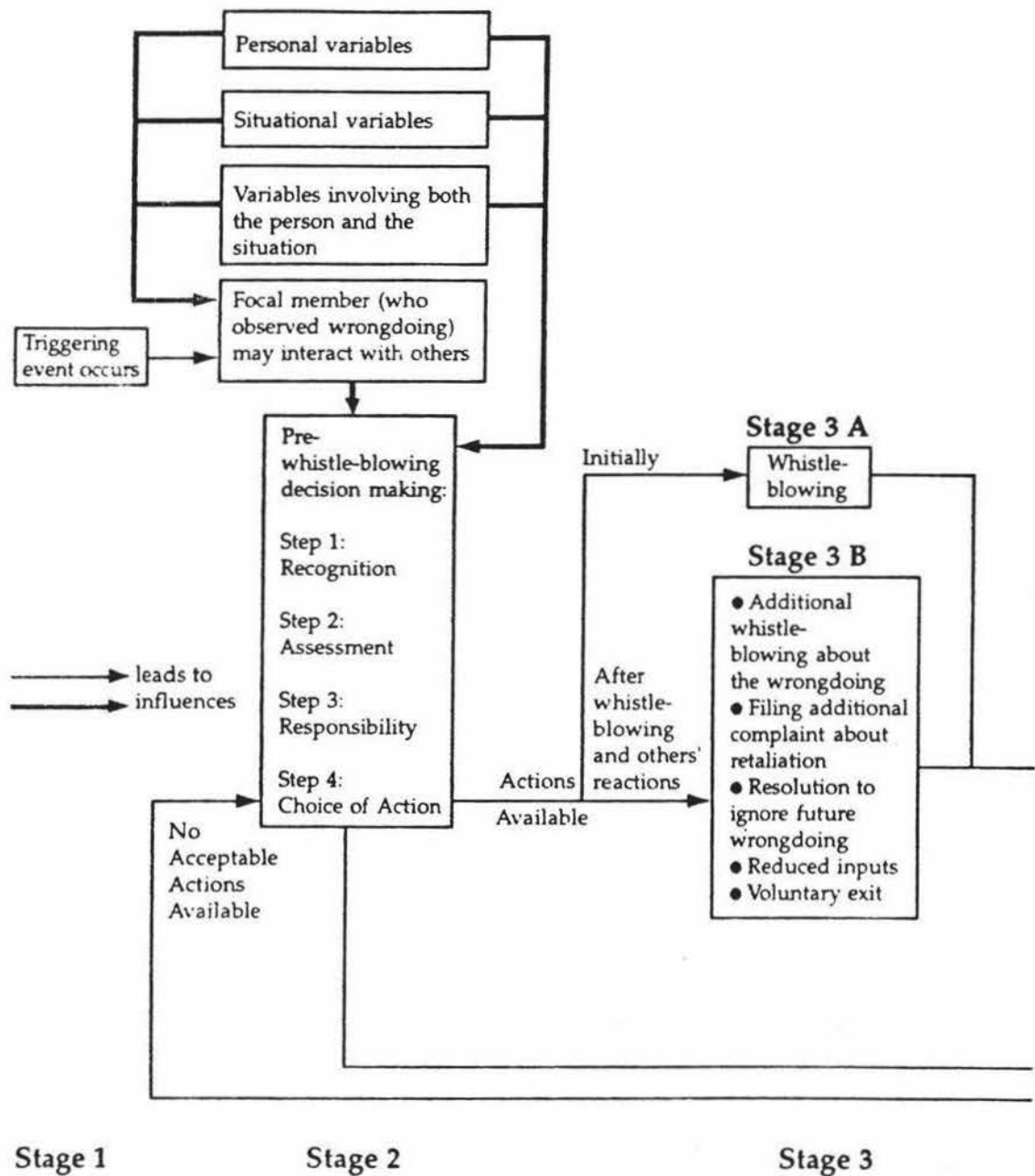
In extension of the framework proposed by Graham (1986), Near and Miceli (1987) have proposed their own whistleblowing model. By way of comparison, Near and Miceli's model recognises both external as well as internal channels to

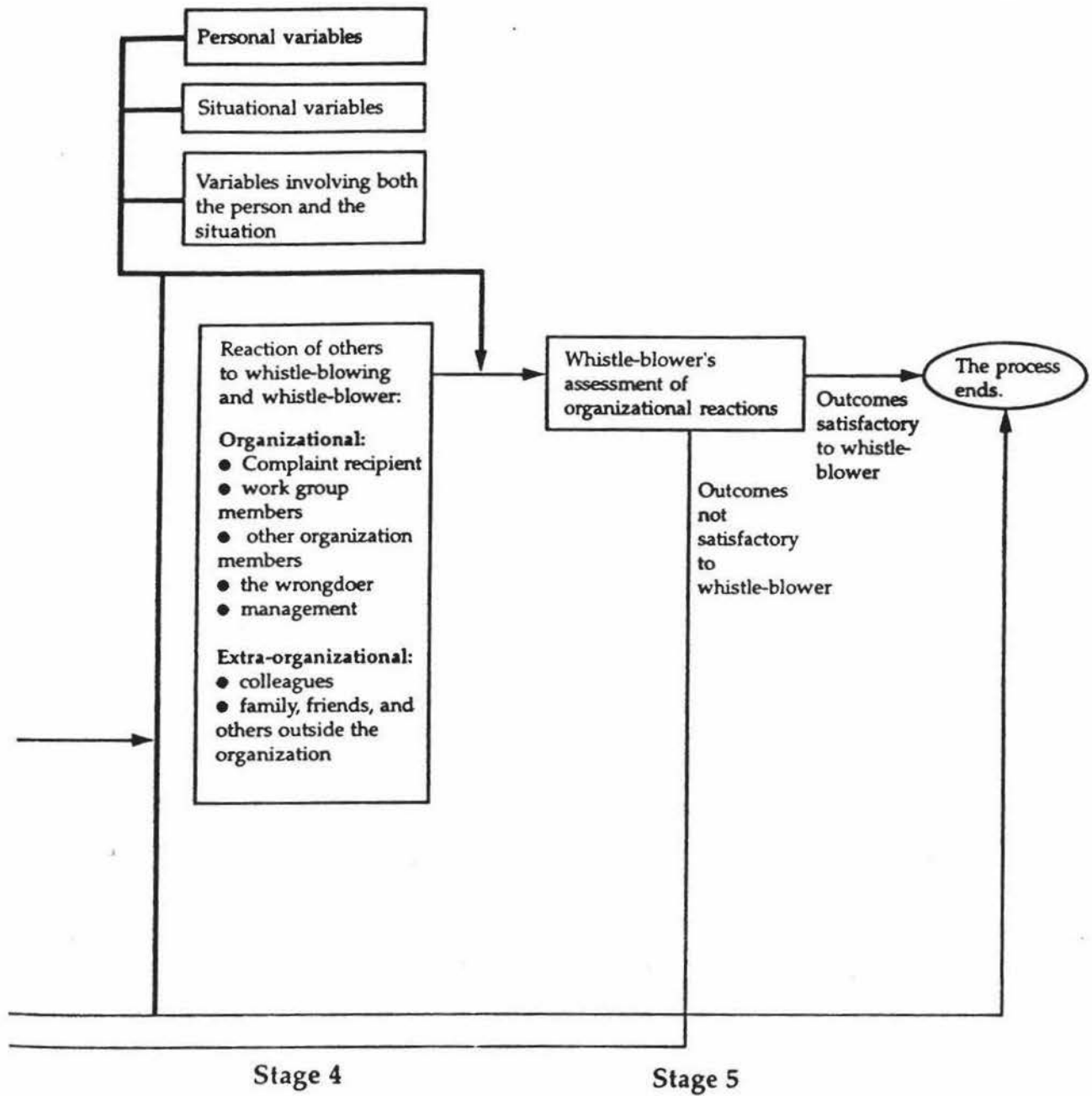
be whistleblowing. Another dissimilarity is over the specification as to why individuals blow the whistle to someone 'outside channels'. Where Graham's model proposes that following an insufficient response, the individual would blow the whistle, Miceli and Near (1992) propose that an insufficient response is only one factor that may determine future action. Finally, it can be argued that Near and Miceli's (1987) model, is a more accurate reflection of the whistleblowing process. Its sequential stage by stage process is organised by time, and it recognises that where outcomes are not satisfactory to a whistleblower (stage 5), the process loops back to the latter part of stage two, where the whistleblower would make another choice of action (Nb: these stages will be later addressed in more detail in this chapter). Considering the drawbacks of Graham's model, Near and Miceli's more expansive model will be used for the purposes of this study to explain the whistleblowing process.

Developed from a wide variety of literature across many fields, Near and Miceli's 1987 model depicts the stages in the whistleblowing process and the parties that may affect one another in each stage. They identify four characteristics thought to be critical in the whistleblowing process. Namely, the *individual* characteristics that affect the whistleblower's approach to the whistleblowing case, the *situational* characteristics such as the content and process of the case, the *organisation* that committed the alleged wrongdoing, and the *relative power* of the concerned parties over one another, including their dependence on the wrongdoing itself (Miceli & Near, 1992).

The whistleblowing model is divided into five stages which, at the end of the fifth stage, may loop back to the second stage until the whistleblower decides to stop acting. The model assumes the perspective of the whistleblower organised by time and is depicted in Figure 2-1.

Figure 2-1 A Model of Whistleblowing





(Miceli & Near 1992, p.54-55).

In order to help clarify how the model works, the case of Neil Pugmire, a whistleblower under Near and Miceli's (1985) definition (he disclosed information to persons able to effect action ie, Ministers Birch, Banks, and Goff) will be used to exemplify the process.

At **stage one** a triggering event occurs such as an act or omission that may be perceived as wrongful. In the case of Neil Pugmire, he was aware of the danger of a 22 year old male patient (and possibly many like him) with a history of sexual violation, being released back into the community through an oversight in the Mental Health (Compulsory Assessment and Treatment) Act 1992. Pugmire believed that the future release of the patient, combined with the Act's classification of particular patients (that failed to recognise dangerous paedophiles), to be wrongful. It can therefore be assumed that the triggering event in Pugmire's mind was his belief that the patient concerned was not fit to return to the community, and when released, was more than likely to re-offend.

Once the triggering event occurs, the focal member (FM), that is the organisation member concerned, is triggered into a decision-making process, namely **stage two**. The focal member then judges the activity concerned, decides whether to report it, and if so, works out how to report it. This decision is influenced through three variables previously mentioned, that is, personal, situational, and variables involving both the person and the situation.

The personal variables that influenced Neil Pugmire were most likely the philosophical and religious beliefs provided by his Quaker background, along with the social conditioning of growing up with "quite an authoritarian family background" (Monin, 1994, p. 2.). (Nb: these assumptions are based on transcripts of interviews conducted with Neil Pugmire).

The influencing situational variable could be assumed to be his organisational placement as charge nurse at Lake Alice Hospital, thereby making him aware

of patients' psychological conditions. The last variable, involving both individual and situational elements, was probably the additional influence of the flaw in the Mental Health Act. This probably influenced Pugmire's perception that something was not right and thereby led him to believe (as he was in an expert position to believe), that certain patients were not fit to return to the community.

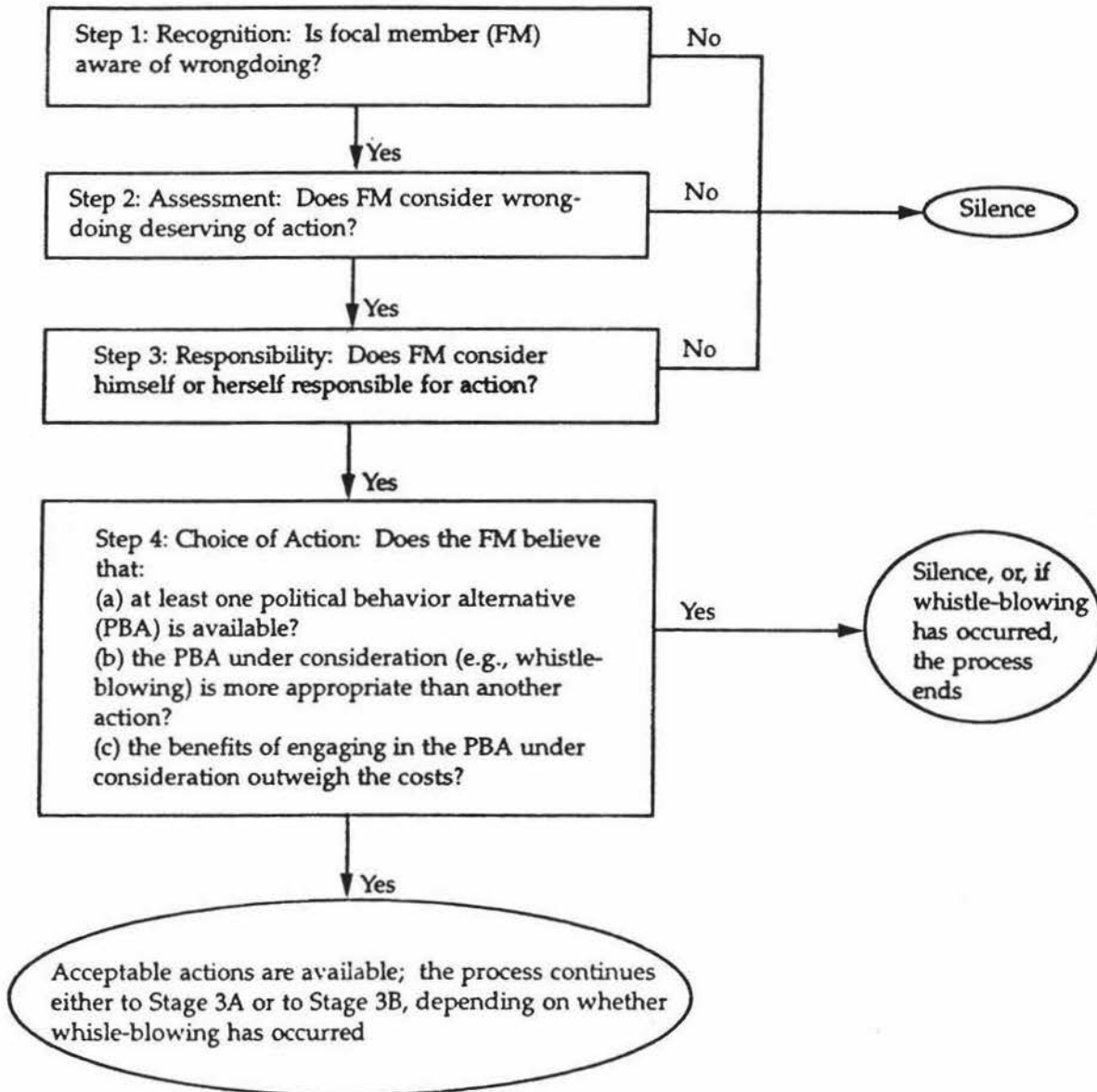
Focal member interaction was evidenced by Mr Pugmire's discussion of the situation with his wife Karen, by raising the issue at a staff meeting (Hubbard, 1994), and through talking with staff. "I talked to them [staff] a lot. The issues are something we often discussed especially in that area, of forensic psychiatry and things. I've had almost 100% support from my colleagues about issues that I was concerned about" (Monin, 1994, p. 6).

The contemplation involved in Neil Pugmire's pre-whistleblowing decision of what action to then take and the thought processes involved (steps one, two and three), can probably be best described by Neil Pugmire's own comments:

... you should examine the issues and your own conscience and look at all the competing ethical values and issues - at that point I think you get so far with logic and to some extent you get to the point where something perhaps a little bit different from logic takes over. And whether that's a higher power, or just a feeling of what is morally right - and I think at some point you see very clearly that something is right or wrong And to some extent, even difficult ethical problems given thought and time, you do get to a point where you feel one particular line feels right, and you feel that you must act along this line (Monin, 1994, p. 5 & 6).

This process, within **Stage Two**, is further expanded to address pre-whistleblowing decision-making as illustrated in Figure 2-2, Stage Two of the Whistleblowing Process.

Figure 2-2 Stage Two of the Whistle blowing Process



(Miceli & Near 1992, p.60).

At step four of the pre-whistleblowing decision-making process, Pugmire decided that blowing the whistle was necessary to inform given authorities of the potential dangers at hand. In deciding this, he planned to employ one political behaviour alternative (PBA) of address through alerting his minister, as prescribed under the first principle of the Public Service Code of Conduct. This states that "it is the responsibility of public servants to provide honest, impartial, and comprehensive advice to Ministers, and to alert Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers' views (State Services Commission, 1990, p. 11).

Once the decision to blow the whistle is made, a report is forwarded (**stage three**). However at this stage the whistleblower may choose not to blow the whistle and engage in other actions. Such actions may involve the whistleblower exiting the organisation, such as 'constructive dismissal', whereby the employee resigns but only because the employer has forced the resignation (Deeks & Boxall, 1989). Another reason for not blowing the whistle is that the whistleblower may confront the wrongdoer to have the wrongdoing stopped, and if no change is made, then possibly blowing the whistle (Miceli & Near, 1992).

After the four steps of the pre-whistleblowing decision-making process in stage two have been followed and whistleblowing is decided upon, the act of whistleblowing is engaged in **Stage 3A**. This can be characterised by Pugmire sending his letter to the then Minister of Health, Bill Birch. However, Miceli and Near (1992) note that the consequences of the initial whistleblowing act may lead to the repetition of at least part of stage two, the decision-making process. Therefore they have designated **Stage 3B** as the outcomes of this repeated decision-making process. In Neil Pugmire's case, having received no action from Mr Birch, he engaged in additional whistleblowing about the wrongdoing by sending a copy of his original letter to the then Minister of Police John Banks,

and with still no address, then sent a confirmed second letter to Labour Spokesperson on Justice, Minister Phil Goff.

Other aspects of **Stage 3B** such as filing an additional complaint about retaliation are also addressed. In this instance, Pugmire applied for a declaration that the defendant's actions were *ultra vires*, an interim injunction against his employer's retaliatory actions, plus compensation for the recovery of costs (*Pugmire v Good Health Wanganui Ltd (No. 1)*, [1994] 1 ERNZ 58, 59). With regard to the resolution to ignore future wrongdoing, Pugmire admitted that he would do the same thing again (Hubbard, 1994), whereas the reduction of inputs in terms of the model is unknown, although judged upon Pugmire's work ethic, highly unlikely. Finally, we know that Pugmire wished to remain at work through seeking a court injunction, and that the Employment Court passed judgement that Mr Pugmire "is to be restored to his position and normal duties . . . " (*Pugmire v Good Health Wanganui Ltd (No. 2)*, [1994], 1 ERNZ 174, 179).

In **stage four**, if the whistleblowing occurs, the reactions of others to the whistleblowing and the whistleblower are recognised. These reactions can be from both organisational and extra-organisational members which are in turn influenced by personal, situational, and a combination of the two variables. Organisational reactions experienced by Pugmire are well documented in section 3.4 of this study and include suspension, threats of employment demotion, and termination from his employer Crown Health Enterprise (CHE), Good Health Wanganui. While Pugmire received positive support from his work group members, most were still 'astounded' when Goff released his letter of concern (Barton, 1994b).

Reactions to Pugmire's whistleblowing by extra-organisational groups was overwhelmingly positive, except for a few members of the public who believed that he willingly transgressed patient confidentiality (although this has not been proven). Rangitikei District Council Mayor, John Wilson, said that "he and the

Marton community were "100 percent" behind Mr Pugmire" (Forde, 1994b, p. 1). A petition to Parliament, launched by Mr Wilson of Marton Citizen's Association in conjunction with the Public Service Association (PSA), was also created to support Neil Pugmire and attracted thousands of signatures, along with numerous facsimiles, mail and phone calls ("Massive Support," 1994). Support even came from arrested paedophile Lloyd McIntosh's mother (Forde, 1994c) and medical specialists throughout the country (Forde, 1994d), as well as his own family and friends.

Reactions from 'others' in stage four then leads onto the whistleblower's assessment of organisational reactions in **stage five**. Pugmire's assessment of organisational reactions were mixed, stating he felt "a whole range of emotions" (Monin, 1994, p. 8). "The CHE, says Pugmire, became extremely aggressive" (quoted in Hubbard, 1994, p. 19). "I felt 'My God, what have I done?' When you have a large institution like a CHE saying you've been bad, you tend to feel perhaps I am guilty of a terrible crime. So I had to rationalise, and think through again . . . " (Monin, 1994, p. 8). Overall, Pugmire was disappointed by the CHE's reaction by first suspending him pending inquiry over an alleged breach of patient confidentiality, and then offering a demotion, with a drop in pay of \$20,000, or termination of his employment. As the outcome of the organisation's actions was not satisfactory, Pugmire filed for a court injunction to get the suspension lifted, and later another to challenge the conditions of the 'alternative employment' offered him (Forde, 1994b). This action is depicted by the model as a return loop to stage two, step 4: Choice of Action. Once the whistleblower had perceived the outcomes to be satisfactory, the process would end.

This end process, depicted by the satisfaction of outcomes, may be looked at in two ways within the Pugmire example. First, Pugmire won his case and was free to return to work in his previous role as charge nurse at Lake Alice Hospital. Regardless of whether or not he felt the outcome was satisfactory, Pugmire noted that despite all the grief and the upheaval, he would do the same thing

again. "I had to do it. It was my duty" (Hubbard, 1994, p. 22). "Yes, I think on balance it's been a positive experience" (Monin, 1994, p. 16). Pugmire was indeed fortunate to come away from the whole episode feeling this way as this is not always the case for whistleblowers. One reason that may have contributed to Pugmire's positive feelings is that "the public cares about Pugmire because he cared about them" (Campbell, 1994, p. 17).

Second, blowing the whistle drew attention to his primary concern that personality disorders be redressed in the Mental Health (Compulsory Assessment and Treatment) Act 1992. This has recently been conducted with amendments to the Act proposed, copies circulated, and now sits before the Justice and Law Reform Committee (Ryan, 1994). In summary, the satisfaction to the whistleblower, as depicted in the final stage of the whistleblowing model, has been met. This is particularly seen in the Pugmire example in that not only was he granted reinstatement, but the case induced both redress of the Mental Health Act, while also spurring the development of legal protection for whistleblowers.

As a descriptive model of whistleblowing, Near and Miceli have constructed a relatively simple but thorough guide to the complex processes involved. As previously stated, numerous theories from the social sciences have been used to explain whistleblowing, although Miceli and Near (1992) emphasise that none of them have been examined adequately as a framework for predicting or explaining whistleblowing. They state that the reason for this is that "the whistleblowing process itself is composed of multiple, interrelated steps, thereby complicating attempts to explain the process through use of a single model of organizational behaviour" (Miceli & Near, 1992, p. 92). Nevertheless, the model acts as an educational guide for increased understanding of the whistleblowing process, and in turn prompts the call for further analysis and address. Having then described a model of the whistleblowing process and applied it to a New

Zealand example, the study will now turn to focus on the wider research base on ethics conducted in the country thus far.

2.7 The Status of New Zealand's Research Base on Ethics

Overseas research has reported that incidents of whistleblowing are on the rise (Ewing, 1983). In light of this development, New Zealand has to consider the implications of such action happening here. To do this, a variety of research techniques will need to be employed to build upon the information already accumulated. However a literature review of the research on ethics in New Zealand to date, reveals only a very small body of work. The majority of these publications are largely of a commentary nature and lack empirical and analytical substance. This fact emphasises the need for some foundation of research to be established.

More specifically, a review of the New Zealand research base pertaining to the study of whistleblowing fails to reveal work of any substance. While no comprehensive literature has been uncovered by the author, elements of documented whistleblowing (of unlawful treatment) can readily be found in law reports under personal grievances or discrimination, or complaint inquiries made to the Ombudsman's office (J. Robertson, personal communication, October 10, 1994). Considering the recent interest in whistleblowing research throughout the world, it is understandable that the study of wrongdoing and those who alert authorities of its existence, is only in its infancy in New Zealand.

To date, the majority of research on ethics in New Zealand, has centred on the attitudes and levels of ethical practice pertaining to the business sector (eg: Brennan, Ennis, & Esslemont, 1992; Strange & Hopkinson, 1992; Alam, 1993; and Newell, 1994), while others have focused on the extent of wrongdoing in business (eg: KPMG Peat Marwick, 1994) and the standing of personal values in

the everyday New Zealander (eg: Gold & Webster, 1990). Overall, there is a paucity of comprehensive analyses or empirical studies on business ethics and more particularly whistleblowing in New Zealand, making this study a seminal piece of work. However, there is anecdotal evidence of an increase in ethics and whistleblowing research. For example, work of a practical nature is currently being undertaken by Colin Hicks for the States Services Commission to provide guidance material about whistleblowing, staff conduct and the management thereof (C. Hicks, personal communication, August 15, 1994).

Work of an academic nature is also being undertaken by some of the country's leading legal and public policy experts. Examples include, Grant Liddell, Senior Lecturer of the Faculty of Law, University of Otago (personal communication, August 22, 1994), and John Martin, Senior Lecturer in Public Policy Group, Victoria University of Wellington (personal communication, September 9, 1994). A case study analysis of whistleblowing has been undertaken by Nanette Monin in 1994 on the reasons and motivations of whistleblower Neil Pugmire, while further academic queries have been forwarded to the author from other universities. One body that has been recently established to help meet increased interest in ethics and whistleblowing research is the New Zealand Association of Applied Ethics. Aligned to this development has also been the call for greater accountability, especially for those persons in positions of power. Given these findings, this small body of work is encouraging and provides the beginnings of a research field in need of expansion. The purpose of this study therefore is to first meet the objectives established in chapter one, and second, to answer the study's research question proposed in the following section. In order to do this, the study must first be justified.

2.8 Justification of Analysis

Barnett (1992) contends that most discussions on whistleblowing can be classified into one of several categories: 1) case studies of whistleblowers (eg: Nader, Petkas & Blackwell, 1972; Glazer & Glazer, 1989), 2) examinations of the legal protection available to whistleblowers (eg: Dworkin & Near, 1978; Howard, 1988), 3) conceptual analyses of the whistleblowing process (eg: Jensen, 1987; Dandekar, 1990), and 4) empirical studies of whistleblowing (eg: Johnson & Pany, 1981; Miceli & Near, 1988).

A review of the above discussions on whistleblowing reveals the various factions by which whistleblowing has been addressed. Firmly leading this body of work should be a sound foundation of empirical research findings. However it would be shortsighted to discount existing discussions as they have raised many important issues and have contributed to the field. For example, case study analyses have provided an important tool for sensitising students to problems they may have to face, for teaching them how to approach similar cases, and for discussing alternative organisational structures that preclude the reoccurrence of similar cases. Examinations of the legal protection available to whistleblowers have endeavoured to identify what kind of environment is able to first encourage, and then support those who blow the whistle. Finally the use of conceptual analyses of the whistleblowing process have raised questions and issues of to whom, why, when, and how one should blow the whistle. Such analyses provide assumptions and hypotheses that require detailed empirical testing. However, the empirical base of the research to date is still very limited. To create and develop a more substantial body of knowledge and research, empirical examination is required.

In review of the literature, the small body of research conducted to date has broadly examined New Zealand business' *ethical values and attitudes*. This general overview has provided a good point from which to expand. A natural extension

of this work is to examine how people who face ethical dilemmas cope, and how they are treated if or when they voice their concerns. However as stated, no uniquely New Zealand research has been conducted on the phenomenon of whistleblowing or the protection of whistleblowers to date.

As a result of the Pugmire episode, an increasingly loud public voice demanded accountability and protection for people who blow the whistle. This demand was quickly followed by the development of the 'Whistleblowers Protection Bill' by Opposition Spokesperson on Justice, the Honourable Phil Goff (Stone, 1994a). Therefore as New Zealand is on the brink of legislative adoption and possible implementation, the timing is now appropriate for an analysis of the mechanisms to protect whistleblowers. This then leads to the thesis research question:

Will the New Zealand Whistleblowers Protection Bill adequately protect whistleblowers if enacted?

In attempting to answer this question, Dane (1990) contends that "the theory we used to derive our research questions also affects the manner in which we conduct the research" (p. 14). The theory and opinions used to derive this study's research question derive from overseas, namely the United States of America and Australia.

The United States was selected as it was the first country in the world to extensively research the area of whistleblowing and to provide legal mechanisms for their protection. It has an extensive history in addressing disclosures of confidence and secrecy through numerous, diverse and far reaching cases. Not only has the United States been a world leader in shifting 'value trends', such as the human rights movement in the 1960s, but it is also a country heavily committed to legislated law and order. With regard to its research base, it heralds the world's most prolific researchers and writers, both academic and

practitioner based. Their contribution has greatly advanced the body of knowledge on whistleblowing, while helping to further advance the development of organisational and legal mechanisms of protection.

Australia was selected as it is the only other country in the world outside of the United States to provide extensive protection to whistleblowers. Adding to this formula are Australia's close societal similarities to the New Zealand context and environment, which are unparalleled by other industrialised countries in the South Pacific. The combination of these variables make the United States and Australia ideal subjects for comparison to the legislative approach proposed in New Zealand. However, due to the extensiveness and variety of protection offered by these countries, they are dealt with separately in the analysis of their literature.

Running through this analysis of the literature is the emergence of two streams of thought as previously mentioned. The first is the broad and simplistic academic view of whistleblowing and protection for whistleblowers. The second stream is the more specific and applied legislative approach to whistleblowing and its protection thereof.

Through the differing streams of thought and perception on how to best protect whistleblowers, disagreement has emerged between the two. Dworkin (1992) states that until very recently, the legal protection for whistleblowers has consistently centred on retaliation. However, as academics Miceli and Near (1992) note, retaliation is not the ordinary response to whistleblowing, and fear of retaliation is not a primary deterrent to whistleblowing. Therefore, the legal focus has not been particularly effective in either protecting or encouraging whistleblowing (Dworkin, 1992).

The aim of this study therefore is not only to meet its stated objectives or answer the research question as stated, but also to identify and analyse the divergence

of protective thought in the establishment of whistleblower protection legislation in the United States of America and Australia, and to assess the New Zealand approach in the light of these findings.

In summary, this chapter has broadly provided the theoretical foundation in which whistleblowing occurs. More specifically, it establishes the foundation on which the rest of this study is based. It is therefore necessary to narrow this framework to address the New Zealand context and the development of its citizens' ethical values and attitudes.

3. NEW ZEALAND'S HISTORICAL AND CONTEMPORARY ETHICAL CONTEXT

3.1 Introduction

In chapter two the theoretical foundation of whistleblowing was broadly addressed. It established the background research on whistleblowing and provides both a frame of reference and context for analysis. Provided with this context, New Zealand's own development in terms of ethical values and attitudes can be appraised. Specifically, chapter three will begin with an historic overview of New Zealand's colonial development, highlighting influences that have shaped the country's work ethic up to the present day. Following this analysis, the chapter makes reference to a New Zealand case that raises questions concerning corporate responsibility. Extensions of this case come in the form of a mixture of New Zealand examples where corporate and social responsibility has been challenged through whistleblowing. Having briefly highlighted these cases, New Zealand's most prominent case of whistleblowing, the Neil Pugmire episode, is addressed. Leading from this address, the episode's main ethical and whistleblowing issues are identified and analysed.

3.2 Historical Overview

Cavanagh (cited in Small, 1993) argues that "[w]e are a product of our past. No matter how rapidly society changes, current attitudes have their roots in history" (p. 28). Although Cavanagh was speaking about America at the time, this opinion can be applied to any nation. In New Zealand's case, its current attitudes of loyalty and hardiness can be seen to have derived from its rugged colonial past and traditional ties to England. It is therefore important that in order to understand current attitudes in New Zealand today, that we look to our

past to examine how it has shaped and influenced the product of present attitudes.

By comparative standards, New Zealand is a very young country barely inhabited for some 200 years by Europeans. Some may say that this is hardly long enough to shape an identity. However, a review of New Zealand's colonial past highlights a strong Anglo influence as the foundation of New Zealand's society was carried over from British legal, economic, and societal values. For example, not only was English common law adopted and applied to New Zealand, but so too were many of the English statutes so as to help establish a system of law and order.

Within these adopted 'values' came the British work ethic and conditions of employment which offered little if no employee protection. Such conditions were governed by the concept of 'freedom of contract', whereby once a contractual link had been formed, it was the role of the courts to ensure that the obligations pertaining to that link were carried out to the full (Mulholland, 1992). This concept heavily favoured the position of the employer. For the instilled premise was that although an employee must obey all orders, summary dismissal could still be carried out at any time for any reason if the employer saw fit, thereby providing employees relatively no protection.

However, New Zealand embarked upon new industrial relations philosophies through the enactment of various legislation such as the Factories Act of 1891 (re-enacted in 1894), to create better working conditions and to prevent 'sweated' labour. In 1894 the Industrial Conciliation and Arbitration Act was enacted to "encourage the formation of industrial unions and associations and to facilitate the settlement of industrial disputes by conciliation and arbitration" (Deeks, Parker & Ryan, 1994, p. 45). This bold move to strengthen the role of trade unions and to provide procedures for the resolution of conflict was keenly observed by many countries, which viewed New Zealand as the world's

"progressive social laboratory" (Hince, 1993, p. 7) of industrial relations. Indeed this label was to reappear nearly one hundred years later to reconfirm this view.

As further employment advancements were made, so too could it be seen that developments in New Zealand's own identity were being developed. Influences such as religion, mainly Anglicanism, Presbyterianism, and Catholicism, were also shaping the baseline of much of New Zealand's societal views with regard to ethical thinking (Jamieson, 1992).

However, instead of being influenced by the indigenous people of New Zealand, the Maori, the settlers and missionaries imposed their own values and beliefs and did relatively little if anything to adopt the beliefs of Maori society. This neglect was further exacerbated in the interpretation of articles within the Treaty of Waitangi by the Pakeha (ie, New Zealand europeans). The ongoing debate over the interpretation of the treaty is beyond the scope of this study, however it should be noted that this 'misinterpretation' still affects the moral and ethical perspectives of many Maori and Pakeha in general today.

While New Zealand remained relatively close to the views and opinions of England (while influenced to some degree by the societal hierarchy instilled there), the larger working class population failed to adhere to the same strict structure. In effect it appeared that New Zealand became ingrained in its own type of conservatism, possibly because of our geographic location, thereby developing a 'hardiness' and loyalty ethic to our own kind. This hardiness can also be applied to the Australian situation, which despite our many differences, is more similar to New Zealand than any other country.

This hardiness and strong draw to unity has led to New Zealand's own version of an Australian expression called an 'anti-dobber mentality', whereby to snitch or tell-tale would be to betray another. While this belief may be seen to be almost universal, it has remained extremely strong in this part of the world, possibly due to our previously mentioned influences and rugged individualism.

Through advancements made worldwide, especially in technology, New Zealand began to be influenced to a greater extent by events overseas. The primary industry of meat and dairy produce, and once the backbone of our economy, began to be eclipsed by the growing service industry. By the early 1980s, New Zealand was heavily regulated and government supported. However the long term forecast for New Zealand indicated that this protection would have devastating effects to the economy if not addressed. In short, the government could no longer protect the country's businesses. In order to grow and benefit from the fruits of a free market economy, they had to be exposed and become 'globally competitive'.

This deregulation of the economy began with the fourth Labour Government, initiated by the then Minister of Finance, Roger Douglas, in 1984. Once deregulation had taken hold, capitalism began to thrive and confidence under these conditions grew, while world markets also tended to enjoy buoyant times. However, 1987 marked the beginning of a world-wide corporate collapse, as stockmarkets plummeted, calling into question the practice of workplace ethics along with numerous other managerial issues.

In 1990, the National Party was elected into power in an effort to turn the country's economic position around. To do this, it established what is frequently termed as 'hard-line tactics' to reduce the national debt and to once again encourage business confidence. The most influential tactic employed to do this was the introduction of the Employment Contracts Act in 1991.

The Employment Contracts Act turned nearly one hundred years of industrial relations development in this country on its head by enacting a new environment that changed the whole basis of industrial bargaining. In short, there has been a move from a centralised system of bargaining to a decentralised one, now at the individual and enterprise level. Under this regime, it has been argued that the development of protection for the employee in the workplace has been swept aside due to the demoted status of the union movement. In

contrast, it has been argued that the new legal framework offers the employee a greater flexibility and choice in negotiating the terms and conditions of their employment. "In this new era there is a return to direct bargaining between employer and employee albeit with the assistance of bargaining agents, and the earlier system of awards and agreements and institutions such as the Arbitration Commission has been rendered nugatory" (McCarthy, 1991, p.vii). Unions are now demoted to the status of 'incorporated societies' and have therefore, in effect, lost generally all of their power and control in negotiating employees' terms and conditions of employment in many situations (although not in all circumstances). Now with the choice of either an individual or collective employment contract, employees are provided the opportunity to negotiate their own terms and conditions or choose a particular representative to do so.

When first enacted, the Employment Contracts Act caused an uproar in public opinion which has now waned considerably. Arguably, it can be credited with being the catalyst of "New Zealand's economic recovery" (Birch, 1993, p. 6), although it is still widely condemned by academics and practitioners such as Secretary for the New Zealand Council of Trade Unions, Angela Foulkes (Foulkes, 1993).

A review of New Zealand's historical development, reveals a diverse range of influences that have contributed greatly in shaping a unique work ethic. Where New Zealand had traditionally looked toward the United Kingdom for leadership, it increasingly looks towards the West, and more recently the South Pacific basin. From these more globally focused neighbours we have absorbed and rejected a multitude of influences that make themselves present in the country's identity. Group Managing Director and Glaxo board member Neil Maidment, goes so far as to say that there are even clear differences between managers in New Zealand and our closest neighbours, Australia. He describes New Zealanders as "an island people, introspective and more inclined to look overseas for inspiration. [Whereas] Australians, in contrast, are a continental

people who know they can depend entirely on their own resources" (Rose, 1993, p. 53).

In keeping with a macro view, Oddie and Perrett (1992) purport that:

the value of liberty and freedom of choice has assumed a central place in New Zealand's economy and society in the 1980s and 1990s. It is the libertarian ideal of a minimal state which lies close to the surface of policies implemented by both Labour and National Governments during this period (p. xiv).

Provided with these influences, attempting to define New Zealand's historical ethical context remains an extremely difficult task. Yet if we are indeed a product of our past as Cavanagh (cited in Small, 1993) duly notes, it could be assumed that contemporary attitudes will not be so distant from those of the past. However it would appear that as society continues to change, so too are the attitudes of its constituents. This is arguably none more evident than at the organisational level. It is therefore at this level that the study shall now focus.

3.3 The Contemporary Context

If one were to solely absorb the extent of wrongdoing currently popularised through the media, it could easily be surmised that 'business ethics' is indeed an oxymoronic joke. Evidence of this demise has been widely splashed across the media, for example the Equiticorp, Renshaw-Edwards, BNZ cases and recently the Cook Islands tax scandal to name a few, bringing to light the growing assumption of declining morals in business.

A recent survey by accountancy firm KPMG Peat Marwick of 340 New Zealand organisations' awareness of fraud has revealed indications of kickbacks, collusion with third parties, plus numerous other cases of bribery and corruption

involving not only private companies, but also local and national government and related organisations, including state-owned enterprises (Harrod, 1994a).

Further to this, in an address to the New Zealand Society of Accountants fraud seminar in May of 1993, Peter Doone, Deputy Commissioner of Police, revealed that reported fraud in New Zealand is currently costing in excess of \$700 million annually, and that this figure is only half of the actual level of fraud (cited in Carpenter, 1993). Included in this estimate is a \$100 million figure, which represents just over 0.1% of total welfare payments, purported by then Social Welfare Minister Jenny Shipley. In comparison with reports on health benefit fraud in Australia of 7.5%, and similar reports in the US that gave an estimate of up to 10% (Thompson cited in Dworkin, 1992), applying a conservative estimate of a 3% level of fraud or abuse on total benefit payments of \$12 billion (including ACC and subsidies to health professionals), Mrs Shipley's figure rises to \$360 million per annum, thereby making the total cost of both public and private fraud in New Zealand to be in excess of \$1 billion annually (cited in Carpenter, 1993).

With fraud at this level, it is disheartening to think that this may be only the tip of the ice-berg. Yet despite these statistics, Pech and Small (1994) contest that public awareness does not instinctively result in outrage towards the exposed crimes or towards the criminals who commit them. Bearing this in mind, it would then appear that for any message on wrongdoing to truly be received and understood by society, the public must first be educated as to how it loses directly. Charles Stuart, Director of the Serious Fraud Office, contends that:

[w]ithout a doubt, serious fraud, which includes corruption-driven frauds, shatters social cohesion and coherence. It is essential to prevent the progression of this phenomenon and to ensure that its negative effects will not endanger the rule of law. In the long term, I believe, a significant contribution to the prevention of this type of sophisticated criminal offending lies in society's persistent, systematic and widespread

affirmation of its scale of values. In the short term I believe prevention lies almost exclusively in the efficiency of punitive and repressive systems that society has at its disposal (cited in Report of the Serious Fraud Office for the year ended 30 June 1994, p. 10 & 11).

In light of these perspectives, it would appear that society needs to be better educated as to the extent of not only fraud, but of all wrongdoing in the community before social consciences can be changed. Nevertheless, it should be remembered that these figures only include fraudulent wrongdoing, and omit issues concerning retaliation, discrimination, harassment, elements of public health and safety, or the immeasurable and far reaching personal costs often involved in wrongdoing.

What ever the case may be, there appears to be a growing movement of social concern and set of values to 'become ethical', expose wrongdoing, and to label and punish those that are responsible or accountable for such acts. It is as if New Zealand has now jumped upon the 'ethical bandwagon' that has been sweeping other countries around the world since the 1980s. In review, New Zealand's past reliance on ethical practice has, for some time, been left to the 'good faith' of the employer within the employment relationship, where now there is a call to make people in positions of power more accountable for their actions. This focus has been especially sought from the health sector in recent months (Kilroy, 1994a).

The reliance on privacy and information usage is another issue that has been long embedded in the employment relationship within many New Zealand organisations. Whether it be over secrecy, confidentiality, commercial sensitivity, or whatever, New Zealand business, the professions, and similar type institutions have followed the premise that sensitive information should not be disclosed for any reason unless given consent by the concerned authority. This premise has gone so far as to become part of the backbone of New Zealand society, and heavily protected by our legal framework. For example, certain

information protected from release is covered under the Official Information Act 1982 and the recently enacted Privacy Act 1993. Confidential information is also addressed under common law in equity, which imposes a duty of confidence on people. However as events have shown here and overseas, this duty of confidence is not always in the best interests of the public. As a result, this duty has at times challenged, some of which by whistleblowers. In light of such challenges, the study now turns to examine a New Zealand case example that raises the issue of corporate responsibility and ethical duties. From this address, a variety of New Zealand cases of whistleblowing are identified and analysed.

3.4 Cases of New Zealand Ethical Misadventure and Whistleblowing

Significant and far reaching cases such the Watergate scandal and Challenger disaster in the United States, and the Fitzgerald inquiry in Australia, had an instrumental effect in challenging where the moral responsibility of corporates lie. New Zealand's most high profile case that has questioned a corporation's moral responsibility is that of the Mt. Erebus disaster. On November 28, 1979, an Air New Zealand DC-10 on a sightseeing flight, crashed into the Antarctic mountain killing 20 crew and 237 passengers (French, 1984). Investigated by a Royal Commission, it uncovered evidence that disputed the **contested** pilot error theory. Instead, it found that navigational computer coordinates had in fact been changed, whereas aircraft pilot Captain Collins, was informed that the coordinates would remain the standard ones for tourist flights of the kind he was to embark on. With weather conditions of a 'white-out' variety, where visibility is close to nil, the plane followed its prescribed flight path which led directly into the side of the mountain. While there were good reasons to change the aircraft's flight coordinates for the flight that day, Captain Collins was never informed of this.

Why the new coordinates were not communicated to Captain Collins is unknown. There obviously appeared to be a breakdown in the internal reporting

system for new flight paths that day. Whatever the case, the DC-10 disaster graphically depicted not only the vulnerability of mistakes by New Zealand corporates, but the potential for immorality in attempting to conceal information that the public should be aware of. It could therefore be assumed that due to the existence of organisational wrongdoing, whether intentional or not, there also exist the potential for acts of whistleblowing.

A review of whistleblowing cases in New Zealand to date reveals few recorded examples. Martin (1994) highlights one documented case where the actions of a Department of Health professional, who in 1983, informed *Truth* of his belief that "the department in the 1960s had used contaminated vaccine to immunise against poliomyelitis" (p. 9). Following an enquiry by the Epidemiological Advisory Committee of the Department of Health, the substance of the claims was rejected, and the officer concerned retired soon afterwards.

Surrounding these larger cases have also been numerous other smaller, and less documented cases that occur every day: cases of sexual harassment, financial maladministration, environmental pollution, unjustifiable dismissal, and many more. Within these more common cases, often lie the personal battles of those persons who have although acted in good faith to inform their employer (or principle) of their concern, but have been victimised for challenging the authority of the very environment they aim to serve. Based on anecdotal evidence, there appear to exist numerous unreported cases of retaliation for whistleblowing, nonetheless a mixture of some of the better and lesser known cases are highlighted here.

In some of the larger cases of assumed ethical misconduct in New Zealand, it is difficult to specifically identify the original whistleblower. In some cases they have been publicly labelled and expelled from employment, whereas in others, informants have been either hushed up, have remained silent, or have left the organisation on their own accord. This has been largely due to the victimisation they have or felt they would have received, and the paucity of any real form of

protection. It is for reasons such as this that many concerned parties have disclosed information by covertly leaking it, often anonymously to either Ministers of the Crown, the media or to some other body or authority that may be able to effect action.

One popular example of a political whistleblower who has been relatively successful in effecting some form of action, is Winston Peters, National Party member for Tauranga. In using his members' right to parliamentary privilege, Peters has exposed cases such as the Bank of New Zealand controversy over the bail-out by the government, massive taxpayer-funding of the Labour government's public relations campaign, and more recently the Cook Islands' tax scandal involving the so called 'wine box' of documents.

Whether his involvement in these cases exemplifies his personal crusade for accountability, a source of gain for personal and/or ulterior motives, or he was simply targeted as someone who could 'make things happen', is unknown. However, what one could generally assume is that it is unlikely that he identified these issues by himself. He was more than likely informed by someone closely involved in each case.

Peters has had a history of public exposés which has seen his popularity skyrocket at times, yet at the price of criticism and ostracism (McLeod, 1992). Whatever his intentions may have been, time has revealed that he, like most whistleblowers, has come off second best.

While Winston Peters has proven to be one of New Zealand's better known whistleblowers, there are numerous cases throughout the country on a less grand scale. Presented here are four different cases that go some extent in highlighting the whistleblowing phenomenon experienced in this country.

The case of Whangamata doctor Ian Duncan is one of the better known and more contentious examples of a whistleblower who suffered retaliation.

Disciplined in 1986, Dr Duncan disclosed confidential information concerning the health status of a patient, a local bus driver who was endangering school children's lives by remaining at work while he suffered from a heart condition (MacLennan, 1994). Found guilty of breaching patient confidentiality, Dr Duncan was removed from the medical register for twelve months, was censured and ordered to pay \$10,000 towards the inquiry costs of the Medical Council and investigation costs by the Preliminary Committee (*Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513). Despite medical codes that strongly emphasise the importance of patient confidentiality, Dr Duncan commented that he had no regrets about his action and would do the same thing again (MacLennan, 1994).

In Wellington, a coachworker received a final job warning after notifying the Ministry of Transport of an unsafe bus that was returning to service. When corrosion was found in an important structural area of the bus through the address of another matter, workers told their supervisor who in turn told the general manager of the workshops. Despite their concerns, the general manager directed the workers to work on their original task. They had difficulty in doing this due to the extent of the corrosion and reported the matter to their delegate who wrote to inform the Ministry. Graeme Clarke, Manufacturing and Construction Workers Union secretary, said that, "[t]o have a delegate given a final warning for disclosing information about activities by the employer which can potentially endanger people's lives is absolutely outrageous" (Kennedy, 1992, p. 9). Although the retaliation experienced in these cases was not of any great or life threatening consequence to the informants, the potential disregard to the public may have had catastrophic results had the buses concerned lost control and crashed, injuring, and possibly causing loss of life.

On a slightly different note, Dennis Foot, a Wellington Regional Councillor, highlights that the reason for most leak problems in his own City Council:

stem from the frustration councillors feel at the lack of public debate on issues, particularly when the council attempts to circumvent the provisions of the Local Government Act by holding secret "workshops" on contentious issues. Then, when the matter finally reaches the council table, there is virtually no debate or, if there is one, it is stifled (Foot, 1994, p. 8).

This frustration may be one of the main reasons why people blow the whistle, although this has not yet been proven in research. People often first report the matter of concern to their superiors and then await a response or action. If this is not forthcoming, frustration, stress and concern builds to the point where the informant either 'blows the whistle' or disregards the concern in some way. This may be to either ignore it, or to physically and/or mentally remove themselves from the problem (Miceli & Near, 1992).

Another example recently in the news was that of Waikato Polytechnic trying to suppress public criticism of its nursing department by buying tutors' silence. Former deputy head of department, Mr Raj Sanggaran, was paid nearly \$60,000 on the condition that he remain silent and leave the polytechnic over his concern of the department's cultural safety programme. "He opposed the programme, which concentrated on Maori culture, because he felt it was inverse racism. Nurses needed to be trained to be sensitive to all people, irrespective of their colour, he said" (Gleeson, 1994, p. 1). This information was revealed by Mr Brian Stabb, a tutor in mental health at the polytechnic, who himself had been offered \$30,000 to keep silent about the department's mental health training. This training involved unqualified tutors taking students for practical work at Tokanui Hospital.

While these New Zealand examples alert us to a small range of cases involving unethical conduct and whistleblowing, no one case of whistleblowing in the history of this country has received so much attention and outrage by the public as has that of the Neil Pugmire episode. The series of events that occurred in

this case example clearly illustrates the vulnerability of blowing the whistle in New Zealand, and thus the need for whistleblower protection. It is therefore to this example that a detailed analysis will take place.

3.5 The Neil Pugmire Episode

In August of 1993, Lloyd McIntosh, a known paedophile, "sexually violated a two-year-old girl in Palmerston North in a sustained attack to her vagina, anus and throat that left her fighting death from her injuries and his venereal disease" (McLeod, 1994, p. 78). Had the authorities acted upon the concerns raised by Lake Alice charge nurse Neil Pugmire, McIntosh and other known paedophiles may not have been released back into the community to re-offend.

On May 10 1993, Neil Pugmire wrote to the former Minister of Health Bill Birch and later sent a copy of the same letter to former Police Minister John Banks (Barton, 1994a). In his letter, Pugmire expressed his "moral and professional concern" (Paviell, 1994b, p. 1) about a 22-year-old patient (not McIntosh), soon to be discharged, who he considered was likely to re-offend. His concern was raised due to an omission or loophole in the Mental Health (Compulsory Assessment & Treatment) Act 1992, whereby a particular group including certain sexually dangerous persons classed as having 'personality disorders', could no longer be held and must therefore be released into the community (McLeod, 1994). Regrettably, no positive response or action was taken by either minister except for a reply of acknowledgement by Associate Health Minister Katherine O'Reagan (Hubbard, 1994). With a whole three months of inaction elapsing after the sending of Mr Pugmire's letter, Lloyd McIntosh, another patient with a history of child sexual abuse was released from Lake Alice. Within a short time of his release he had re-offended.

On February 1 of 1994, the Government quickly moved to find out how many psychiatric patients have been released from mental hospitals, and to what

extent they posed a danger to the community (Stone, 1994b). This inquiry was sparked by the release of Neil Pugmire's letter of concern by the Honourable Phil Goff, Labour Spokesperson on Justice (although he refused to say how he obtained it). Later that week Mr Goff released a second letter, this one detailing the medical and personal history of paedophile Lloyd McIntosh with the signature blacked out (Barton, 1994b).

Following the release of the first letter, Good Health Wanganui, (Pugmire's employer), suspended him. Wanganui Crown Health Enterprise (CHE) head Ron Janes said Pugmire's suspension during a CHE inquiry was aimed at determining whether he knowingly released confidential patient information. "It's got nothing to do with whether he wrote to Mr Birch or not. In my opinion . . . he was entitled to write to the Minister of Health. The question is whether he knowingly released information that was going to fall into the public arena. If the inquiry finds all Mr Pugmire did was write a letter to Mr Birch, then that's an end to the matter and he'll be reinstated" (Janes quoted in Paviell, 1994c, p. 1). The suspension had in fact come a day after Health Minister Jenny Shipley told hospital managers she "expected them to take action against anyone issuing patient information" ("CHE Defends," 1994, p. 1). However Mr Janes did comment that the CHE's inquiries were in no way related to Mrs Shipley's comments, "but had been initiated by Mr Pugmire's immediate supervisor 24 hours before Mrs Shipley's statement was publicised" (Barton, 1994b, p. 1).

Regarding the release of alleged confidential information, then Health Minister Jenny Shipley directed inquiries to Mr Goff on February 6 over whether he had approached Lake Alice staff for the information, or if it was offered voluntarily. This was because Mr Goff had in turn exposed Mr Pugmire to an inquiry as to how the detailed information got out (Paviell, 1994b). No comment was made pending an inquiry by the CHE. Suspended on full pay for a week while the alleged breach of patient confidentiality was investigated, Mr Pugmire and his family left their Marton home to stay with friends.

Mr Pugmire and his legal representative then applied for an urgent interim injunction against his employer, Good Health Wanganui Ltd, contesting the suspension. However Judge Colgan, of the Auckland Employment Court, rejected the application saying "he couldn't make definitive rulings on the limited evidence before [him]" ("Pugmire Admits," 1994, p. 1). Nor could the suspension be lifted as it was not necessary as "the employer had lifted the suspension unilaterally after the hearing started" said Public Service Association (PSA) Deputy General Secretary Jim Turner ("Court Decision," 1994, p. 10). Mr Pugmire also admitted that day (ie, February 11) to sending Mr Goff a copy of his letter, "but denied he was responsible for the wider release of the letter to the news media" ("Pugmire Admits," 1994, p. 1).

On Friday March 4, Good Health Wanganui sent Mr Pugmire a letter saying that "he must choose between demotion to a clerical job or "termination" by midday Monday" (Gerritsen, 1994b, p. 3). Fortunately the PSA managed to get him an urgent Employment Court hearing to get an interim injunction against the action (Forde, 1994b). Judge Derek Castle then reserved his decision.

In making his decision, Wellington Employment Court Judge Castle said that the Wanganui Crown Health Enterprise had shown a "reprehensible abuse of the concept of fair dealing by an employer" (Gerritsen, 1994a, p. 1). Judge Castle then issued an interim injunction preventing the Wanganui CHE from either demoting or sacking Pugmire and ordered immediate reinstatement. This order was to stand until Mr Pugmire's personal grievance case against the CHE was heard, (however this was later withdrawn in exchange for a settlement in which the CHE agreed to take no further action against him (McLeod, 1994). Judge Castle went on to say that "[a]s a result of that one incident the consequences to date to him and his family have been verging on the disastrous and should not be allowed to continue unnecessarily" (Paviell, 1994a, p. 1.). This was further reiterated by Prime Minister Jim Bolger who ticked off the CHE over its treatment of Pugmire ("Bolger Ticks," 1994) and said that his "employers should

spare him, despite any misdemeanour he may have been associated with - simply because he and his family had suffered enough" (Campbell, 1994, p. 17).

Analysis of the trials experienced by Pugmire and his family send out a comprehensive message to many that speaking out over wrongdoing just is not worth the risk. Pugmire was fortunate in the respect that he was truly sincere in his disclosure, and the conduct of his employer was found to be in 'bad faith' by the court. Whether such fortune would be carried over in such cases of environmental pollution or financial mismanagement is unknown. However what the Pugmire case did provide was the impetus for a review of New Zealand's status on whistleblowing and its surrounding issues.

3.6 Identification and Analysis of the Main Ethical and Whistleblowing Issues to Emerge

The exposure of the Neil Pugmire episode can be said to have indeed opened a Pandora's Box of issues. Issues that until that time had been relatively dormant, although slowly building towards the point of eruption. In fact it was this eruption that questioned the country, and more specifically the government, about its ethical duty to the public. Arising from this has been a call for greater protection for the disclosure of issues concerning public interest, and the need to penalise those who frustrate or commit acts of wrongdoing align to this interest. In examining not only the Pugmire case, but New Zealand's historical and contemporary ethical context, six issues come to mind, namely issues of 1) loyalty, 2) privacy, 3) public interest, 4) accountability, 5) whistleblowing, and 6) the protection of whistleblowers.

As a condition of employment it is considered that employees owe an implied duty of *loyalty* to their employers that they follow reasonable directions, and conduct themselves in a manner in accordance with their employers' interests (Westman, 1991). Yet on some occasions the employer's demand for loyalty may

conflict with the moral interests of the employee. In Neil Pugmire's case, he was not considered disloyal for writing to his minister informing him of his immediate concern, and from the Wanganui CHE's perspective this was totally acceptable. However, when the personal details of a patient were later released and Pugmire was suspected as the culprit, the CHE became aggressive and accused Pugmire of disloyalty to the patient, his employer, and profession.

While loyalty in itself can produce positive consequences in many circumstances, it may also cause poor ones by keeping questionable actions or intentions from being exposed (Ewin, 1993). Yet in the case of a profession, or any employment relationship for that matter, it is argued that the primary virtue in such associations is trustworthiness (Brien, 1994a). Therefore to achieve this, one must show their commitment by being loyal, that is both employer and employee. Thereby faced with a dilemma of conflicting interests, the pressure to conform to one's implied duties can be extremely powerful, although ultimately, the decision rests with those parties concerned.

The issue of *privacy* within the employment relationship is one that is fiercely guarded by employers and is protected in both statutory and common law. Its primary objective is to protect employers from unwanted review and revelation of sensitive information. Yet more recently, developments have been made to promote and protect individual privacy through the Privacy Act 1993. This framework imposes new obligations of confidentiality and privacy for any personal information which parties have access to or for which they are responsible, subject to any legal requirements for disclosure and any rights that the employees might have to gain personal information about themselves (Privacy Act 1993).

In the Pugmire episode, Good Health Wanganui alleged that patient confidentiality had been breached through the disclosure of personal information on a patient. In light of privacy legislation, such a disclosure was unlawful and subject to penalty. In fact statutory and common law mechanisms that aim to

protect a person or body's privacy exists for some very good reasons. Yet this case highlighted that such protection may not be appropriate for all cases, such as those concerning the wider public interest. Having identified the gap between what exists and what is necessary to adequately protect whistleblowers, the Pugmire episode also highlights the ambiguity concerning those parties accountable for either the wrongdoing and/or retaliation.

Since the restructuring of the 1980s and reforms initiated under the State Sector Act 1988, it can be argued that the natural links that existed between government departments weakened, and with them the safety mechanism whereby state servants could consult the State Services Commission over issues of concern ("Truth Must," 1994). Evidence of this weakening is found in the disregard of acceptance by ministers one would assume are accountable for Mr Pugmire's concerns. Yet it appears that the release of dangerous patients under the Mental Health Act held no person accountable. Despite Bill Birch being the Health Minister at the time, he received no discipline, nor did other directed parties such as ministers Banks and Shipley who were alerted to the potential for public harm.

Whether in the public or private sector, this case identifies a further gap in existing mechanisms to hold persons at fault accountable. This issue thereby raises the question concerning how such persons will need to be made answerable for wrongdoing under their control.

One of the main issues to arise from the Neil Pugmire episode is whether *whistleblowing* is indeed a legitimate action. Evidence from the case indicates that from an employer's perspective internal whistleblowing is acceptable, whereas external disclosure is not. While Pugmire followed correctly documented internal channels in alerting his minister, the public release of confidential information is at the best of times questionable. Whether whistleblowing is a legitimate action is an extremely complex and difficult issue. In many cases informing may be completely inappropriate, but if the employer's conduct or activity was either

illegal, immoral or illegitimate (as in Near and Miceli's 1985 definition), whistleblowing may in fact be legitimate. This is not to say that this would be so in all occasions, but rather each individual case should be examined in light of the pertaining circumstances involved. It is for this reason that protective mechanisms for both internal and external environments have been proposed.

Possibly the most important issue to arise from the Neil Pugmire episode is that of inadequate *protection for whistleblowers*. The Pugmire episode exemplifies this in two ways. First, the internal mechanisms in place to receive and respond to issues of concern failed to address Pugmire's complaint. This inaction supports Miceli and Near's (1992) previous contention that retaliation is not the ordinary response to whistleblowing. Nonetheless, if internal mechanisms fail to address whistleblowing, or to disclose their information to parties outside of the organisation. This leads to the second point that external mechanisms such as authoritative bodies and the law tend to carry inherent inadequacies. These may range from ambiguities in what conduct is and is not protected to lengthy time delays and cost.

In retrospect, these points highlight problems employees face in both seeking protection through either internal or external mechanisms. Providing protection that will meet the needs of whistleblowers is by no means an easy feat, in fact it is much easier to make matters worse. Provided with this dilemma, countries like the United States and Australia have enacted whistleblower protection legislation to provide both a legitimate channel for whistleblowers, and two, to encourage a more socially responsible society.

Overall these six issues typify valid concerns that require address in New Zealand. However if overseas experience is anything to go by, it would appear that the road of development is one laden by trial and error. Given the proposal of whistleblower legislation the issue that then remains is whether New Zealand can learn from the mistakes of other jurisdictions. Before addressing the merits of legal mechanisms of whistleblower protection, it is first necessary to attain an understanding of *why* it is important to protect whistleblowers. This will now be addressed in chapter four.

4. WHY PROTECT WHISTLEBLOWERS? ISSUES OF RETALIATION, INTIMIDATION AND HARASSMENT

4.1 Introduction

Whistleblowing, as a form of principled dissent, accuses and challenges not only the organisation's authority, but if disclosed externally, may also direct challenges from the public, political, social and legal arenas (Frith, 1993). It is the fact that such a challenge has been forwarded in the first place, labelling the organisation or a person(s) within it as wrongdoers, that prompts some form of response to discount or suppress the allegations. The media portrayal of this response is often negative, emphasising severe degrees of retaliation, intimidation or harassment. Evidence from the research body on victimised whistleblowers has also tended to confirm this view. Research by Soeken (cited in McMillan, 1989) on the experiences of 233 whistleblowers in the United States found both direct and indirect evidence of this. In particular:

- 90 percent lost their jobs or were demoted;
- 27 percent faced law suits;
- 6 percent faced psychiatric or medical referral;
- 25 percent admitted alcohol abuse;
- 17 percent lost their homes;
- 15 percent were subsequently divorced;
- 10 percent attempted suicide; and
- 8 percent went bankrupt.

More recently a study cited in the *British Medical Journal* surveyed 35 people from various occupations who had exposed corruption or danger to the public, or both, from a few months to 20 years before ("Cost Of," 1993). Of the 25 men

and 10 women who had contacted the support group 'Whistleblowers Australia', all had suffered adverse consequences from their actions, for example:

[f]or 29, victimisation had started immediately after they had made their first complaint. The victimisation in the workplace was extensive, including dismissal, demotion, resignation and early retirement seven of the whistleblowers [broke] up with their partners seventeen considered suicide [while] the financial loss for the 35 people was estimated in hundreds of thousands of dollars ("Cost Of," 1993, p. 9).

While the sample studied is not considered to be typical of all those who blow the whistle, the response by different organisations was quoted as being "strikingly similar" ("Cost Of," 1993, p. 9).

While these statistics seem to illustrate the graphic and far reaching nature of retaliation, it is difficult to ascertain the background of the whistleblowers, or the individual circumstances of their case, thereby raising questions concerning methodological focus. Nevertheless, these studies identify some of the more extensive implications of blowing the whistle.

Contrary to these findings, research on federal employees by Near and Miceli (1986) discovered that less than a quarter of the responding whistleblowers ($N = 636$) who had observed wrongdoing (and had reported it), experienced any retaliation. In later studies, on internal auditors (Near & Miceli, 1988) and federal employees (Miceli & Near, 1989), it was more commonly found that the whistleblower receives neither organisational support and encouragement nor retaliation, instead, a more likely response of 'inaction' would occur - an example being the Pugmire case. Retaliation was rather more likely to follow if the whistleblower pursued their concerns after their first complaint or went to external sources. However these studies must be seen in light of the differing focus and methodologies that were adopted for them. For example, whistleblowing on many activities for federal employees and internal auditors

is 'role prescribed' (Miceli & Near, 1992). Inaction and other organisational responses to not only the whistleblower, but also to the wrongdoing will be addressed in the following section, 4.2 Consequences of Whistleblowing.

Nevertheless, people are still generally reluctant to disclose public interest information. Goff contends that there are two reasons that discourage people from doing this at present in New Zealand: first there is no available and appropriate authority to disclose that information to, and secondly, concern that disclosure of information will have negative repercussions for the person making a public interest disclosure (personal communication, November 25, 1994).

The retaliation experienced by Neil Pugmire and many other whistleblowers who act in the interests of the public good has given rise to the need for some form of protection in addition to that which presently exists. Australian research on NSW public servants indicated that nearly 75 percent feared they would suffer some form of retaliation if they reported corrupt conduct (Morris, 1994). For this reason and the necessity of public accountability and 'openness', that some countries have enacted protective whistleblower legislation. However before such jurisdictional mechanisms are examined, it is important to be informed of the consequences that whistleblowing can have in both the short and long term.

4.2 Consequences of Whistleblowing

Blowing the whistle has many consequences not only for the whistleblower but also for those whom the whistleblowing affects, namely the complaint recipient, the co-workers, the organisation, and sometimes other parties such as the general public (Miceli & Near, 1992). These affected parties and the influences upon them (such as personal and situational variables, and variables involving both the person and the situation), have been previously identified in Near and Miceli's 1987 whistleblowing model addressed in section 2.6 of this study.

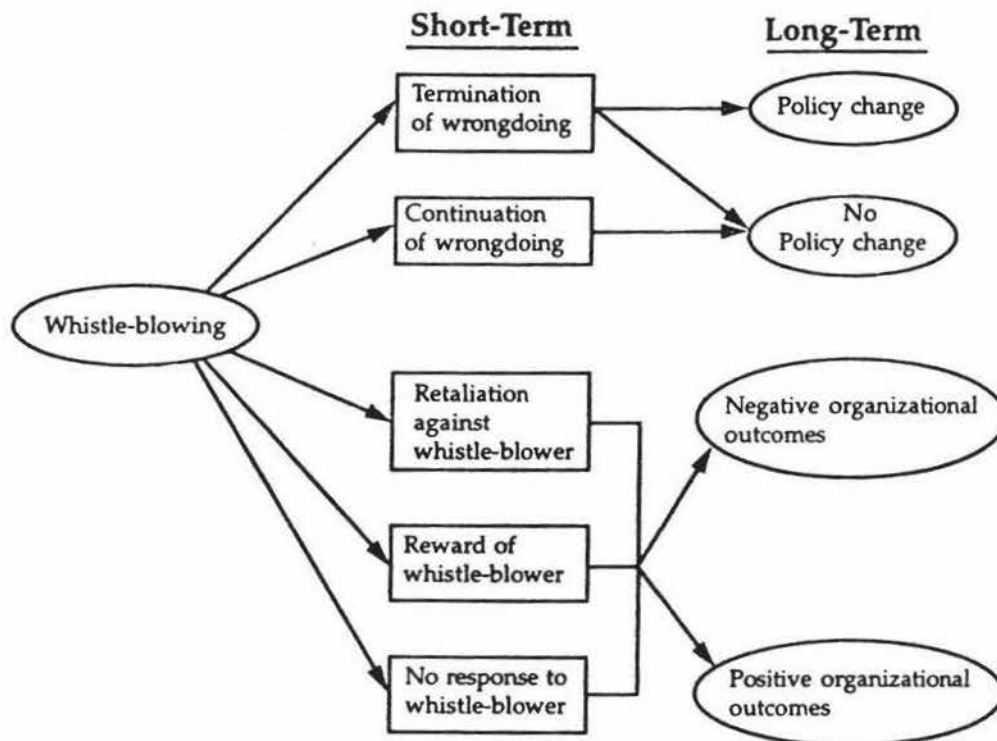
As a result of a disclosure, these parties may react in a variety of ways. For example, the complaint recipient may address the concern or they may retaliate against the whistleblower. If, for example, the complaint is ignored, the whistleblower may pursue the matter through other channels to obtain the attention of other recipients. These actions may include going outside of the organisational confounds. Whereas if the whistleblower experiences retaliation, they may seek legal advice and file a personal grievance, or alternatively drop the complaint altogether. Whatever the reaction of each party, no one case will necessarily follow the same sequence as another.

In examining the possible effects of whistleblowing, two perspectives of concern emerge. The first depicts the course of action taken considering the **wrongdoing**, while the second depicts the course of action considering how to deal with the **whistleblower**. Therefore when contemplating action, the organisation must first consider whether the disclosure is advantageous or disadvantageous to their cause, and what degree of effect its release will or may have. Second, the organisation needs to consider how to react to the person(s) who disclosed the complaint. Here it should also be noted that whistleblowers are not always individuals, they may be groups with a collective interest such as construction workers concerned about unsafe working conditions.

In the case of the whistleblower, the organisation will either retaliate, reward, or offer no response, ignoring the complaint of the whistleblower irrespective of whether or not the wrongdoing is terminated or continued. Figure 4-1 depicts short-term and long-term outcomes of whistleblowing.

In the short-term, the organisation can choose to either terminate the wrongdoing by addressing and resolving the complaint, or they can continue the wrongdoing, carrying on business as usual. In the long-term, the organisation can either alter their existing policy to ensure that further wrongdoing can no longer occur, or, keep the existing policy intact making no changes and choose to either correct the wrongdoing or not.

Figure 4-1 Short-term and Long-term Outcomes of Whistleblowing



(Miceli & Near, 1992, p.180).

The long-term consequences of the organisation's response to a whistleblower's complaint (to either retaliate, reward, or ignore) will provide either a positive or negative organisational outcome dependant on the situation. For example, the retaliation and intimidation experienced by charge nurse Neil Pugmire cast Good Health Wanganui as the wrongdoer in the eyes of the public (Forde, 1994a). An example of a positive organisational, and national outcome through whistleblowing, was when workers at Three Mile Island spoke out about the construction and design flaws of the nuclear plant (cited in Duska, 1988). They may have experienced great pressure and retaliation from their direct employers for speaking out, but they helped prevent a nuclear disaster that the Nuclear Regulatory Commission and the country were thankful for.

Miceli and Near (1992) acknowledge that there are costs as well as benefits to both blowing the whistle and of **not** blowing the whistle, or 'inaction', from an organisational as well as societal perspective. Table 4-1 identifies these.

TABLE 4-1

Potential Costs and Benefits of Whistleblowing and Inaction

Target of the Cost, Benefits	Outcomes of Whistleblowing and Inaction	
	Costs	Benefits
<i>Inaction</i>		
Observer's organisation	Employee withdrawal, risk to long-term organisational survival, escalation of wrongdoing	Smooth organisational functioning, avoidance of frivolous complaints
Society at large	Citizens' rights, privileges, and safety jeopardized	Avoidance of frivolous complaints (e.g., law-suits)
<i>Whistle-blowing</i>		
Observer's organisation	Challenge to authority structure, threats to organisational viability, limits on control, unpredictability of organisation member actions	Increased safety and well-being of organisation members, support for codes of ethics, reduction of waste and mis-management, improved morale, maintenance of good will and avoidance of damage claims, avoidance of legal regulation
Society at large	Court logjams	Increased safety and well-being of societal members, reduction of taxes and increases in services, less regulation, support for codes of ethics

(Miceli & Near, 1992, p.5)

When an organisation chooses to ignore the complaint of a whistleblower, they forfeit a golden opportunity to correct the wrongdoing before it escalates, or is disclosed to the public. In ignoring the complaint, the organisation is not only damaging the employment relationship with the whistleblower, they are running a great risk of adverse publicity, possibly affecting future earnings. What many organisations sometimes fail to recognise are the possible implications (both human and financial) that inaction can bring. For example, public relation campaigns that emphasise goodwill and quality, which may take years and even decades to build, can be destroyed almost over night due to an organisation's failure to properly address an issue. One example is automobile giant Ford Motor Company. They experienced great difficulty in re-establishing their credibility in the market place once the findings involving the ill-fated Ford *Pinto* case were released. Rather than recall and fix the design fault of the automobile, Ford strategists figured that it would be more cost effective to settle potential law suits stemming from the fatalities (cited in Solomon, 1992). As identified in Table 4-1, it appears the benefits of whistleblowing and the costs of inaction far outweigh their counterparts. Yet many organisations, either consciously or unconsciously, still fail to recognise this, possibly because they maintain a short-term focus or simply have a blatant disregard for others.

With reference to Figure 4-1, Short-term and Long-term Outcomes of Whistleblowing, it is noted that the whistleblower may sometimes experience retaliation if no organisational response or reward is provided. Survey research by Near, Dworkin, and Miceli (1993) suggests that the rate of retaliation is much lower than thought, probably less than 20 percent, although they recognise that the rate of retaliation probably varies widely across cases of whistleblowing. This may explain the great diversity that appears to exist between 'incidents of retaliation' studies. In addition to this, Miceli and Near (1992) recognise further methodological difficulties in that while it is hoped that incidents of whistleblowing remain small, only in the largest samples can enough whistleblowers (who have suffered retaliation) be identified so as to characterize their experiences reliably.

However, where retaliation has been claimed, the issue of attempting to protect the whistleblower from further action has been complicated by the interpretation of what actually defines retaliation. Defining retaliation is a difficult and complicated task, as what may be seen as retaliation by one person may not be seen so by another. For example, how does demotion or transfer affect a married versus a single person? In attempting to define retaliation, Miceli and Near (1992) state that:

the standard approach is to provide a checklist of possible forms of retaliation and to ask respondents to check those which they've experienced and those with which they've been threatened. [It is argued that the] sum of these experienced and threatened reprisals represents a measure of the extent to which retaliation is not an isolated event but is rather a concerted effort by the organisation to systematically harass the whistleblower (p. 202).

They coin this the "comprehensiveness of retaliation" (p. 202) and contend that it is "merely an attempt to gauge the degree to which the organizational response to the whistleblower is part of some integrated strategy" (Miceli and Near, 1992, p. 202).

In contrast, Keenan and Krueger (1992) define reprisal as involving:

an undesirable action taken against an employee or a desirable action not taken because he or she disclosed information about a serious problem. Reprisal may involve such consequences as a re-assignment to a less desirable job or location, suspension or removal from a job, or denial of a promotion or training opportunities (p. 23).

Through analysing these definitions, it can be seen that retaliation, or reprisal, does not solely consist of employment termination as many may think, but exists in varying degrees with regard to numerous varieties of work and sometimes

non-work related activities. The complexity of these degrees illustrate just how difficult it is to first identify what constitutes retaliation, and second how to adequately protect whistleblowers from it. Defining retaliation in overseas whistleblower legislation has required 'standards of proof' and 'tests of burden' to be established.

In the United States there exist numerous whistleblower statutes at both federal and state level, yet due to their recency there are few precedents in case law to assist in the interpretation of proof requirements. As the federal statute of Title VII of the amended Civil Rights Act 1991 has been assisting judicial decisions for the past 25 years, its anti-retaliation provision (which is similar to whistleblower cases of retaliation), has been applied with evidentiary standards developed under this provision to establish a *prima facie* case (Westman, 1991). In order to do this, whistleblowers are typically required to "present [evidence] in order to carry their burden of proving a *prima facie* case, and the evidence that employers typically are required to present in order to rebut the whistleblowers' *prima facie* case" (Westman, 1991, p. 150). This framework enables the setting of boundaries for gathering evidence in discovery proceedings before the trial. In order to prove a *prima facie* case of unlawful reprisal, employees must prove: 1) that they engaged in protected activity; 2) that they were subsequently treated in an adverse fashion by their employer; 3) that the deciding official had knowledge of the protected activity; and 4) that there was a causal connection between the protected activity and the employer's adverse treatment of the employee (Westman, 1991).

South Australian legislation on the other hand requires the whistleblower to make an 'appropriate disclosure' where that person 1) believes on reasonable grounds that the information is true; or 2) if not in a position to do this but believes that the information *may* be true and is of sufficient significance to justify its disclosure so that the truth may be investigated; and 3) the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure (Whistleblowers Protection Act 1993).

In New Zealand, the law stands that any disciplinary action or dismissal enforced by an employer must be justified. Where a breach of contract has occurred, for example as in a breach of confidence by disclosing unauthorised information, the element of acting in 'good faith' by both employer and employee must be established. As no personal grievances have been heard under the Employment Contracts Act concerning unjustified action or dismissal for disclosing public interest information, it is difficult to assess the merits of the legislation in this respect. However it could be assumed that as no cases have been heard, the protections in place may not be sufficient enough to warrant disclosure, possibly because employees do not feel on solid enough ground to proceed on this basis.

Indeed the consequences of blowing the whistle can travel with the whistleblower far beyond the realms of the organisation they work, or in many cases, worked for. The tag of 'snitch', 'tell-tale' and 'muck-raker', can greatly effect future employment opportunities and the perceptions of a person's level of organisational loyalty and commitment. Risking present and future opportunities may indeed act as a powerful incentive not to 'rock the boat' or follow through on one's concerns.

Some organisations will even go to the extent of blacklisting previously employed whistleblowers within the community they serve to ensure that they never find work, or receive privileges of a similar standard again. Such cases are well documented. For example the story of Stanley Adams, former Senior Executive of Hoffman-La Roche, the world's biggest vitamin suppliers and makers of the widely-prescribed tranquillisers valium and librium is one such case (Round, 1994). While at La Roche, Adams wrote to the commissioner for competition at the then European Economic Community (EEC) Commission in Brussels accusing La Roche of price and production level fixing in conjunction with other chemical and vitamin producers throughout the world. For informing on his employer, not only did the EEC Commission fine him for breach of the Treaty of Rome, but leaked his name to his Swiss employers. When later

crossing the Italian-Swiss border on holiday, he was arrested by Swiss police, put in solitary confinement, tried in secret for industrial espionage and was given a suspended sentence. With the thought that he was likely to spend twenty years in prison, his wife committed suicide. Swiss authorities refused Adams permission to attend the funeral. Furthermore when later released on bail, Italian authorities called in his loan for his pig farming business.

Having lost his case against the European Human Rights Commission claiming that Switzerland had been guilty of a breach of human rights, he turned to the European Court of Justice in Luxembourg, Europe's highest court from which there is no appeal. In 1985 Adams won a landmark case and received £400,000, an amount he said would barely cover his debts. "I lost my wife - you can't put a price on that" he said (cited in Round, 1994, p. 8). To place this case in perspective it should be noted that this is only one of many cases of whistleblower victimisation, and one at the more extreme end of the continuum. Whistleblowers may well pay a heavy price for standing up against the might of their organisation, for which it is understandable why many potential whistleblowers may choose to remain silent.

An interesting development of late by employers has been the active recruitment of whistleblowers and people of a high ethical standing. This initiative has been to help police and encourage the disclosure of internal information so as to address and resolve any unethical conduct or practice. *Fortune* magazine noted that over 200 of America's major corporations had recently appointed ethics officers, usually senior managers with long experience, to serve as ombudsmen and to encourage whistleblowing (Labich, 1992). This move was possibly prompted by the fact that between 1970 and 1980 over one-fifth of *Fortune* 500 companies had been convicted of at least one major crime or had paid civil penalties for illegal behaviour (cited in Brien, 1993).

Moving from an organisational to individual perspective, in many reports and case studies on whistleblowers, a considerable number have commented that if

they knew what they were letting themselves in for, they would probably have had second thoughts, but still have followed through (eg: Nitschke in Alcorn, 1993; Dillon in Edwards, 1994; and Pugmire in Monin, 1994). This honesty typifies the extent to which some people are willing to go on the strength of their convictions, often at a cost to themselves and sometimes to others such as their families. Under such circumstances it is understandable that in considering some of the potential costs to the whistleblower, informants may seek the protection of anonymity (Elliston, 1982).

Given the possibility of retaliation, intimidation or harassment, it is important that society devise adequate protections for whistleblowers (Glazer & Glazer, 1989). It has been argued that society should even go so far as to encourage whistleblowing to ensure that wrongdoers are held accountable for their actions. However not all whistleblowers' actions can be said to have been disclosed for the good of specific persons, the organisation or the public, as whistleblower's motives are not always altruistic. Disgruntled workers who have been mistreated in the past who may have missed out on salary increases, promotion, or recognition for example may 'muck-rack' in order to draw attention to their own personal needs and demands. So in effect, organisations also need protection from unjustified disclosures. Fortunately the legislation in many jurisdictions protects both parties in this extent. For example, whistleblower legislation in many American states, South Australia, and draft protection here in New Zealand, make it a punishable offence to knowingly disclose information that is not true. The protections offered and proposed in these examples even go so far as to provide protection even if such allegations are found to be incorrect, so long as they can be proven that they were disclosed in 'good faith'.

In summary, it can be concluded that New Zealand whistleblowers require some form protection above and beyond what presently exists. The Neil Pugmire case exemplifies this as highlighted by Goff:

Neil Pugmire survived with union, public and political support. But what he went through would have reaffirmed to most others that the costs of speaking out are too great (Goff, 1994, p. 1).

Many may perceive that Mr Pugmire was indeed fortunate to have this support, whereas others may consider that existing mechanisms of protection are sufficient enough to handle whistleblower's complaints. Yet it may also be argued that the case of Mr Pugmire did not truly test the state of whistleblower protection in place under the Employment Contracts Act or Human Rights Act. Public consensus contends that Mr Pugmire's action was appropriate, but whether such support be equal to lesser or more diverse areas of wrongdoing is unknown. Nor is it known whether the next whistleblower will be so lucky without a clear and appropriate avenue of address and protection. This then raises further questions concerning the adequacy of New Zealand's existing level of protection, and what can or should be done to improve it. Such issues will therefore be addressed in the analysis of the New Zealand Whistleblowers Protection Bill. In order to address these issues, chapters five and six appraise the American and Australian approaches to whistleblower protection, and thereby establish a comprehensive foundation in which to examine the New Zealand approach taken in chapter seven.

5. WHISTLEBLOWER PROTECTION IN THE UNITED STATES OF AMERICA

5.1 Introduction

In the preceding chapters the study has provided a picture of what whistleblowing is, its effect in a New Zealand setting, and identified its extent and consequences. The establishment of these chapters have progressively led to the affirmation that there exists a need not yet met in the protection of whistleblowers. As a result, various mechanisms have been proposed. Of these, the call for the legal protection of whistleblowers has been long standing and has only of late been developed and enacted in some countries throughout the world. Leading this development has been the United States of America. For centuries, the United States (US), like many other countries, has relied upon an 'employment-at-will' relationship whereby an employee without a written contract of employment could be discharged at any time for any reason at the will of the employer, so long as that employee was not employed for a specific time (Vinten, 1992). Likewise, an employee was free to leave the employment relationship at any time for any reason. However, as many employees were usually hired for an indeterminate period of time, no protection existed for them. The only partial protection US citizens received with regard to information disclosure was through the American Constitution's First Amendment right to freedom of speech. This guarantee was later extended in 1968 by the Supreme Court to federal employees who expressed public dissent about work-related matters, provided that any available internal administration remedies were first used (McMillan, 1989). This amendment has been used as a course of action with some success so long as the free speech is related to a matter of public interest (Massengill & Peterson, 1989). However as a stand alone piece of law this neither encouraged nor adequately protected whistleblowers from employer retaliation.

The employment-at-will doctrine remained relatively strong well into the 1980s in many states but began to slowly be eroded as far back as the 1930s as exceptions for specific types of employees or the promotion of specific goals were set (Dworkin, 1992). These exceptions, while not specifically designed to protect whistleblowers, were "written in such a way that whistle-blowers could be encompassed within their protections" (Dworkin, 1992, p. 232). Nevertheless it was not until the late 1970s that whistleblowers began to be legally protected in any substance.

A review of whistleblower legislation enacted in the US to date, reveals two separate and distinct models or approaches, with a third beginning to emerge. The federal and state approaches have been said to be "designed to protect employees from, or to compensate them when they have suffered, retaliation" (Dworkin, 1992, p. 232). However, the design of such legal mechanisms have generally taken a reactive stance focusing on the retaliation that had been initiated, rather than competently encouraging and protecting whistleblowers *prior* to retaliation. However, it is argued that this legal address upon whistleblower retaliation has proven ill-founded. Miceli and Near (1992) note that research has identified that retaliation is not the ordinary response to whistleblowing, nor fear of retaliation a primary deterrent (Nb: research addressed in section 8.2 of this study), and thus the legal focus has not been particularly effective in either protecting or encouraging whistleblowing. As a result, a third model has arisen that offers rewards in an effort to encourage whistleblowing and to provide some form of compensation for those who expose wrongdoing. To initiate the American approach to whistleblower protection, the federal approach will first be examined.

5.2 The Federal Approach

In 1935 the United States passed the National Labor Relations Act which is now recognised as the first major piece of legislation to recognise whistleblowers. With the aim of protecting employees involved in union-related activities, it also contained provisions for the protection of employees who "testified or filed charges concerning illegal unfair labor practices" (Dworkin, 1992, p. 233). This Act not only gave legislative strength to employees' organisational rights, but provided a recognised form of protection against employer retaliation for legitimate whistleblowing.

Unions gained greater power under the National Labor Relations Act and through their collective strength in bargaining, began to eliminate the employment-at-will relationship for most unionised employees (Dworkin, 1992). This began to be replaced with a 'just cause' condition with regard to employment termination. Therefore as long as whistleblowing concerned illegal unfair labour practices, unionised whistleblowers would be better protected. Therefore it was the National Labor Relations Act that first established the federal approach to whistleblower protection.

Following the enactment of the National Labor Relations Act, came a highly regulated period of federal development concerning conditions of employment. The 1960s and 1970s saw the introduction of a number of employment related laws involving legislation on public health, environmental issues, consumer protection and many more areas such as the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1976, and the Occupational Safety and Health Act of 1976. Within these Acts, along with numerous others that were passed after the National Labor Relations Act, were whistleblower provisions that covered 'select' groups of employees. These federal Acts tended to cover only a small group of employees and topics, yet the type of whistleblowing activity covered within them tends to be quite broadly based.

For example, most Acts protected whistleblowers who are about to commence, who are commencing, and have commenced, some whistleblowing activity. These activities range from reporting, to assisting investigations, to testifying, and to initiating in proceedings (Dworkin, 1992), while many Acts also carry a catch-all phrase such as "any other action to carry out the purposes of this subchapter" (p. 234). This provided a broad latitude for the Secretary of Labor and courts in interpreting what is regarded as protected activity. Despite this broad latitude for interpretation, the narrow coverage of protected whistleblower groups within federal mechanisms still failed to provide *generalised* federal protection.

Under the National Labor Relations Act, an administrative procedure to address whistleblower complaints and to determine appropriate remedies was established for the testifying or filing of complaints against illegal unfair labour practices. However in doing so, the Act tended to be more heavily focused on the retaliatory aspects of whistleblowing rather than on some of the more important issues, such as correcting the wrongdoing, or providing internal control mechanisms to address future cases of whistleblowing (Dworkin, 1992). As a result, the Act did little to encourage whistleblowing.

In the procedure of making a provisional claim under the National Labor Relations Act, the whistleblower would direct their concern to the Secretary of Labor who would then address the concern with the employer if a violation of the provision was found. If the Secretary's orders of corrective measures were not complied with, the Secretary could then file a law suit against the employer with the federal district court (Dworkin, 1992). However a large percentage of federal Acts that followed the National Labor Relations Act stipulate that the Secretary must complete their investigations within a restrictive time limit. As most Acts stipulate this period to be 30 days, only the most motivated whistleblowers tended to forward their complaints for address. This measure places extreme restrictions on procedures seeking remedies and would often

expire due to the short time limit imposed. However it should be noted that under the Fair Labor Standards Act, employees are given the grace of two years after the violation to file their claim, and three years if the violation was wilful. In effect, having such short statutes of limitations acts as a paradoxical measure preventing many whistleblowers pursuing their claims. As a result of this short time-frame, many whistleblowers who are covered by the federal laws pursue their claims under wrongful firing theories in state courts, where the statute of limitations is generally one or two years, and where the courts have greatly extended damages generally available in wrongful firing suits (Dworkin, 1992). Overall, these restrictions neither encouraged nor protected whistleblowers to the extent that their intentions implied.

Remedies under the National Labor Relations Act and subsequent federal laws often provided for reinstatement, payment for lost wages and benefits. Often inclusive in this is also the recovery of costs, including attorney fees of bringing the claim (Dworkin, 1992). These remedies tended to cover the bare minimum of loss (on occasions), and failed to fully compensate victimised whistleblowers for the emotional stress and turmoil sometimes experienced. Evidence of this limited redress through the decisions of the courts acted as a further contributing factor to the failure to prompt potential whistleblowers to come forward.

Under the Fair Labor Standards Act retaliators are liable for fines of up to \$10,000 and/or imprisonment, while the Longshoreman's and Harbor Worker's Compensation Act allows for fines up to \$5,000 which cannot be paid by insurance (Dworkin, 1992). Dworkin goes on to note that the only real way to threaten retaliators through legislative enforcement was for the Secretary to try and lessen the employer's violation. In effect, these relatively low fines fail to act as any great deterrence to victimisation, and thereby have no real effect on altering employer behaviour. Thus Congress did not view the imposition of

"employer sanctions as a major weapon in the fight against retaliation for whistle-blowing" (Dworkin, 1992, p. 237).

One of the positive aspects of the development of numerous federal Acts in the 1960s and 1970s, was that most of the statutes applied to both union and non-union employers throughout the US. Thereby much of the private sector work force was provided with limited protection against retaliation for the first time, where previously they had been unable to enjoy such protection (Westman, 1991). However, while many of the statutes developed under the federal approach up until the late 1970s offered some form of protection to both union and non-union employees, there was no *comprehensive* protection in place for federal employees who reported wrongdoing. In an effort to overcome this, the government made provisions within the Civil Service Reform Act enacted in 1978 to provide protection for civil servants. This development occurred as a result of the Personnel Management Project, a comprehensive five-month study of the civil service, commissioned by President Carter in 1977 to examine possible reforms to the civil service (Westman, 1991).

While the Act's principal purpose was to "codify the merit system principles by restructuring the agencies responsible for administering the federal system of employment" (Westman, 1991, p. 49), the Civil Service Reform Act also provided procedures for ensuring that all federal employees were to be evaluated on the basis of merit rather than on political patronage. Most importantly, it provided new protections for civil servants who exposed illegal or improper government conduct. For the first time "federal law expressly prohibited retaliation against whistleblowers in the federal civil service [empowering federal employees to ensure that the public could be both aware and protected against] mismanagement, abuse of authority, gross waste of funds, substantial and specific dangers to the public health and safety, and violations of law" (Westman, 1991, p. 17).

Provisions established under the Civil Service Reform Act differentiated the Act from preceding legislation in that it actively attempted to further encourage whistleblowing. For example it allowed whistleblowing to be directed to any recipient internal to their organisation (ie, internal whistleblowing), whereas if the whistleblower chooses to expose wrongdoing outside their direct organisation (ie, external whistleblowing), the Act provides for a recognised recipient. This recipient is the Office of Special Council (OSC) which not only protects the whistleblower but maintains their anonymity. The OSC would also investigate the allegation on the whistleblower's behalf, and aimed to ensure the correction of the wrongdoing.

In examining the intentions of the OSC, it would appear that the development of whistleblower protection and facilitation had advanced considerably, however this was sadly not the case. While its intentions may have been virtuous, the OSC failed to deliver its promises as up to 90 percent of federal employees lost their appeals (Dworkin, 1992). During the 1980s many employees complained that the Office of Special Counsel:

was not investigating their [the whistleblower's] complaints in a timely fashion, and was not prosecuting meritorious cases. Moreover, several employees complained that their identities had been disclosed by the Special Counsel, permitting the agencies to engage in retaliation (Westman, 1991, p. 51).

Such poor federal controls quickly diminished the credibility of the Office of Special Counsel's mandate under the Civil Service Reform Act. Further to this, a report conducted by the U.S. Merit Systems Protection Board (MSPB) found that the percentage of federal employees with knowledge of fraud, waste or abuse who did not report it because of fear of reprisal, rose from 20 percent in 1980 to 37 percent in 1983 (U.S. Merit Systems Protection Board, 1984). Despite the initial intentions of the Civil Service Reform Act whistleblower provisions,

these statistics clearly highlight the loss of faith in protective whistleblower legislation offered herein.

In response to these criticisms, Congress amended the Civil Service Reform Act and enacted the Whistleblowers Protection Act (WPA) of 1989 in order to strengthen protection for civil servant whistleblowers. Under the WPA, the role of a special investigating officer (Special Counsel) has been extended. In particular, the WPA:

- 1) strengthens the Office of Special Counsel by making it independent while requiring that the Office's functions be carried out by a qualified attorney;
- 2) breaks down the restrictive 'standards of proof' for demonstrating retaliation (Israel & Lechner, 1989);
- 3) empowers civil servants to pursue their own case against their organisation if the Office of Special Council does not take the case to the Merit Systems Protection Board (ie, an independent, quasi-judicial agency established in 1979, as a result of the Civil Service Reform Act to provide statutory jurisdiction over appeals from certain personnel actions made appealable by statute or by regulation of the Office of Personnel Management); and
- 4) prevents the Office of Special Council from responding to prospective inquiries from employers about information concerning employees who have sort its help (Dworkin, 1992).

While significant advancements for whistleblowers had been made in federal protection over the years, the WPA failed to deliver the desired protection or response. For in only one case has the legislation worked in the manner in which

it was designed (Westman, 1991). In addition to federal approaches to whistleblowing, has also been the enactment of protections at the state level. In many places, these protections picked where the WPA had fallen and continued with more specific methods of whistleblower protection. Therefore it is to the state approach that the chapter now turns.

5.3 The State Approach

The creation of further whistleblower protection by individual states initiated in the early 1980s developed what can be termed as the 'state approach'. However this additional protection raises the question of why recent statutes have rejected the traditional federal approach. Dworkin and Callahan (1991) suggest that the two most important reasons are the perceived failure of the federal approach to produce the results desired, nor a desire to prevent wrongdoers from escaping punishment.

In retrospect, the federal approach suffered from many shortcomings. For example, the questionable credibility and conduct of the OSC, restrictive whistleblower coverage, the limited degree of protection offered, its inability to actively encourage whistleblowing, plus numerous other elements greatly contributed to its perceived failure. Therefore given the evidence and extent of whistleblower protection attempted, state legislatures obviously decided that more can and should be offered. To date, up to 36 states now have whistleblower legislation in place, offering a mixture of broad, narrow, and diverse protections (T.M. Dworkin, personal communication, 30 January, 1995). Due to the sheer number of states with protection, it would be both inappropriate and beyond the scope of this study to address every one. Nonetheless, some of the more notable developments will be addressed for the purpose of this study.

In 1981, the state of Michigan became the first state jurisdiction to provide general statutory protection for whistleblowers. Its intention was to "encourage employees to assist in enforcing federal, state, and local statutes and regulations" (Malin, 1983, p. 304); a philosophy that many states follow. By the late 1980s, states such as Connecticut (1982), Maine (1983), California and New York (1984), and New Jersey (1986) had enacted their own whistleblower protection statutes. However while new whistleblower initiatives were enacted, the most notable being coverage for both public and private sector employees (eg: Minnesota, Montana, and Hawaii), state legislation, like the federal approach, also tended to be heavily focused on employer reprisal.

While a significant number of states offer protection for all parties, the majority still only protect the public sector, government contractors and the like, and only in some instances. This preference of coverage is usually heavily dependant on the philosophies of the jurisdictional legislators who draw them up. Indeed, the debate over who should be covered, why they should be covered, and for what areas remains an ongoing debate. From a broad perspective, it can also be argued that any retaliation is too much retaliation, and that all parties should be covered irrespectively. Nevertheless, the dichotomy over coverage remains.

In protecting private sector whistleblowers, Westman (1991) highlights the controversy in justifying complaints that are made in the public interest. He notes that:

unlike in the public sector, not all waste or mismanagement in the private sector has a direct impact on the public treasury. Therefore, private sector whistleblower statutes tend to define more narrowly the subjects about which whistleblowers may complain than do statutes applying in the public sector (p. 62).

In review of the existing whistleblower statutes in the US, one can see the many diversities as well as commonalities that exist between states. Parlman (1987) contends that while they all aim to provide protection against retaliatory behaviour on employees who blow the whistle on various illegal, immoral, or illegitimate acts, they vary to quite some degree in exactly what issues they will protect, and the methods in which they do this.

Legal coverage under the state approach ranges from a broad to a narrow focus. This range generally specifies who will be and will not be protected, what protection will be offered, and on what criteria disclosures will be examined and deliberated on. For example for the disclosure of information, some states require that 'reasonable cause', 'reasonable belief' or 'good faith' tests are employed to assess whether the whistleblower's accusations are in the interest of the public good. It should also be noted that these tests and 'standards of proof' may also vary greatly from state to state in their definition and coverage. Indiana, for example, requires that employees go beyond making claims of reasonable belief, in that the employee must make an attempt to verify the accuracy of the information before the state will offer protection for disclosure (Parlman, 1987). A common theme among states, requires that employees will be subject to discipline for knowingly making false disclosures or preventing or obstructing investigations. Some of the more interesting statutory initiatives regarding whistleblower coverage include Pennsylvania, West Virginia, and Connecticut which protect employees who report violations of codes of conduct, or ethics, while only seven states protect employees who refuse to carry out or participate in an activity which violates the law (Dworkin, 1992)!

The procedures under which whistleblowers may direct their claims is also another area of diversity that exists. The majority of states, for example Arizona, Colorado, and Texas, require that if the whistle is to be blown external to the organisation, then it must be to a specific entity, government agency, or to a public body. Dworkin (1992) makes an interesting point in that:

the requirement that employees blow the whistle *only* [italics added] externally in order to be protected forces the employee to be an adversary of the employer, denies the employer any chance to correct possible unknown problems, and . . . is likely to increase retaliation (p. 242).

This serves little purpose in allowing the organisation the opportunity to correct the wrongdoing or build a culture of loyalty and trust. However in some states the employee is required to first blow the whistle internally to allow for this opportunity. While some legislators perceive that internal reporting may only allow the wrongdoing to continue, some states now require the whistleblower to provide the organisation a chance to correct the problem, sometimes within a given time span, before the whistleblower can release the disclosure externally (Westman, 1991).

In the case of protecting employees who have blown the whistle within their organisation, sometimes referred to as 'embryonic whistleblowers', some states have provided a separate form of protection. It is understandable that the requirement for internal disclosure of information can be advantageous for both parties. For a start it shows the credibility and loyalty of the employee as an organisational member, and displays their attempt(s) to have someone address the complaint. Second, internal disclosure provides the organisation with the opportunity to correct the wrongdoing, thereby avoiding the negative aspects that often follow external disclosure such as bad publicity, extensive investigations, and legal proceedings (Dworkin, 1992). Third, internal disclosure also divulges whether the organisation is ethically minded, open for input, and will address and justify their decision(s).

While the majority of state mechanisms require appropriate disclosures to be made internally within the organisation or externally to recognised bodies for whistleblowers to receive protection, some state laws provide additional channels for disclosure. While the general preference is for *appropriate* external

recipients, there is a consistent view in state law that the media should not be one of these recipients. Indeed, fewer than one-third of states protect whistleblowing to the media, for example through legal provisions allowing disclosure to 'nongovernmental' parties, or 'anyone' or 'any person'. Whereas other states are silent about the appropriate recipient (Dworkin & Callahan, 1993). With the exception of Colorado, the media can only be contacted as a secondary source after a supervisor or employer has failed to make a report. Overall, while such a channel can be seen as a quick and direct method of calling attention to some indiscretion in order to have it attended to quickly, it is unlikely that this medium will be further developed due to its potential for negative consequences. This is not to say that the media cannot be used as a party to direct disclosures, but rather whistleblowers will be unable to enjoy the benefits of statutory protection.

Remedies under the statutory approach are similar to those of the federal approach in that they offer reinstatement, lost benefits and back-pay, and injunctive relief. "Less than half of the states allow suit for damages, some of them allowing punitive damages only, some allowing actual damages only, and some not specifying between the two" (Dworkin, 1992, p. 243). This has in effect restricted the range in which the employee may seek the full benefits of allowing suit, thereby limiting the encouragement and protection of employees who blow the whistle.

In addition to providing remedies to employees, many states provide for sanctions against the employer. However these sanctions can only be described as nominal. The most common fine is \$500 and in some states cannot exceed \$1,000, while other states provide for the suspension or discharge of the offender and may, in Oregon's case, result in one year's imprisonment (Dworkin, 1992). In effect these sanctions would do little to curtail employer retaliatory behaviour, as such penalties would be perceived by many retaliators as a small price to pay for exercising their displeasure. While such fines enacted in state legislation

provide no real deterrence, the possibility of imprisonment may. Whatever the sanction, for the law to have any real teeth or influence, these penalties would need to be more draconian.

In review, the restrictions placed on state laws are much more limited than would be available in a tort suit for wrongful firing. In addition to the standard remedies of lost pay and benefits, whistleblowers are likely to receive a substantial award for emotional stress plus any other damages that are related to the case (Nb: an average award for wrongful firing cases is nearly three-quarters of a million dollars US) (Dworkin, 1992). However, Dworkin (1992) contends that "in general, the type of whistle-blowing that is protected is no broader than, or narrower than, what would be protected under common law theories" (p. 241). This in effect highlights the inadequacy of state legislation despite its intentions. Therefore given the shortcomings that exist under both federal and state protection, further elements of protection and encouragement are obviously required. In an effort to achieve these objectives, alternative approaches to those previously mentioned are now emerging.

5.4 Alternative Approaches to Whistleblower Protection in the United States

While preliminary research has proposed that retaliation is not the ordinary response to whistleblowing, nor fear of retaliation a primary deterrent to whistleblowing, it can be argued that the retaliatory focus of both federal and statutory approaches has proven relatively ineffective in either protecting or encouraging whistleblowing. Perhaps in recognition of this failure, a new approach to whistleblower protection has started to emerge in order to encourage whistleblowing. This approach provides rewards as incentives while also protecting the employee from retaliation (Dworkin, 1992).

Evidence of this move to encourage whistleblowing is best exemplified by the significant amendments made to the False Claims Act in 1986. These amendments increased the penalties imposed upon violators, enacted protections for whistleblowers who participate in false claims actions, and may apply to virtually all private and public sector employees (Westman, 1991).

The approach taken by the False Claims Act offers a new motivation to potential whistleblowers by rewarding *qui tam* claimants (persons who file suit on behalf of the government) who bring a successful suit. Once filed, the government, represented by the Attorney General, has sixty days to decide whether to join the suit (Westman, 1991). If it does join and the suit is successful, the *qui tam* plaintiff is entitled to receive up to 25 percent of the judgement, and up to 30 percent if the government does not join the suit (Dworkin, 1992). Therefore in cases where federal fraud may reach into the millions, successful whistleblowers may come away with quite substantial amounts. Indeed preliminary evidence suggests that offering financial incentives to encourage whistleblowing appear to be having the desired effect. Prior to amendments made to the False Claims Act in 1986, cases averaged 10 per year. By late 1989, the number of suits filed since revisions became effective rose to 198 (Miceli & Near, 1994).

The possibility of receiving hundreds, thousands, or even millions of dollars for reporting information in the public interest, would leave an unpleasant taste in the mouth of most ethical purists. Nevertheless, in possible recognition of the failure of previous federal protections, the False Claims Act appears determined to address federal wrongdoing whether the whistleblower's motives are altruistic or not. Dworkin and Callahan (1993) contend that it:

rewards a "source" who comes forward with useful information, no matter whether his or her decision to report was based on greed, a risk/benefit analysis, conscience, or something else. Indeed, a party who planned and

initiated a false claim can recover under the [False Claims Act] as long as he or she is not convicted of a crime arising from the false claim (p. 368).

However, the False Claims Act has been criticised as being counterproductive because it provides monetary incentives to employees to *bypass* internal reporting systems, even though federal sentencing guidelines require corporations to set up these systems (Ettore, 1994).

At the state level, the majority of states have tended not to offer financial incentives to encourage whistleblowing. Yet contrary to this stance, Congress has begun to include incentive provisions in new and emerging federal laws as a method to reduce federal losses. Examples include the Financial Institutions Reform, Recovery and Enforcement Act of 1989, where an informant whose original information can lead to the recovery of monies can receive up to a maximum of \$100,000, while an award of up to \$250,000 is offered under the Major Fraud Act of 1989 for whistleblowers who provide information for criminal cases against federal contractors (Callahan & Dworkin, 1992).

Not only have incentives dramatically increased as much as twenty-fold (Dworkin, 1992) since the introduction of the False Claims Act, Westman (1991) highlights that the amount of recovery by the Department of Justice through settlements and judgements in all civil fraud cases, not limited to false claims actions, rose to \$225 million in 1989. Given these results, it appears that the offer of incentives and greater protection is welcomed by many whistleblowers, with the possibility that employers are likely to experience a greater number of incidents of whistleblower complaints. In light of this, whistleblower provisions within the False Claims Act appear to be having the desired effect of encouraging whistleblowing and addressing wrongdoing. A statute of limitations of 10 years allows plenty of time for complaints to be filed. Although the argument over the employment of financial incentives to encourage whistleblowing continues, the results really speak for themselves. If it takes the

prompting of incentives to spark whistleblowing, the costs incurred are worthwhile if society benefits as a whole, yet it should be noted that there is a danger in overstepping this mark.

While new incentive based approaches are appearing at the federal level, new developments are just beginning to be made at the state level. Where federal developments have focused on encouraging whistleblowing through financial incentives, a new movement now gaining interest was initiated by Montana in 1987. It specifically protects whistleblowers by extending 'just-cause' firing protection to all employees (Dworkin, 1992).

In particular the Montana statute defines one type of wrongful discharge as that which "was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy" (Dworkin, 1992, p. 248). Punitive damages can be claimed if the terminated employee can prove an employer's violation of public policy or malice for an amount inclusive of lost wages and benefits for a period not exceeding four years. As yet, Montana is the only state to adopt such a statute, although the idea has attracted substantial discussion in other jurisdictions.

In summary, the incentive approach employed in recent federal legislation offers a significant advance in the eradication of wrongdoing and the encouragement of whistleblowing. In comparison to the options under 'just-cause' bills, it appears that the former approach is a much more preferred option to whistleblowers. However, as previously mentioned, there is a danger in motivating people in this way. So long as there exists an effective screening process to hear and determine appropriate disclosures, and that all cases are extensively monitored, there may be valid reasons to pursue this path. What is therefore primarily required is further research into the merits of both approaches. In light of the development of whistleblower protection under federal and state approaches, collective analysis is now appropriate.

5.5 Conclusion on the Legal Protection Offered to Whistleblowers in the United States

Considering the United States was the first country to extensively address, enact and research the phenomenon of whistleblowing and its protection thereof, many countries now look to its experiences in order to judge the merits of such initiatives. From a historical perspective, US whistleblower statutes have told a story of trial and error and of lessons learnt and to be learnt. Indeed hindsight now provides a much clearer picture for examination as does research and public discussion. So in order to effectively assess US whistleblower protection, it is therefore necessary to address these issues.

In response to the rise of whistleblower statutes enacted in the early 1980s, Dworkin and Near (1987) undertook an analysis to examine how effective they had been. In light of the cases and comparisons made, they contested that whistleblowing statutes had not had the expected effect as there had not been any increase in the number of cases brought forward, nor recoveries to whistleblowers. Dworkin and Near suggested three possible reasons for this result:

- 1) that the risks of whistleblowing and the motivations behind it are not easily influenced by statutory enactments, 2) that the statutes as enacted are not perceived as being effective or are not adequately understood, and 3) that the statutes are having a beneficial but unanticipated effect-causing employers to change their policies by encouraging internal whistleblowing and refraining from retaliation against whistleblowers (1987, p. 260).

Given these early inferences, it appears that the same conclusions may still hold true (as proven by some of the findings and research that followed). As the nominal penalties for victimisation offer little in the way of a deterrent nor

protection for whistleblowers, there will be little incentive for an organisation or employer to prevent victimisation. Therefore the probability of experiencing retaliation remains relatively similar to that prior to legislative enactment.

In analysing the motivations of whistleblowers, Miceli and Near (1992) have purported that whistleblowers are primarily motivated by 'expected effectiveness', or rather that their concerns will hopefully be addressed by the organisation concerned. Yet if the fear of victimisation is so great, or the lack of protection offered weak, the motivation to blow the whistle is also likely to be weakened. Miceli, Roach & Near, (1988) have also found that fear of retaliation is not a primary deterrent to whistleblowing. Therefore considering that the focus of whistleblower protection has, until very recently, centred on retaliation (Dworkin, 1992), it has been relatively ineffective.

This then leads into the second possible explanation that if the law fails to offer adequate protection or compensation from the whistleblower's perspective, they will be further unlikely to disclose information of concern. However, this perception of inadequate coverage does not deter all whistleblowers from speaking out as evidenced by numerous cases.

If, on the other hand, the law is not adequately understood, this may be due to two reasons. Either the law has been written in such a way that its interpretation is made difficult by complex and ambiguous provisions, or, that its directed publics have not been adequately educated as to its strengths and weaknesses. If provisional complexity is the case, further amendments may be necessary to provide clarification or court precedents to be set to aid clarification. If educational devices have not been fully utilised or are poor, further efforts such as targeted campaigns and training sessions may need to be developed.

The third possible explanation that Dworkin and Near propose for the failure of legal mechanisms to encourage and protect whistleblowing through external

channels, is that employers have modified their organisation's policies to encourage internal whistleblowing, or are refraining from retaliation. First impressions may appear that whistleblowers are still too scared to come forward, yet research by Barnett, Cochran, and Taylor (1993) reveals that "legal, ethical, and practical considerations increasingly compel companies to encourage employees to disclose suspected illegal and/or ethical activities through internal communication channels" (p. 127). However as this area is relatively unresearched, it is difficult to assume whether the legislation has directly prompted organisations to implement internal channels or not. Overall, it can be surmised that legal mechanisms aimed to encourage and protect whistleblowers are relatively ineffective due to their resistance to offer extended coverage and protection to whistleblowers than that already prescribed.

Further to these conclusions, regarding the failure of legal mechanisms to effectively protect whistleblowers because of its inappropriate focus on retaliation, is that research has found that retaliation does not occur in the majority of whistleblowing cases. This inference however, is tentative due to the few systematic, empirically sound studies that have been completed on the topic. Nevertheless, based on data Miceli and Near conducted on the MSPB in 1989, and on private sector directors of internal auditing in 1988, it was more commonly found that the whistleblower receives neither organisational support and encouragement nor retaliation (Miceli & Near, 1989). This is not to say that retaliation does not occur, or that its impact is any less than sometimes horrific, but that certain types of cases are more likely to provoke negative reactions than others.

Caiden and Truelson (1988) further conclude that legal solutions of whistleblower protection are severely limited in several ways. First, the *interpretation of the law is biased toward the establishment*. This limitation is most evident in the mechanics of the legislation. For example, instead of focusing on

the actions of the retaliator, the law places a higher evidential burden on the whistleblower to prove the alleged victimisation.

Second, *statutes such as the Civil Service Reform Act contain many administrative and procedural deficiencies*. Due to the lack of specificity regarding coverage and criteria for evaluating and investigating complaints by the OSC and the MSPB, confusion and inefficiency has arisen. While it is acknowledged that some of these problem areas have been successfully addressed by the OSC, the language of whistleblower provisions in places is either too broad or too restrictive. For example, protected personnel actions addressed by the OSC are restricted to *formal* personnel actions. Whereas, threats and *informal* personnel retaliatory action taken by an employer can in some instances be just as effective as those restricted by law.

Third, *the law cannot effectively sanction organisational deviance*. In short, no legal mechanism will ever have the effect of completely eradicating unlawful activity, especially that concerning practices protected under whistleblower legislation. In dealing with retaliation against whistleblowing, Caiden and Truelson (1988) highlight the adoption of a fair bargain strategy. This "threatens the organisation not with such costs that will necessarily force the questioned authority to stop, but only with such costs as constitute some measure of the damage it is causing" (p. 126). However in terms of sanctions against the organisation, it is often difficult, if not impossible to establish the 'corporate conscience' which governs an organisation's behaviour. Therefore the law cannot rely on mechanisms like guilt, shame, or conscience which can be applied to individuals. Second, prosecutors such as the OSC and MSPB must rely on weak disciplinary actions such as letters of reprimand, admonishment and fines (Caiden & Truelson, 1988). Further to this, the law cannot impose penalties that may be appropriate to individuals such as imprisonment upon an organisation. Overall, one would be living in a fool's paradise to ever believe that organisational deviance could ever be sanctioned.

Finally, *the law is primarily a reactive institution*. Legal mechanisms cannot, within reason, pre-empt the avoidance of wrongful activity or conduct. So too then does the law fail to adequately deter wrongdoing, although it should be remembered that it is neither designed nor appropriate for it to do so. The law is also reactive in the sense that the whistleblower must take the initiative and engage in the formal allegation procedures for victimisation, or to seek protection, before their grievances can be either heard or redressed.

In summary, research on both federal and state approaches reveal that neither really met their intended objectives. Federal attempts have met with mixed fortune in that cases have not been heard in the correct manner in which the legislation was designed. On the other hand, the contentious use of Acts that employ financial rewards as an incentive to encourage whistleblowing have achieved an overwhelming rate of success. Yet despite the success of this approach, federal statutes have provided little in the advancement of whistleblower protection.

In an effort to assist in enforcing federal, state and local statutes and regulations, individual states adopted new strategies and methods to encourage, facilitate, protect, and in some cases compensate whistleblowers for incurred losses while attempting to fill in the gaps that federal protections omitted. Yet they too tended to focus on retaliation and thereby experienced similar failings.

Bearing in mind the limitations of legal mechanisms as methods to influence behaviour Caiden and Truelson (1988) highlight that:

reform models for ensuring accountability must not be judged solely through examination of statutory solutions. There must also be in place strong stabilising factors such as political unity, economic comfort, social discipline, civic virtue and public service ideology, which takes time and much trial and error before they are deemed sufficient. The media, the

legislature, the courts, agency leaders and appeals systems are essential elements of the reform process (p. 127).

Although Caiden and Truelson were speaking of the public sector, their message can be applied to society as a whole inclusive of all public interest whistleblowing. If indeed legislative reform requires trial and error at the expense of victims if it is to succeed, it must be expected that developments will be slow coming and subject to mistakes. What is then required of society and the workplace is an environment that is supportive and conducive to whistleblowing. It will only be when this occurs that whistleblowers will begin to feel protected. But until such time, legal mechanisms provide not only a safety net but a starting point to encourage, facilitate and protect the whistleblower from employer retaliation.

Overall, the address of the US approach to whistleblowing has identified a number of elements thought to be necessary in the protection of whistleblowers. Indeed the foundation of legislation and research established by the US on whistleblowing and whistleblower protection has been substantial despite the paucity of legislative success. Having now addressed the variety of legal mechanisms of whistleblower protection in the US, it is advantageous to address the Australian approach so that a mixture of comparisons can be applied to the New Zealand approach.

6. WHISTLEBLOWER PROTECTION IN AUSTRALIA

6.1 Introduction

Australia would have to be described as the most similar country to New Zealand than that of any other in the world. It is for this reason, and its recent adoption of whistleblower legislation in some jurisdictions, that a detailed address for comparison is warranted. Having established the American approach to whistleblower legislation, the focus of this chapter is to look at the contemporary context and legislative activity in Australia to date, so as to provide a comparative base for analysis. In order to do this it is first important to address the influences that shaped Australian society in both the past and the present.

As with many newly established commonwealth countries, Australia adopted not only a great deal of English common and statute law when first colonised by European settlers, but also its traditional work ethic. Within this framework a countervailing theme was also carried across "which affords protection to the preservation of the secrecy of sensitive information, by making it unlawful for individuals to disclose official information or confidential information without authority" (Electoral and Administrative Review Commission, 1991, p. 26). This legal vein for the secrecy of sensitive information has remained an underlying theme since its initial inception into Australian law, and is only now being questioned as to its place in a truly 'open and democratic society'.

Despite its early English and later American influences, Australia has developed its own unique identity and ethical disposition. It would be true to say that the preservation of secrecy within legislative jurisdictions is indeed instilled in many cultures and societies, but arguably none more so than in Australia. Australian society has unerringly followed, and indeed encouraged, what can be called an

'anti-dobber mentality', where to dob, or inform against, implicate, or betray (Sykes, 1987) is frowned on and discouraged. Similar to the Anglo-American term of 'finking', dobbing, or rather not dobbing, has in fact become a part of Australian culture. This loyalty to others, often at all costs, is an unwritten rule instilled in early childhood, a reciprocal agreement that one could expect to rely on if in trouble. It could be argued that this type of behaviour has placed a damper on the ethical development of the nation in that it encourages an acceptance of wrongdoing along with observers who are willing to keep silent over what they've seen, heard, or been a party to. This inaction does little to correct the wrongdoing as any corrective action would be seen as non-conformity to Australian society's unwritten values. However, to say that such inaction or unethical behaviour is true of *all* Australians would be a gross generalisation. Nevertheless, some of Australia's more recent cases of whistleblowing provides compelling evidence of the need for whistleblower protection.

6.1.1 Recent Australian Cases

The case of Philip Nitschke is a recent example of a victimised whistleblower who suffered for speaking out on safety issues that could have a direct effect on the Australian public. A 46 year old doctor at the Royal Darwin Hospital (RDH) for six years, Nitschke exposed the "woeful inadequacy" (Alcorn, 1993, p. 30) of the hospital's nuclear protocol. After being informed that an American nuclear ship was to visit Darwin within 24 hours, Nitschke, the only doctor in the hospital's accident and emergency section who is trained to treat radiation, later went on radio and questioned RDH's preparedness to cope with a nuclear accident.

Threatened with dismissal for breaching the Public Sector Employment and Management Act by speaking to the media, RDH later publicly apologised and promised an urgent review of its nuclear protocol. Unfortunately, Nitschke did not have his contract renewed for 1994 based on management's opinion that Nitschke had "not made any special contribution to RDH during 1993" (quoted in Alcorn, 1993, p. 31). Furthermore, when asked to view the independent report on the incident (conducted by the Australian Medical Association's Northern Territory Branch), the request was declined. Philip Nitschke was later to hear through the media that RDH were to offer him a job at the same level of senior medical officer, although at the date of the article's publication, nothing had been formally arranged.

An environmental example involving the adverse treatment of whistleblowers was that of John Tozer. Tozer, a structural engineer, received a public disciplining by the Australian Institution of Engineers for behaving unethically when campaigning against a proposed sewage outfall near his favourite surfing spot. This disciplining was enacted despite the code requiring engineers to "put the health, welfare and safety of the community before all other considerations" (Beder, 1993, p. 36).

When city council engineers told the public that there was no alternative to pumping the sewage into the sea at this spot, Tozer said that it was "my duty to the community to inform them that there were engineers who believed the problem was solvable" (Beder, 1993, p. 37). Tozer spoke out to the media over his concerns while in turn criticising council engineers. After an investigation of complaints laid by six of the council's engineers, Tozer was later found guilty of breaching the engineering code and had his membership to the Association of Consulting Engineers Australia (ACEA) revoked. This thereby placed restrictions on the scope of future consultancy work he was previously eligible

for by denying jobs with the government or other clients who insist on the ACEA's membership.

These brief examples reveal that the scope of whistleblower retaliation in Australia is not confined to just any one profession or area but experiences the same dilemmas faced by all countries. However the most popularised and seemingly unethical area of practice in Australia, or that of any country for that matter, would have to be business.

In 1991, in an address to the Australian Finance Conference, then Prime Minister Bob Hawke referred to the need for "sober lending practices and management policies in the wake of profligate practices of the past" (The West Australian, 1991). Indeed, the corporate collapses of the 1980s had tainted the reputation and credibility of the country's accounting profession and business ethic (Parker, 1993), as had cases of fraudulent lawyers (The Advertiser, 1990) and corruption in parliament (The West Australian, 1991).

Although no longer seen as such a recent case example, probably one of Australia's most well known whistleblowers who suffered victimisation was Col Dillon. The then-sergeant was the first police officer to testify about corruption in Queensland to the Fitzgerald inquiry. It is his evidence that is said to have "helped bring down senior police, racketeers and eventually the National Party government" (Edwards, 1994, p. 41). After testifying to the Fitzgerald inquiry, Col Dillon found newspaper clippings of himself taped on police station walls daubed with obscenities. "The hardest thing . . . was to be branded a 'dog'. . . It's the worst insult a policeman can use to another. It's a bosses' man, a dobber who can't be trusted" (Edwards, 1994, p. 41). Yet despite these reprisals when asked why did he do it? "It's the right thing to do" (p. 41) came the frequent whistleblower response.

In retrospect, these few examples provide just a small insight to the extensive range of Australian wrongdoing and whistleblowing. Prompted by such cases, Australia has embarked upon comprehensive reviews of whistleblowing and its protection. The speed of this address has been particularly quick from a legal perspective, with the proposal and enactment of various mechanisms around the country. This development can be broadly seen in the contemporary context to which the chapter will now focus.

6.2 The Contemporary Context

Attempts to establish an open and socially responsible climate within Australia is extremely difficult, as it is for any country. Attaining across-the-board standards of ethical conduct appears virtually impossible, but none more expected than in the public sector. The management of public funds and resources is continually under close scrutiny by the public to ensure taxpayers' monies are utilised effectively and efficiently. However, as frequently noted by the media, this has not always been the case. If ethical responsibility is to occur, it has been argued that the public sector must first take the initiative and provide the appropriate lead.

A review of the past thirty years of public sector development in Australia has seen sporadic attempts to focus more intentionally on ethical issues, but it is only since the late eighties that the country has seen a number of more significant initiatives (Preston, 1994). These initiatives may be said to have been sparked by countless individual cases in addition to Australia's two most publicly addressed commissions to date, namely the Fitzgerald inquiry in Queensland (costing \$A30 million to date), and the Royal Commission in Western Australia, which is investigating a number of commercial/financial deals in which the government, its ministers and associates were involved

(Small, 1993). In all, the Fitzgerald inquiry raised a public awareness for the need to address not only Queensland's, but the country's level of ethical conduct, and can be arguably said to have acted as the catalyst for national reform and change.

As a result of the Fitzgerald inquiry, cases of unethical conduct gained greater exposure in the media and it appeared that corruption seemed fairly wide spread. In fact five Australian states, namely Queensland, Victoria, Tasmania, Western Australia and South Australia have all held either Royal Commissions or Commissions of Inquiry into alleged corruption recently (Small, 1993). As a result of these commissions and their findings, arrangements to address such problems began to be developed.

Recent developments include:

- Whistleblower legislation in the **Australian Capital Territory** which covers any person making a disclosure of public interest information. It even goes so far as to provide procedures for doing so.
- The introduction of legislation for the management of the public sector in **Western Australia**. If effectively established, its tasks will include the establishment of public sector-wide codes of ethics and standards of integrity for public officials.
- Revised codes of conduct in **Victoria** and **South Australia** for public employees. However Preston (1994) argues that they continue to follow the "traditional "top-down", employee focused, directive model, with no discernable emphasis on the need for training, advice on effective implementation, or the need for

leadership in modelling the cultural change required for any code to be effective" (p. 3).

- The Public Service Commission of the Australian Public Service is about to release a revised version of its 'Guidelines on Official Conduct'.
- The **Queensland** State Government announced in April of 1994 (in response to the Reports on the Electoral Administrative Review Commission (EARC) and the Parliamentary Committee for the Electoral and Administrative Review (PCEAR) on codes of conduct for public officials, that it is to have a Public Sector Ethics Act (applicable at this stage only to appointed officials) (Preston, 1994).

Aligned to these developments has been the creation of various authoritative bodies of inquiry, many of which have produced reports on their findings. These reports have provided a wealth of information through comprehensive investigation and analysis of whistleblowing and the protection of whistleblowers, however for the sake of brevity they will only be noted.

Examples include:

- The Gibbs Committee (Review of Commonwealth Criminal Law, December 1991)
- The F&PA Committee (Senate Standing Committee on Finance and Public Administration - Review of the Office of the Commonwealth Ombudsman, December 1991)

- The DFAT Inquiry (Senate Standing Committee on Finance and Public Administration - Inquiry into the Management and Operations of the Department of Foreign Affairs and Trade, December 1993)
- The Elliot Committee (House of Representatives Standing Committee on Banking, Finance and Public Administration - Inquiry into Fraud in the Commonwealth, November 1993)
- The EARC Report (Electoral Administrative Review Commission Queensland, October 1991)
- The PCEAR Report (Parliamentary Committee for Electoral and Administrative Review - Queensland, April 1992)
- The Finn Integrity in Government Project (1991).

With regard to the findings of these bodies, it can be seen that the speed of development is steadily gaining momentum and whistleblower protection legislation is on the national agenda for reform. In fact the status of such protection has already been drafted and enacted in some jurisdictions. So in order to review the merits of these approaches, the state of legislative activity requires exploration.

6.3 Legislative Activity

The development of legislation to protect whistleblowers in Australia has generally followed along the same lines as developments that first occurred in the United States of America. The only major difference between the two, apart

from legal specifications, is that Australia does not yet have protective legislation for whistleblowers at the federal level.

As the occurrence of whistleblowing increasingly began to appear, the call for some form of protection for those whistleblowers who experienced victimisation began to gain momentum. As previously mentioned, no one case has had more effect on Australia than has that of the Fitzgerald inquiry.

Initiated in 1987, the Fitzgerald inquiry found that corruption within the Queensland police force was extensive and far reaching, involving senior members right through to officers. Detailed in the *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, the inquiry critically examined the state of affairs and touched on the issue of whistleblowing. Furthermore this inquiry had the effect of questioning the extent of possible problems in other Australian jurisdictions. As a result of this case and the corporate collapses of the 1980s, it could be said that Australia engaged in a time of ethical reflection.

Parliamentary and government inquiries around the country addressed the possible scope of legislative issues regarding whistleblower protection and its effect on society. These inquiries called for submissions from a wide variety of sectors. Examples include legal, public policy, and specialist 'experts'; the general public; academia; as well as a number of concerned interest groups such as Whistleblowers Australia and the Whistleblowers Action Group to mention only a few.

Once submissions were forwarded and heard, issues were debated and final reports constructed. Draft bills would then go before a committee, such as the Senate Select Committee, and would undergo meticulous examination. Once examined and revised if necessary, the committee would call for further

submissions on the redrafted bill. When complete, the bill would face its first, second and third readings within the State or Territory's House of Parliament, until granted Royal Assent and enacted.

However Australian jurisdictions are at various stages in their legislative development. At present only South Australia and the Australian Capital Territory have passed whistleblower legislation, although Queensland was the first state to enact interim protection provisions. It is acknowledged that other Australian jurisdictions have constructed, or are in the process of constructing, whistleblower protection bills. However, for the purposes of this analysis only the three most progressive jurisdictions to date will be addressed, namely Queensland, South Australia, and the Australian Capital Territory. However prior to these jurisdictional analyses, it is first appropriate to address whistleblower developments that have been proposed at the federal level.

6.3.1 Legislative Activity at the Federal Level

In December of 1991, a Whistleblowers Protection Bill was tabled in the federal Senate by Senator Vallentine, although it failed to be enacted and lapsed following the 1993 federal election. Christabel Chamarette, Senator for the Greens (Western Australia), undertook a rewrite of the Vallentine Bill and tabled an exposure draft on 26 May 1993 (The Parliament of the Commonwealth of Australia, 1994). As of 20 April 1994, there has been no federal government sponsored activity regarding the Bill other than a call for public submissions by the Senate Committee (J. Lennane, personal communication, April 20, 1994).

In review, the Bill reveals a comprehensive address of protection for whistleblowers. Its 30 pages and 50 sections provides for some alternative proposals in comparison to protective whistleblower legislation presently

enacted at the state level. Highlights include the creation of a fully independent Whistleblowers Protection Agency, headed by a Commissioner with the power to investigate allegations of wrongdoing within Commonwealth government or government agencies. The Agency's main functions would be to 1) investigate allegations of wrongdoing, prohibited personnel practices, and harassment; 2) take, or recommend the taking of, corrective action in instances where any allegations are substantiated; 3) bring to the attention of the Parliamentary Joint Committee (once established) any matter which in the Commissioner's opinion the Joint Committee's attention ought to be drawn; and finally 4) protect whistleblowers from prohibited personnel practices or harassment, promoting the ethic of openness and public accountability and improving the community perception of whistleblowers (The Parliament of the Commonwealth of Australia, 1994).

Coverage under the Bill includes disclosures of wrongdoing made by public service employees, prospective employees, and members of the public subject to whether they had reasonable grounds to believe that the disclosure was true and was not made with the intent to deliberately mislead. Furthermore, the Bill only finds wrongdoing to exist where a person has committed:

- a) an infringement of the law; or
- b) a gross waste of public moneys; or
- c) an act constituting abuse of authority; or
- d) an act which substantially endangers public health or safety; or
- e) gross mismanagement of public moneys or property; or
- f) suppression of an expert opinion, finding or document prepared by another person (Whistleblowers Protection Bill 1993).

Other highlights include:

- The protection of whistleblowers from 'prohibited personnel practices' such as victimisation, harassment, and discrimination concerning appointments, promotion, disciplinary action, transfers and matters associated with pay, training or benefits.
- The empowerment of staff of the Agency to enter, search and remove material from premises.
- The provision of remedies including re-instatement, re-location, and if appropriate, compensation.
- The provision of expansive reporting and review mechanisms.

Despite its intentions and aims, the Whistleblowers Protection Bill 1993 has attracted a number of concerns via public submission. Anticipated teething problems have presented themselves regarding definition and interpretation, the establishment of a Whistleblowers Protection Authority, legislative coverage, investigative powers, and protections and remedies.

To date, the Bill is stalled somewhere at the inquiry level with submissions still being reviewed with regard to the Bill's 'fabric'. Nevertheless, support from the Senate Select Committee report on public interest whistleblowing looks promising as does the adoption of a Federal Act, once some of the more problematic issues have been ironed out. In commenting on the legal mechanism of whistleblower protection, Christabel Chamarette contends that:

[i]t is doubtful whether any amount of legislation will reduce the personal damage that public interests disclosure suffer by exposing wrongdoing.

The Committee has highlighted the need for a change in community attitude towards public interest disclosure and has recommended both public and private institutional and educational mechanisms to foster recognition of this valuable public service (C. Chamarette, personal communication, September 20, 1994).

The proposal of a federal Act to protect whistleblowers across Australia has significant implications for the country. For those states or territories without such mechanisms, it provides an unparalleled degree of protection. It shows the Parliamentary Committee's commitment to the eradication of wrongdoing and drive towards a more open and accountable society. However such an initiative is a formidable challenge, and a repeat of US experiences will obviously want to be avoided. Overall the sheer grandiose and complex nature of implementing a statute at this level will require extensive debate and research. It could therefore be assumed that like most federal bills, especially one of this latitude, that advancement will be slow coming.

In contrast to this development, state and territory initiatives have been comparably quick. Similar to the development of protection among states in the US, Australian jurisdictions have addressed whistleblower protection from a variety of perspectives. The first to formally protect whistleblowers was the state of Queensland which is next addressed in the following section.

6.3.2 Whistleblower Protection in Queensland - Interim Provisions

Investigation into illegal activities and police misconduct in Queensland initiated the first large scale address in Australia of not only corruption, but also the need to protect conscientious informants such as police officers Nigel Powell and Col Dillon from retribution and victimisation. Indeed an environment with legitimate

and recognised channels where concerned persons could inform the authorities of wrongdoing, was regarded as one of the main recommendations to emerge from the Fitzgerald Report.

In particular the Fitzgerald Report observed that:

Honest public officials are the major source of the information needed to reduce public mal-administration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.

It is enormously frustrating and demoralising for conscientious and honest public servants in a department or instrumentality in which mal-administration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority.

Even if they do report their knowledge to a senior officer, that officer might be in a difficult position. There may be no-one that can be trusted with the information.

If either senior officers and/or politicians, are involved in misconduct or corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only welcome but attract retributions.

Strong honest leadership is one step which is essential to a build-up of confidence.

There is an urgent need, however, for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities. Such measures have recently been made law in the United States of America by the Whistleblower Protection Act 1989. (Report of the Parliamentary Committee for Electoral and Administrative Review, 1990, p. 1).

These points highlight the difficulties Queensland whistleblowers face in bringing attention to their claims. They further illustrate the need for reform and a legal framework that offers protection from victimisation.

Arising from a Fitzgerald Report recommendation was the establishment of the Electoral and Administrative Review Commission (EARC), which amongst other things, was to prepare "legislation for protecting any person making public statements bona fide about misconduct, inefficiency, or other problems within public instrumentalities, and providing penalties against knowingly making false public statements" (Parliamentary Committee for Electoral and Administrative Review, 1992, p. 2).

In June of 1990, the PCEAR tabled a report entitled 'Whistleblowers' Protection - Interim Measures'. It recommended amendments to the Criminal Justice Act 1989 and the Electoral and Administrative Review Act 1989 which in effect strengthened protection for persons providing information to both the EARC and the Criminal Justice Commission. These provisions were then enacted under the 'Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990'. In short, the so called 'Interim Protection Act', made it an offence to victimise a person who has given evidence to or assisted either the EARC or the Criminal Justice Commission in the discharge of its objects, functions and responsibilities. It also empowered the EARC and the Criminal Justice

Commission to seek interim and final injunctions from the Supreme Court to restrain persons who engage, or are proposing to engage, in conduct that would breach the victimisation provisions of the respective Acts (Electoral and Administrative Review Commission, 1991).

Following further recommendations of the Fitzgerald Report, EARC released an issues paper entitled 'Protection of Whistleblowers'. This paper requested written submissions from the public to determine the scope and form whistleblower protection should take (The Parliament of the Commonwealth of Australia, 1994). With submissions heard and experts consulted, EARC released a report entitled the 'Report on Protection of Whistleblowers' in October of 1991. Accompanied with this comprehensive study was also a draft copy of the Queensland Whistleblower Protection Bill. However following a review by PCEAR, the Bill was re-issued in 1992 in its 'Whistleblowers Protection' report.

Specific coverage of public interest disclosures under the Bill include:

- (a) conduct constituting an offence; or official misconduct;
- (b) conduct constituting misconduct by a public official punishable as a disciplinary breach; or negligent, incompetent or inefficient management of or within a public sector unit resulting in a substantial waste of public funds; and
- (c) information believed to show a substantial and specific danger to the health or safety of the public; or to the environment (Whistleblowers Protection Bill 1992).

In order for a whistleblower to receive protection under the Bill, the whistleblower must honestly believe on reasonable grounds in the information

they disclose. Once made, genuine disclosures would not be liable to any claim, demand or action including criminal sanction for breach of secrecy rules, civil action for defamation, or breach of confidence. However if proven otherwise, the whistleblower may be subject to an offence and subsequently the penalty it carries.

The EARC Bill provides for some interesting provisions within its draft framework. For example there is a provision for disclosure to the media as an appropriate channel if there is serious, specific and imminent danger to the health or safety of the public. Furthermore, the Bill offers protection to any employee who refuse to commit an offence in the course of their employment, or who makes a disclosure in a court, tribunal or Commission of Inquiry (Whistleblowers Protection Bill 1992).

The EARC Bill has also proposed the establishment of a Whistleblowers Counselling Unit within the Criminal Justice Commission, which in turn provides a Whistleblowers Support Program. However for those persons who make disclosures knowing them to be false or misleading, the Bill proposes such action to be of a disciplinary and criminal offence. These same sanctions also extended to apply to employees who take unlawful reprisal against a person for making a disclosure. Remedies recommended by the EARC for whistleblowers allow not only for the award of financial compensation for lost earnings from unlawful reprisal action, but also having recourse to existing grievance procedures.

EARC proposed that the handling of public interest disclosures under the Bill would be best served through internal procedures established by government agencies. Such disclosures could either be made internally, or through a designated external body, and was felt that this should only be applicable to the public sector. A proper authority or public sector body may also decline to take

action upon a whistleblower's claim if it considers it frivolous or vexatious, or for any other reason under clause 17(1) of the Bill.

Interestingly, the Criminal Justice Commission has acknowledged that the interim protective measures in the Criminal Justice Act need to be more comprehensive (The Parliament of the Commonwealth of Australia, 1994). Nevertheless the EARC report has been reviewed by PCEAR and is satisfied by EARC's recommendations. If all goes according to plan, the EARC Bill is expected to be introduced into the Queensland legislature in early 1995.

However, not all parties are in agreement with the new legislative framework. Principal Investigator of the Queensland Whistleblower study, William De Maria (1994), expresses his discontent with the EARC. He draws attention to the EARC's argument that:

the arbitrator of what constitutes the 'public interest' when there is a conflict about its nature, should be the Minister [and goes on to highlight how the] EARC states that a professional with recourse to professional and public sector ethics codes which are in conflict must remember that his/her principal obligation is to the employer (p. 5)!

In consideration of these points it is understandable that De Maria has concerns for future Queensland whistleblowers. On one hand the Queensland legislators are encouraging the notion of protection for whistleblowers by simply addressing the issue and drawing up a Bill, yet forward an opposing opinion by reminding employees of their duty to their organisation, which may in turn do nothing, or worse retaliate. Presented with such a paradox, it appears that the state's legislators need to return to the objectives of what they initially set out to achieve. Maybe it is because of this mind-set and the disagreement of the

appropriate degree of protection that has hindered Queensland's transition from interim to final enactment of whistleblower legislation for so many years.

In summary, Queensland has had a mixture of success with regard to the legal protection of whistleblowers. Its EARC and PCEAR reports have made considerable inroads into the analysis of whistleblower protection in Queensland. Furthermore, the findings and recommendations of its reports have been extensively reviewed by many other states and territories in assisting the development of their own frameworks of legal protection. However while Queensland's interim protection has attempted to provide protection while more permanent legislation is developed, there have been no prosecutions for the offence of victimisation in the three years that the Interim Scheme has been in place (The Parliament of the Commonwealth of Australia, 1994). This outcome calls attention to the unlikelihood of organisational compliance, when within this period, yet realistically it is more likely that the mechanisms is not employed because of its inadequacies.

In short, the Fitzgerald Report that initiated whistleblower development in Queensland has experienced difficulty in sustaining its momentum. Yet new developments are afoot with the state government announcing its response to EARC and PCEAR reports on codes of conduct for public officials in April of 1994. This response proposes the creation of a Public Sector Ethics Act, yet unfortunately, Queensland still fails to recognise the need to protect whistleblowers in the private sector.

6.3.3 South Australia - Whistleblowers Protection Act of 1993

Although Queensland was the first state to provide interim protection for whistleblowers, South Australia was the first state to enact whistleblowers protection legislation.

Passed into law on 20 September 1993, the Whistleblowers Protection Act 1993 covers both the public and private sectors, although it discriminates between the two. Matthew Goode, Senior Legal Officer of the South Australian Attorney-General's Department and drafter of the Act, commented that the legislative committee felt it was appropriate to "discriminate between the public and private sector in terms of matters in which the public interest in having the information revealed outweighs the private interest in having something not nice concealed" (Goode, 1993a, p. 14). This, in effect, allowed public interest disclosures by the private sector when dealing with the government, for example contractors who discover fraud or maladministration.

The South Australian Whistleblowers Protection Act 1993 has generally two main aims. The first was to make it relatively easy for whistleblowers who make 'appropriate disclosures' to obtain protection. This thereby requires a wide framework for inclusiveness. The second aim was to "encourage whistleblowers to act judiciously and deal through a responsible authority that was the responsible action to take in the circumstances" (The Parliament of the Commonwealth of Australia, 1994, p. 42). Thereby a whistleblower's concern would be addressed by the most appropriate authority instead of less experienced or inadequately skilled bodies.

Public interest information is defined under the Act as that which encompasses an adult person, body corporate or government agency. It addresses the conduct of these bodies and whether they are or have been involved in illegal activity;

irregular or unauthorised use of public money; substantial mismanagement of public resources; conduct that causes a substantial risk to public health or safety, or to the environment; or maladministration in, or in relation to, the performance of a public officer's official functions (Whistleblowers Protection Act 1993).

Protection under the Act is only granted to those persons who make appropriate disclosures if they believe that the information they disclose is true, or believe on reasonable grounds that the information *may* be true and is of sufficient significance to justify its disclosure so that the truth may be investigated. Protection will still be offered to whistleblowers even though they may not be in a position to form a belief on reasonable grounds about the truth of the information, so long as the whistleblower's intentions can be proven to be in good faith, they will receive all the protection offered under the Act.

Similar to the recommendations made by the EARC in the Queensland Whistleblowers Protection Bill, one of the most important protections offered under the South Australian Act for persons who make appropriate disclosures of public interest information, is that they would incur no civil or criminal liability. For those making appropriate disclosures in the public interest, a number of appropriate authorities such as the Minister of the Crown have been designated to receive complaints. Other authorities include a member of the police force; the Police Complaints Authority; the Auditor-General; the Commissioner for Public Employment; the Chief Justice; the Ombudsman; a responsible officer of an instrumentality, agency, department or administrative unit of government; a local government body; or to an appropriate authority where the information relates to a person or matter of a prescribed class (Whistleblowers Protection Act 1993). Therefore disclosures outside of these authorities, or 'inappropriate disclosures', would not be protected.

These appropriate authorities were used as designated points of contact where whistleblowers would disclose information that related to the nature of their public interest concern. For example, information that related to a member of the police force would go to the Police Complaints Authority. Similarly, information that related to a member of the judiciary would be directed to the Chief Justice, and so on. A full description of what disclosures should be directed to the correct authority is provided under section 5(4) of the Act.

In contrast to establishing a single body to hear complaints, the use of multiple points of contact offers some significant benefits. For example, establishment costs would be far lower as the employment of existing bodies provides both structural and skill based advantages through utilising human resources and infrastructures that are experienced in handling similar forms of inquiry.

On the other hand, designating numerous authorities raises some areas of concern. For example the in-house handling of disclosures may be subject to internal biases and consequently conceals not only good but possibly poor performances to other authorities. A second concern is over the consistency of providing uniform, quality responses, due to the different procedures and capacities of the bodies. Matthew Goode acknowledges this point in saying that "a price of the scheme is that, because there is a variety of people to whom you can go, there may be some degree of unevenness in the investigation of the disclosure" (The Parliament of the Commonwealth of Australia, 1994, p. 44). Although the intent of the Act was to direct whistleblowers to the bodies that were most likely to deal with their disclosures, Mr Goode did go on to say that the risk of this unevenness was minimised by the specialist agencies who were best equipped to deal with the matters brought before them.

If, however, a disclosure was made to a body that considered it was inappropriately equipped to handle with it, the information could be passed to

a *more* appropriate body. This then means that it would be difficult to gauge initial progress due to the different procedures and capacity of the previous authority, and that a whistleblower may in fact have to deal with a number of authorities, thereby highlighting a further argument in favour of a single authoritative body.

An act of victimisation under the statute refers to those persons who cause detriment to another who has made or is about to make an appropriate disclosure. Such detriment includes injury, damage, or loss; intimidation or harassment; discrimination, disadvantage or adverse treatment in relation to a person's employment; or threats of reprisal (Whistleblowers Protection Act 1993).

Moved by the opposition when the Bill was being debated, the South Australian Act also provides a choice for whistleblowers who have suffered victimisation to address their case either in tort, or as if it were an act of victimisation under the Equal Opportunity Act 1984. This choice however is subject to the proviso that the victim can only pursue remedy under one of the two alternatives. Therefore employing the correct legal address is most important. Goode (1993b) however claims that the inclusion of a civil remedy was unnecessary considering the provisions within the Equal Opportunity system. These provisions empowered the Equal Opportunity Commission to make injunctive orders and award compensation for loss or damage. The argument against providing the victim an optional address of remedy was that the Equal Opportunity route was specifically designed to reduce confrontation and encourage conciliation. Nevertheless the government accepted the amendment.

Josephine Tiddy, South Australian Commissioner for Equal Opportunity, comments that it was appropriate for Parliament to import the Provisions of the Equal Opportunity Act into whistleblower legislation for the purpose of resolving allegations of victimisation. "I will always investigate and attempt to

resolve matters by conciliation in the first instance. It is only in those cases where conciliation fails that the heavy guns of litigation are drawn" (Tiddy, 1993, p. 57). Bearing this stance in mind, whistleblowers can be confident that the Commissioner and her team are committed to resolving complaints of victimisation, while first attempting to do so in the least aggressive manner possible.

However, a review of informed opinion indicates a number of fundamental flaws in the South Australian Act. With regard to the in-house handling of whistleblowing, John McMillan of the faculty of law, Australia National University, provided evidence to the Review Committee stating that:

[t]he South Australian Act protects a person who complains to a "responsible officer", but there is no obligation upon agencies to define a whistleblowing procedure, nor is there any presumption that internal procedures should be preferred to public channels (cited in The Parliament of the Commonwealth of Australia, 1994, p. 43).

Another criticism forwarded by Len Wylde, organiser for the South Australian branch of Whistleblowers Australia, noted that:

The South Australian legislation provides for any victim of a whistleblower to be reported to the Equal Opportunity Commission, which has no direct authority to stop any institutional response, but only to conciliate. By the time this has been done, the damage to the whistleblower would have occurred and any action which could be taken would be far too late (cited in The Parliament of the Commonwealth of Australia, 1994, p. 44).

These legal oversights raise the question of the comprehensiveness of the Act. A review of the Act's design reveals its 5 pages and 12 sections to be quite brief and simple. While in some cases this may be perceived as a strength, it may also be perceived as a significant drawback. Queensland Attorney-General, the Honourable C.J. Sumner, spoke of the statute's brevity by saying:

... when we were considering this Bill I was strongly of the view that we ought to make it as simple as possible and ought not to get involved in the great elaborate 70 pages which was being proposed in Queensland and which they have been mucking around with for some three years or so (Sumner, 1993b, p. 1520), (Nb: the Queensland Bill actually has 27 pages and 70 sections).

He later commented on the failure of the Queensland government to pass legislation and suspects "that a basic reason [for this] is that the Bill is too complex and tries to write into law all the tiniest details" (Sumner, 1993b, p. 1481). In comparison, the legal drafters of the South Australian Act obviously wanted a brief and simple statute that achieves its objectives, yet implicit does not necessarily equate to appropriateness.

Given this view it appears that the South Australian Government obviously did not want to be either bogged down or held up by the debate over the details of coverage. This approach could then be perceived as what Fox (1993) describes as being largely symbolic, thereby doing little to adequately protect whistleblowers. It then appears that it will require a number of test cases for the merits of the Act to be accurately assessed.

As with any new legislation, especially that which involves ethical and moral behaviour, it is important that a jurisdiction provides education with regard to an Act's scope, use, and implications for both public and private sectors. Such

a campaign was launched in August of 1994 by the Attorney-General nearly one full year after its enactment. This involved training for 'responsible officers' and the distribution of informative pamphlets (The Parliament of the Commonwealth of Australia, 1994).

Educational campaigns are a vital tool to ensure that those who carry out the functions of the Act are appropriately trained, while the public is made aware of their rights and the implications of new law. However like most educational campaigns for new legislation, its timing leaves a lot to be desired. It is recognised that while South Australia is providing a necessary service to its citizens, the launching of an educational campaign nearly one year later to its public raises questions as to the state's level of commitment.

In review, the South Australian Bill carries both strengths, such as the employment of experienced authorities, and weaknesses, such as its failure to provide internal counselling services to assist whistleblowers direct their complaints (Clark, 1993a). Nevertheless, in making a preliminary judgement on the success of the Act, a divergence of opinion may occur.

As previously mentioned, South Australian whistleblowers may pursue their complaints either in tort, or as if it were an act of victimisation under the Equal Opportunity Act (1984). To date, no one has yet taken an action to court in tort. However, as at December 9, 1994, six cases had been brought to the attention of the Equal Opportunity Commission, with four or five having some element of substance (M. Goode, personal communication, December 12, 1994). Although details could not be released due to privacy requirements, these cases are presently at the first stage of the mediation process under the Equal Opportunity Act.

When questioned as to the success of the Act, Goode drew on the difficulty of making such a measurement and said that no meaningful statistics can be provided due to the nature of the whistleblowing phenomenon. Some may see this as a failure making it difficult to justify the Act's existence as results cannot be accurately measured by quantitative means. This however does not mean that the act is poor. It means that the measurement of success has to be more qualitatively addressed. When asked how do you know if the Act is working? Goode again replied that no action had yet been taken to court (personal communication, December 12, 1994). This result could be interpreted in one of two ways. The first being that the enforcement of the Act has made employers aware of their ethical and now legal duties, and have therefore influenced organisations to comply. The second, is that whistleblowers are still reluctant to come forward for fear of retaliation, which is probably the more likely of the two. Overall, the South Australian Act has provided a reasonably good base of protection for whistleblowers, although lacks specific detail with regard to many areas such as procedures, counselling and investigation. However, the Act should with time and a greater address of complaints, offer further developments in the future.

Despite its faults, the South Australian Act provides a more appropriate mechanism to handle whistleblower complaints than that which was previously in place. It will therefore take time before the Act's true potential can be realised. Similarly, the recency of whistleblower protection enacted in the Australian Capital territory will require the address of a number of complaints to determine its particular strengths and weaknesses. Thus it is the analysis of this jurisdiction's mechanism that completes the review of the Australian approach to whistleblower protection.

6.3.4 Protection in the Australian Capital Territory - Latest Developments

In June of 1994 the Australian Capital Territory enacted the Public Sector Management Act. Under this Act, whistleblowing by public sector employees and contractors is specifically covered under division XII while imposing stated obligations on employees. Yet in an attempt to provide wider coverage and better protection for whistleblowers, the opposition introduced the Public Interest Disclosure Bill which offers protection to any person making an appropriate disclosure.

The Public Interest Disclosure Bill goes so far as to outline procedures for making and handling public interest disclosures. For example, Public Sector Units **must** establish procedures concerning disclosures, counselling and advice, duties of protection, and how to action disclosures. In contrast, division XII of the Public Sector Management Act does not offer these procedures, although its standards are intended to incorporate such provisions (Public Sector Management Act 1994).

A review by the Select Committee on the establishment of the Territory's public service was conducted on both legislative proposals and found that the Public Sector Management Bill (now enacted), provided fundamental coverage to public servants. While on the other hand, the Public Interest Disclosure Bill was said to be "far more comprehensive in its detailing of definitions, investigative responsibilities, annual reporting requirements, remedies and penalties provisions" (The Parliament of the Commonwealth of Australia, 1994, p. 54).

However very recent developments have dramatically altered the legislative protection offered to whistleblowers in the Australian Capital Territory. Late in the evening of December 7 1994, the government repealed division XII of the Public Sector Management Act and in turn enacted the Public Interest Disclosure

Bill (Mapstone, 1994). In short, the parameters for whistleblowers established by the Public Interest Disclosure Act have been stretched further than any other whistleblower legislation in Australia. It contains many features that make it unique. For example it goes so far as to attempt to pre-empt a wrongful activity or conduct by defining an 'appropriate disclosure' to contain a provision for where a person *proposes* to engage in a disclosable conduct.

Penalties under the Act also offer the steepest maximums in the country regarding whistleblower legislation. Penalties for unlawful reprisal or knowingly making false or misleading statements may be up to a maximum of \$10,000 or imprisonment for one year, or both. In the case of a corporation convicted under the Act, the court may impose a fine not exceeding five times the maximum amount (Public Interest Disclosure Act 1994).

Another noteworthy feature of the Act is its specific definition of 'public wastage' under section 3 with regard to a public official. This definition entails conduct that "amounts to negligent, incompetent or inefficient management within, or of, a government agency resulting, or *likely* [italics added] to result, directly or indirectly, in a substantial waste of public funds, other than conduct necessary to give effect to law of the Territory . . . " (Public Interest Disclosure Act 1994). While many American and Australian Acts address the issue of substantial public wastage, the Public Interest Disclosure Act extends previous definitions by providing for the 'likelihood' of wastage. This in turn places a greater accountability on the official to manage resources with care.

Due to the recent address of whistleblower protection in the Australian Capital Territory, there is very little work available on its development. However while no cases of whistleblowing have as yet employed the protection of the Public Interest Disclosure Act, a few cases had engaged protection under division XII of the Public Sector Management Act. In judging division XII's success, Director

of Reform Projects for the Australian Capital Territory government, Helen McKenna reported that the Auditor-General had just recently heard two complaints and will be embarking on the investigative stage of the whistleblowers' claims early in 1995 (H. McKenna, personal communication, December 14, 1994). Now provided with the strength of a stand alone piece of law, it will be interesting to observe the course of whistleblower protection in the Australian Capital Territory.

In conclusion, while Queensland, South Australia, and the Australian Capital Territory have some form of legal mechanism to protect whistleblowers, developments in other jurisdictions are also beginning to show promise. Overall, the Australian approach to whistleblower protection is relatively new and subject to further change and development. Nonetheless, based on developments to date, summary conclusions can be drawn and analysed. These shall broadly be addressed in the following section.

6.4 Conclusion of the Legal Protection offered to Whistleblowers in Australia

Whistleblower protection in Australia is a relatively new phenomenon that has been greeted with scepticism as to the level of adequate protection offered (eg: Clark, 1993b; Fox, 1993; and McMahon, 1993). Despite such inadequacies, it is commonly recognised as 'a step in the right direction'. A review of jurisdictional cases to date reveals that no one case has yet gone to court, although remedies through other channels, such as provisions in the Equal Opportunity Act, are being pursued.

Matthew Goode (speaking of his own South Australian jurisdiction) contends that this is due to one of two reasons. Either there has been a sudden raising of

ethical standards in the community, or on the other hand, whistleblowers are still too scared to come forward. The answer probably lies somewhere between these two views. However, it is felt that there may also be other elements missing in addition to these reasons. The first is that there may in fact be few cases of whistleblowing because major misconduct itself is so rare, and that potential whistleblowers are more reluctant to risk reprisal for informing on lesser deviancies. Whereas a second possible element is that ethical discrepancies may in fact be settled or resolved outside of the courts by third parties such as counsellors or 'honest brokers'. This has proven particularly effective in Canada (Strickland, 1993).

Based on the recency of Australian legislation and the small amount of evidence available to date, it appears that whistleblowers are choosing to pursue their cases of victimisation through conciliatory channels provided by the Equal Opportunity Commission and the like. This forum has possibly been chosen due to its less aggressive and more conciliatory nature that largely hears 'complaints', whereas courts are perceived as 'defendant's forums' where it is the victim who is on trial. Indeed the expense, time, cross examination and confrontation of an 'us versus them' situation involved in the court address may act as a determining factor in demotivating whistleblowers to pursue the tort avenue proposed by the South Australian Act. Another factor influencing this outcome may be the grounding and experience of the Equal Opportunity Commission in handling cases of victimisation, whereas any case brought in tort would be untested and subject to the initial settling of the law.

Realistically, it is still too early to truly judge the effectiveness of Australian whistleblower protection. Although considering that such approaches have been largely based on US reform models, which have not been particularly effective, it can be assumed that legal mechanisms may not offer the best method of protecting whistleblowers. In addition, it appears that there must be other

elements of address missing in the protective formula, more than likely in the realm of the organisation's control.

Nevertheless, appropriate legal mechanisms do have the potential to both encourage and protect whistleblowers. To exactly what extent this is done is largely dependent on the legal drafters and committees that review them. In summary, American and Australian approaches have met with mixed fortunes. It is therefore with caution that New Zealand should proceed if it is to enact whistleblower legislation. This caution is paramount due to the numerous and far reaching complexities that exist, both those similar to American and Australian jurisdictions, and those unique to the New Zealand environment. So in order to explore some of these complexities, chapter seven considers the New Zealand approach to whistleblower protection.

7. THE NEW ZEALAND APPROACH TO WHISTLEBLOWER PROTECTION

7.1 Introduction

Analysis of chapters one through to six reveals the development of a sound foundation in which to analyse the New Zealand approach to whistleblower protection. This foundation first introduced the topic area and established the theoretical base on whistleblowing. This base was then narrowed and applied to New Zealand's historical and contemporary ethical context and then further narrowed to explore the need to protect whistleblowers in chapter four. Once this need was identified, the natural progression was to then examine the mechanisms that have been both proposed and enacted in other countries such as the United States and Australia. This analysis not only establishes an appropriate foundation for understanding legal mechanisms of whistleblower protection, but enables a clearer comparison to be made when examining the New Zealand approach.

Given this contextual base, the scene is set for chapter seven to examine how New Zealand mechanisms are presently designed to address disclosures of public interest information. This is then followed by an address of whether there is indeed a need to have such protection over and above what presently exists. Once determined, the chapter turns to focus on what is proposed under the New Zealand Whistleblowers Protection Bill. Addressed section by section, only the Bill's more prominent and noteworthy propositions and their implications are addressed. These propositions are then compared with protections in overseas' jurisdictions, ending with a summary of the Bill's affirmation.

7.2 Legislative Activity

A review of the past five years within New Zealand reveals a hive of legislative activity concerning issues of employment and business, crime and wrongdoing, and the utilisation of information. Examples within employment and business include the *Employment Contracts Act 1991* which first decollectivised, and second, decentralised industrial regulation in New Zealand (Hince, 1993), providing for freedom of association in an effort to promote an 'efficient labour market' (*Employment Contracts Act 1991*); the *Health and Safety in Employment Act 1992* which introduces 'self regulation' in employment matters while giving employers sole responsibility for controlling occupational health and safety in the workplace, to the effective exclusion of individual workers or their representatives (Hughes, 1993); the *Human Rights Act 1993* which brought together the Human Rights Commission Act of 1977 and the Race Relations Act of 1973 into one piece of legislation, while expanding the grounds for discrimination to include sexual orientation, disability, family status, employment status, political affiliation, and the presence of organisms capable of causing disease (Briar, 1994); and the *Companies Act 1993* which acts to reform the law relating to companies and their operations.

Legislative developments concerning crime and wrongdoing have tended to focus on the investigative and prosecuting aspects of business practice. Built on the foundation established by the Crimes Act 1961, examples include the *Corporations (Investigation and Management) Act 1989* which grants greater powers of intervention to the Registrar of companies in the affairs of corporations at risk (*Corporations (Investigation and Management) Act 1989*); the *Proceeds of Crimes Act 1992*, which provides for confiscation of the proceeds of serious criminal offending, while requiring the accused to show that anything forfeited was legally acquired (*Proceeds of Crimes Act 1992*); and the *Mutual Assistance in Criminal Matters Act 1993*, which was designed to facilitate the provision and obtaining of international assistance by the Serious Fraud Office in criminal

matters, but as yet has no provisions for mutual extradition arrangements (Mutual Assistance in Criminal Matters Act 1992).

Finally, legislative developments have also been made in the area of information and how it can be used and accessed. Although enacted in 1982, the *Official Information Act* has, for over a decade, made official information more freely available, providing proper access by each person to official information relating to that person, protecting official information to the extent consistent with the public interest and the preservation of personal privacy, while establishing procedures for the achievement of these purposes (Official Information Act 1982). A closely analogous piece of legislation to the Official Information Act was the enactment of the *Local Government Official Information and Meetings Act 1987*. This Act makes provisions regarding information held by local authorities similar to that established under the OIA with regard to withholding and releasing information that may prejudice the interests of those protected. Whereas in contrast, the *Privacy Act 1993* encompasses a wider framework in which information can be used or sought by enforcing measures that protect and promote individual privacy in accordance with O.E.C.D. guidelines (The Privacy Act 1993). Finally, the enactment of the *Defamation Act 1992* provides defamed persons with a powerful tool to protect one's character by restricting the type of information that is written or spoken about someone, and by offering a broader and clearer definition of libel and slander.

Such developments have dramatically affected the face of business practice in New Zealand, the most radical of these being the Employment Contracts Act 1991. However, while these developments have been introduced with the intention to achieve both government market philosophies, and to make the workplace a more efficient and safer place, legislation has tended to side with the employer. This in effect shifts the balance of power and control to the decision making minority rather than to the working majority. The implications of this are that by adopting such a philosophy, the obligations of the employer

to the employment relationship make no substantive advance in accountability, thereby providing the relative freedom for employers to act as they wish within the confines of the law.

Yet given this new employment regime, where it is contested that there exists no obligation for the employer to bargain in 'good faith' when establishing an employment contract (Harbridge, 1993), nothing appears to have changed in relation to an employer's implied duties. If anything, employers are given greater freedom in negotiating employment terms and conditions (inclusive of how information is managed). So long as such contracts remain outside the bounds of being 'harsh and oppressive' (McCarthy, 1991) and do not contravene other laws, employers are fully entitled to negotiate employment contracts as they see fit.

Despite efforts to free up public information, legislation has tended to be fairly restrictive in New Zealand. Similar to the American Constitution's First Amendment Right to Freedom of Speech, New Zealand has a similar right under section 14 Freedom of Expression, of the New Zealand Bill of Rights Act 1990. It states that:

everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form (New Zealand Bill of Rights Act 1990).

However, while the Act asserts the right for information and opinions to be freely expressed, there are restrictions on exactly how and for what reasons that information may be expressed. With regard to information that may be of public interest, the Official Information Act 1982 places prohibitions on the disclosure of information that could damage the interests of the country and its citizens. To enforce this requirement the Crimes Act 1961 and the Summary Offences Act 1981 were accordingly amended in 1982 to create offences in relation to such

damaging disclosure. Such disclosures, stipulated under section 6 of the Official Information Act mainly relate to those which could damage the security of New Zealand, the investigation of crime, custody of offenders, the safeguarding of life and property, and the economy of New Zealand (Burrows, 1990).

Further to this, the disclosure of information by public servants is also heavily regulated. Under the section 57 of the State Sector Act 1988, it is prescribed that "minimum standards of integrity and conduct are to apply in the Public Service". The State Sector Act also provides for the creation of Codes of Conduct to be created and enforced. Given this mandate, the 1990 Public Service Code of Conduct states that it is:

unacceptable for public servants to make unauthorised use or discourse of information to which they have had official access. Whatever their motives, such employees betray the trust put in them, and undermine the relationship that should exist between Ministers and the Public Service. Depending on the circumstances of the case, the unauthorised disclosure of public information may lead to disciplinary action, including dismissal (p. 17).

By offering such a wide ranging restriction on information release, a significant majority of information regarding unlawful, corrupt, or unauthorised use of public funds or public resources is in turn restricted, (although it is recognised that the Official Information Act has assisted in allowing public access to a lot of official information). With regard to 'the code', Martin (in press) identifies that the presumptive duty that heavily underlines a public servant's duty fails to acknowledge "that there may be occasions when other motives may in the individual's - and in the public's - judgement, 'trump' this presumptive allegiance" (p. 5). While on many occasions there are perfectly legitimate reasons for enforcing this allegiance, it has for too long remained a dominant theme covering **all** areas of information protection in New Zealand. Thereby, the only

means by which wrongdoing could be addressed was either through preferred internal channels, by 'blowing the whistle', leaking information to a fourth party such as the media, or by utilising other recognised channels such as the Ombudsman, Police, or Human Rights Commission (which are all fairly limited in the type of protection they can offer informants). Bearing these limitations in mind, the methods in which disclosed information and informants were dealt with have been fairly aggressive and archaic.

7.3 Address of Information Disclosure

Disclosing information that overrides one's duties to an employer or client, in light of the public interest, may in many circumstances be perceived as morally correct. However the major difficulty arises in defining what is in the public interest and who decides it. This has been a contentious issue since before the adoption of the Westminster system of parliament. Furthermore, attempting to pinpoint a definition of the legal interpretation of what is regarded as in the public interest would be fruitless. The Official Information Act acknowledges the right of the public interest (and the preservation of privacy) in the long title of the Act, yet fails to offer a definition for interpretation. Defining this can indeed be dangerous considering the dynamic nature of public interest information and the government of the day that defines it. Instead, and for many good reasons, this interpretation has been left to the judicial judgement in common law, allowing for the shift of 'value trends' which could influence public interest as previously mentioned by Mulholland (1990). Hence, it should be with caution that the Whistleblowers Protection Bill attempts to provide a statutory interpretation of public interest.

To date, those who have disclosed information in the interest of the public or others, have largely been found to have breached their obligations of confidence to their employer or client, and have received little if no protection for their

actions (even though such actions may appear morally right, for example the case of Dr Ian Duncan addressed in section 3.3 of this study). In fact anecdotal evidence suggests that most cases of whistleblower retaliation are dropped prior to ever reaching a legal forum.

In analysing the appropriateness of blowing the whistle, the distinguished House of Lords Judge Lord Denning struggled to justify where a person can break the confidence of a contract. He believed it was justified where the employer had been guilty of a crime or fraud (which covers quite a narrow range of wrongdoing), yet thought that this exception should not be so limited, and should extend to misconduct of such a nature in the public interest to permit its disclosure, so long as it was done with the correct interest (cited by Hodge, 1994).

Presented with the dilemma of conflicting duties between the duty of confidence and its maintenance in an employment relationship, against the duty to protect the public interest, New Zealand legislation, as previously identified, has been rigidly designed to protect one's duty of confidence over one's perception of what may be perceived as in the public interest. The only solace then left to a known whistleblower remained under common law. This philosophy has stood since the adoption of our legal framework, and is only now being challenged as to its place in an open and democratic society. Yet despite the benefits that can be provided to the public through legislated protection for whistleblowers, not all see the need for additional mechanisms.

Bill Hodge, Associate Professor of Law at Auckland University, is one such person who takes this stance by contesting that the existing law is 'good enough' (Hodge, 1994). He bases his argument on a number of points. The first is that since 1973, under the Industrial Relations Act, any dismissal or disciplinary action taken by an employer *must* be justified. This justification is based on whether the employer has followed both substantive and procedurally correct

disciplinary action, or, whether their disciplinary action is commensurate with the action (or omission) of the employee's conduct, subject to their contractual obligations.

His second argument is that there already exist recognised channels of redress and competent authoritative bodies that can deal with information of an unlawful or public interest nature. Therefore there is no need to extend the law to create additional bodies that offer redress, so long as the informant abides by the provisions already established by recognised offices and the like.

Within the wider framework of societal and legal requirements in which an employment relationship must operate, lie both implied and expressed obligations. These obligations represent valid legal interests and may be represented by a triangular shaped structure linking the employer, employee, and the client or patient (as in the Pugmire episode). However the obligations that are owed by and to each party are not equal. To reiterate the duties that were identified in section 2.4 of this study, it is recognised that there is a requirement that employers agree to provide financial compensation on both agreed wages and expenses incurred on the job, work (in certain circumstances), a safe system of work, and to be trustworthy and cooperative. In return, employees agree to be present at work, obey all lawful and reasonable orders, exercise reasonable skill and care, and to work honestly and faithfully (Deeks, Parker, & Ryan, 1994). Finally, both the employer and employee owe duties directly and vicariously to their client or patient not to be negligent, to act in their best interests, and most importantly not to reveal issues of confidence. In addition to these obligations is the requirement for both employer and employee to act in 'good faith'. If, for example, an employee decides to act on a conflicting dilemma by informing a fourth party, such as the media or a politician (apart from their appropriate Minister in the case of public servants) external to their immediate triangle of obligation, they break this obligatory link and are likely

to experience some form of retaliation for doing so. Therefore in order to breach a duty of confidence there must be extremely good reasons for doing so.

As there exists no contractual relationship between the 'employment triangle' and a stranger or fourth party, the law has provided the employer or client with remedies against that fourth person in equity. These act as a legal mechanism to reach out and restrain the fourth party by imposing a duty of confidence on people who receive confidences in breach of a contractual duty (Hodge, 1994). Hodge suggests that issues of confidence may be raised in several ways. First, the Neil Pugmire episode is a typical example where the employee becomes 'known' for reaching out and contacting a fourth party. The employer may possibly discipline the employee for a breach of confidence. In response, the employee may in turn file a personal grievance (from one of five categories such as unjustifiable action or dismissal), claiming that their duty to the public outweighed that to their employer.

A second way in which an issue of confidence may be raised (where the source is not known, but where the information has been released), is for the employer or client, to bring an action against the disclosure by the fourth party in an attempt to try and find out who released the information. By suing for disclosure, the employer or client attempts to force the fourth party to reveal the identity of the informant. This may be so they can either, from the employer's perspective, discipline them, file an action in tort, or from the client's perspective, seek damages.

While fourth parties are often the media (due to their ability to quickly inform the public of any interest matters), there may lie difficulties in attaining such information as journalists are often reluctant to release the name of their informant(s), and may endure legal retribution, such as contempt of court, for their beliefs. Due to overwhelming support to protect journalist's confidential sources in South Australia, the State Parliament is considering creating a shield

law that can be used to protect journalist's sources in certain circumstances (Duncan, 1993). In New Zealand, it is a rule of law that every person (apart from certain categories of professional people such as doctors, lawyers and Ministers for example) must answer all questions put to them when giving evidence in a court of law, yet Burrows (1990) highlights that this rule must be read subject to certain qualifications. First, like any other witness, journalists have all the general protections people have available to them. If therefore they do not wish to reveal an informant's identity and be in contempt of court (and therefore subject to penalty), the court cannot compel them to answer any question. Secondly, the court has been given the latitude to show discretion in particular cases not to press a question relating to sources of information if it so desires (under section 35 of the Evidence Amendment Act (No. 2) 1980). Thirdly, a special rule known as the 'newspaper rule' can be used if a "news medium is sued and admits publication, a court will not order it to disclose before trial, whether by interrogatory or order for discovery, its sources of information. [The basis of this rule] is the public interest in protecting the media's sources of information so as to encourage the free flow of information to them" (Burrows, 1990, p. 398).

A third example, where an issue of confidence can be raised, may be through an application for an injunction against a fourth party. This may occur where the employer or client has learned that confidential information has been released and they want to restrain it before it gets out any further.

In summary, Hodge's points recognise that all parties, employee, employer, and client have recognised obligations and rights which need protecting. Indeed, the existing body of law has provided employees with a great deal of legal protection regarding many employer actions of retaliation, although it still falls short of providing clarity and coverage in cases of disclosure concerning public interest information.

To date, information disclosure has been addressed by the law with a contractual slant heavily favouring the employer or client. Within their armoury lies the advantages of the principles of equity, the freedom for disciplinary action over contractual duties, the option to sue for disclosure, and the availability to apply for an injunction to restrain further information release. These options provide the employer with powerful tools in the argument against unwanted information disclosure. On the other hand, the informant only has the choice of seeking redress for their actions via personal grievance procedures, or by informing bodies already heavily inundated with cases. The only additional avenue whistleblowers have, if they lose a personal grievance, is the right of appeal to the Employment Court and then the Court of Appeal. Considering then that the legal framework is geared to either identify, stop, or assess the credibility of the whistleblower's motive and the actions of the employer, it also carries with it the trials and tribulations that are inherent to the court system. It may therefore be argued that there are other viable options that may better protect informants who legitimately blow the whistle in light of the public interest, while providing an easier and much less arduous channel than that which presently exists.

7.4 Is There a Need for Whistleblower Protection?

Judging by the seemingly escalating extent of wrongdoing in New Zealand (New Zealand Official Yearbook, 1994) and overseas, it would appear that the legal mechanisms in place in New Zealand warrant further reinforcement and clarification, especially in cases of public interest information. This unfulfilled need has been particularly exemplified by the Neil Pugmire episode.

Not only would the adoption of a reinforced mechanism to encourage and facilitate whistleblowing be advantageous for the whistleblower, but also for society. For such a mechanism would add a more direct and expansive tool in

the fight against wrongdoing. In short, the public are their own best watchdog and by providing a legitimate and more 'user-friendly' avenue for the disclosure of questionable conduct or activity, they are empowered to take action that is in their general interest.

Although fraud is only one of many areas of wrongdoing, it has a considerable impact on the economy, government spending and the quality of people's lives. Serious Fraud director Charles Sturt, contends that:

the dollar value of white-collar offending is conservatively estimated at four times the dollar value of the rest of crime [while] Canterbury University sociologist Greg Newbold presents a compelling argument when he says an increase in the size and scope of the Serious Fraud Office would undoubtedly continue to produce returns vastly in excess of input (cited in Harrod, 1994b, p. 11).

Given this information, and the potential benefits that sanctioned whistleblowing could bring, the welfare of society could markedly benefit. So long as the motivations for whistleblowing are altruistic, society may indeed adopt a less tolerant approach to wrongdoing and be encouraged to blow the whistle. However, until attitudes change and protection is offered, whistleblowers will continue to receive retaliation, while potential whistleblowers will remain reluctant to come forward. In short, adequate whistleblower protection, like the iceberg principle, would aim to address the unreported extent of wrongdoing that remains submerged.

In consideration of Bill Hodge's argument that the existing law is good enough, there do exist limitations and shortcomings over the protections offered to whistleblowers. His first argument centres around that fact that any dismissal or disciplinary action taken by the employer must be justified. This requirement is stipulated under section 27 of the Employment Contracts Act relating to

personal grievances. By law (see s26(a)), all employment contracts must contain a procedure for the settlement of personal grievances. This procedure (see s26(e)) is an alternative to making a complaint under the Human Rights Act 1993 and once an option has been chosen, a complainant cannot change to another forum.

There are five categories into which a personal grievance falls.

1. That the employee has been unjustifiably dismissed, which covers both substantive and procedural aspects of the dismissal (s27(1)(a)).
2. That the employee's employment, or one or more of its conditions is or are affected to the employee's disadvantage by some unjustifiable action of the employer (s27(1)(b)).
3. That the employment has been discriminated against in the employee's employment (s27(1)(c)).
4. That the employee has been sexually harassed in his or her employment, as defined in the ECA (s27(1)(d)).
5. That the employee has been subject to duress in their employment in relation to membership or non-membership of an employees' organisation (s27(1)(e)).

The standard procedure set out in the first schedule to the Act sets out the following steps:

1. That the grievance is to be submitted to the employer or its representative within 90 days of arising or coming to the employee's notice to enable it to be dealt with rapidly.

2. If the grievance is not settled in discussions between the parties, the employee shall promptly give the employer a written statement setting out the nature of the grievance and the remedy sought.
3. If the employer is not prepared to grant this remedy and the parties have not settled the grievance the employer shall, as soon as practicable, but not later than 14 days after receiving the written statement, give a written response setting out the employer's view of the facts and the reasons why the employer is not prepared to grant the remedy sought.

The parties can agree to waive this exchange of written statements without affect to the subsequent parts of the procedure.

4. If the employee is not satisfied with the response or there is a failure to respond or statements have been waived, the employee may refer the grievance to the Employment Tribunal.
5. The Tribunal shall provide mediation assistance or proceed to adjudicate on the grievance. In its adjudication the Tribunal shall consider the written statements of the parties (if available) and any evidence or submissions put before the Tribunal.

If adjudication takes place and a decision is made in favour of the grievant, the Tribunal can order remedies under section 40 of the Act. In settling the grievance, the Tribunal may provide for any one or more of the following remedies:

1. Reimbursement of all or part of the wages or other money lost by the employee as a result of the grievance (s40(1)(a)).

2. Reinstatement of the employee to their former position, or one no less advantageous to the employee (s40(1)(b)).
3. Payment of compensation by the employer for humiliation, loss of dignity and injury to feelings or for the loss of any monetary or other benefit (s40(1)(c)).
4. If the employee is found to have been sexually harassed, recommendations to the employer on action in respect of the person guilty of the harassing behaviour can be made. This may include transfer, discipline, or rehabilitation (s40(1)(d)).

However under section 76(c) of the Employment Contracts Act, Tribunal members have experienced difficulty in conducting proceedings in the 'spirit of the Act' where it was designed to establish:

a low level, informal specialist Employment Tribunal to provide speedy, fair and just resolution of differences between parties to employment contracts, it being recognised that in some cases mutual resolution is either inappropriate or impossible (s76(c)).

Such 'difficulty' is described by Hughes who notes that:

the extension of access to the grievance procedure, while providing a significant benefit to workers previously excluded from the procedure, has to be seen in the context of 'the new environment of increased formality and legalism, with its time limits, forms and regulations, the requirement to lodge a fee on filing a grievance application and the potential liability for costs' (cited in Deeks, Parker, & Ryan, 1994, p. 384).

Dumbleton, an Employment Court adjudicator in Auckland, further extends this difficulty when he addresses the advantages in mediation over adjudication, such as in the hearing of a personal grievance (or dispute) (cited in Deeks, Parker, & Ryan, 1994). His first point addresses the *flexibility and control of outcomes*. Because of the nature of adjudication, there tends to be a winner and a loser, whereas mediation provides a more flexible forum where the parties retain a greater control over the outcome through negotiating outcomes through give and take, rather than having a third party taking control. Adjudication may also be restricted to deciding outcomes based on facts of law, where mediation may look beyond the immediate legal merits of a grievance, or not at all.

Second, mediation enforces *finality* on a settlement as binding whereas decisions made through adjudication can be appealed. The implications of a further appeal means that parties will incur greater time and financial expense, while also experiencing further risk and uncertainty.

Third, the *time and money* involved in adjudication is more likely to be higher due to its more formal nature and involvement of lawyers and professional advocates. In contrast, mediation is generally less costly since formal evidence is not required and the determination of factual issues is of lesser importance.

Fourth, the choice of either avenue for settlement will have implications for the *maintenance of relationships*. Mediation tends to remove the ordeal of formal cross examination that can be extremely taxing on parties, especially the grievant. Adjudication on the other hand may tend to separate parties making them more defensive and likely to strain future confidences.

Finally, settling grievances or disputes confidentially through mediation has the advantage of avoiding *publicity*, if parties so wish. Whereas adjudication through the Employment Tribunal or Court makes public record of the events and issues of a grievance, and are therefore subject to media coverage.

In light of the above, it would appear that a quick and efficient settlement of disputes and personal grievances under the Employment Tribunal appears unlikely. Hughes (cited in Deeks, Parker, & Ryan, 1994) notes that applications to the Employment Tribunal were averaging over 200 a month with two thirds of these being related to personal grievances. Considering that there are only 13 mediator and/or adjudicator members, plus the Chief of the Tribunal in only four centres to serve the whole country, it is no wonder backlogs of 6 to 12 months are being experienced.

Furthermore, Chief Judge Thomas Goddard of the Employment Court acknowledges the problems mentioned above in an address on the four corner stones on which the employment institutions stand: effective procedures, appropriate services, low level informal specialist tribunal, and speedy resolution (Goddard, 1993). In this address Judge Goddard provides an example of a recent case that he heard which experienced problems represented by each corner stone. In comparing the elements of this case to those of others he has heard, Judge Goddard acknowledges the ineffectiveness of the personal grievance procedure in continuously meeting all of the employment institution's affirmations under section 76(c) of the Employment Contracts Act. In particular Goddard makes special reference to the lengthy time delays experienced by grievants which tend to further exacerbate the whole problem.

It is recognised that these shortcomings may indeed act as significant disincentives to pursue a case such as alleged unjustified retaliation on a whistleblower. The percentage drop out rate is unknown and any statistics of such would need to be analysed cautiously, yet anecdotal evidence suggests that this rate is noteworthy. While many grievances may be settled by direct negotiation some fall by the wayside and go no further. In conjunction with the disadvantages of adjudication as previously outlined by Dumbleton, this avenue may be chosen because the employer has shown that they will defend their

action(s) and will challenge the plaintiff in court. This alone may be enough to force the plaintiff into forgoing their case.

Not only do there exist drawbacks in the machinery of adjudication under the Employment Contracts Act for personal grievances, but also for the manner in which they are sought. For example, difficulties lie in providing elements of proof for unjustified dismissal. In order to argue unjustified dismissal, the employee must show a *prima facie* case and may have to prove some threshold issues, yet the primary onus lies with the employer to prove that their actions were justified (Mazengarb's Employment Law, Volume One, 1994).

For the employee to prove that there are *prima facie* grounds for the grievance, the employee will need to provide facts regarding the unjustified dismissal and by making reference to the surrounding circumstances. Once established, this in turn prompts an 'evidential burden' on the employer to show that their action was justified. In *Airline Stewards and Hostesses of New Zealand IUW v Air New Zealand Ltd* [1990] 3 NZILR 584, the Court of Appeal has considered what an employer must prove as summarised as follows:

- (a) An employer must prove that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred.
- (b) This decision must be made not only on the basis of evidence known to the employer but that which would have been available after proper inquiry by the employer.
- (c) An employer must base the decision to dismiss on a reasonably founded belief, honestly held, on the balance of probabilities, that serious misconduct has occurred (cited in Mazengarb's Employment Law, Volume One, 1994, p. A/238).

In addition to the substance of the dismissal, the employer must also comply with the accepted procedural fairness requirement in order for a dismissal to be justified. Under an action that may be perceived as unjustifiable, an employee may file a personal grievance under section 27(1)(b) of the Employment Contracts Act where "the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer". The difficulty herein is for the employee to show that the grievance relates to their "employment, or one or more conditions thereof" (s27(1)(b)), and may be "interpreted as meaning that there must be a breach of a contractual obligation or contractual entitlement" (Mazengarb's Employment Law, Volume One, 1994, p. A/248).

In light of the requirements for proof on the actions of an employer under both unjustified dismissal or action, it would appear that blowing the whistle to a fourth party external to the employment relationship is in breach of a contractual obligation of confidence, which in turn may be regarded as 'misconduct'. Therefore such misconduct, whether of a serious nature or not, is often subject to disciplinary action within a person's employment contract. It is these contractual stipulations that tend to act as a strong disincentive for many, while also highlighting the vagueness concerning where it may be acceptable to breach a confidence in respect of the public good.

While it is recognised that there are duties on both employer and employee to act in good faith, the difficulty lies in where the disclosure is justified. For example, an employee may perceive that they have acted in the best interests of the public by breaching their obligation of confidence in disclosing information, and an employer may believe that they have also acted in good faith by disciplining the employee for breach of contract. Deciding which party is correct may be extremely complex and difficult. The Tribunal or Court will therefore take equitable considerations into account such as the intentions, motives and actions of each party, in line with existing legislation and common law decisions

regarding natural justice and fairness. This raises the question whether retaliation by an employer is a unjustifiable action under a personal grievance. With reference to *Pugmire v Good Health Wanganui Ltd (Nos 1 & 2)* [1994] 1 ERNZ 58 & 174, Judges Colgan and Castle seem to indicate that it is a breach of 'fairness'. In short, there exist no *clear* guidelines for protection or discipline for either whistleblowers or their employers.

Although not heard under an application of personal grievance, the Neil Pugmire episode provides additional evidence of how the existing legal machinery of injunctive relief was used to protect a whistleblower from further retaliation by their employer. In *Pugmire v Good Health Wanganui Ltd (No 1)* [1994] 1 ERNZ 58, the advocate for the plaintiff sought to obtain an interim injunction directing the defendant to restore the plaintiff to his normal duties. This was in light of the defendant's suspension of the plaintiff pending inquiry based on the release of alleged confidential information to Phil Goff, Opposition Spokesperson for Justice. However, it should be noted that Judge Colgan of the Auckland Employment Court emphasises that:

the case is not about the rights or wrongs of disclosure of information about hospital patients. Nor is it about the interesting and no doubt important subject of the interface between confidentiality, public safety and duties of employees' fidelity and confidentiality or what has been described as "whistleblowing" I must decide this case on the evidence presented to the Court and not otherwise (*Pugmire v Good Health Wanganui Ltd (No 1)* [1994] 1 ERNZ 58, 60).

As the evidence before the Court concerns the questionable actions of the employer Good Health Wanganui in justifying its suspension of Mr Pugmire, it must base its decision on the evidence surrounding the case alone, and not be influenced by the public outrage over the CHE's action. Subsequently the

suspension was dropped by the defendant prior to the plaintiff's application for injunctive relief.

Provided with advice from counsel, the defendant chose to offer the plaintiff the choice of demotion to a lower position or termination of his employment. This ultimatum was to be accepted within a short but set deadline. In response the plaintiff quickly applied for an ex parte interim injunction and associated relief against the defendant. However Judge Castle declined to consider the matter on an ex parte basis as being inappropriate to the circumstances of its previous application, and directed a hearing to commence later that day. In light of the evidence presented before the Court of the reasons for the defendant's action (pending inquiry), Judge Castle identified that "the core issue between the parties was whether the plaintiff was justified in breaching an alleged requirement of confidentiality, or whether that action made him guilty of serious misconduct" (cited in *Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174, 174).

Such conduct had been spelled out by the CHE in an additional document attached to Mr Pugmire's employment contract entitled "Disciplinary Procedures and Rules of Conduct". Under the 'Advance Warning' section of the attached document it is stated that "[i]n some circumstances, an employee may be suspended from duty on pay or transferred to other work while an allegation of misconduct is being investigated" (cited in *Pugmire v Good Health Wanganui Ltd (No 1)* [1994] 1 ERNZ 58, 64). This notice was to be seen in light of provisions 12 and 14 of that same document, where the defendant's suspension of Pugmire (pending inquiry), was to establish whether he was guilty of either one of two instances of serious misconduct, ie.

12. Acts detrimental to the quality and/or efficiency of the [defendant's] services or detrimental to the safety of all staff, patients or visitors.

14. The disclosure to unauthorised persons of any confidential information concerning any patient or employees (cited in *Pugmire v Good Health Wanganui Ltd (No 1)* [1994] 1 ERNZ 58, 64).

What the court found was that it was arguable whether it was necessary to suspend Mr Pugmire for one week in respect of inquiries.

Deciding whether the counter action by the defendant to offer the employee demotion or employment termination over alleged disclosure was justified, could be viewed as a substantive issue considering it was unknown who had sent Mr Goff the confidential details of the paedophile in question. To determine whether to allow interim relief, Judge Castle of the Wellington Employment Court applied a well established three-fold test - namely:

- (1) It is necessary to decide whether there is a *seriously arguable case* for subsequent trial between the parties.
- (2) If there is, then the Court seeks to establish where *the balance of convenience* lies between them pending trial.
- (3) Because the remedy of injunction is discretionary the Court is to stand back from the detail of the case and independently assess where the *overall justice may lie* in relation to orders sought (*Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174, 178).

Presented with the first test to decide whether there is a seriously arguable case for subsequent trial between parties, the Court has to decide if there is substance in the competing claims of each party. As previously mentioned, the core issue between the parties was "whether Mr Pugmire was justified in disclosing to Mr Goff information about a patient in breach of an alleged requirement of confidentiality, or whether that action made him guilty of serious misconduct" (cited in *Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174, 174). In hearing counsel for the defendant, it was found that there was a strong conflict

of opinion between eminent and well-respected constitutional lawyers. It was for this reason that Judge Castle found there to be a seriously arguable case for Mr Pugmire.

In applying the second test regarding the balance of convenience, Judge Castle found that because of the consequences to Mr Pugmire and his family due to the alleged and disputed breach of patient confidentiality, the defendant had nothing to lose by continuing Mr Pugmire's employment on his normal duties. Thereby the balance of convenience was clearly in Mr Pugmire's favour.

As to the overall justice of the case, Judge Castle held that:

Mr Pugmire's sincerity, integrity, skill as a charge nurse, and genuineness of the motives behind his actions have not been questioned, [and] I find and hold that the interests of justice and fairness demand that Mr Pugmire be restored to his previous position until a substantive judicial hearing has considered and ruled upon the actions and decisions of Good Health Wanganui Ltd by its chief executive (cited in *Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174, 179).

However a substantive hearing never occurred as Mr Pugmire's personal grievance against the CHE was withdrawn in exchange for a settlement in which the CHE agreed to take no further action (McLeod, 1994).

In summary, there appear many compelling arguments why the existing legal framework is not 'good enough'. First, the nature of the personal grievance procedure is reactive by nature following the full or partial retaliation by the employer. While it is recognised that legal mechanisms cannot pre-empt legal conduct, some form of intervening mechanism is therefore required to avoid the unnecessary retaliation on legitimate whistleblowing. Second, the existing mechanisms are arduous, time consuming, and taxing upon the whistleblower.

The gamut of emotions experienced by Mr Pugmire and his family emphasise the need for alternative measures that make such experiences unnecessary. Thirdly, the divergence of opinion between eminent and well-respected constitutional lawyers such as Sir Geoffrey Palmer and Mr Rennie on the one side, and Dr Barton QC on the other over the justification or otherwise of Mr Pugmire's actions (*Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174, 178), typifies the need for clarification and protection for public interest disclosures.

Bill Hodge's second argument, is that there already exist recognised channels of address and competent authoritative bodies that can deal with information of an unlawful or public interest nature. However, here also lie some limitations that require address if whistleblowers are to receive adequate protection in addition to that which presently exists. Bodies such as the Ombudsmen's Office, the Police, and the Human Rights Commission at present all have a narrow latitude in which they can hear and address cases, with neither being able to offer a whistleblower any concrete protection.

Under the Ombudsmen Act 1975, the Ombudsman is empowered to investigate the administrative acts and decisions of central and local government departments and organisations, while also playing a role in the review of refusal to supply official information. These powers also stretch to cover organisations such as state owned enterprises, school boards of trustees, universities, regional health authorities and crown health enterprises. In investigating the events that give rise to a complaint, the Ombudsman will form an opinion as to whether the act or decision:

- appears to be contrary to law
- was discriminatory, unjust, oppressive or improperly discriminatory or in accordance with a rule of law, or a provision

of an Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust or improperly discriminatory.

- was based on a mistake of law or fact
- was wrong (Ombudsmen Act 1975)

An Ombudsman can also consider whether a discretionary power has been exercised for an improper purpose or on irrelevant grounds, or on account of irrelevant considerations, or whether reasons have been given for the decision or recommendation. Where appropriate, an Ombudsman will make recommendations for resolution of a complaint. While it is recognised that the Ombudsmen's Office performs a vital function, it suffers from certain shortcomings. In particular, the powers of the Ombudsman are restricted to serving only the public sector, local government authorities and the like. While this scope of coverage is quite narrow when compared to the entire working population, the workload is exacerbated by the fact that there exist only two Ombudsmen who work with a small team of experts to serve the whole country. A notable disadvantage of using the Ombudsman's Office is the 15 stage complaints procedure that can be extremely time consuming. With some complaints taking up to a year and more for recommendations to be made, such delays are unlikely to act as incentives for complainants. Even once a recommendation is made, the final discretion lies with the department or organisation, although it is recognised that most recommendations are accepted (J. Robertson, personal communication, October 10, 1994).

Another recognised body that can legitimately receive disclosures concerning unlawful activity or conduct is the New Zealand Police Force. The scope of their role to receive public complaints is wide and generally involves investigating cases under the protection of the Crimes Act 1961 and Summary Offences Act 1981. Dependant on the disclosure being made, they may refer the case to more specialised and established bodies such as the Audit Office.

The New Zealand Police Force have been seen to even go so far as to actively encourage whistleblowing while offering anonymity. This has more recently been conducted through vehicles such as confidential telephone hotlines and television programmes such as *Crimewatch*. However, while they may hear and receive public interest disclosures, their role is to serve the Crown and are thereby governed by the existing legal framework and all that it brings with it.

Individual bodies that are also recognised as authorities with influence to address issues of public interest are the Auditor-General, Members of Parliament, and various legal sources. Although such bodies may be in such positions so as to serve the public, they offer little in the way of protection to whistleblowers as Phil Goff's disclosure recently showed. Although not meant to be an exhaustive list, one final body that offers a more conciliatory approach to complaints and protection of complainants is the Human Rights Commission.

Protection offered by the Human Rights Commission under the Human Rights Act 1993 (which became law on 1 February 1994), has greatly extended the coverage of discrimination, and thereby the functions of the Commission. For the year ended 30 June 1994, staff at the Commission had increased from 31 to 47, while there had been a 29% increase in complaints to a total of 235, with several of these complaints involving an alleged breach of more than one section of the Act (Report of the Human Rights Commission and the Office of the Race Relations Conciliator for the year ended 30 June 1994).

In relation to offering protection from discrimination in employment matters, the Human Rights Act offers a similar protection under section 22 to that established under section 28 of the Employment Contracts Act, yet differences do occur. In particular, the Human Rights Act provides redress for refusal to employ whereas no similar provision in the personal grievance section of the Employment Contracts Act exists, while grounds for discrimination under the Employment Contracts Act are significantly more narrow than that of the Human Rights Act.

It should also be noted that under s26(e) of the Employment Contracts Act, the personal grievance procedure is an alternative to, and *not* in addition to, any right to make a complaint under the Human Rights Act. Given this mechanism for address, the Human Rights Commission is empowered to enforce decisions regarding unlawful discrimination, yet while this protection appears broad, the Act does not *clearly* recognise the status of whistleblowers. Therefore like the Employment Contracts Act, persons who suffered retaliation in employment matters under the jurisdiction of the Human Rights Act for blowing the whistle, would experience similar problems regarding interpretation and judgement via common law. However it should be noted that protection does exist against victimisation in the Human Rights Act under section 66. This provides partial protection not just to those subjected to discrimination, but also to those who report discrimination or harassment, or who give evidence in that regard.

Like the Office of the Ombudsman and the New Zealand Police, the Human Rights Commission also suffers from similar limitations. It too acts as a reactive mechanism that must first be initiated by the complainant in order to seek address. A recent review of timeliness indicates that 72% of complaints took more than 12 weeks of being opened to be either investigated or mediated (Report of the Human Rights Commission and the Office of the Race Relations Conciliator for the year ended 30 June 1994).

In conclusion, it is recognised that the before-mentioned authorities have an unenviable and difficult task, yet provide a valuable service to those they cover. However in respect of this service, they do suffer from various shortcomings given their limited resources and legislative powers. In addition to these limitations, there lies an inconsistency over the handling and investigative procedures of such authorities and decisions regarding protection, coverage, remedies and penalties. Nevertheless, these authorities provide the bulk of legitimate external channels of address for New Zealand whistleblowers. Therefore given these similarities, many potential whistleblowers are unlikely

to become motivated to speak out. Instead, they may either drop their complaint and accept their employer's actions, detach themselves from the problem or workplace, or may decrease their level of productivity, or, if brave enough, inform a fourth party.

Possibly one of the most popular fourth parties outside of the bodies identified, would have to be the media. For while the media may not offer legal protection to the whistleblower (providing the reason why many informants probably choose to remain anonymous, but even this does not provide full-proof protection), it has the effect of providing immediate exposure of an issue. Therefore providing this exposure directly into the public arena acts as both catalyst and vacuum by drawing public attention and hopefully a call for immediate address.

With knowledge of the limitations of the existing authorities, and the power and influence the media has and can create through scandals (Clifton, 1995), Goff released Neil Pugmire's letter so as to inform the public, highlight and seek address of the problem at hand, and to enforce accountability on those who were responsible. Indeed the furore that followed Goff's release of Pugmire's letter not only highlighted a split in opinion about the merits of releasing confidential information concerning the public interest, but also the need to provide a greater legal protection for whistleblowers.

7.4.1 The Call for Whistleblower Protection

The treatment Neil Pugmire was subjected to following Goff's release of his letter sparked outrage and a wave of public support, while also reviving the call of Chief Ombudsman John Robertson for the legal protection of whistleblowing state servants. Mr Robertson said "he had had people come to him when trying to decide whether to blow the whistle about a matter of public importance. He

said they had been reluctant mainly because there was no protection for them and their careers could be damaged because of their actions" ("Law Urged," 1994, p. 1).

Joining in the call for whistleblower protection for public servants were Privacy Commissioner Bruce Slane and State Services Minister and Attorney-General Paul East. Mr Slane endorsed concerns about whistleblowing but stressed that "his office was not interested in technical breaches of the [Privacy] Act but those where complainants suffered an adverse outcome as the result of disclosure of personal information" (Ross, 1994, p. 6). While in the process of preliminary discussions with Chief Ombudsman John Robertson, Mr East said that "any legislation would have to cover the whole public service, though different types of information might have to be treated differently" (cited in Kilroy, 1994b, p. 1). Yet despite the intentions of Minister East, Opposition Spokesperson for Justice Phil Goff was the first to forward a hardcopy of proposed whistleblower legislation.

Entitled the 'Whistleblowers Protection Bill', it proposes the establishment of a special authority with the power to investigate 'public interest' disclosures, and offers protection to both public and private sector whistleblowers from criminal and civil prosecution. The Bill also promises a counselling and advisory service to potential whistleblowers. Comparing its powers to the Spanish Inquisition, Minister of Justice, Mr Doug Graham, commented saying "I do think we're going a little too far" (cited in Stone, 1994a, p. 5). While this extended coverage may go beyond the ideals of Mr East and Mr Graham, general support for the Bill has been expressed by the governing National party, while other political parties such as the Alliance and NZ First are also likely to show their support ("National To Support," 1994).

Having received Government support when introduced into Parliament, Mr Goff's Bill is now before the Justice and Law Reform Committee awaiting

hearing and receipt of public submissions. However formal review of the Bill is presently stalled due to 'other' committee hearings (A. Powell, personal communication, February 10, 1995), and appears unlikely to come into force by its intended date of July 1st, 1995.

7.5 Review of the Whistleblowers Protection Bill

In reviewing this Bill it is important to note that the comments made on it are based solely on the copy of the Bill (inclusive of the explanatory note) in Appendix B at the back of study, and are therefore subject to change following review by the Justice and Law Reform Committee. Despite the possibility of change, propositions made under the Bill remain worthy of investigation and address in this study. In order to review this Bill, comparisons will be made against protection enacted and proposed in the United States of America and Australia. Once identified, the implications of such points will be discussed. However to provide a clause by clause analysis of the Bill would be superfluous and premature considering its status prior to review by the Committee. Nor would it be appropriate considering the focus of this study. Instead, the analysis of the Bill will only draw upon specific clauses, and will generally analyse its more noteworthy points through general themes. For the purposes of analysis, the following address should be examined with reference to the Bill attached in Appendix B.

7.5.1 Part I - Preliminary Provisions

The preliminary provisions of a bill provide the brief of what the bill entails. In this case it provides definitions to aid in the interpretation of terms used throughout the bill. The Bill is also stated to bind the Crown. Finally, under clause 4, is the stated purpose of the Bill. Clause 4(1) states that this "is to

facilitate and encourage [italics added], in the public interest, the disclosure, investigation, and correction of any conduct or activity . . . [stipulated under subclauses 4(1)(a), (b), and (c)]" (Whistleblowers Protection Bill 1994).

The preliminary provision then goes further and extends the 'spirit of the Bill' under clauses 4(2) and 4(3). Clause 4(2)(a) and (b) can be seen to propose this spirit by emphasising the ideals of the Bill in light of a democratic society and how disclosures can benefit the community, while sending an important message in that public interest disclosures should be seen as acts of 'responsibility'. In order to attain these purposes, subclauses 4(3)(a), (b), (c), and (d) provide methods in which the Bill will do this. These are to create a Whistleblowers Protection Authority which establishes procedures to facilitate and encourage disclosure of public interest information; to provide that such disclosures are properly investigated and dealt with; to provide for the protection of persons who make disclosures of public interest information to the Authority; and to provide for remedies for such persons who encounter discrimination or harassment for disclosing public interest information.

While it has been argued that the central focus of whistleblower legislation overseas has until recently been on retaliation, it has of course also focused on the facilitation of whistleblower disclosures. This focus can be seen to have been addressed in one of the most important areas of the legislation - the Act's stated object or purpose. The object or purpose of an Act establishes its intention or what it aims to achieve. Thereby the success of the Act will be ultimately judged upon the attainment of such statements.

A comparison of the focus of these intentions can be made via examination of some of the whistleblower legislation enacted in Australia and the United States to date. The Whistleblowers Protection Act of 1989 enacted in the United States under section 2(b) states:

[t]he purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government (Whistleblower Protection Act of 1989, § 103, 5 U.S.C. § 1201).

This 'purpose' is facilitated by the Office of Special Council (OSC), yet does not purport (in writing) to 'encourage' whistleblowing, although it is recognised that this is an intention of the Act.

Under section 3, Object of the Act, the South Australian Whistleblowers Protection Act 1993 states:

The object of this Act is to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally . . . (Whistleblowers Protection Act 1993).

However it appears that changes in a new era of legislative focus are being attempted in order to address the wider societal acceptance of public interest whistleblowing. This movement has been introduced by the inclusion of efforts to 'encourage' whistleblowing through recently enacted and newly proposed legislation.

The recently enacted Public Interest Disclosure Act 1994 of the Australian Capital Territory simply states:

An Act to encourage the disclosure of conduct adverse to the public interest in the public sector, and for related purposes (Public Interest Disclosure Act 1994).

Under section 3, Object of the Act, Queensland's Whistleblowers Protection Bill 1992 states that:

The principle object of this Act is to further the public interest in encouraging the disclosure, investigation and correction of illegal conduct, improper conduct in the public sector and danger to public health or safety by . . . (Whistleblowers Protection Bill 1992).

This new address to whistleblower protection can also be seen to have been proposed here in New Zealand. In direct comparison, the purpose of the New Zealand Bill states intentions over and above those which are legislated elsewhere. Although it should be noted that this stated purpose is almost identical to that which has been proposed by Senator Chamarette at the federal level. Nevertheless, this development indicates a movement away from the retaliatory focus of the past, toward a more facilitative and mediatory one. The implications of this are that the approach to dealing with wrongdoing and retaliation aims to be less confrontational and aggressive. Although this may appear to be a generalisation based merely on the stated purpose or object of the Acts, the spirit of these objects can be seen to have followed through to their interpretive machinery. This is most evident in the procedures and remedies inherent in the legislation. However the test of any legislation is in its outcome to the relevant parties. Review of success in the US reveals a mixed outcome, with generally no substantial gains in whistleblower protection (apart from an increase in cases filed sparked by monetary incentives). Meanwhile, the level of success in meeting Australian objects cannot be truly assessed as no case has yet tested its whistleblower legislation.

7.5.2 Part II - Disclosure of Public Interest Information

Clauses five to eight make up Part II of the Whistleblowers Protection Bill and address the disclosure of public interest information. The design of this part borrows considerably from the South Australian approach, along with influences from the Ombudsmen and Privacy Acts. Clause five sets out the manner in

which a public interest disclosure is to be made, and the matters to which such a disclosure may relate.

One of the most notable features of the Bill is that not only does it relate to conduct or activity concerning public interest information in the public sector, but also in the private sector. This is a rather bold move in relation to legislation enacted in the United States and Australia whose first legislation applied only to civil servants, contractors and the like. There are many sound arguments that extol the virtues of both views, the most common being the debate over wrongdoing that does not have a direct impact on the public treasury. Yet if New Zealand is to truly affirm public accountability and the ethic of openness, it is necessary that all sectors are included.

Nevertheless this extended coverage has remained a contentious issue among some. As previously mentioned, Minister of Justice Doug Graham believes that whistleblower protection should be restricted only to the public sector. In initial support of this view was also Attorney-General Paul East who has reservations about the extension of the law to the private sector at this point. He argues that there has been little discussion of the merits of extending the proposed legislation, and that it would be preferable to first introduce such legislation to the public sector, including Crown entities such as Crown Health Enterprises (P. East, personal communication, October 31, 1994). Once the legislation had been in place for some time, then it would be appropriate to look to extend it to the private sector as well.

Proponent of the Bill, Phil Goff, denounces this perspective and justifies the Bill's inclusion of equal coverage to both public and private sectors:

because actions which are illegal, corrupt or injurious to public health, safety or environmental wellbeing should be exposed regardless of whether they are a product of public or private sector decision making.

Given the blurring lines between public and private sectors it is also an unnecessary complication and a nonsense to provide protection to people working in one sphere but not the other (P. Goff, personal communication, November 25, 1994).

Further to this, if only the public sector was protected, people like Neil Pugmire would not receive any protection because the State Services Commission only has responsibility over the core public sector, but not over State Owned Enterprises. Nor would private contractors receive protection for disclosing information such as the huge cost overruns incurred at the Ohakea Air Force base commander's home in early 1994. In short, the inclusion of coverage for both public and private sector persons who disclose public interest information would aid in the advancement of the Bill's affirmation toward promoting the well being of the community and a democratic society.

Subclauses under clause 5 are of special note when compared to overseas jurisdictions. For example, subclause 5(1)(a) of the New Zealand Bill singles out the unlawful, corrupt, or unauthorised use of public funds or public resources. Whereas unlike Australian initiatives, the Bill does not extend to the 'mismanagement' of public resources or to 'maladministration' including impropriety or negligence unless the related conduct or activity is corrupt, unauthorised, or unlawful. Therefore New Zealand wrongdoers are not *as* accountable as their Australian counterparts in this regard, thereby ensuring the Bill concerns itself only with *intended* activity or conduct.

Subclause 5(1)(b) extends the coverage of information regarded as 'public interest information' to include any conduct or activity that is otherwise unlawful. This makes the scope for protected whistleblowing extremely wide. For example, all sources of law in New Zealand are therefore included such as the common law, New Zealand statutes, some United Kingdom statutes which are still in force, and subordinate legislation such as by-laws made by local

bodies in accordance with the relevant statutes. This inclusion greatly increases the scope of accountability upon many people across a wide array of issues.

Subclause 5(1)(c) further extends public interest information to include that which constitutes a significant risk or danger, or is injurious, to public health, public safety, the environment, or the maintenance of the law and justice. This coverage is similar to that enacted in the US and Australia and is commonly viewed as a necessary element in the protection of the public. In fact subclause 5(1)(c) has been worded in such a way that it protects persons who make disclosures they perceive are a risk, dangerous or injurious to the public even though they may *not* have occurred.

Furthermore, the Bill does not offer definitions of the public health, safety, or the environment for interpretation, therefore inviting the starting of common law with regard to whistleblowing. This is not necessarily a bad thing as statutory definitions can at times be restrictive. While there may be no definitions offered under the Bill, it may be assumed that the interpretation of the public health, safety and the environment are similar to those offered under the Health and Safety in Employment Act 1992, the Resource Management Act 1991, or the Environment Act 1986.

In general, the New Zealand Whistleblowers Protection Bill is in many ways closely modeled on the South Australian approach. Clause 6, which defines appropriate disclosures of public interest information, is no exception to this. It is almost identical to section 5(2) of the South Australian statute which is in turn similar to provisions under the Whistleblowers Protection Act in the United States.

Clause 6 of the New Zealand Bill defines appropriate disclosures of public interest information as if, and only if, the person believes on reasonable grounds that the information is true; or if not in this position, believes that it is true and

it is of sufficient significance to justify its disclosure so that its truth may be investigated, so long as the person discloses the information to the authority. One of the main implications of clause 6 is that it imposes a high threshold for granting a disclosure as appropriate. For example, belief on 'reasonable grounds' has to be considered reasonable, objectively by others. Therefore although a whistleblower may perceive *their* disclosure to be appropriate, if it is not considered reasonable by a third party, the disclosure may not hold in law.

A further implication is that there is no requirement to blow the whistle internally to an employer or organisation prior to informing the Authority. As previously mentioned in chapter five, some states in the US require that all whistleblowing first be disclosed internally so that organisations are given the opportunity to address the complaint. John Martin, of the Public Policy Group at Victoria University of Wellington, is one public notary that advocates that whistleblowers should first exhaust all established channels before going to the Authority. Martin proposes that not only would this be morally right, it would also reduce the load of the Authority in matters which might be described as 'trivial' (personal communication, September 26, 1994). Yet Martin asserts that there would need to be a let-out clause to cover cases where reprisal is genuinely feared with the onus lying on the whistleblower to demonstrate this fear. Generally speaking, whistleblowing should be seen as a last resort and not presented as a license for 'pimping' on the boss. While the argument against this may allow an organisation to destroy evidence to hinder investigation and potentially prosecution, it would also allow an organisation unaware of a problem some latitude in addressing it while also protecting their credibility and goodwill.

Clause 7 provides whistleblowers immunity from civil and criminal proceedings for making an appropriate disclosure, while clause 8 creates an offence for disclosing an informant's identity. These provisions are standard in comparison to other jurisdictions overseas. One feature that is of significance is the nominal

penalties issued under the Bill. This will however be later analysed in the address of Part VI, Miscellaneous Provisions.

In summary, Part II establishes the setting of the Bill under which the conduct and activity which protects whistleblowing is identified. Part III extends this setting by addressing the body that is responsible for receiving appropriate disclosures and outlines its specific functions, duties and various requirements and obligations.

7.5.3 Part III - Whistleblowers Protection Authority

Part III of the Bill provides for a Whistleblowers Protection Authority to be constituted. Similar in nature to the Office of Special Council in the US, the Authority acts as a single body to receive and investigate public interest disclosures, while providing advice, counselling, and assistance to prospective and protected informants.

Obvious advantages of such an Authority lie in its centralisation of power to manage, control, and monitor the processes involved in handling complaints. This central focus empowers the Authority to act as a single entity while also allowing it to oversee investigations it has referred to appropriate persons or 'enforcement agencies'. Most importantly a single authority would develop a specialised function, able to draw on the strength of specialised and experienced experts, while communicating to the public a clear message of its commitment and credibility. In short, it aims to provide a clearly visible and legitimate channel through which whistleblowers can voice their concerns, while receiving adequate protection for doing so.

However like the US and Australia, the proposal of a separate authority or agency to handle whistleblower complaints has been met with mixed responses

in New Zealand. Similar to the argument previously raised by Bill Hodge, Privacy Commissioner Bruce Slane is another authority figure not convinced of the need for a new body. He argues that there should first be consideration to existing statutory bodies based on four notable disadvantages (B. Slane, personal communication, 28 July, 1994).

First, setting up a new body or authority will incur substantial establishment costs. Not only will the Authority require sufficient finance to cover fixed and variable costs, but also the acquisition of human resources and the necessities of a supporting infrastructure. The comparison between establishing the functions under a new body, and adding them to existing ones raises a viable argument.

Second, it is likely that a new body may incur overlapping functions with other bodies. This overlap could lead to some jurisdictional complexities and possibly even some duplication of function. Third, a new authority will need to make its presence known. This will require significant educational and public relations campaigns to establish a credible identity readily recognised by people who may wish to blow the whistle.

Finally, Commissioner Slane raises the question concerning the effectiveness of the Authority. Given the wide jurisdiction required to address issues from the misuse of public funds to environmental pollution, a single small authority may not be able to retain a wide range of highly expert staff needed to deal with major issues on an irregular basis.

Analysis of Slane's points in regard to the proposition of a single authority raises valid points that the Justice and Law Reform Committee must now answer. In short, the Committee is left with two options. Either empower existing bodies through amendments to the relevant Acts, or continue with the proposition of a new statute and independent body. Whether a single agency is required to

achieve the purposes of the Bill is beyond the address of this study, although it can be recognised that existing statutory bodies such as the Office of the Ombudsman, Auditor-General, or Commissioner for the Environment do perform functions similar to those proposed by the Bill.

It is interesting to note that the Electoral and Administrative Review Commission in Queensland examined this issue, as did the South Australian drafters, and decided not to recommend the establishment of a separate agency. If however the Justice and Law Reform Committee chose not to follow this line and create a single authority, it must ensure that the Authority fulfil its mandate and does not repeat the failings experienced by the OSC under the Civil Service Reform Act in the United States.

While clauses 11 to 19 address specifics pertaining to the Authority such as appointment, tenure, annual reports, and legislative review, Part IV establishes the procedures under which the Authority will oversee the Bill's propositions.

7.5.4 Part IV - Procedures

One of the most important services the Authority provides under clause 20 of the Bill is advice and counselling to prospective and protected informants. This function is crucial to the role of the Authority and the spirit of the Bill if the public are to be encouraged to come forward with sensitive information. The public needs to be assured that before they disclose information they will have been fully informed as to the kinds of disclosable information that will grant protection; the manner and form in which it may be disclosed; how such information disclosed to the Authority may be disclosed under the Act and what consequences disclosure may have; the protections and remedies available under the Act or otherwise in relation to discrimination or harassment; and the operation of the Act in any respect.

As overseas and New Zealand experiences show, blowing the whistle can have a significant effect on the lives of whistleblowers including their families, friends and colleagues. So it is important that this service is not only made available to all persons, but that it is widely promoted to inform the public of how it can support whistleblowers. John Martin goes so far as to suggest that the scope of this clause be extended to give the Authority power to require the employer to pay for counselling, as prescribed, to the whistleblower if considered justified (personal communication, September 26, 1994).

In comparison to the South Australian Act, the decision not to create a centralised counselling service was considered by both academics and legal sources to be one of its most significant shortcomings. Disclosed during a personal interview, Chief Ombudsman John Robertson said that this view was also shared by the South Australian Ombudsman (personal communication, October 10, 1994). Instead of receiving uniform advice from a single body, public interest disclosures under the South Australian Act are to be made to a number of relevant authorities. This in effect allows for an element of variation in the type of advice given and the danger of inconsistency. Fortunately, the New Zealand Bill did not adopt South Australia's approach to offering advice and counselling and will provide this necessary service in a centralised form.

Clauses 21 and 22 provide for action to be taken by the Authority on receiving a disclosure of public interest information, or, to decide in accordance with provisions stipulated under clause 22 to take no action, or no further action, on any disclosure. The Authority may decide to do so if, and only if, it considers that reasonable mechanisms already exist; the information is already publicly known; investigation of the information is no longer practicable or desirable; the subject matter is trivial; the disclosure is frivolous, vexatious or not made in good faith; or the information is insufficient to allow an investigation to proceed (Whistleblowers Protection Bill 1994). To provide justification for what ever reason the Authority finds appropriate not to action a disclosure, the Bill ensures

that the person making the disclosure will be informed of such with the relevant reasons for it.

Stipulation of these provisions for no action ensures that the Authority is not overloaded with investigating every claim for which perfectly appropriate mechanisms or bodies may already exist. Not only would these provisions save the Authority time and expense, while going some distance to avoid the duplication and complexity of overlapping jurisdictional functions, they would also ensure that it remains focused in providing a specialised function to receive appropriate public interest disclosures. Such provisions are standard requirements developed to fulfil the object or purpose of Acts in both American and Australian jurisdictions.

Clauses 23 to 27 relate to the proceedings of the Authority. In brief, the Authority is to hold its investigations in private, and is not required to hold hearings. However, where any report or recommendation made by the Authority may adversely affect anyone, the Authority shall give that person the opportunity to be heard (in accordance with the principles of fairness and natural justice). The Bill also empowers the Authority to be able to summon witnesses and documents or things that are relevant to the subject matter of the investigation or inquiry, while according privilege to the Authority and witnesses in relation to the Authority's proceedings.

Following investigation, clause 28 stipulates the procedure where the Authority is of the opinion that the matter disclosed to it as public interest information has substance, appears to be unlawful, or a danger to the public. Once established, the Authority will refer the matter to the person concerned with a recommendation that appropriate action be taken. In accordance with this provision, the Authority may request that person to notify it of the steps it proposes to take (within a specified time) to give effect to the Authority's recommendation. Furthermore, the Authority may refer the matter to an

'appropriate enforcement agency' as described under subclause 28(6). These agencies may include (without limitation) the Solicitor-General and a variety of specialised offices, commissions and authorities. This enables the Whistleblowers Protection Authority to refer matters, from time to time, to bodies that are best versed in the specifics of a disclosure's nature.

Drawing on the expertise of a variety of authorities raises questions concerning the suitability of an independent authority if investigations will more than likely be redirected. As previously mentioned, such a stance has been adopted by Australian jurisdictions. However, establishing an independent authority to refer a matter for investigation has various advantages. First, the Authority can perform a screening function to hear initial disclosures and then redirect them to appropriate enforcement agencies if necessary. It ensures that where matters are referred, experts 'in the field' to which the disclosure is concerned investigates the allegation. This avoids the Authority itself having to first become immersed in the specific details and background of the matter.

Second, by enforcing that all disclosures first be directed to the Authority for whistleblowers to receive protection, the Authority is in a better position to monitor and control investigations, while enforcing ultimate accountability upon itself. The advantage this offers whistleblowers is the assurance of expert address and uniformity in response (through the information returned to the whistleblower by the Authority). Having thereby established the procedures of the Authority under Part IV, the Bill provides remedies for injury to protected informants under Part V.

7.5.5 Part V - Remedies for Injury to Protected Informants

Most notably, Part V of the Bill heavily employs provisions stipulated under Human Rights legislation. In relation to matters of disclosure, clause 29 makes

it unlawful to discriminate against anyone on the ground, or substantially on the ground, that a person has made, or intends to make, an appropriate disclosure of public interest information. Discrimination in this sense is stipulated as subjecting "a person to any detriment, or to treat or threaten to treat that other person less favourably, or to harass that person (Whistleblowers Protection Bill 1994).

Using sexual harassment and racial discrimination provisions from the Human Rights Act, subclause (29)2 of the Bill specifically outlines the areas that apply in relation to discrimination, such as in the making of an application for employment. This protection is reinforced especially in subclause 29(3) of the Bill for protected informants by regarding their status as if it were a prohibited ground of discrimination within the meaning of the Human Rights Act. In addition, the unlawful discrimination section established under Part II of that Act shall also apply.

In comparison to Australian jurisdictions, South Australia provides similar protection from victimisation under its Equal Opportunity Act 1984. However it should be noted that it does provide victimised whistleblowers with the option of seeking a remedy in tort, although no complaint to date has as yet been lodged. The Australian Capital Territory on the other hand broadly prohibits a person engaging, or attempting or conspiring to engage in an unlawful reprisal, although offers no address under Human Rights legislation. Instead, the Act is used as a single mechanism to hear a complaint of unlawful reprisal.

Complaints under clause 30 relating to a breach of protected informant are directed to a Complaints Division. This Division first hears cases where an informant's identity has been disclosed, and where he or she has been subjected to detriment or less favourable treatment or harassment in any of the areas described in clause 29 of the Bill. Clauses 31 and 32 of the Bill relate to the procedures that are to apply to whistleblower's complaints. These procedures

are drawn directly from provisions stipulated under the Human Rights Act, most significantly Parts III, IV, V and VII, and extend the grounds of prohibited discrimination as applied to certain other Acts to include discrimination by reason of protected informant status (Whistleblowers Protection Bill 1994).

In light of the Bill's weighty reference to Parts of the Human Rights Act, complaints about unlawful discrimination under Part III provide for remedies, costs, and damages. It is under these provisions that victimised whistleblowers are provided with a form of compensation for what they may have endured in 'acting responsibly'. Section 86 of the Human Rights Act outlines remedies which may be granted by the Complaints Review Tribunal as detailed in subclause 86(2). These provisions strengthen the cause for discriminatory address and thereby the protection and defense of the whistleblower.

Part III of the Human Rights Act also provides for costs of which the Tribunal may make an award as it sees fit, whether or not any other remedy is granted. Furthermore, section 88 empowers the Tribunal to award damages against a defendant for a breach of any of the provisions of Part II of the Act in respect of any one or more of the following:

- (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 (Human Rights Act 1993).

However, section 89 of the Human Rights Act places monetary limits upon what the Tribunal may grant as a remedy. For example, awards cannot exceed those already in place beyond the jurisdiction of a district Court. In this case \$200,000 (District Courts Act 1947). However, where the Tribunal is satisfied on the balance of probabilities that a defendant has committed a breach of Part II of the Act, and the granting of the appropriate remedy is outside the limits imposed by section 29, or may be better dealt with by the High Court, the Tribunal shall refer the granting of a remedy in those proceedings to the High Court. Therefore, as the High Court's jurisdiction is inherent, there is no statute imposed limit and so there is scope for awards over and above the jurisdiction of the District Courts Act. It is important that such a provision for extension exists where cases of loss may be significant. This in effect provides sufficient latitude for the Whistleblowers Protection Authority to award remedies in comparison to hearing cases in tort, as in the South Australian Act.

In South Australia's case where remedies in tort are offered, the potential for damages is unlimited. It is therefore obvious that the New Zealand Bill's drafters wanted to keep a lid on the possibility of exorbitant dollar amounts so that financial remedies do not become a form of incentive to prospective whistleblowers.

By adopting Parts III, IV, V and VII of the Human Rights Act, the Whistleblowers Protection Bill employs well established and proven procedures for the handling of complaints and their investigation. These will obviously require some form of modification so as to apply to the Whistleblowers Authority as recognised in clause 31 of the Bill. The exact extent of such modifications is unknown at this stage, but it is hoped that they will offer substance in protecting and assisting the complaints of whistleblowers.

7.5.6 Part VI - Miscellaneous Provisions

Part VI of the Bill pools together the remaining provisions that strengthen the Bill, in particular the integrity of information, delegations, liabilities and offences, savings, and subsequent amendments. In ensuring the integrity of information, clauses 33 to 35 require the Authority and its staff to maintain secrecy in matters that come to their knowledge. Of note is clause 33(2), which John Burrows, Professor of Law at the University of Canterbury, draws specific reference to. Where it is stated that the Authority can disclose such matters which in the Authority's opinion ought to be disclosed, Burrows queries whether this would encompass, in exceptional circumstances, disclosure to the public by the media if the public safety required it (personal communication, April 6, 1994). In some cases urgent notification to the public may need to be made, yet it is unclear whether this is actually covered under the Bill. This query is of special note considering such a provision exists for serious, specific and imminent danger to the health or safety of the public under the Queensland Bill.

While clauses 36 to 38 relate to the delegation of functions or powers by the Authority, clauses 39 and 40 pertain to the liability of employers and principles and the enforcement of offences. Considered to be one of the most significant shortcomings of whistleblower legislation around the world, the imposition of penalties for offences under the New Zealand Bill is no exception.

In particular, clause 40 makes it an offence for anyone who without reasonable excuse, obstructs, hinders, or resists the Authority or any other person in the exercise of their powers under the Bill, or who falsely contends that they have authority under the Bill. Those persons who commit an offence against the Bill are liable on summary conviction to a fine not exceeding \$2,000. While the New Zealand maximum may be higher in comparison to US fines that average around \$500, such nominal penalties offer little disincentive to retaliation, or to penalise persons who obstruct the Authority or make false disclosures.

Andrew Brien, lecturer in Philosophy at Massey University, contends that penalties under the Bill need be more draconian for subverting the Bill or attempting to do so. Brien believes that fines for individuals should start at \$25,000, payable personally, while conviction should carry with it a minimum of three months imprisonment and a maximum of seven years (personal communication, April 15, 1994). As for corporations, Brien contends that fines should begin at \$250,000 and extend to a maximum of \$5 million.

Whether such extreme penalties are needed to remind employers of their obligations under the Act is uncertain. However, stiffer penalties would go some distance in this cause. If for example corporate fines were as high as \$5 million, retaliatory conduct would more than likely be influenced to comply with the law. Nevertheless, whatever penalties are imposed, retaliation will more than likely continue. This in effect remains one of the major shortcomings under the Bill and identifies another limitation of legal whistleblower protection mechanisms. In light of both shortcomings and strengths, the following section will now make its final affirmation on the Bill.

7.6 Conclusion on the Whistleblowers Protection Bill

In the explanatory note that precedes the New Zealand Whistleblowers Protection Bill, it is affirmed that "public accountability and the ethic of openness are essential elements of a democratic society and for promoting the well being of the community" (see Appendix B). In an effort to achieve these elements, the Bill proposes a mechanism whose purpose is to facilitate and encourage, in the public interest, the disclosure, investigation, and correction of specified conduct or activity mentioned within the Bill. In doing so, the Bill provides for the protection of persons, commonly known as whistleblowers, who make disclosures of public interest information to a designated authority.

The proposal of a statute of this nature has extensive implications for the fabric of society. It would provide a legitimate channel whereby those persons recognised as acting responsibly and in the public interest, are provided protection from the possibility of retaliation. In effect, the Bill attempts to overturn the stigma associated with informing on wrongdoing to the benefit of the majority - a goal of a democratic society.

However, uncertainty exists as to the degree such an ideal can be achieved without becoming authoritarian. With regard to the New Zealand Bill, certain strengths and weaknesses are inherent. Of these, four notable features emerge. These are the constitution of an *independent authority* to hear and investigate disclosures of wrongdoing and retaliation; the provision of a *counselling and advice service* to persons who have made, or are about to make, appropriate disclosures of public interest information; a level of protection that offers whistleblowers *protected informant status*; and a provision for the *penalising of offenders* convicted of offences stipulated under the Bill.

In providing for a Whistleblowers Protection Authority to be constituted, the handling of whistleblowers' disclosures becomes centralised under one governing authority. While such an initiative has not been taken up by Australian jurisdictions and has suffered extensive problems at the federal level in the United States, its proposal here in New Zealand has been met with mixed responses. For example, it is argued that the functions the Authority provides may be carried out by empowering existing authorities. This would avoid the expense of initial set up costs and the complexities of overlapping jurisdictional functions with other bodies. On the other hand, the enactment of a centralised body to receive and investigate public interest disclosures makes the Authority ultimately accountable for the handling of complaints, even when referred to an appropriate enforcement agency under the Bill. A central authority would also have greater control over the complaint process and has the advantage of providing uniform responses in investigation and advice. Furthermore, a central

independent authority is more visible to the public it aims to serve. In retrospect, the enactment of a single authority has the advantage of a clean slate. So long as it fulfils its mandate and does not repeat the experiences of the United States' Office of Special Counsel, the Whistleblowers Protection Authority proposed by the Bill should offer a vital role in the protection of whistleblowers.

While the Whistleblowers Protection Authority is empowered to receive and investigate whistleblowers' disclosures, one of its most important functions is to provide counselling, advice, and assistance to prospective and protected informants. This centralised service would act to inform protected and prospective whistleblowers of the protection and services offered by the Authority, while simplifying the interpretation of the law for those to whom it applies. More specifically, this service informs the complainant of how the legal mechanism would apply to the individual circumstances of their case and the possible implications thereof. As previously mentioned, this function provides a vital service to whistleblowers by establishing an easily recognised and specialised authority, while minimising the potential for variances in consultation that may occur in multiple authorities. Overall, this feature of the Bill makes significant inroads by helping to break down the initial barriers that potential whistleblowers face (as in stage two of Miceli and Near's whistleblowing model), while also clarifying any ambiguities or perceptions of what can be offered to whistleblowers. In short, the Authority offers potential whistleblowers with an informed decision, and also support to those who disclose information.

The third factor of note within the Bill is the level of protection provided to protected informants. By providing an informant with this status, whistleblowers are able to enjoy protection from discrimination within the meaning of the Human Rights Act. Furthermore, having protected informant status provides whistleblowers with immunity from civil and criminal proceedings. While this protection does not greatly extend those protections in place under the

Employment Contracts Act, Human Rights Act or under common law, what it does aim to provide is reinforced protection prior to disclosure. This in effect hopefully avoids a variety of differing forms of retaliation that may follow disclosure. It offers remedies, costs and damages and other relief that the Complaints Tribunal thinks fit. Yet while these provisions attempt to compensate a whistleblower's loss or experiences, it is arguable that they fully recognise whistleblowers as 'acting responsibly and in the public interest', as the purpose of the Bill intends. This would more than likely have the effect of keeping potential whistleblower's motives honest, and therefore fail to actively encourage disclosures to the extent that the offering of financial incentives have shown in the United States. In meeting the primary purpose of the Bill to 'facilitate and encourage whistleblowing' through protection, the protection factor plays a vital role in deterrence to would be offenders so that such legal mechanisms need not be required. This therefore leads this study to the Bill's provision for the penalising of offenders convicted of offences.

To a significant degree, the penalties within a statute have a considerable influence on the extent to which its provisions are complied with. Although not designed to curtail behaviour, the severity of penalties should be significantly more than the cost or damage that an offender's action, or inaction, may have caused. The nominal penalty imposed under the offences section of the Bill raises the question of the Bill's commitment to its intended purpose and affirmation. This paradox generally defeats the purpose of having protection if it is unlikely that an Act's provisions will be adhered to. However, in a personal capacity, the stigma of a conviction itself may be significant, yet such a conviction would more than likely be regarded as technical in an organisational context. In short, it can be argued that enforcing whistleblower protection in the form of a nominal deterrent is like withdrawing the central stabilising column in a colosseum. To be effective in protecting whistleblowers the Bill must have teeth. As this provision is vital to the success of the Bill, it too is likely to experience similar failings as those which have been encountered overseas. So

while New Zealand has in many ways learnt from the lessons of overseas' whistleblower protection mechanisms, there are still lessons to be learnt.

The determining factor that will decide the success of the legislation is whether it offers enough to motivate whistleblowers to come forward. If this is not the case, whistleblowers will remain reluctant to come forward and will either accept the dilemma imposed, or will reassess the outcomes of the complaint and make decisions concerning future activities (as in the feedback loop from stage five to stage two of Miceli and Near's whistleblowing model).

Nonetheless, the Bill is still able to overcome this shortcoming as it is yet to be heard and addressed by the Justice and Law Reform Committee. If the deterrence factor of the Bill is then addressed, whistleblowers are more likely to act in the public's interest in greater confidence knowing that wrongdoers are less likely to retaliate. However, despite such provisions, legal mechanisms will never completely eradicate wrongdoing nor retaliation against whistleblowers. In light of the environment in which such mechanisms operate, there must obviously be 'other elements' in the protective formula. It is proposed that such alternative approaches could operate under the more direct control of those whom whistleblowing is first triggered - for example, the organisation. Bearing this in mind, it is necessary that the potential for greater protection be explored. It is then to chapter eight that this study will now turn.

8. ALTERNATIVE APPROACHES TO WHISTLEBLOWER PROTECTION

8.1 Introduction

In chapter seven the New Zealand approach to whistleblower protection was broadly examined in two parts. The first part focused on existing mechanisms of protection, while the second part focused on that proposed under the Whistleblowers Protection Bill. Examination of both mechanisms identified the need to protect whistleblowers, yet raised concerns over the focus and appropriateness of legal mechanisms of protection. Taking these concerns into consideration, it was proposed that there must be other elements or approaches that are not addressed by such mechanisms. The purpose of chapter eight is to therefore explore some of these alternative approaches so that whistleblowers are provided with the most receptive environment possible. This will be first addressed from a broad perspective.

World renown economist, Milton Friedman, has argued that the social responsibility of business is to increase its profits and states that one should "make as much money as possible while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom" (cited in Beauchamp & Bowie, 1988, p. 87). Indeed it can be argued that many businesses today seem to be not only following this strategy, but surpassing it. However Solomon (1992) contends that it is precisely some of those 'ethical customs' of contemporary business that should concern us, along with the practices that support and sanction them.

The question of whether good ethics is good business has been researched with many executives of the opinion that it is, yet it was proven in particular circumstances many would themselves act in an unethical manner (Brennan,

Ennis, & Esslemont, 1992). Whether there is a direct correlation between ethical behaviour and successful business is unknown. In 1982 James Burke, chief executive of Johnson & Johnson, put together a list of major companies that had paid a lot of attention to ethical standards (Labich, 1992). He found that the market value of the group (ie, Johnson & Johnson, Coca-Cola, Gerber, IBM, Deere, Kodak, 3M, Xerox, J.C. Penny, and Pitney Bowes) grew at 11.3% annually from 1950 to 1990, whereas the growth rate for Dow Jones industries as a whole was 6.2% over the same period.

It may therefore be assumed that good ethics is indeed good business and that focusing solely on 'the bottom line' can be detrimental to the long-term growth and success of an organisation. Not only may poor business ethics, or ethical practice, be an influence upon poor organisational growth, but it may also be costly. For example, Labich (1992) highlights that:

under the new [US] federal sentencing guidelines, corporations face mandatory fines that reach into the hundreds of millions for a broad range of crimes - antitrust violations, breaking securities and contract law, fraud, bribery, kickbacks, money laundering, you name it. And that's if just one employee gets caught (p. 172).

While such extravagant amounts do not exist here in New Zealand, the threat of fines and/or imprisonment are substantial enough to remind the felon of the risk they run if caught. Yet with regard to whistleblower legislation, chapters five, six and seven have identified that such mechanisms contain a variety of shortcomings. These are now addressed in the following section.

8.2 Legal Considerations

Despite the intentions of the legal system to prosecute and deter wrongdoing, difficulties exist in legislating moral values. Mulholland (1990) contends that:

[n]ot all values exhibited in a particular society will be reflected in the legal system. This becomes evident when the question of moral values is considered: that is, those aspects of the value system which are concerned with the more intimate personal, including sexual, relationships Many factors can operate to determine whether or not an act generally regarded as immoral will be considered a crime in our law. These can include difficulties in defining such acts, the obvious problem of the prevalence of such acts and difficulties in respect to obtaining evidence There is thus some degree of overlap between law and morality but the two do not, by any means coincide completely (p. 2).

The complexity in legislating issues involving morality in New Zealand is therefore extremely difficult, and is further exacerbated by a shifting societal value system. Needless to say, this difficulty is also experienced by any country which attempts to legislate issues of morality. In addition to this difficulty, is the battle against a long standing societal culture that has consistently discouraged moral related disclosures. Nevertheless, Phil Goff's Bill has initiated a journey to legislate against wrongdoing in the public's interest and the victimisation of those who bring it to notice. However the destiny of this journey can possibly be foreseen when compared to the legal mechanisms that have been introduced elsewhere.

In order to assess the merits of legislation as a mechanism to protect and encourage whistleblowing, it is necessary to bring together and recap the points that have emerged throughout the study thus far. First and foremost, whistleblowers are primarily motivated by 'expected effectiveness', that is to

have their concerns addressed (Miceli & Near, 1992). While the development of substantial incentives at the federal level in the United States adds a new element to this premise, evidence from research conducted on federal employees suggests that cash awards only motivated a very small number of organisational members (Miceli, Roach, & Near, 1988).

Second, Miceli, Roach and Near's (1988) findings on federal employees suggest that fear of retaliation is not a primary deterrent to whistleblowing. Instead it was found that retaliation was unrelated to a whistleblower's avowed willingness or unwillingness to blow the whistle again, should the need arise. This finding is consistent with previous research on the area, for example Near & Jensen, 1983; and Parmerlee, Near, & Jensen, 1982.

Third, retaliation is not the ordinary response to whistleblowing. Miceli and Near (1989) more commonly found that the whistleblower receives neither organisational support and encouragement nor retaliation. As previously mentioned, this is not to say that retaliation does not occur, or that its impact is any less than sometimes horrific, but that certain types of cases are more likely to provoke negative reactions than others.

Fourth, Dworkin and Near's (1987) preliminary assessment on the effectiveness of early whistleblower protection in American states, discovered that: 1) statutes are not effectively motivating potential whistleblowers to file cases, 2) state statutes are either not perceived as effective, or are not adequately understood, and 3) state statutes are either having the unanticipated effect of encouraging organisations to change their policies while being more receptive to internal whistleblowing, or that the risks of blowing the whistle are still far too great to warrant disclosure.

Finally, Caiden and Truelson (1988) have made several judgements on US statutes stating that: 1) the interpretation of the law is biased toward the

establishment, 2) many statutes contain numerous administrative and procedural deficiencies, 3) the law cannot effectively sanction organisational deviance, and 4) the law is primarily a reactive institution.

In light of the above research and commentaries, it is necessary to remember that while these propositions are based on preliminary findings and personal belief, they are subject to several limitations. For example, cause-effect relations cannot be established for all the findings due to the nature in which some areas have been examined. For example, the items included in the surveys may not be adequate or the most appropriate to test a study's propositions. Nor can some sample populations be compared to other kinds of organisations due to the generalizability of the target populations, such as public versus private sector organisations. Finally, as these points have been largely based on protections established in the United States, they cannot in many circumstances, be completely compared to legal frameworks enacted or proposed in either Australia, or here in New Zealand.

Considering that Australian legislation is so recent and has as yet been untested, while proposed New Zealand legislation is still at the review stage, US whistleblower statutes are the only legal mechanisms that have been tested and can therefore be truly assessed. However, this is not to disregard inferences made on Australian or New Zealand approaches, but that until a number of cases have been heard in light of such mechanisms, an accurate assessment of their effectiveness cannot be made. Nonetheless, it is important to note that while the structure of each country's legal framework, work ethic, and societal values vary, elements of US findings can still be applied to both nations. Further to this, it could be argued that the major failure of legal mechanisms to deter whistleblower retaliation is its nominal penalties, or lack of teeth. While penalties for wrongdoing can be quite substantial in the US, "Congress does not see employer sanctions as a major weapon in the fight against retaliation" (Dworkin, 1992, p. 237). This is also true of many American states who take this

view with the most common fine being \$500, while a few states provide for the suspension or discharge of the offender, while others make a violation a criminal misdemeanour (Dworkin, 1992).

Under the South Australian Whistleblowers Protection Act 1993, those persons who commit an offence of false disclosure may incur a penalty of up to a maximum of \$8,000 or 2 years imprisonment, yet no penalty is clearly stated for an act of victimisation. Instead, the plaintiff may seek remedy in tort, or as if it were an act of victimisation under the Equal Opportunity Act 1984. In contrast, under the New Zealand Whistleblowers Protection Bill 1994, every person who commits an offence is liable on summary conviction to a fine not exceeding \$2,000. Needless to say, such penalties would do little to deter employers from victimising whistleblowers, and could have the reverse effect of actually deterring whistleblowers from coming forward. This raises the question, would the creation of stiffer penalties make any difference in deterring victimisation? The answer to this is uncertain as no significant victimisation penalties exist to make such comparisons. Nevertheless, a broad comparison can be made with organisations that are aware of wrongdoing and the substantial penalties they carry, yet continue such conduct or activity. Bearing this in mind, it could be assumed that victimisation would probably continue regardless of the severity of a penalty, although not to such a great extent. Nor would there possibly be any influence on the existing rate of whistleblowing from the threat of victimisation, considering a whistleblower's primary motivation is not the punishment of the organisation (in most instances), but by the expected effectiveness that their concerns will be addressed (Miceli & Near, 1992).

This raises further questions, such as what will it take to motivate potential whistleblowers to speak out - some form of incentive, possibly financial? Considering whistleblowers have been found to be primarily motivated by expected effectiveness, it would suggest that financial incentives would play no major role in prompting whistleblowing. However evidence recently identified

in some federal statutes indicate that the substantial financial incentives that can be gained have markedly increased the number of whistleblowing suits filed (Miceli & Near, 1994).

This dichotomy however may be explained by Vroom's 'expectancy theory' which asserts that people will be motivated (to take action) when they expect they will be able to achieve the things they want (from their action) (Robbins, Waters-Marsh, Cacioppe, & Millett, 1994). Therefore, expectancy theory recognises that rewards or outcomes will motivate different people at different times in different ways. Therefore while the primary motivation of most whistleblowers may be expected effectiveness, for others it may be a financial reward (although it is difficult to assess whether a direct correlation between the two exists in this case).

Possibly a more appropriate theory of motivation to explain the increase in whistleblowing suits filed is that of 'cognitive evaluation theory'. This theory asserts that people have an internal source or causation for doing things, that is, 'intrinsically motivated behaviour', for example, personal interest (Robbins, 1993). Whereas in comparison, an extrinsically motivated behaviour has an external source or causation, for example where a person performs a task in order to obtain a reward or comply with an external constraint. Therefore under cognitive evaluation theory, rewarding an intrinsically motivated activity extrinsically has the effect of shifting toward the external an otherwise internal source of motivation (Callahan & Dworkin, 1992).

While preliminary evidence suggests incentive based statutes appear to be achieving their desired effect, the issue remains contentious. Remedies under most jurisdictions offer the whistleblower back pay, reinstatement, and in some cases actual and punitive damages, yet do not wholly compensate for the emotional and physical upheaval victimised whistleblowers sometimes incur. Therefore the offer of a reward may be viewed by the whistleblower as a form

of compensation for actual victimisation, or, the potential for victimisation, thereby adding a further variable to the perception of financial rewards as a motivator for disclosure. To understand the limitations of the before mentioned considerations, it is important to view them from the wider context in which such mechanisms operate - the environment.

8.3 The Environment, Culture, and Climate for Whistleblowing

Taking the research on retaliation and the focus of the legislation into consideration, directs one to the opinion that there must obviously be 'other elements' outside of the legal approach that must be employed so that whistleblowers can be adequately protected and encouraged. In order to do this, a shift in paradigm is required, moving from the legal address being primarily focused on the act of retaliation and the facilitation of disclosures, to a holistic and environmental address that actively encourages whistleblowing in consideration of the primary motivation of whistleblowers. Notably, it is recognised that there are dangers in 'encouraging whistleblowing' (especially through financial incentives), therefore it is important to first establish an open environment with an infrastructure supportive of whistleblowing, where all parties are equitably treated.

Professor John Goldring, Dean of Law at the University of Wollongong contends that:

[t]he basic issue of protecting whistleblowers is one of culture. The employment culture, the corporate culture and the union culture all regard 'dobbing' as bad. Those who are disloyal to the corporation or the union are ostracised. When a government is trying to corporatise its management structures, it is ironic that it should be trying to throw out

one of the essential ingredients of the corporate structure - corporate loyalty" (cited in Sumner, 1993a, p. 7).

Therefore to adequately protect whistleblowers, the culture of the environment must change and in turn shape a climate or set of conditions in which 'dobbing' is accepted. This opinion is supported unanimously by researchers in the area of whistleblower protection and business ethics (eg: Glazer & Glazer, 1989; Westman, 1991; Dworkin, 1992; Fox, 1993; Brien, 1994; and Miceli & Near, 1994). However attempting to change or alter something as deep as the beliefs, values and norms that guide behaviour is a difficult task, with considerable debate over whether such change is indeed possible.

Addressing the issue of environmental change to both encourage and better protect whistleblowers may be achieved from two angles. The first of these is the address of society as a whole. By changing New Zealand society's perspective of what is regarded as wrongdoing and selling the benefits of having loyal citizens such as whistleblowers in the community, whistleblowing would be viewed as beneficial and therefore encouraged. Furthermore, victimisation would be seen as detrimental to society, and would therefore be discouraged and further penalised by harsher means than those that presently exist.

While this kind of environment may be the ideal for many, it would certainly be extremely difficult if not impossible to achieve or sustain, nor would it be without its problems. From a realistic perspective having to look over one's shoulder all the time, and be extremely thorough in everything one does is not part of human nature and is therefore unrealistic nor expected. Nevertheless, endeavours should still be pursued to achieve the most responsive and equitable environment possible. One method in which New Zealand attempts to do this is through statute law. Such strategies are implemented to assist the government to enforce its policies in reflection of social and economic changes (Mulholland,

1990). However as previously mentioned, such mechanisms are not without their shortcomings.

If external mechanisms such as the law and their associated authorities are relatively restricted in providing whistleblower protection, internal mechanisms must offer the next best hope. This then leads to discussion of methods that may reform the internal environment and climate of the organisation in which (current or former) whistleblowers are or were employed, promoting what William De Maria calls a 'culture of dissent' (B. Martin, personal communication, December 6, 1993).

At this point it is both important and necessary to define and differentiate between an environment, an organisation's culture, and its climate. The environment can be defined as a person or society's surroundings, or circumstances of life (Sykes, 1982). An organisation's culture on the other hand, is defined by Smircich as "a system of shared values, assumptions, beliefs and norms, that unite members of an organisation" (cited in Bartol & Martin, 1991, p. 103). While organisational culture is often perceived as a 'way of doing things around here', it should not be confused as one in the same as an organisation's climate which tends to be more dynamic. An organisation's climate may shift while still remaining within the bounds of organisational culture. Climate can be best defined as the state of interactions within the organisation which create either positive or negative feelings, and therefore attitudes which comprise the climate of organisational relationships (Bedian, 1986).

While efforts to influence change in the culture of an environment, whether societal or organisational, are considered contentious, the possibility of changing an organisation's values and beliefs is considered much more likely in comparison to those of society. Evidence of organisational culture change has been seen in the rebuilding stage following the world stock market crash in 1987, and largely involved programmes of 'restructuring' in order to change past

behaviours and practices. Culture is indeed an important consideration in the design of organisations because of its great influence on the behaviour and performance of employees (Pearce & Robinson, 1989). Therefore if culture change is to refocus work-related attitudes, management will need to employ strategies of persuasion for the shift to be effective (Greenberg & Baron, 1993).

If whistleblowers are therefore primarily motivated by expected effectiveness, the most important incentive an organisation's culture can offer potential whistleblowers is its willingness to correct the wrongdoing (Miceli & Near, 1994). Therefore an organisation's culture will need to shift from ignoring wrongdoing and internal whistleblowing, or worse victimisation of whistleblowers, to being open and responsive to employee concerns. This creates a climate in which not only is it safe to disclose information of concern, but provides confirmation that meritorious complaints will be addressed. In this way, both parties win. The employee is recognised for alerting a problem while keeping intact and even enhancing their commitment of organisational loyalty. The organisation wins because it saves face by the problem not being reported externally and possibly being penalised, while it is also provided it with the perfect and possibly earlier opportunity to address the problem (for examples see Table 4-1). Therefore to ensure that the beliefs, values, and norms of the organisation are continually reinforced, it is important that the climate *sustains* positive attitudes amongst organisational members.

One advantage of creating a supportive climate that is open to employee concerns is that it will also help avoid some of the inaccuracies that sometimes occur in reporting, or the feedback of information. For example, it is contended that employees tend to report only positive information that their superior would wish to hear, rather than negative information that they should hear (Greenberg & Baron, 1993).

However creating and influencing an organisation's climate and culture is an extremely difficult exercise, especially in attempting to change the values and beliefs that the majority of employees have held for a period of time. In response to this difficulty, Cummings and Huse (1989) have derived from the literature on corporate culture change the following practical advice:

- 1) Establish a clear strategic vision.
A clear vision of the organisation's new strategy and the shared values and beliefs is needed to ensure success. This vision is said to provide the purpose and direction for personal change, while also acting as a yardstick for comparing the organisation's existing culture and for deciding whether proposed changes are consistent with new values.
- 2) Ensure senior management commitment.
Effective cultural change must have senior management's commitment to the new values. Top management also need to create constant pressures for change.
- 3) Provide evidence of symbolic leadership.
Senior management must communicate their new culture through their behaviours. These must symbolise the kind of values and behaviours being sought.
- 4) Support organisational changes.
To establish cultural change, the organisation must have a supportive infrastructure. This includes possible changes to organisational design, human resource systems, information and control systems, and management styles.

- 5) Select and socialise new comers and terminate deviants.
Select and terminate the employment of those organisational memberships that are akin with the new culture, or in other words, those that meet the requirements of 'organisational fit' (Marshall, 1991). This is most important in key leadership positions where leadership actions will have an influence on employee's values and beliefs.
- 6) Ensure ethical and legal sensitivity.
Changes to organisational culture may cause conflicts of interest over the values and beliefs that the organisation wishes its employees to adopt. This may create ethical and legal problems for the organisation of which it must be aware and address if necessary. However for cultural change to be effective, the organisation must remain committed to its new values and beliefs.

Having now identified some of the 'broader elements' considered important in providing whistleblowers an environment offering better protection, a variety of organisational mechanisms exist that can aid this cause. If implemented and managed correctly, these mechanisms can help organisations achieve an environment that is constructive for both whistleblowers and their organisations. Some of these internal mechanisms will now be explored.

8.4 Internal Mechanisms of Whistleblowing

In light of the legal considerations previously identified in this chapter, legal mechanisms of whistleblower protection have tended to be inappropriately focused and generally reactive to victimisation. In contrast to this, it has been argued that internal mechanisms can provide senior management the opportunity to be proactive in creating a positive climate for correcting wrongdoing (Miceli & Near, 1994). Provided with this opportunity to change the

existing organisational culture, sometimes referred to as 'corporate culture', organisations can meet the expected effectiveness of whistleblower motives.

While Cummings and Huse (1989) have provided some good advice on how to go about changing an organisation's culture, Miceli and Near (1994) have narrowed this focus more specifically to adopting a culture that provides organisations with an internal mechanism that both encourages whistleblowing, and addresses wrongdoing. They propose six steps to do this.

Similar to Cummings and Huse's (1989) first advisory stage, **Step One** of Miceli and Near's adaption requires that an organisation must *define wrongdoing and its consequences*. In defining what the organisation perceives as wrongdoing, all parties who play a role in establishing a climate conducive to whistleblowing must be involved. This would possibly include the board of directors (if an organisation has one), senior management, middle and/or supervisory management, right through to employees at the lowest levels. All members should have the opportunity for perspectives to be shared, especially in conjunction with the consultation of specialists experienced in likely areas of wrongdoing. Examples would include both internal and external auditors, human resource management professionals and legal council, all of whom would provide a much richer and more comprehensive perspective for top management to make decisions.

In clarifying beliefs about what constitutes wrongdoing and helping in the identification of problem areas, Miceli and Near (1994) propose that managers should focus on several key questions, such as:

- What kind of an organisation are we?
- What are our values and standards?
- What are our ethical obligations?

- What are the costs and benefits of enacting our values and meeting our standards?
- What are we willing to do to ensure that our values and standards are upheld in practice (p. 66)?

In answering these questions, organisations must also address any related areas that may harm other parties other than the stakeholders of the organisation, such as meeting health and safety conditions and human rights obligations. In the long-term interests of the organisation, it is best that the organisation view wrongdoing as ongoing and changing.

In **Step Two**, the organisation must *communicate its policies and codes of ethics*. Once desirable and non-desirable actions have been identified, they should be implemented within the organisation's policies and codes of ethics. These policies and codes should contain specific examples of questionable activities so as to help clarify their interpretation by staff. Once drawn up, policies must be clearly communicated throughout the entire organisation. Simply publishing policies and codes of ethics is not enough. It is recommended that such policies should become part of the organisational culture and reward system, with training provided to help organisational members take the initiative in reporting wrongdoing. The undertaking of internal public relation campaigns has proven successful in communicating new policies (Peart & Macnamara, 1990) and may therefore be another useful channel in which to communicate the desired culture. However, Miceli and Near (1994) emphasise that care should be taken to ensure that employees understand that the purpose of the training is to improve the work climate in the *future* rather than to highlight cases of *past* incidents. Finally, for employees to believe and take up the new culture, managers must model the values they wish employees to emulate.

In a review of recent research conducted on the use of Internal Disclosure Policies/Procedures, or IDPPs, significant increases in the number of internal

disclosures by employees after implementation have been found (Barnett, Cochran, & Taylor, 1993), while respondents also reported a significant decrease in the number of external disclosures after IDPP implementation. Furthermore, organisations with IDPPs had a significantly higher level of internal disclosures than organisations that did not have such mechanisms. Finally, respondents reported a marginally significant association between the responsiveness of management to employee-voiced concerns and the level of internal disclosures by employees. One New Zealand organisation that has recently implemented their own form of IDPP to success is Mercy Hospital in Auckland (McTurk, 1994).

Another method in which an organisation's values, beliefs, norms, and expectations could be communicated, is through the organisation's code of ethics. While many of the respondents to Brennan, Ennis, and Esslemont's (1992) New Zealand study did not have a code of ethics (62%), almost all (92%) those who had a code thought it was useful. Although it is recognised that codes of ethics, company policies, nor mission statements will create an ethical environment alone and tend to carry many faults (Molander, 1987), they can be used as effective 'working documents' if people truly believe and understand them (Brien, 1993).

In order for the organisation to reinforce its commitment to addressing complaints of wrongdoing, it must have *established complaint recipients*; **Step Three**. The benefit of having nominated complaint recipients is that it provides a focal point for potential whistleblowers to disclose their concerns or seek advice. These persons should be elected carefully and should have experience or training in the handling of complaints. Examples may include the establishment of an ethics committee or ombudsman. Where no such person(s) exists, recruitment could be sought external to the organisation, however it would be more favourable to appropriately train an internal member that is already familiar with the organisation's business strategies. It is also important

that these complaint recipients are also known to be trustworthy, approachable, and committed to problem address. Prior to contacting these recipients, there must be a clear complaint process in place for informants to follow. Once established, the organisation is at liberty to employ further mechanisms to encourage internal whistleblowing.

Step Four encourages the *utilization of alternative reporting mechanisms*. As an alternative or in addition to reporting to a nominated complaint recipient, employees may feel more comfortable reporting through a suggestion system (Miceli & Near, 1994). This is to accommodate individual differences in communication preferences and may entail either oral or written media. For example, where one person may wish direct contact, others may pursue complaint address anonymously, or by other means apart from direct contact with the complaint recipient. This may be for a variety of reasons. Whatever the case, if an organisation is to respond to the presumption of expected effectiveness, and just as importantly keep disclosure within internal channels, it must ensure the least number of barriers possible to show that it is truly committed to resolving wrongdoing.

The creation of suggestion boxes and set programmes may be launched to encourage potential whistleblowers to speak out, and may follow the organisation's internal public relation campaigns as previously mentioned. One channel that may be employed in conjunction with this campaign is the use of telephone hotlines. An employee could call in, choosing anonymity or not, and advise an appointed party of their concern. A review of the US General Accounting Office's 'Whistleblowing Hotline', projected possible annual savings of \$24 million, in addition to the 'one-off' \$20 million identified in misspent federal funds (cited by Bruce Carpenter, 1993). With a potential strike rate such as this, telephone hotlines provide a viable alternative.

A second internal mechanism that may help address a complaint of whistleblowing, could be through the employment of an 'in-house' review panel. If complaints are not initially addressed by the complainant's supervisor, or are assessed by a person otherwise inappropriately skilled to address the complaint, a review panel may help in addressing the concern. The review panel could be made up of employee nominated staff, or a mixture of management and staff that possibly turns over from time to time. These panellists should be specially trained in dispute resolution techniques if their decisions are to be accepted as credible. For lesser complaints, the utilization of a 'peer review process', without the influence or input of supervisors or management, could be employed such as quality circles or autonomous work groups.

If the choice of mediation is by-passed, or its decision is unsatisfactory to either or both parties, another alternative to settle whistleblowing complaints could be via arbitration. Where an agreement has not been reached through mediation, the concerned parties may agree to settling the grievance through the decision of a third party without recourse to the courts of law. The Arbitrators' Institute of New Zealand Incorporated exists to provide such a service, and advocates the use of arbitration to the benefit of all parties involved in dispute resolutions (Green, 1993).

Under **Step Five**, it is important that *managers are seen to take action*. First of all, they must take care to devise fair and effective responses to whistleblower complaints, and should be thoroughly trained in the organisation's procedures for handling such issues and the need to be considerate of employee rights (Miceli & Near, 1994). Considering most managers or supervisors will be the first point of reference for internal whistleblowers, it is important that they are adequately trained in how to deal with complaints, or their direction to other parties. If the complaint is taken up and actioned, it sends a powerful message to others that management is committed to the new policies and that complaints will be addressed. On the other hand, if no action is warranted, it must be

clearly communicated as to why no action was taken. Ensuring that employees understand this is vital to sustaining the organisational culture of encouraging whistleblowing in the long-term.

While internal mechanisms should be designed to encourage legitimate complaints, there should also be procedures in place to handle the possibility of abuse by employees who claim to be whistleblowers, but are merely disgruntled poor performers. Miceli and Near (1994) suggest three steps that can be taken to protect managers from such abuses. First, managers should leave a paper trail in performance appraisal. If disgruntled workers have performed poorly in the past, incidents should be clearly documented throughout the year in performance meetings and reports, and reviews to senior staff. Second, the organisation's performance appraisal process should have a progressive disciplinary system built into it. By clearly communicating organisational actions for poor performance, employees are educated as to what levels of performance will equate to particular levels of discipline, for example counselling, warnings or written reprimands, suspension or other actions, and how such disciplines will be handled. The organisation on the other hand, protects its interests by following 'procedurally correct' disciplinary measures in line with employment court decisions (Rudman, 1994). Third, managers should refer to a third party when employment termination is contemplated. This party can then objectively review the termination process to ensure that the documentation is complete and that based on such information, the disciplinary action is fair and warranted.

The **Sixth Step** of providing *incentives* has recently grown in popularity. While research proposes that the majority of whistleblowers are motivated by expected effectiveness, the use of incentives as a motivator has been utilised to encourage those potential whistleblowers who may be motivated by other means. However, there are dangers to those who blow the whistle primarily for financial reward. They are likely to be viewed as just as bad as the wrongdoers and may be ostracised from the work group.

To a large extent, the only limitations upon strengthening an organisation's culture supportive of whistleblowing are those that organisations place upon themselves. However the challenge comes in sustaining an organisation's climate so that it does not become stale or complacent. As Table 4-1 depicts, the benefits of whistleblowing and the costs of inaction for the organisation far outweigh its alternative in the long-term. Therefore the message that both external and internal mechanisms should be sending, is that of the importance of educating both their direct and indirect publics. For the more organisations and groups that adopt the principles of whistleblowing through this message, the more that society can benefit as a whole.

While an organisational culture containing people who 'fit' with its values and beliefs may be the ideal, it is generally unrealistic to believe that an organisation would obtain 100 percent commitment and uniformity of belief. Changing people's values and attitudes does not occur over night if at all, nor on the other hand can wrongdoing be easily stamped out. These things take time. What organisations, and hopefully society must do is create and foster 'citizenship behaviour' where a culture of voluntary actions are performed without the expectation of rewards (Greenberg & Baron, 1994). While it is accepted that not everyone will or can conform, and that there will always exist wrongdoing and wrongdoers, it does not necessitate that such a culture should not still be sought. On the contrary, all efforts should be actively encouraged to achieve the goal of corporate responsibility.

Having now completed a thorough address of the topic at hand, it is necessary to conclude the study by briefly revisiting the main themes which have emerged and to answer the research question. In doing so, the study now make its final conclusion in chapter nine.

9. CONCLUSION

9.1 Summary

This exploratory study has revealed that the protection of whistleblowers is a complex and difficult process not readily resolved by the enactment of legal mechanisms. It has broadly explored and highlighted the phenomenon of whistleblowing and its protection thereof through the examination of current research literature and legislation overseas. Having established this frame of reference, comparisons were made with proposed whistleblower protection here in New Zealand. This broad perspective was necessary due to New Zealand's developmental stage in whistleblower protection in both a research and statutory context.

In order to address the effectiveness of such proposed legislation and to answer the research question, 'will the New Zealand Whistleblowers Protection Bill adequately protect whistleblowers if enacted', it is necessary to first summarise the issues that relate to such protection. Once summarised, the main themes of the study will be revisited and analysed.

Most notably, this study has demonstrated that there is a growing divergence between academic and legal approaches to defining and protecting whistleblowing. Within the literature on whistleblowing, there has been a general lack of agreement regarding its *precise* definition, although as has been previously identified, most examples contain similar themes. This debate has centred on various points such as the channel used and the audience to which a disclosure is made. For the purposes of this study, Near and Miceli's (1985) definition was adopted for its broad address, namely:

the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons or organisations that may be able to effect action (p. 4).

Yet from a legal perspective, statutes overseas have avoided defining whistleblowing and have instead defined the circumstances in which whistleblowers will be protected from retaliation. This definition has tended to be fairly narrow and specific. However when the legal interpretation of American, Australian, and New Zealand 'whistleblowing circumstances' are examined, it can be seen that these jurisdictions are in fact altering the definition of whistleblowing as defined by academics like Near and Miceli. As a result, the variance between academic and legal definitions widens. This in turn has raised the question of just what the appropriate elements for inclusion in a definition of whistleblowing should be?

By comparing the two approaches, variations on similar themes emerge. For example, both recognise the person making the disclosure, both indicate the questionable activities of concern, and both recognise that receivers of the disclosure must be in a position of power. While these themes or elements are broadly similar, the respective methods in applying them to whistleblowing as previously outlined are quite different. Furthermore, both approaches have similarities in defining the process of whistleblowing through various stages. For example, research has provided a simplified model that divides the whistleblowing process into five stages. Analysis of the model reveals it is itself a type of framework for legislation. For example, someone identifies and decides to report on a perceived wrongdoing, this in turn raises questions of what happens to that person, what goes on inside the organisation, what goes on in the person's life, and what the eventual outcome is. So in many ways whistleblower legislation simply follows the academic model. However at the end of the day despite what ever the model or relevant legislation may cover,

it must be asked what does society actually do about whistleblowing and wrongdoing in practice?

To address this question we need to return to the wider context of the environment and address the state of its values and attitudes. This review reveals the predominance in more recent times, of the role of ethics in society, or what Mulholland (1990) refers to as a 'value trend', and the influence of various societal changes. These changes recognise that employees may no longer hold work related attitudes where they centre themselves around the organisation and in turn the organisation centres itself around them. Indeed, it appears that a more individualistic approach is being adopted. Considering this transition, it is indicated that individual attitudes may be changing, which may mean that concepts like commitment and loyalty are changing as well.

This context raises the issue of how should society provide mechanisms that recognise this change whilst encouraging and protecting whistleblowers. New Zealand is fortunate in that it has the advantage of hindsight by assessing the success of overseas' protections. However it is whether these lessons are applied to the New Zealand context that will determine the degree of success achieved here. If New Zealand is to offer whistleblower protection it must be of an equitable balance that provides appropriate protection for all parties. It must provide attractive enough outcomes in terms of motivation for people to come forward, focusing on legitimate whistleblowing and the whole concept of social responsibility and justice, due process and personal values. This is an intention of New Zealand's proposed Bill, in that it aims to educate people about the link between their own performance, or some form of intrinsic reward, and that they have contributed towards a better society or a more socially responsible organisation. It is important that this is indeed acknowledged, if not encouraged, so that whistleblowers are viewed as acting for the good of society rather than labelled with the negative connotations as is usually the case. To provide such an attractive element of motivation for those with legitimate concerns,

whistleblowers need to be assured that they will be protected. If no such provisions exist, wrongdoing will continue and whistleblowers will remain reluctant to speak out.

As most whistleblowing occurs within the organisational context, organisations need to have an understanding of the type of environment that not only eradicates wrongdoing, but is receptive to complaints when forwarded. A review of organisational behaviour theory exhibits an abundance of work that now exists on learning organisations and organisational cultures. Therefore if organisations are going to learn, they will need to develop an organisational culture that allows individuals some sort of opportunity to comment on the management processes or management style. This may involve complex initiatives involving restructuring and educational programmes. While it is recognised that there are numerous benefits of establishing such a culture, it would be unrealistic to envisage total compliance. It is for this reason that external mechanisms such as the law are sometimes necessary.

Recent events in New Zealand have highlighted the **need** for whistleblower protection. Yet what form this should take is as yet undecided. In short, two options exist. The first is to either amend existing statutes to empower recognised bodies as authorities to advise, protect and investigate disclosures on behalf of whistleblowers. The second is to create a new statute and authority with independent powers to oversee the entire process of handling whistleblower complaints.

To date, only the latter has been formally proposed. In summary this proposal, the New Zealand Whistleblowers Protection Bill, provides an alternative route for whistleblowers to take rather than being subjected to the reactive and arduous nature of existing legal mechanisms. It aims to enforce greater accountability on those guilty of wrongdoing, while providing protection for those who alert the authorities of such wrongdoing. Indeed the Bill has far

reaching implications for the moral fabric of the country. It is based on the attempt to enforce "public accountability and [encourage] the ethic of openness . . . [regarded as] essential elements of a democratic society and for promoting the wellbeing of the community" (Whistleblowers Protection Bill 1994). While attaining such an ideal may be cynically seen as optimistic, what this does provide is a significant step toward the eradication of organisational wrongdoing. Yet, bearing in mind the experiences of overseas' jurisdictions, it may be best to acknowledge that it too will be subject to trial and error.

Having broadly summarised and addressed the issues surrounding whistleblowing and its place in society, it is necessary to reflect upon the main themes and points to have emerged from this study with regard to whistleblower protection. **First**, it is recognised that the majority of whistleblower protection has, until recently, focused on retaliation (Dworkin, 1992). However preliminary research reveals that retaliation is not the ordinary response to whistleblowing (Miceli & Near, 1989), nor is fear of retaliation a primary deterrent (Miceli, Roach, & Near, 1988). This implies that the majority of whistleblower protection enacted to date is relatively ineffective.

Second, Caiden and Truelson (1988) have forwarded four reasons why legal mechanisms of whistleblower protection are severely limited. First, they contend that the interpretation of the law is biased toward the establishment. Second, many broadly written statutes contain numerous administrative and procedural deficiencies. Third, the law cannot effectively ^{discourage} sanction agency deviance. Fourth, the law is primarily a reactive institution.

Third, the approach adopted under the New Zealand Whistleblowers Protection Bill tends to endorse a facilitative stance. While it aims to encourage whistleblowing, like its counterparts overseas, it falls short of providing the infrastructure through which to truly eradicate wrongdoing in the business community. It is proposed that its 'lack of teeth' in penalising and deterring

retaliators would tend to act more as a disincentive rather than incentive to blow the whistle.

Fourth, given that there are shortcomings in legal mechanisms for whistleblower protection, there is an assumption that there must be 'other elements' necessary to create a climate both conducive and protective of whistleblowers.

Therefore in analysing these themes with regard to answering the research question, 'will the New Zealand Whistleblowers Protection Bill adequately protect whistleblowers if enacted', only a hesitant and partial yes can be offered. This is based on four reasons. The first is that it is unlikely that the Bill, if passed, will be enacted in its present form. The scope for modifications by the Justice and Law Reform Committee is extensive, therefore to pass judgement at this stage in its hearings would be both inappropriate and premature. Second, if the Bill were passed in its present state, it is unknown whether the Authority may be subject to the repeating the mistakes its original counterpart in the United States, the Office of Special Counsel, experienced. Third, the Bill's stance on the imposition of nominal penalties for offenders similarly follows that of Congress in the United States. In this case neither country sees employer sanctions as a major weapon in the fight against whistleblower retaliation. Fourth, legal mechanisms such as the Bill are subject to the shortcomings that all sources of law experience such as its reactive and taxing nature.

In specific, the *substance* of the Bill adds little more protection to that which is already covered under existing legislation such as the Human Rights Act 1993 and Employment Contracts Act 1991. However what it does offer over and above these existing protections, are three key advances in the *method* in which it addresses whistleblowing. First and foremost, the Bill provides informants with a protected status. This particularly reinforces to employers that no retaliatory action stipulated under the Bill can be directed at the whistleblower. While such actions are largely present in existing legislation and under common

law, this protected status aims to act as a proactive measure to protect the whistleblower prior to retaliation for disclosure. Furthermore, informants are provided immunity from civil and criminal proceedings concerning their disclosure. Second, the Bill provides for a clear and legitimate channel in which informants may make their disclosures. Where it was previously unclear where, how, and to whom one could make a disclosure and receive legitimate protection (while being fully assured of its investigation), the creation of a single authority under the Bill provides clarity and purpose in meeting this need. Third, the provision in which the Authority provides advice and counselling is of central importance. This service provides a uniform response to both informants and prospective informants on the specific procedures and remedies set under the Bill, how it would effect them and the parties around them, the recognition and commitment the Authority has to a whistleblower's complaint, and the full extent of processes involved. Overall, these key advances attempt to protect whistleblowers by providing a method in which not only is retaliation less likely because of enacted protection prior to disclosure, but the full gamut of grievance procedures previously identified under existing law such as the Employment Contracts Act and the Human Rights Act, is avoided.

However despite these advances, the imposition of a nominal penalty significantly subtracts from the intentions of the Bill. This paradox questions the actual level of commitment to the eradication of wrongdoing. If the Bill is to enforce its intentions while reminding employers of their obligations under the law, the imposition of penalties will need to be more severe.

Whatever structure the Justice and Law Reform Committee select at the end of the day, whether the Bill will offer enough substance to both encourage and protect whistleblowers is yet to be seen. United States experience indicates that whistleblower statutes are not being employed in the manner in which they were designed, while developing Australian experience indicates that whistleblowers are pursuing their cases through a more mediatory environment

under the Human Rights Commission. No matter what protections are enacted, the reality is that wrongdoing will still continue and whistleblowers will be subjected to retaliation.

Nevertheless, in its present state the Bill advances the cause for protection of whistleblowers more than any other statute enacted in New Zealand before. What is then hoped for from the Justice and Law Reform Committee may be summed up by John McMillan, lecturer at the Faculty of Law, Australian National University in that:

[t]he lingering ethical choice is whether the society which [whistleblowers] have chosen to protect has the same determination to respond with its own protection (McMillan, 1989, p. 96).

9.2 Directions for Future Research

In light of the status of research on whistleblowing and whistleblower protection in New Zealand, the scope for further research is vast. With regard to this study, the most obvious direction would have to be a complete follow up on the Bill once reviewed and modified by the Justice and Law Reform Committee, and enacted. This undertaking may be from a variety of perspectives - for example legal, organisational behavioural, or psychological.

With regard to original research, New Zealand offers a unique industrial relations environment under the Employment Contracts Act, while we are also perceived as world leaders in environmental and resource protection and enhancement. Given these unique characteristics and our blend of distinctive attributes and demographics, New Zealand provides an appealing subject country in which to examine whistleblowing. Furthermore, such studies would help to provide a snapshot of where we are in terms of corporate and social

responsibility, while furthering our understanding of the complexities of information and its use for the benefit of the public.

To extend research in other aspects of whistleblowing, one could focus on the areas previously categorised by Barnett (1992) in chapter two of this study. Examples include case studies on whistleblowers, conceptual analyses of the whistleblowing process, and empirical studies of whistleblowing. While such studies may be applied to circumstances here in New Zealand, it is important not to 'reinvent the wheel'. In summary this study aimed to provide an exploratory address highlighting prominent themes in whistleblowing and whistleblower protection, with the primary objective to open the issue to constructive debate and research. This initiative must therefore be viewed as just the beginning of a long and fruitful line of research.

REFERENCES

- Alam, K.F. (1993). Ethics in New Zealand organisations. *Journal of Business Ethics*, 12, 433-440.
- Alcorn, G. (1993, November 29). Doctor Fallout. *Time: International*, (48) pp. 30-31.
- Barnett, T. (1992). A preliminary investigation of the relationship between selected organizational characteristics and external whistleblowing by employees. *Journal of Business Ethics*, 11, 949-959.
- Barnett, T., Cochran, D.S., & Taylor, G.S. (1993). The internal disclosure policies of private-sector employers: An initial look at their relationship to employee whistleblowing. *Journal of Business Ethics*, 12, 127-136.
- Bartol, K.M., & Martin, D.C. (1991). *Management*. New York: McGraw-Hill, Inc.
- Barton, W. (1994b, February 6). Suspended nurse a 'shy man with real concerns'. *Sunday Times*, p. 1.
- Barton, W. (1994a, February 12). Silencing the whistle. *The Dominion*, p. 14.
- Beauchamp, T.L., & Bowie, N.E. (Eds.). (1988). *Ethical Theory and Business*. (3rd ed.). Englewood Cliffs, New Jersey: Prentice-Hall.
- Beder, S. (1993, September 25). Engineers, ethics and etiquette. *New Scientist*, 139(1892) pp. 36-41.
- Bedian, A.G. (1986). *Management*. New York: The Dryden Press.

- Birch, W. F. (1993, October). *Address*. Paper presented at the New Zealand Institute of Industrial Relations Conference on Employment Law: Present Developments and Future Issues, Wellington.
- Bok, S. (1982). *Secrets: On the Ethics of Concealment and Revelation*. New York: Pantheon Books.
- Bolger ticks off CHE over Pugmire case. (1994, March 12). *Evening Standard*, p. 5.
- Brennan, M., Ennis, M., & Esslemont, D. (1992). The ethical standard of New Zealand business managers. *New Zealand Journal of Business*, 14, 100-124.
- Briar, C. (1994). Tracing the patterns: The development of EEO policies in New Zealand and overseas. In J. Sayers & M. Tremaine (Eds.). *The Vision and the Reality: Equal Employment Opportunities in the New Zealand Workplace*. Palmerston North: The Dunmore Press Limited.
- Brien, A. (1993, March). *Designing and Implementing a Code of Ethics: Seminar Handbook*. Handbook presented at 'A Seminar on Business and Professional Ethics', Massey University, Palmerston North.
- Brien, A. (1994a). Creating and maintaining an ethical profession. *Chartered Accountants Journal of New Zealand*, 73(4), 34-39.
- Brien, A. (1994b, April). *Professional Ethics and the Culture of Trust*. Paper presented at the Australian Association of Applied and Professional Ethics Conference, Adelaide.
- Brosnan, P., Smith, D.F., & Walsh, P. (1990). *The Dynamics of New Zealand Industrial Relations*. Auckland: John Wiley & Sons.

- Burke, E. (1992) In Partington, A. (Ed.). *The Oxford Dictionary of Quotations*. (4th ed.). New York: Oxford University Press Inc.
- Burrows, J.F. (1990). *News Media Law in New Zealand*. (3rd ed.). Auckland: Oxford University Press.
- Caiden, G.E., & Truelson, J.A. (1988). Whistleblower protection in the USA: Lessons learnt and to be learnt. *Australian Journal of Public Administration*, 47(2), 119-129.
- Callahan, E.S., & Dworkin, T.M. (1992). Do good and get rich quick: Financial incentives for whistleblowing and the False Claims Act. *Villanova Law Review*, 37(2), 273-336.
- Campbell, G. (1994, March 26). Politics. *Listener*, pp. 17.
- Carpenter, B. (1993, June). *Adopting an Ethical Approach to Fraud*. Paper presented at Ethics in Business and the Professions conference. Massey University, Palmerston North.
- CHE defends suspension. (1994, February 5). *Evening Standard*, p. 1.
- Clark, D. (1993b, April). *Whistleblowing: Theory and practice*. Paper presented at a half day seminar entitled 'The Whistleblowers Protection Bill', Adelaide.
- Clark, D. (1993a, November). *Implementing Whistleblowing Legislation: Lessons from South Australia and Elsewhere*. Paper presented at the 'Whistleblowers - Concerned Citizens or Disloyal Mates?' conference, Brisbane.
- Clifton, J. (1995, January 22). The not-so-noble art of scandalmongery. *Sunday Star Times*, pp. C1, C2.

- Corporations (Investigation and Management) Act 1989, No. 11.
- Cost of blowing the whistle. (1993, September 14). *The New Zealand Herald*, p. 9.
- Court decision 'vindicated' nurse - PSA. (1994, February 12). *The Dominion*, p. 10.
- Cummings, T.G., & Huse, E.F. (1989). *Organization Development and Change*. (4th ed.). St. Paul, Minnesota: West Publishing Company.
- Dandekar, N. (1990). Contrasting consequences: Bringing charges of sexual harassment compared with other cases of whistleblowing. *Journal of Business Ethics*, 9, 151-158.
- Dane, F.C. (1990). *Research Methods*. California: Brooks/Cole Publishing Company.
- Deeks, J., & Boxall, P. (1989). *Labour Relations in New Zealand*. Auckland: Longman Paul Limited.
- Deeks, J., Parker, J., & Ryan, R. (1994). *Labour and Employment Relations in New Zealand*. (2nd ed.). Auckland: Longman Paul Limited.
- Defamation Act 1992, No. 105.
- De George, R.T. (1987). The status of business ethics: Past and future. *Journal of Business Ethics*, 11, 201-211.
- De Maria, W. (1994, April). *The Queensland Whistleblower: Chipping Away at the Unethical Enamel*. Paper presented at the First National Conference of the Australian Association for Professional and Applied Ethics, Adelaide.

District Courts Act 1947, No. 16.

Duncan, R. (1993). Parliament poised to pass shield law. *Free Speech*, 1(1), pp. 1, 2.

Duncan v Medical Practitioners Disciplinary Commission [1986] 1 NZLR 513

Duska, R. (1988). Whistleblowing and employee loyalty. In T.L. Beauchamp & N.E. Bowie (Eds.), *Ethical Theory and Business* (pp. 299-303). (3rd ed.). New Jersey: Prentice Hall.

Dworkin, T.M. (1992). Legal approaches to whistle-blowing. Chapter contributed in M.P. Miceli & J.P. Near, *Blowing the Whistle: The Organizational and Legal Implication for Companies and Employees*. New York: Lexington Books.

Dworkin, T.M., & Callahan, E.S. (1991). Internal whistleblowing: Protecting the interests of the employee, the organization, and society. *American Business Law Journal*, 29(2), 267-308.

Dworkin, T.M., & Callahan, E.S. (1993). Employee disclosures to the media: When is a "source" a "sourcerer"? *Hastings Communications and Entertainment Law Journal*, 15(2), 357-397.

Dworkin, T.M., & Near, J.P. (1987). Whistleblowing statutes: Are they working? *American Business Law Journal*, 25(2), 241-264.

Edwards, K. (1994, April 4). Anatomy of a Whistleblower. *Time: International*, (14) pp. 40-43.

Electoral and Administrative Review Commission. (1991). *Report on Protection of Whistleblowers* (Serial No. 91/R4). Queensland.

- Elliston, F.A. (1982). Anonymity and whistleblowing. *Journal of Business Ethics*, 1, 167-177.
- Elliston, F., Keenan, J., Lockhart, P., & van Schaick, J. (1985). *Whistleblowing Research: Methodological and Moral Issues*. New York: Praeger.
- Employment Contracts Act 1991, No. 22.
- Ettorre, B. (1994, May). Whistleblowers: Who's the real bad guy? *Management Review*, pp. 18-23.
- Evans, S. (1988, September 30). Ethics challenge for business leaders. *The Dominion*, p. 7.
- Ewin, R.E. (1993). Loyalties, and why loyalty should be ignored. *Criminal Justice Ethics*, 12(1), 36-42.
- Ewing, D.W. (1983). *Do it my way or you're fired! Employee rights and the changing role of management prerogatives*. New York: John Wiley & Sons.
- Farrell, D. & Petersen, J.C. (1982). Patterns of political behaviour in organisations. *Academy of Management Review*, 7, 561-575.
- Foot, D. (1994, October 25). Council leaks in the public interest. [Letter to the editor]. *Evening Post*, p. 8.
- Forde, R. (1994d, February 5). Specialists join in condemnation. *Evening Standard*, p. 1.
- Forde, R. (1994c, February 14). Paedophile's mum backs suspended psych nurse. *Evening Standard*, p. 1.

- Forde, R. (1994b, March 9). Outrage greets Pugmire action. *Evening Standard*, p. 1.
- Forde, R. (1994a, March 10). Petition backing Pugmire launched. *Evening Standard*, p. 1.
- Foulkes, A. (1993, August). *Mediation of Employment Disputes Seminar*. Paper presented at the Arbitrators Institute of New Zealand Seminar, Wellington.
- Fox, R.G. (1993). Protecting the whistleblower. *Adelaide Law Review*, 15, 137-163.
- French, P.A. (1984). The principle of responsive adjustment in corporate moral responsibility: The crash on Mount Erebus. *Journal of Business Ethics*, 3, 101-111.
- Frith, F. (1993, July). *Crime and Punishment: Whistleblowing and Intimidation Rituals*. Paper presented at the Employment Relations: Theory and Practice conference. University of Western Sydney, Nepean, Australia.
- Gerritsen, J. (1994b, March 9). Nurse seeks injunction over dismissal. *The Dominion*, p. 3.
- Gerritsen, J. (1994a, March 11). Judge blasts Wanganui CHE over treatment of Pugmire. *The Dominion*, pp. 1, 3.
- Glazer, M.P., & Glazer, P.M. (1989). *The Whistleblowers: Exposing Corruption in Government and Industry*. New York: Basic Books Inc.
- Gleeson, S. (1994, April 21). Tutors allege payout for silence. *The New Zealand Herald*, p. 1.

- Goddard, T.G. (1993, April). *The Role of the Employment Court*. Paper presented to the New Zealand Institute of Industrial Relations Research Seminar on The Future of the Employment Court and Employment Tribunal, Wellington.
- Goff, P. (1994, June 15). *Introductory Speech - Whistleblowers Protection Bill*. Parliament House.
- Gold, H., & Webster, A. (1990). *New Zealand Values Today*. Palmerston North: Alpha Publications.
- Goode, M. (1993a). A Guide to the South Australian Whistleblowers Protection Act 1993. *Australian Institute of Administrative Law Newsletter*, No. 13 of 1993, p. 10-14.
- Goode, M. (1993b). The South Australian Whistleblowers' Protection Act. *Communications Law Bulletin*, 13(2), 10-14.
- Graham, J.W. (1986). Principled organizational dissent: A theoretical essay. In L.L. Cummings and B.M. Staw (eds.), *Research in Organizational Behaviour*, 8 (pp. 1-52). Greenwich, Connecticut: JAI Press.
- Green, J. (1993, August). *Introduction*. Brief presented at the Mediation of Employment Disputes Seminar, Wellington.
- Greenberg, J., & Baron, R.A. (1993). *Behaviour in Organisations: Understanding and Managing the Human Side of Work*. (4th ed.). Massachusetts: Allyn and Bacon.

- Harbridge, R. (1993). Collective employment contracts: A content analysis. In R. Harbridge (Ed.), *Employment Contracts: New Zealand Experiences*. Wellington; Victoria University Press.
- Harris, T.E. (1994, July). *Hero or Heretic: Whistleblowing*. Paper presented at the Organizational Communication Division - International Communication Association 44th Annual Conference, Sydney.
- Harrod, V. (1994b, March 9). White-collar criminals still slip through legal loopholes. *The Dominion*, p. 11.
- Harrod, V. (1994a, June 9). Where fraud can flourish. *The Dominion*, p. 7.
- Hince, K. (1993). From William Pember Reeves to William Francis Birch: From conciliation to contracts. In R. Harbridge (Ed.), *Employment Contracts: New Zealand Experiences*. Wellington: Victoria University Press.
- Hodge, B. (1994, June). Address. A. Brien (Chair), *The New Zealand Association of Applied Ethics Inaugural Meeting*. North Shore, Auckland. Symposium conducted at the Auckland Institute of Technology, Akoranga Campus, North Shore, Auckland.
- Howard, J.L. (1988). Current developments in whistleblower protection. *Labor Law Journal*, 39(2), 67-80.
- Hubbard, A. (1994, May 14). Why I blew the whistle. *Listener*, pp. 16-22.
- Hughes, J. (1993, October). *Enforcing Safety Standards*. Paper presented at the Employment Law: Present developments and Future Issues conference, Wellington.

Human Rights Act 1993, No. 82.

Israel, D., & Lechner, A. (1989). Protection for whistleblowers. *Personnel Administrator*, 34, 106.

James, G.G. (1980). Whistle blowing: Its nature and justification. *Philosophy in Context*, 10, p. 99.

Jamieson, P. (1992). Forward. In A. Webster, & P. Perry. (1992). *What Difference Does it Make? Values and Faith in a Shifting Culture*. Palmerston North: Alpha Publications and The Research Directorate of the New Zealand Study of Values.

Jensen, J.V. (1987). Ethical tension points in whistleblowing. *Journal of Business Ethics*, 6, 321-328.

Johnson, D.A., & Pany, K. (1981). Exposé or cover-up: Will an employee blow the whistle? *Management Accounting*, 59, 32-36.

Keenan, J.P., & Krueger, C.A. (1992, August). Whistleblowing and the professional. *Management Accounting*, p. 21-24.

Kennedy, E. (1992, March 27). Coachworker warned for alerting MOT. *The Dominion*, p. 9.

Kilroy, S. (1994b, February 14). East wants law on whistle-blowing. *The Dominion*, p. 1.

Kilroy, S. (1994a, August 1). Laws turns up the heat in battle for CHE accountability. *The Dominion*, p. 2.

- KPMG Peat Marwick. (1994). *Just How Much is Your Organisation Losing to Fraud Each Year*. Wellington.
- Labich, K. (1992, April). The new crisis in business ethics. *Fortune*, pp. 167-176.
- Law urged on whistle-blowing. (1994, February 5). *The Dominion*, p. 1.
- Lewis, P.V. (1985). Defining 'business ethics': Like nailing jello to a wall. *Journal of Business Ethics*, 4, 377-383.
- MacLennan, C. (1994, February 17). Disclosure law requires balancing act. *Evening Standard*, p. 11.
- Malin, M.H. (1982). Protecting the whistleblower from retaliatory discharge. *University of Michigan Journal of Law Reform*, 16(2), 277-318.
- Mapstone, N. (1994, December 7). Carnell pushes new Bill on whistleblowers. *The Canberra Times*, p. 6.
- Marshall, B.A. (1991). *Employee Homogeneity and Perceptions of Organisational Fit*. Unpublished master's thesis, Massey University, Palmerston North.
- Martin, J. (1994). Protection for heroes or charter for the disaffected? *Health Manager*, 1(2), pp. 9-10.
- Martin, J. (in press). Democracy and duty: The New Zealand way. *Business Ethics Reader*.
- Massengill, D., & Peterson, D.J. (1989). Whistleblowing: Protected activity or not? *Employee Relations Law Journal*, 15(1), 49-56.

- Massive support floods in. (1994, March 11). *Evening Standard*, p. 1.
- Mazengarb's Employment Law: Volume One*. (1994). Wellington: Butterworths.
- Mazengarb's Employment Law: Volume Two*. (1994). Wellington: Butterworths.
- McCarthy, P. (1991). *Negotiating Employment Contracts in New Zealand*. Auckland: CCH New Zealand Limited.
- McLeod, R. (1992, September). The lonely mission of Winston Peters. *North and South*, pp. 44-55.
- McLeod, R. (1994, June). Mental health mayhem: Act of omission. *North and South*, pp. 78-89.
- McMahon, J. (1993, April). *Whistleblowers protection: A union perspective*. Paper presented at a half day seminar entitled 'The Whistleblowers Protection Bill', Adelaide.
- McMillan, J. (1989, November). *Principled Organizational Dissent: Whistle Blowing in Response to Corruption*. Paper presented at the Fourth International Anti-Corruption Conference, Sydney.
- McTurk, L. (1994, June). *Address*. In A. Brien (Chair), *The New Zealand Association of Applied Ethics Inaugural Meeting*. Symposium conducted at the Auckland Institute of Technology, Akoranga Campus, North Shore, Auckland.
- Miceli, M.P., & Near, J.P. (1988). Individual and situational correlates of whistleblowing. *Personnel Psychology*, 41, 267- 281.

- Miceli, M.P., & Near, J.P. (1989). The incidence of wrongdoing, whistleblowing, and retaliation: Results of a naturally occurring field experiment. *Employee Responsibilities and Rights Journal*, 2, 91-108.
- Miceli, M.P., & Near, J.P. (1992). *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*. New York: Lexington Books.
- Miceli, M.P., & Near, J.P. (1994). Whistleblowing: Reaping the benefits. *Academy of Management Executive*, 8(3), 65-72.
- Miceli, M.P., Roach, B., & Near, J.P. (1988). The motivations of anonymous whistle-blowers: The case of federal employees. *Public Personnel Management*, 17, 281-296.
- Molander, E.A. (1987). A paradigm for design, promulgation and enforcement of ethical codes. *Journal of Business Ethics*, 6, 619-631.
- Monin, N. (1994, May). [Interview with Neil Pugmire. *Transcript of Video Interview*].
- Morris, L. (1994, April 28). Fear paralyses PS whistleblowers. *The Sydney Morning Herald*, p. 3.
- Mulholland, R.D. (1992). *Business Law Today*. (3rd ed.). Palmerston North: The Dunmore Press Limited.
- Mulholland, R.D. (1990). *Introduction to the New Zealand Legal System*. (7th ed.). Wellington: Butterworths.
- Mutual Assistance in Criminal Matters Act 1992, No. 86.

- Nader, R. (1972). An anatomy of whistleblowing. In R. Nader, P.J. Petkas, & K. Blackwell, K. (eds.). *Whistleblowing: The Report of the Conference on Professional Responsibility*. New York: Grossman Publishers.
- National to support Goff bill. (1994, June 1). *The Dominion*, p. 2.
- Near, J.P., Dworkin, T. M., & Miceli, M.P. (1993). Explaining the whistle-blowing process: Suggestions from power theory and justice theory. *Organization Science*, 4, 204-226.
- Near, J.P., & Jensen, T.C. (1983). The whistle-blowing process: Retaliation and perceived effectiveness. *Work and Occupations*, 10, 3-28.
- Near, J.P., & Miceli, M.P. (1985). Organizational dissidence: The case of whistleblowing. *Journal of Business Ethics*, 4, 1-16.
- Near, N.P., & Miceli, M.P. (1986). Retaliation against whistle blowers: Predictors and effects. *Journal of Applied Psychology*, 71(1), 137-145.
- Near, J.P., & Miceli, M.P. (1987). Whistleblowers in organisations: Dissidents or reformers? In B.M. Staw, & L.L. Cummings (Eds.), *Research in Organizational Behaviour*, 9, (pp. 321-368). Connecticut: JAI Press Inc.
- Newell, H. (1994, May). Ethical behaviour - Can it be taught? *Chartered Accountants Journal of New Zealand*, 73(4), 39.
- New Zealand Bill of Rights Act 1990, No. 109.
- New Zealand Official Yearbook. (1994). (97th ed.). Auckland: Statistics New Zealand.

- Nurse suspended after leak of warning over paedophile. (1994, February 4). *The Dominion*, p. 3.
- Oddie, G., & Perrett, R.W. (Eds.). (1992). *Justice, Ethics, and New Zealand Society*. Auckland: Oxford University Press.
- Official Information Act 1982, No. 156.
- Ombudsmen Act 1975, No. 9.
- Parker, L. (1993, June). Ethics at Work. *Australian Accountant*, 21-25.
- Parliamentary Committee for Electoral and Administrative Review. *Whistleblowers Protection*. (1992). Queensland: Legislative Assembly of Queensland.
- Parlman, G.C. (1987). Protecting the whistleblower. *Personnel Administrator*, 32(7), 26-32.
- Parmerlee, M.A., Near, J.P., & Jensen, T.C. (1982). Correlates of whistleblowers' perceptions of organizational retaliation. *Administrative Science Quarterly*, 27, 17-34.
- Paviell, J. (1994c, February 5). CHE defends suspension. *Evening Standard*, p. 1.
- Paviell, J. (1994b, February 7). Jobs at stake, warns Shipley. *Evening Standard*, p. 1.
- Paviell, J. (1994a, March 11). Pugmire to return to work. *Evening Standard*, p. 1.

- Pearce, J.A.(II), & Robinson, R.B.(Jr.). (1989). *Management*. Singapore: McGraw-Hill, Inc.
- Peart, J., & Macnamara, J.R. (1990). *The New Zealand Handbook of Public Relations*. Lower Hutt: Mills Publications.
- Pech, R.J., & Small, M.W. (1994, April). Management, white-collar crime and the practising manager: Who should be most concerned? *The Practising Manager*, pp 23-26.
- Preston, N. (1994, April). *Public Sector Ethics: The State of the Art in Australia*. Paper presented at the First National Conference of the Australian Association for Professional and Applied Ethics, Adelaide.
- Privacy Act 1993, No. 28.
- Proceeds of Crime Act 1991, No. 120.
- Public Interest Disclosure Act 1994 No. 108 of 1994. (Australian Capital Territory).
- Public Sector Management Act 1994 No. 37 of 1994. (Australian Capital Territory).
- Pugmire admits sending copy of letter to Goff. (1994, February 12). *Evening Standard*, p. 1.
- Pugmire v Good Health Wanganui Ltd* (No. 1) [1994] 1 ERNZ 58.
- Pugmire v Good Health Wanganui Ltd* (No. 2) [1994] 1 ERNZ 174.

- Report of the Human Rights Commission and the Office of the Race Relations Conciliator for the year ended 30 June 1994* (Report No. E. 40) (1994). Wellington.
- Report of the Parliamentary Committee for Electoral and Administrative Review. (1990). *Whistleblower's Protection - Interim Measures*. Queensland.
- Report of the Serious Fraud Office for the year ended 30 June 1994* (Report No. E6). (1994). Wellington.
- Robbins, S.P. (1993). *Organisational Behaviour: Concepts, Controversies, and Applications* (6th ed.). Englewood Cliffs, New Jersey: Prentice-Hall Inc.
- Robbins, S.P., Waters-Marsh, T., Cacioppe, R., & Millett, B. (1994). *Organisational Behaviour: Concepts, Controversies and Applications: Australia and New Zealand*. Sydney: Prentice-Hall of Australia Pty Ltd.
- Rongine, N.M. (1985). Toward a coherent legal response to the public policy dilemma posed by whistleblowing. *American Business Law Journal*, 23, 281-297.
- Round, D. (1994, February 18). Whistleblower paying heavy price. *The Dominion*, p. 8.
- Rose, R. (1993, August). Why kiwis are different. *Management (NZ)*, pp. 50-54.
- Ross, F. (1994, February 10). Privacy chief backs whistleblower concern. *The Dominion*, p. 6.
- Rudman, R. (1994). *Human Resources Management in New Zealand: Contexts and Processes*. (2nd. ed.). Auckland: Longman Paul Limited.

- Ryan, D. (1994). *Mental Health (Compulsory Assessment and Treatment) Amendment Bill* (Bills Digest No. 46). Wellington: Parliamentary Library.
- Sculnik, M.W. (1986). Disciplining whistle-blowers. *Employment Relations Today*, 13, 189-194.
- Shaw, R.K. (1989). *The Public Interest: A Concept in New Zealand's Official Information Act, 1982*. Wellington: New Zealand Institute of Public Administration.
- Small, M.W. (1993). Ethics in business and administration: An international and historical perspective. *Journal of Business Ethics*, 12, 293-300.
- Solomon, R.C. (1992). *Ethics and Excellence: Cooperation and Integrity in Business*. New York: Oxford University Press, Inc.
- Solomon, R.C., & Hanson, K. (1983). *Above the Bottom Line*. New York: Harcourt Brace Jovanovitch.
- State Services Commission. (1990). *Public Service Code of Conduct*. Wellington: State Services Commission.
- Stone, A. (1994b, February 2). Govt seeks tally of released patients. *The New Zealand Herald*, p. 1.
- Stone, A. (1994a, June 16). Protection for whistleblowers. *The New Zealand Herald*, p. 5.
- Strange, T., & Hopkinson, G. (1992, December). Ethics: Can they be taught? *Management (NZ)*, pp. 48-54.

- Strickland, A. (1993, April). *Whistleblower Protection in the Public Sector*. Paper presented at a half day seminar entitled 'The Whistleblowers Protection Bill', Adelaide.
- Stuart, C.E. (1994). Report of the Serious Fraud Office for the year ended 30 June 1994 (Report No. E. 40). Wellington.
- Sumner, C.J. (1993b, March 10). South Australia, Parliamentary Debates, Session 1993, p. 1520.
- Sumner, C.J. (1993a, April). *The Whistleblowers Protection Bill - Its Genesis and Rationale: Efficiency, Effectiveness and Ethics*. Paper presented at a half day seminar entitled 'The Whistleblowers Protection Bill', Adelaide.
- Sykes, J.B. (Ed.). (1982). *The Concise Oxford Dictionary*. (7th ed.). New York: Oxford University Press Inc.
- Sykes, J.B. (Ed.). (1987). *The Australian Concise Oxford Dictionary*. (7th ed.). Melbourne: Oxford University Press.
- The Advertiser. (1990, November 30). In Small, M.W. (1993). Ethics in Business and Administration: An International and Historical Perspective. *Journal of Business Ethics*, 12, 293-300.
- The Parliament of the Commonwealth of Australia. (1994). *In the Public Interest: Report of the Senate Select Committee on Public Interest Whistleblowing*. Canberra: The Senate, Parliament House.
- The West Australian. (1991, September 27). In Small, M.W. (1993). Ethics in Business and Administration: An International and Historical Perspective. *Journal of Business Ethics*, 12, 293-300.

- The West Australian. (1991, December 12). In Small, M.W. (1993). Ethics in Business and Administration: An International and Historical Perspective. *Journal of Business Ethics*, 12, 293-300.
- Tiddy, J. (1993, April). *Protection and Support for Whistleblowers*. Paper presented at a half day seminar entitled 'The Whistleblowers Protection Bill', Adelaide.
- Truth must be set free. (1994, February 14). *The Dominion*, p. 8.
- U.S. Merit Systems Protection Board. (1984). *Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings* (MS1.2: W57/2). Washington, D.C.: U.S. Merit Systems Protection Board.
- Vinten, G. (1992). Whistle blowing: Corporate help or hinderance? *Management Decision*, 30(1), 44-48.
- Westin, A.F. (1981). *Whistleblowing: Loyalty and Dissent in the Corporation*. New York: McGraw-Hill.
- Westman, D.P. (1991). *Whistleblowing: The Law of Retaliatory Discharge*. Washington, D.C.: BNA Books.
- Whistleblowers. (1994, December 8). *The Canberra Times*, p. 6.
- Whistleblowers Protection Act 1993, No. 21 of 1993. (South Australia).
- Whistleblowers Protection Act of 1989, § 103, 5 U.S.C. § 1201. (United States of America).
- Whistleblowers Protection Bill 1992. (Queensland).

Whistleblowers Protection Bill 1993. (The Commonwealth of Australia).

Whistleblowers Protection Bill 1994. (New Zealand).

Yukl, G., & Falbe, C.M. (1990). Influence tactics and objectives in upward, downward, and lateral influence attempts. *Journal of Applied Psychology*, 75, 132-140.

APPENDIX A: PERSONAL COMMUNICATION FOR STUDY

- Brien, A.** **Lecturer, Department of Philosophy**
Massey University, Palmerston North, New Zealand
- Burrows, J.** **Professor, School of Law**
University of Canterbury, Christchurch, New Zealand
- Chamarette, C.** **Senator for the Greens (Western Australia)**
WA, Australia
- Dworkin, T.M.** **Professor, Department of Business Law**
Indiana University, Bloomington, IN,
United States of America
- East, P.** **Attorney General & Minister of State Services**
Parliament House, Wellington, New Zealand
- Goff, P.** **Opposition Spokesperson for Justice**
Parliament House, Wellington, New Zealand
- Goode, M.** **Senior Legal Officer**
Attorney General's Department, South Australian
Government, SA, Australia
- Hicks, C.** **Seconded Project Officer**
State Sector Development, State Services Commission,
Wellington, New Zealand

Lennane, J.	National President, Whistleblowers Australia Birchgrove, NSW, Australia
Liddell, G.	Senior Lecturer, Faculty of Law University of Otago, Dunedin, New Zealand
Martin, J.	Senior Lecturer in Public Policy Victoria University of Wellington, New Zealand
Marton, B.	Senior Lecturer, Department of Science and Technology Studies University of Wollongong, NSW, Australia
McKenna, H.	Director, Reform Projects Department of Public Administration, Australian Capital Territory Government, ACT, Australia
Powell, A.	Clerk of the Committee, Justice and Law Reform Committee Wellington, New Zealand
Robertson, J.	Chief Ombudsman Office of the Ombudsman, Wellington, New Zealand
Slane, B.	Privacy Commissioner Office of the Privacy Commissioner, Auckland, New Zealand
Stewart, B.	Manager, Codes and Legislation Office of the Privacy Commissioner, Auckland, New Zealand

APPENDIX B: WHISTLEBLOWERS PROTECTION BILL 1994

WHISTLEBLOWERS PROTECTION BILL

EXPLANATORY NOTE

The purpose of this Bill is to facilitate and encourage, in the public interest, the disclosure, investigation, and correction of specified conduct or activities. Conduct and activity to which the Bill relates is that which—

- (a) Concerns the unlawful, corrupt, or unauthorised use of public funds or public resources;
- (b) Is otherwise unlawful;
- (c) Constitutes a significant risk or danger, or is injurious, to—
 - (i) Public health;
 - (ii) Public safety;
 - (iii) The environment;
 - (iv) The maintenance of the law and justice, including the prevention, investigation, and detection of offences, and the right to a fair trial.

The disclosure of information relating to such conduct or activity (in the Bill called “public interest information”) is generally known as “whistleblowing”.

The Bill affirms that public accountability and the ethic of openness are essential elements of a democratic society and for promoting the wellbeing of the community. It is similarly affirmed that informants (or “whistleblowers”) who act in accordance with the legislation should be recognised as acting responsibly and in the public interest. (*Clause 4*)

A person makes an appropriate disclosure of public interest information if that person either believes on reasonable grounds that the information is true or, although not in a position to form a belief on reasonable grounds about the truth of the information, believes that the information may be true and is of sufficient significance to justify its disclosure so that the truth may be investigated. The concomitant is that a disclosure of information is an appropriate disclosure only if made to the Whistleblowers Protection Authority constituted by the Bill. (*Clause 6*)

Any person making an appropriate disclosure of public interest information as described obtains immunity from civil and criminal proceedings. (*Clause 7*)

The Bill contains provisions for investigating complaints of unlawful discrimination by persons on the ground of protected informant status. Provisions of the Human Rights Act 1993 are applied. (*Part V*)

Clause 1 is the Short Title. The Act is expressed to come into force on 1 July 1995.

PART I

PRELIMINARY PROVISIONS

Clause 2 is the interpretation provision.

Clause 3 provides that the Act binds the Crown.

Clause 4 sets out the purpose of the Act, already described.

PART II

DISCLOSURE OF PUBLIC INTEREST INFORMATION

Clause 5 sets out the manner in which a disclosure of public interest information is to be made, and the matters to which such disclosure may relate.

Clause 6 defines what constitutes an appropriate disclosure of public interest information, as already described.

Clause 7 provides immunity from civil and criminal proceedings for making an appropriate disclosure of public interest information.

Clause 8 creates an offence of disclosing an informant's identity.

PART III

WHISTLEBLOWERS PROTECTION AUTHORITY

Clause 9 provides for a Whistleblowers Protection Authority to be constituted. The Authority is designated an officer of Parliament and, accordingly, is to be appointed by the Governor-General on the recommendation of the House of Representatives.

Clause 10 sets out the Authority's functions. These include investigating any disclosure of public interest information made to the Authority, and providing advice, counselling, and assistance to prospective or protected informants.

Clause 11 provides for the appointment of a Deputy Authority.

Clauses 12 to 15 relate to the term of office of the Authority. Tenure is protected, as for other officers of Parliament.

Clause 16 prevents the Authority from holding other offices or engaging in other occupations without the consent of the Speaker of the House of Representatives.

Clause 18 requires the Authority to make an annual report.

Clause 19 provides for review of the operation of the Act.

PART IV

PROCEDURES

Clause 20 requires the Authority to provide an advisory and counselling service to prospective and protected informants.

Clauses 21 and 22 provide for the action to be taken by the Authority on receiving a disclosure of a public interest information, and allow no action in certain circumstances.

Clauses 23 to 27 relate to the proceedings of the Authority. The Authority is to conduct its investigations in private, and is not required to hold hearings. However, where any report or recommendation by the Authority may adversely affect anyone, the Authority is to give that person an opportunity to be heard (in accordance with the principle of fairness and natural justice).

The Authority is given power to summon witnesses and documents, and privilege is accorded to the Authority and witnesses in relation to the Authority's proceedings.

Clause 28 provides that where, as a result of its investigation, the Authority is of the opinion that the matter disclosed to it as public interest information has substance and also appears to be unlawful or a danger, the Authority shall refer the matter to the person to whom the investigation relates with a recommendation that appropriate corrective action be taken or to an appropriate enforcement agency.

PART V

REMEDIES FOR INJURY TO PROTECTED INFORMANTS

Clause 29 makes it unlawful to discriminate against anyone, in areas consistent with those specified in the Human Rights Act 1993, on the ground, or substantially on the ground, that the other person has made or intends to make an appropriate disclosure of public interest information.

Clause 30 provides that a complaint relating to a breach of protection of an informant may be made to the Complaints Division, which consists of Human Rights Commissioners.

Clause 31 provides that the procedures under the Human Rights Act 1993 are to apply in relation to any complaint. The effect of this provision is that complaints may be investigated by the Complaints Division and, if appropriate, proceedings may be brought before the Complaints Review Tribunal by the Proceedings Commissioner (a Human Rights Commissioner) or, if the Proceedings Commissioner declines to do so, by the protected informant.

The Tribunal may grant remedies (including damages) where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is a breach of protected informant status.

Clause 32 extends the grounds of prohibited discrimination as applied to certain other Acts to include discrimination by reason of protected informant status.

PART VI

MISCELLANEOUS PROVISIONS

Clauses 33 to 35 relate to ensuring integrity of information, including requiring the Authority and the Authority's staff to maintain secrecy in matters coming to their knowledge.

Clauses 36 to 38 relate to delegation of functions or powers by the Authority.

Clause 39 provides that an employer or principal is liable for the acts and omissions by that person's employees or agents except in certain cases.

Clause 40 makes it an offence for anyone (among other things) to obstruct the Authority or any other person in the exercise of their powers under the Act, or for a person to represent falsely that he or she holds any authority under the Act.

Clause 41 provides that the Act does not derogate from protections under other Acts relating to disclosure of information.

Clause 42 applies the Official Information Act 1982 to the Authority.

Clause 43 makes the Authority an Office of Parliament for the purposes of the Public Finance Act 1989.

Clause 44 excludes the application of the Privacy Act 1993 to the Authority (which itself is protecting the privacy of protected informants).

SCHEDULE

The *Schedule* relates to standard personnel and other matters applying to the Authority.

WHISTLEBLOWERS PROTECTION

ANALYSIS

Title	
1. Short Title and commencement	
PART I	
PRELIMINARY PROVISIONS	
2. Interpretation	
3. Act to bind the Crown	
4. Purpose of Act	
PART II	
DISCLOSURE OF PUBLIC INTEREST INFORMATION	
5. Making disclosure of public interest information	
6. Appropriate disclosures of public interest information	
7. Immunity for appropriate disclosures of public interest information	
8. Offence to disclose identity of informant	
PART III	
WHISTLEBLOWERS PROTECTION AUTHORITY	
9. Whistleblowers Protection Authority constituted	
10. Functions of Authority	
11. Deputy Authority	
12. Term of office	
13. Continuation in office after term expires	
14. Removal or suspension from office	
15. Filling of vacancy	
16. Holding of other offices	
17. Further provisions relating to Authority	
Reporting and Review Provisions	
18. Annual report	
19. Review of operation of Act	
PART IV	
PROCEDURES	
Advice and Counselling	
20. Advisory and counselling service	
Investigation by Authority	
21. Action on receiving disclosure of public interest information	
22. Authority may decide to take no action on disclosure of public interest information in certain circumstances	
Proceedings	
23. Proceedings of Authority	
24. Evidence	
25. Protection and privileges of witnesses, etc.	
26. Disclosures of information, etc.	
27. Proceedings privileged	
28. Procedure after investigation	
PART V	
REMEDIES FOR INJURY TO PROTECTED INFORMANTS	
29. Unlawful discrimination	
30. Complaints relating to breach of protection of informant	
31. Procedures under Human Rights Act 1993 to apply to complaints	
Extension of Grounds of Prohibited Discrimination	
32. Application of provisions relating to Human Rights Act 1993	
PART VI	
MISCELLANEOUS PROVISIONS	
Integrity of Information	
33. Authority and staff to maintain secrecy	
34. Corrupt use of official information	
35. Exclusion of public interest immunity	
Delegations	
36. Delegation of functions or powers of Authority	
37. Delegation to produce evidence of authority	
38. Revocation of delegations	
Liability and Offences	
39. Liability of employer and principles	

40. Offences	<i>Amendments</i>
<i>Savings</i>	42. Official Information Act 1982 amended
41. Act not to derogate from protection under other Acts	43. Public Finance Act 1989 amended
	44. Privacy Act 1993 amended Schedule

A BILL INTITLED

An Act—

- (a) To facilitate and encourage, in the public interest, the disclosure, investigation, and correction of unlawful, improper, or injurious conduct or activity: 5
- (b) To constitute the Whistleblowers Protection Authority and establish procedures to deal with such disclosures:
- (c) To protect persons who make appropriate disclosures of public interest information: 10
- (d) To make provision on matters incidental thereto
- BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Whistleblowers Protection Act 1994. 15
- (2) This Act shall come into force on the 1st day of July 1995.

PART I

PRELIMINARY PROVISIONS

2. Interpretation—In this Act, unless the context otherwise requires,— 20
- “Appropriate disclosure of public interest information” means a disclosure made in accordance with section 6 of this Act:
- “Complaints Division” means the Complaints Division referred to in section 12 (1) of the Human Rights Act 1993: 25
- “Environment” has the same meaning as in section 2 of the Environment Act 1986:
- “Informant” means a person who makes a disclosure of public interest information under section 5 of this Act: 30
- “Protected informant status” has the meaning given to it in section 29 (3) of this Act:
- “Public funds or public resources” includes—
- (a) Public money within the meaning of the Public Finance Act 1977: 35
- (b) Public stores within the meaning of that Act:

- (c) Money and stores of a Government agency within the meaning of that Act:
- (d) Money and stores of a local authority within the meaning of that Act;—
- 5 and also includes like money and stores of—
- (e) A Crown entity within the meaning of the Public Finance Act 1989:
- (f) A State enterprise within the meaning of the State-Owned Enterprises Act 1986:
- 10 (g) A local authority trading enterprise within the meaning of section 594B (1) of the Local Government Act 1974:
- (h) An airport company within the meaning of the Airport Authorities Act 1966:
- 15 (i) A port company within the meaning of the Port Companies Act 1988:
- “Public interest information” means information relating to conduct or activity of the kind specified in section 5 (1) of this Act:
- 20 “Whistleblowers Protection Authority” or “Authority” means the Whistleblowers Protection Authority constituted under section 9 of this Act.

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

4. Purpose of Act—(1) The purpose of this Act is to
- 25 facilitate and encourage, in the public interest, the disclosure, investigation, and correction of any conduct or activity that—
- (a) Concerns the unlawful, corrupt, or unauthorised use of public funds or public resources:
 - (b) Is otherwise unlawful:
 - 30 (c) Constitutes a significant risk or danger, or is injurious, to—
 - (i) Public health:
 - (ii) Public safety:
 - (iii) The environment:
 - 35 (iv) The maintenance of the law and justice, including the prevention, investigation, and detection of offences, and the right to a fair trial.
- (2) The purpose of this Act is further to affirm—
- 40 (a) That public accountability and the ethic of openness are essential elements of a democratic society and for promoting the wellbeing of the community:

- (b) That informants who act in accordance with this Act should be recognised as acting responsibly and in the public interest.
- (3) For attaining its purpose, this Act—
 - (a) Constitutes a Whistleblowers Protection Authority and establishes procedures to facilitate and encourage disclosure of public interest information: 5
 - (b) Provides for such disclosures to be properly investigated and dealt with:
 - (c) Provides for the protection of persons (commonly known as whistleblowers) who make disclosures of public interest information to the Authority: 10
 - (d) Provides for remedies for such persons who encounter discrimination or harassment for disclosing public interest information. 15

PART II

DISCLOSURE OF PUBLIC INTEREST INFORMATION

5. Making disclosure of public interest information—

- (1) Public interest information is information which relates to any conduct or activity, whether in the public sector or in the private sector, that— 20
 - (a) Concerns the unlawful, corrupt, or unauthorised use of public funds or public resources:
 - (b) Is otherwise unlawful:
 - (c) Constitutes a significant risk or danger, or is injurious, 25
 - to—
 - (i) Public health:
 - (ii) Public safety:
 - (iii) The environment:
 - (iv) The maintenance of the law and justice, 30
 - including the prevention, investigation, and detection of offences, and the right to a fair trial.
- (2) Any person may disclose public interest information to the Authority.
- (3) A person may disclose to the Authority— 35
 - (a) Information the disclosure of which could properly be withheld in accordance with—
 - (i) The Official Information Act 1982; or
 - (ii) The Local Government Official Information and Meetings Act 1987: 40
 - (b) Personal information the disclosure of which would breach the Privacy Act 1993 or a code of practice issued under section 63 of that Act:

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

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

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

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

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

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

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

(a) The person—

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

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

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

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

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

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

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

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

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

PART III

5

WHISTLEBLOWERS PROTECTION AUTHORITY

9. Whistleblowers Protection Authority constituted—

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

(2) Subject to section 15 of this Act, the Authority shall be appointed by the Governor-General on the recommendation of the House of Representatives. 10

(3) The Authority shall be a corporation sole with perpetual succession and a seal of office, and shall have and may exercise all the rights, powers, and privileges, and may incur all the liabilities and obligations, of a natural person of full age and capacity. 15

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

10. Functions of Authority—(1) The functions of the Authority shall be— 20

- (a) To investigate any disclosure of public interest information made to the Authority;
- (b) To provide advice, counselling, and assistance to prospective informants and protected informants;
- (c) To monitor developments in relation to disclosures of public interest information: 25
- (d) To report to the House of Representatives or, as the case may be, the Prime Minister from time to time on any matter relating to the disclosure of public interest information, including the need for, or desirability of, taking legislative, administrative, or other action to give better protection to informants: 30
- (e) To make public statements in relation to disclosures of public interest information;
- (f) To review the operation of this Act as required by section 19 of this Act: 35
- (g) To do anything incidental or conducive to the performance of the preceding functions;
- (h) To exercise and perform such other functions, powers, and duties as are conferred or imposed on the Authority by or under this Act or any other enactment. 40

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

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

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

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

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

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

25 Cf. 1993, No. 28, s. 15

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

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

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

13. Continuation in office after term expires—

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

(a) That person is reappointed; or

(b) A successor to that person is appointed.

(2) The person appointed as the Authority—

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

- no Speaker or Deputy Speaker or if both the Speaker and Deputy Speaker are absent from New Zealand:
- (b) Shall resign the office on attaining the age of 72 years.
- Cf. 1986, No. 127, s. 6 (2); 1991, No. 126 s. 9 (3); 1993, No. 28, s. 17

5

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

10

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

20

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

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

25

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

(3) If—

30

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

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

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

35

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

40

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

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

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

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

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

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

Reporting and Review Provisions

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

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

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

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

(a) Review the operation of this Act since—

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

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

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

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

10

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

PART IV

PROCEDURES

Advice and Counselling

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

15

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

20

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

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

25

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

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

Investigation by Authority

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

30

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

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

35

Cf. 1993, No. 28, s. 70

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

40

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

- 5 (a) The Authority considers that under the law there is an adequate remedy, right of appeal, or agency for investigation to which it would have been reasonable for the person disclosing the public interest information to resort; or
- 10 (b) The Authority considers that the information disclosed is already publicly known or concerns a matter of public policy or debate on which diverse opinions may reasonably or sincerely be held, unless in the circumstances of the particular case there are other considerations which render it desirable in the public interest for the Authority to investigate the matter; or
- 15 (c) The length of time that has elapsed between the date when the subject-matter of the disclosure of the public interest information arose and the date when the disclosure was made is such that an investigation of the information is no longer practicable or desirable; or
- 20 (d) The subject-matter of the information is trivial; or
- (e) The making of the disclosure is frivolous or vexatious or is not made in good faith; or
- 25 (f) The information is insufficient to allow an investigation to proceed.

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

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

Proceedings

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

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

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

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

Provided that if at any time during the course of an investigation it appears to the Authority that there may be sufficient grounds for making any report or recommendation that may adversely affect that person, the Authority shall give that person an opportunity to be heard. 5

(5) Subject to the provisions of this Act, the Authority may regulate the Authority's procedure in such manner as the Authority thinks fit. 10

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

24. Evidence—(1) The Authority may summon before him or her and examine on oath any person who in the Authority's opinion is able to give information relevant to an investigation being conducted by the Authority under this Part of this Act. 15

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

(3) Every examination by the Authority under subsection (1) of this section shall be deemed to be a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury). 20

(4) The Authority may from time to time, by notice in writing, require any person who in the Authority's opinion is able to give information relevant to an investigation being conducted by the Authority under this Part of this Act to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Authority are relevant to the subject-matter of the investigation or inquiry. 25 30

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

(a) The provisions of any regulations in that behalf under the Summary Proceedings Act 1957 shall apply accordingly; and 35

(b) The Authority shall have the powers of a court under any such regulations to fix or disallow, in whole or in part, or to increase, any amounts payable under the regulations. 40

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

25. Protection and privileges of witnesses, etc.—

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

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

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

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

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

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

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

(a) The Authority; and

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

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

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

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

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

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

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

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

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

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

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

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

(a) Has substance; and

(b) Appears to—

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

(ii) Be otherwise unlawful; or

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

(A) Public health; or

(B) Public safety; or

(C) The environment; or

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

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

- (a) To the person to whom the investigation relates with a recommendation that appropriate corrective action be taken:
- 5 (b) To an appropriate enforcement agency for investigation and, where that agency is so empowered, decision whether to institute proceedings.
- (3) In any case where the Authority has referred the matter in accordance with paragraph (a) of subsection (2) of this section, the Authority may request the person to notify the Authority,
- 10 within a specified time, of the steps, if any, that that person proposes to take to give effect to the Authority's recommendation.
- (4) If within a reasonable time no action is taken that seems to the Authority to be adequate and appropriate, the Authority
- 15 may report to the Prime Minister accordingly, and may thereafter make such report to the House of Representatives on the matter as the Authority thinks fit.
- (5) The Authority shall, in any case to which this section relates, inform the person who made the disclosure of public interest information of the result of the Authority's
- 20 investigation.
- (6) In subsection (2) (b) of this section, the term "appropriate enforcement agency" includes (but without limitation)—
- (a) The Solicitor-General:
- 25 (b) The State Services Commissioner appointed under section 3 of the State Sector Act 1988:
- (c) The Audit Office (as defined by section 14 of the Public Finance Act 1977):
- (d) The Commissioner of Police:
- 30 (e) The Police Complaints Authority established by section 4 of the Police Complaints Authority Act 1988, in relation to information alleging Police misconduct:
- (f) The Director of the Serious Fraud Office within the meaning of the Serious Fraud Office Act 1990:
- 35 (g) The Public Health Commission established by section 27 of the Health and Disability Services Act 1993:
- (h) The Director-General of Health, in relation to information relevant to the administration of—
- (i) The Toxic Substances Act 1979; or
- 40 (ii) The Medicines Act 1981; or
- (iii) The Food Act 1981:
- (i) The Director of Mental Health appointed in terms of section 91 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, in relation to

- information relevant to the administration of that Act:
- (j) The Director-General of Agriculture and Fisheries or, as the case may require, the Registrar of the Pesticides Board, in relation to information relevant to the administration of the Pesticides Act 1979: 5
 - (k) The Director-General defined by the Biosecurity Act 1993 as responsible for the time being for the administration of that Act:
 - (l) The Hazards Control Commission established by section 346 of the Resource Management Act 1991: 10
 - (m) The Parliamentary Commissioner for the Environment appointed under section 4 of the Environment Act 1986:
 - (n) The Secretary for Justice, in relation to information relevant to the administration of— 15
 - (i) The Penal Institutions Act 1954:
 - (ii) The Criminal Justice Act 1985:
 - (o) The Director-General of Social Welfare, in relation to information relevant to the administration of the Children, Young Persons, and Their Families Act 1989: 20
 - (p) The Secretary of the Department defined by the Health and Safety in Employment Act 1992 as responsible for the administration of that Act: 25
 - (q) The Secretary of Labour,—
 - (i) As Chief Inspector of Explosives under the Explosives Act 1957:
 - (ii) As Chief Inspector of Dangerous Goods under the Dangerous Goods Act 1974: 30
 - (r) The Transport Accident Investigation Commission established by section 3 of the Transport Accident Investigation Commission Act 1990:
 - (s) The Civil Aviation Authority of New Zealand established by section 72A of the Civil Aviation Act 1990 (as inserted by section 31 of the Civil Aviation Amendment Act 1992) or, as the case may require, the Director of Civil Aviation appointed under section 72I of that Act (as so inserted): 35
 - (t) The General Manager of the Aviation Security Service appointed under section 72L of the Civil Aviation Act 1990 (as inserted by section 14 of the Civil Aviation Amendment Act 1993) or, as the case may require, an authorised provider of aviation security service under Part VIII of that Act: 40 45

- 5 (u) The Land Transport Safety Authority of New Zealand established by section 15 of the Land Transport Act 1993 or, as the case may require, the Director of Land Transport Safety appointed under section 24 of that Act:
- 10 (v) The Maritime Safety Authority of New Zealand established by section 3 of the Maritime Transport Act 1993 or, as the case may require, the Director of Maritime Safety appointed under section 13 of that Act.

Cf. 1975, No. 9, s. 22

PART V

REMEDIES FOR INJURY TO PROTECTED INFORMANTS

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

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

- (a) The making of an application for employment:
- 25 (b) Employment, which term includes unpaid work:
- (c) Participation in, or the making of an application for participation in, a partnership:
- (d) Membership, or the making of an application for membership, of an industrial union or professional or trade association:
- 30 (e) Access to any approval, authorisation, or qualification:
- (f) Vocational training, or the making of an application for vocational training:
- (g) Access to places, vehicles, and facilities:
- (h) Access to goods and services:
- 35 (i) Access to land, housing, or other accommodation:
- (j) Education.

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

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

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

30. Complaints relating to breach of protection of informant—Any informant may make a complaint to the 5
Complaints Division that—

- (a) His or her identity has been disclosed; and that
- (b) He or she is being or has been subjected to detriment or 10
less favourable treatment or harassment in any of the
areas described in section 29 of this Act,—

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

31. Procedures under Human Rights Act 1993 to apply 15
to complaints—Where any informant makes a complaint in
terms of section 30 of this Act, Parts III, IV, V, and VII of the
Human Rights Act 1993, so far as applicable and with all
necessary modifications, shall apply in relation to that
complaint as if it were a complaint under that Act.

Cf. 1956, No. 65, s. 22f 20

Extension of Grounds of Prohibited Discrimination

32. Application of provisions relating to Human 25
Rights Act 1993—Every reference to a complaint under the
Human Rights Act 1993 shall be construed in the following
enactments (which relate to choice of procedure where
circumstances give rise to a personal grievance by an employee)
as including a reference to a complaint under section 30 of this
Act:

- (a) The Police Act 1958: section 95:
- (b) The State-Owned Enterprises Act 1986: section 6: 30
- (c) The New Zealand Symphony Orchestra Act 1988: section
10:
- (d) The Broadcasting Act 1989: clause 7 of the First Schedule:
- (e) The Employment Contracts Act 1991: sections 26 (e) and 35
39.

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

(3) The grounds of prohibited discrimination specified in 40
section 28 (1) of the Employment Contracts Act 1991 shall be
deemed to include protected informant status.

PART VI

MISCELLANEOUS PROVISIONS

Integrity of Information

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

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

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

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

(i) The security or defence of New Zealand; or
 (ii) Any interest protected by section 7 of the Official Information Act 1982; or
 20 (iii) The prevention, investigation, or detection of offences; or

(iv) The safety of any person; or
 (b) Any information, answer, document, or thing obtained by the Authority by reason only of compliance with a requirement made pursuant to section 24 (1) of this Act.
 25

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

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

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

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

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

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

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

5

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

Delegations

36. Delegation of functions or powers of Authority—

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

10

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

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

15

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

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

20

25

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

30

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

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

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

35

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

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

40

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

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

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

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

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

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

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

Liability and Offences

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

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

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

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

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

- (a) Without reasonable excuse, obstructs, hinders, or resists the Authority or any other person in the exercise of their powers under this Act: 5
- (b) Without reasonable excuse, refuses or fails to comply with any lawful requirement of the Authority or any other person under this Act:
- (c) Makes any statement or gives any information to the Authority or any other person exercising powers under this Act, knowing that the statement or information is false or misleading: 10
- (d) Represents directly or indirectly that he or she holds any authority under this Act when he or she does not hold that authority. 15

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

Savings

41. Act not to derogate from protection under other Acts—This Act is in addition to, and does not derogate from, any privilege, protection, or immunity existing apart from this Act under which information may be disclosed without civil or criminal liability. 20

Cf. Whistleblowers Protection Act 1993 (South Australia), s. 11 25

Amendments

42. Official Information Act 1982 amended—The First Schedule to the Official Information Act 1982 is hereby amended by inserting, in its appropriate alphabetical order, the following item: 30

“Whistleblowers Protection Authority”.

43. Public Finance Act 1989 amended—Section 2 (1) of the Public Finance Act 1989 is hereby amended by repealing the definition of the term “Office of Parliament” (as substituted by section 129 (1) of the Privacy Act 1993), and substituting the following definition: 35

“‘Office of Parliament’ means the Parliamentary Commissioner for the Environment (and that Commissioner’s office), the Office of Ombudsmen, the Whistleblowers Protection Authority (and that 40

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

- 5 **44. Privacy Act 1993 amended**—Section 2 (1) of the Privacy Act 1993 is hereby amended by inserting in paragraph (b) of the definition of the term "agency", after subparagraph (ix), the following new subparagraph:
 "(ixa) The Whistleblowers Protection Authority; or".
-

Section 17

SCHEDULE

PROVISIONS APPLYING IN RESPECT OF AUTHORITY

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

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

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

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

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

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

(5) The Authority shall—

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

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

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

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

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

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

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

SCHEDULE—continued

PROVISIONS APPLYING IN RESPECT OF AUTHORITY—continued

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

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

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

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

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

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

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

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

SCHEDULE—continued

PROVISIONS APPLYING IN RESPECT OF AUTHORITY—continued
for the supply to the Authority of any goods, stores, or equipment, on and subject to such terms and conditions as may be agreed.

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

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