The Law Reform Commission

DISCUSSION PAPER

LEGISLATIVE PROTECTION OF WHISTLEBLOWERS- AN EXAMINATION OF LEGISLATION IN THE CAYMAN ISLANDS AND OTHER JURISDICTIONS

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LEGISLATIVE PROTECTION OF WHISTLEBLOWERS- AN EXAMINATION OF LEGISLATION IN THE CAYMAN ISLANDS AND OTHER JURISDICTIONS

INTRODUCTION

1. The Law Reform Commission ("LRC") in carrying out its mandate to make the laws of the Islands more responsive to the changing needs of our society, submits with this discussion paper a Protected Disclosures Bill. The objects of the Bill are to-

(a) facilitate and encourage the making, in a responsible manner, of disclosures of improper conduct;
(b) protect persons who make specified disclosures from being subjected to detrimental action;
(c) regulate the receiving, investigating or otherwise dealing with disclosures of improper conduct;
(d) provide protection to the person and the property of the person making the protected disclosure; and
(e) compensate the person making protected disclosures from damages suffered by him as a result of making such disclosures.

2. On 3 April, 2013 the Complaints Commissioner, pursuant to her legislative powers, gave notice of the intention of that office to carry out an own motion investigation into whether there are adequate protections for reporters of wrongdoing (also known as whistleblowers). The Office was of the view that there were reasons of special importance which makes such investigation desirable in the public interest.[1]

3. The Director of the Law Reform Commission met with one of the officers[2] of the office of the Complaints Commissioner ("OCC") in June 2013. A brief overview of the more relevant laws in the Cayman Islands as well as in other jurisdictions was provided by the Director. Pursuant to a request of the OCC, the Chairman of the Commission thereafter agreed to assist in the investigation by the provision of a paper on the relevant legislative provisions in the Islands and a summary of legislation in some other Commonwealth jurisdictions.

4. A draft paper giving a summary of relevant legislation in Jamaica, Canada and the United Kingdom was sent to the OCC in July, 2013 and a draft Protected Disclosures Bill was submitted in late September, 2013.

[1] Memorandum of 4 April, 2013
[2] Mr. Sonji Myles

5. In the terms of reference[3] given by the Commissioner, the office examined, among other things, whether new legislation was needed and if so what; whether there are any whistleblowing policies in place and the adequacy of such policies; the current work culture, custom and practice as well as best practice from other jurisdictions.

6. The report of the OCC was published on 13 March, 2014 and findings in the report included the following-

(a) that civil servants were extremely reluctant to report wrongdoing both for fear of reprisal and because of the belief that the wrongdoer would not be punished;

(b) that civil servants who were interviewed recounted many instances of intimidation, victimisation or reprisal; and

(c) that there is no effective and rigorously enforced whistleblowing policy in the government and the absences of such a policy undermines the ability of public officers to comply with Part II of the Public Services Management Law.

7. The Complaints Commissioner recommended stand-alone legislation such as that found in Australia, New Zealand and Jamaica and elsewhere.

8. When the Law Reform Commission commenced its work in this area it decided that its review would not only relate to the public sector but to the private sector as well. The approach of this paper is to compare how legislation protects whistleblowers in the Cayman Islands with how such protection is given in other jurisdictions and to discuss the essential elements of effective whistleblower legislation.

WHISTLEBLOWING IN THE CAYMAN ISLANDS

9. The term "whistleblower" is a term which was coined[4] to describe a person who makes a disclosure or disclosures of alleged illegality or misconduct, either to his employer or to persons such as the media, lawyers, law enforcement agencies or other government agencies. It has been posited that whistleblowing dates back to the 1780s in the UK with reporting on corruption in the British Navy and navy contractors[5] although our research finds that forms of whistleblowing may be found much earlier.

10. It is a well known term, more so over the past several of years with international incidents such as the WikiLeaks scandal and more recently revelations by American Edward Snowden. Legislation[6] in the USA defines a whistleblower as a person who discloses information that he or she reasonably believes evidences-

[3] OCC report 13 March, 2014
[4] Allegedly by US political activist Ralph Nader in the 1970's
[5] Caslon Analytics Guide -secrecy and accountability
[6] E.g. Whistle Blower Protection Act 1989

(a) a violation of any law, rule or regulation;
(b) gross mismanagement;
(c) a gross waste of funds;
(d) an abuse of authority;
(e) a substantial and specific danger to public health; or
(f) a substantial and specific danger to public safety.

11. The types of conduct on which reports may be made are similar to those identified in the Jamaican Protected Disclosures Act of 2011[7]. That Act provides that one of its objects is to facilitate and encourage the making, in a responsible manner, of disclosures of improper conduct, in the public interest. "Improper conduct" is defined in the Act as any-

(a) criminal offence;
(b) failure to carry out a legal obligation;
(c) conduct that is likely to result in a miscarriage of justice;
(d) conduct that is likely to threaten the health or safety of a person;
(e) conduct that is likely to threaten or damage the environment;
(f) conduct that shows gross mismanagement, impropriety or misconduct in the carrying out of any activity that involves the use of public funds;
(g) act of reprisal against or victimisation of an employee;
(h) conduct that tends to show unfair discrimination on the basis of gender; race, place of origin, social class, colour, religion or political opinion; or
(i) wilful concealment of any act described in paragraphs (a) to (h).

12. Under that Act a disclosure may be made in relation to a fellow employee or in relation to the employer of the person who makes the disclosure.

13. The UK Committee on Standards in Public Life[8] noted in its Second Report that[9]-

> "All organisations face the risks of things going wrong or of unknowingly harbouring malpractice. Part of the duty of identifying such a situation and taking remedial action may lie with the regulatory or funding body. But the regulator is usually in the role of detective, determining responsibility after the crime has been discovered. Encouraging a culture of openness within an organisation will help: prevention is better than cure. Yet it is striking that in the few cases where things have gone badly wrong in local public spending bodies, it has frequently been the tip-off to the press or the local Member of Parliament - sometimes anonymous, sometimes not - which has prompted the regulators into action. Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation.".

[7] Came into force August 2012
[8] An independent body which advises the UK government on ethical standards in public life
[9] Second Report, Cm 3270 -1 (May 1996) p. 21

14. It is clear from the report of the OCC that the reporting of illegality of misconduct is not a part of the "culture" of the public service of the Cayman Islands. However, the Law Reform Commission noted that in the months leading up to the 2013 election the reporting of illegality by surreptitious means was widely discussed in several talk shows and in the newspapers[10].

15. The most well known case of whistleblowing in the Cayman Islands occurred where certain information provided to the media in 2005 by Mr. Charles Clifford, the former Permanent Secretary[11] of the Ministry of Tourism, led to a Commission of Inquiry in 2008 headed by Sir Richard Tucker. Mr. Clifford was accused of divulging confidential information to the media in relation to alleged financial irregularities at two statutory authorities. Mr. Clifford defended his actions in giving the information to the media as being in the public interest. He noted that he had resigned his post as Permanent Secretary as the complaints he had made to the Governor in connection with the issues had not been dealt with.

16. Although Mr. Clifford was found by the inquiry to have acted in breach of the then General Orders which regulated the public service, it was recommended that no action be taken against him as, inter alia, the unauthorised disclosures did not cause any damage and the public had a legitimate interest in the information disclosed.

17. In that case Mr. Clifford felt that the issues should have been reported to the media and not internally and it appears that some public officers continue to believe this, if the discussions on several talk shows can be used as evidence. An example of this continued belief are the allegations of conflicts of interest at the Cayman Islands Airport Authority which were brought to the notice of the public by information leaked to the MLA for the Northside district. In another incident, earlier last year, it was reported in the media that documents relating to the development of the Port were leaked secretly to the MLAs for Northside and East End. [12]

18. The difference between the leaking of the documents in 2005 and the leaking of documents in 2013 is the legislative environment. In 2005 there was no Freedom of Information Law which changed the information landscape as it relates to access to public documents. Public officers were regulated by the Confidential Relationships (Preservation) Law and General Orders.

19. Commissioner Tucker noted, in relation to past laws and those which were in force at the time which regulated the handling, retention and possession of documents as follows-

> "The effectiveness and extent of these rules is a matter which gives rise to concern. Significantly, these rules do not relate to the precise matters specified in

[10] E.g. "Board shoots messenger", Cayman News Service 27th February, 2013
[11] Mr. Charles Clifford, also former Minister of Tourism 2005 to 2009
[12] "CHEC Port deal leaked", Cayman News Service, 2nd April, 2013

this Terms of Reference, namely the handling, retention and possession of documents. There do not appear to have been any laws or regulations in existence which governed a civil servant's duties in relation to this aspect of his dealing with documents which came into his possession. Greater attention needs to be paid to the question of the security of government documents, by requiring retiring officers to surrender them (and if need be, by shredding them) in order to prevent their disclosure or unauthorized use.".

20. Commissioner Tucker stated that there was an ingrained culture of secrecy within the civil service.

21. The **Freedom of Information Law** was passed in November 2007 but was not brought into force until 1 January, 2009 after the inquiry. The Commissioner stated that a number of witnesses in the inquiry expressed the view that this Law would herald a sea of change in the culture of the service. He opined that "[in] the space of only one year, the long established "culture of secrecy" is to be transformed by giving the general public a statutory right of access to government records….".[13]

22. Commissioner Tucker stated that the information which was the subject of the inquiry would be the type of information which could be disclosed under the coming Freedom of Information Law and that section 50 of the Law would provide adequate protection for whistleblowers. Why then were there recent allegations of documents being found by politicians in the back of the trucks or on windshields?

23. What current legislative protection is there for persons who report alleged wrongdoing? Several pieces of legislation provide for some protection of reporters of wrongdoing. **The Freedom of Information Law, 2007** provides in section 50 as follows-

> "50. (1) No person may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment-related obligation, for releasing information on wrong-doing, or that which would disclose a serious threat to health, safety or the environment, as long as he acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.
>
> (2) For the purposes of subsection (1), "wrongdoing" includes but is not limited to-
>
> (a) the commission of a criminal offence;
> (b) failure to comply with a legal obligation;
> (c) miscarriage of justice; or
> (d) corruption, dishonesty, or serious maladministration.".

24. Thus a person-

[13] Para 3.4.1. Inquiry report

(a) acting in good faith; and
(b) holding a reasonable belief that certain type of information he has is true and reveals certain type of wrongdoing,

is protected from victimisation under the Freedom of Information Law.

25. Under the **Anti-Corruption Law of 2008** there is limited protection for all persons who make reports of corruption, not only public officers. Section 37 provides as follows-

> "37. (1) Where a person discloses to the Commission or to a constable information concerning a corruption offence or the proceeds or suspected proceeds of a corruption offence, the disclosure shall not be treated as a breach of any restriction upon the disclosure of information by any enactment or otherwise and shall not give rise to any civil liability.
>
> (2) Except as provided in this section, no complaint as to an offence under this Law shall be admitted in evidence in any civil or criminal proceeding and no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery.
>
> (3) Where any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contains any entry in which any informer is named or described or which might lead to his discovery, the court before which the proceeding is held shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery but no further.
>
> (4) Where, in any proceeding relating to an offence under this Law, the court, after full inquiry into the case-
>
> (a) is of the opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true; or
> (b) is of the opinion that justice cannot be fully done between the parties thereto without the discovery of the informer,
>
> the court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.".

26. Similarly under the **Gender Equality Law, 2011** and **the Sexual Harassment Bill,[14] 2013** there are provisions which make it an offence to victimise persons who report wrongdoing under those pieces of legislation. For example, section 22 (1) of the Gender Equality Law provides that-

[14] Submitted to the Attorney General in May 2013

" (1) A person shall not subject or threaten to subject another person to any detriment -

(a) on the ground that the second mentioned-person -

(i) has made, or proposes to make, a complaint under this Law;

(ii) has furnished or proposes to furnish, any information, or has produced, or proposes to produce, any document to a person exercising or performing any power or function under this Law;

(iii) proposes to provide evidence or testimony as a witness; or

(iv) has made a good faith allegation that a person has committed an act of discrimination in contravention of this Law; or

(b) on the ground that the first-mentioned person believes that the second-mentioned person has done, or proposes to do, an act or thing referred to in paragraph (a)(i) to (iv).

27. A person who contravenes section 22 (1) of the Law commits an offence and is liable on summary conviction to a fine of five thousand dollars.

28. In 2006 the **Personnel Regulations**[15] continued the requirement for public officers to sign a declaration of secrecy, similar to the General Orders it had repealed. This fact was lamented by Commissioner Tucker, who recommended that this requirement be repealed as the declaration may be inconsistent with the Freedom of Information Law. The regulation was repealed in 2009 and in the amendment which effected such repeal it was also provided that, in accordance with section 5(1)(h) of the Law, a public servant shall not disclose to an unauthorised person information obtained in the course of employment unless authorised to do so under the terms of his employment or by or under the Freedom of Information Law, 2007.

29. One of the recommendations of the inquiry was that the Personnel Regulations should contain practical guidance to assist civil servants who seek to report or expose wrongdoing and, for example, the regulations could give guidance about appropriate channels of communication. However, notwithstanding the amendments to the regulations, no such guidance has been provided to date.

30. Under the Anti-Corruption Law complaints may be made to the police or to the Anti-Corruption Commission, while under the Gender Equality Law complaints may be made to an employer or to the Gender Equality Tribunal.

31. On 31 January, 2014 the Legislative Assembly passed the Standards in Public Life Law which provides that its purpose is to promote integrity in public life. It provides in section 24 for the protection of whistleblowers and that section is worded in exactly

[15] Regulation 28(1)(b)(ii)

the same way as section 50 of the Freedom of Information Law. Again, however, there is no guidance on the procedures to be followed for providing information anonymously and no details are provided on how whistleblowers may seek damages or other reparations for acts of reprisals.

32. Other legislation which the report of the OCC states[16] deal with the reporting of wrongdoing includes section 30 of the Insurance Law (2010 Revision); section 13 of the Bank and Trust Companies Law (2009 Revision) and section 50 of the Monetary Authority Law (2011 Revision).

WHISTLEBLOWER PROTECTION IN OTHER COMMONWEALTH JURISDICTIONS

33. As can be seen from the above, legislation in the Cayman Islands relating to the reporting of wrongdoing can only be described as piecemeal. How does this compare with the regulation of the whistleblowing process in other countries? Are the Cayman Islands complying with recognised international standards in this area? In order to answer this the Commission examined the laws in a number of jurisdictions and provide below a summary of the laws in the UK, Jamaica and Canada in order to provide such a comparison.

Jamaica

The Protected Disclosures Act

34. In Jamaica the Protected Disclosures Act was passed in 2011 and came into force in August 2012. The Act is grounded primarily in the employer/employee relationship and relates to both the private and public sector. The object of the legislation is to encourage and facilitate the making by employees of specified disclosures of improper conduct in the public interest; to regulate the receiving, investigating or otherwise dealing with disclosures of improper conduct and to protect employees who make specified disclosures from being subjected to occupational detriment.

35. An employee is defined as-

(a) any person who-
  (i) works or has worked for another person; and

  (ii) receives, received, or is entitled to receive, any remuneration for work done;

(b) any person who in any manner assists or has assisted in the carrying on or conduct of the business of an employer, without any entitlement to receive remuneration or reward; or

[16] Page 19

(c) any person who is, or was, engaged or contracted under a contract for services to do work for another person, or any agent of the person.

36. A disclosure under the Act means disclosure of information made by an employee, regarding any conduct of an employer of that employee or another employee of the employer, where the employee has a reasonable belief that the information disclosed shows or tends to show that improper conduct has occurred, is occurring or is likely to occur.[17] An employee is only protected if the disclosure is made in good faith and in the public interest.[18]

37. As seen at paragraph 10 above, the Act specifies the types of improper conduct on which a disclosure may be made. However, it should be noted that the list has been described by the Commonwealth Human Rights Initiative as being too restrictive as it does not include disclosure of the commission of human rights violations as a category entitled to protection.[19]

38. A disclosure of information is not protected under the Act if the employee making the disclosure commits an offence by making it. Thus, if an employee, who does not have authorisation to access a document which has been categorised as secret or confidential by the organization, reveals such information under the Act he does not have the benefit of protection. This section has also been criticised and it has been argued that it is not uncommon for employers to hide documentary evidence of wrongdoing by stamping the document 'secret' or 'confidential' with access being restricted to a few officials only.[20] The Commonwealth Human Rights Initiative opined that if an official who does not have authorisation happens to obtain classified documents that contain information about 'improper conduct' and makes a disclosure under this Act such disclosure should receive the benefit of protection in the larger public interest.

39. Each employer and prescribed person must establish and operate procedures for receiving, investigating and otherwise dealing with disclosures. Procedures for making a disclosure must be in writing and must contain the following minimum information as set out in the Second Schedule to the Act-

(a) the full name, address and occupation of the person making the disclosure;
(b) the nature of the improper conduct in respect of which the disclosure is made;
(c) the name of the person alleged to have committed, to be committing or to be about to commit the improper conduct;

[17] Section 2
[18] Section 5
[19] "Jamaica's Protected Disclosures Bill, 2010- A preliminary analysis with recommendations for improvement"- V. Nayak and V. Choraria, Commonwealth Human Rights Initiative
[20] ibid

(d) the time and place where the alleged improper conduct is taking place, took place or is likely to take place;
(e) the full name, address and description of a person (if any) who witnessed the commission of the improper conduct;
(f) whether the person making the disclosure has made a disclosure of the same or of some other improper conduct on a previous occasion and if so, about whom and to whom the disclosure was made; and
(g) if the person is an employee making a disclosure about that person's employer or a fellow employee, whether the person making the disclosure remains in the same employment.

40. The persons to whom disclosures may be made under the Act by an employee are-

(a) an employer or any person specified in a procedure for making disclosures as is established by the employer;
(b) a Minister of government if the employer is appointed under any law by the Minister or if the employer is a public body any of whose members is appointed by the minister;
(c) a prescribed person where the employee reasonably believes that the conduct disclosed falls within the areas of responsibility of the prescribed person;
(d) the Corruption Prevention Commission (which is the designated authority appointed under the Act for monitoring compliance with the Act) if it is reasonable in all the circumstances of the case, to make the disclosure and any of the following circumstances applies, namely-

(i) at the time of the disclosure, the employee reasonably believed that he would be subject to an occupational detriment if he made the disclosure to his employer in accordance with section 7 of the Act;
(ii) there is no prescribed person in relation to the relevant improper conduct;
(iii) the employee making the disclosure has reason to believe that it is likely that evidence relating to the improper conduct will be concealed or destroyed if he makes the disclosure to his employer;
(iv) the employee making the disclosure had made a disclosure on a prior occasion to his employer or to a prescribed person in respect of which no action was taken within thirty days;

(e) an attorney-at-law; or
(f) where an employee seeks to make a disclosure in relation to a matter that would prejudice national security, defence or international relations of Jamaica the disclosure shall be made to the Minister who has responsibility for the subject matter or the Prime Minister or to both.

41. A prescribed person to whom a disclosure may be made is set out in the First Schedule to the Act and includes persons such as the Auditor-General, the Contractor-

General, the Fair Trading Commission, the Political Ombudsman and the Public Defender. A public body which is categorised as an employer means a Ministry, department, executive agency or other agency of Government; a statutory body or authority or any government company. The definition of public body has been criticised as being too restrictive and not covering the legislature or the judiciary and the concern is that this is not in keeping with international best practices.[21]

42. The provisions relating to the reporting of matters of national security above have been seen to be tantamount to putting a whistleblower before a firing squad without even a summary trial. This is based on the fact that decisions such as national security are generally made by the persons to whom one must make a disclosure under the Act.[22]

43. The legislation deals with procedures to be followed for making disclosures internally as well as externally. An employee must, for example, make a disclosure to his employer in the first instance if the disclosure relates to another employee. Only if the person to whom the initial disclosure is made fails to take steps to deal with the disclosure within thirty days then the employee may make a disclosure either to a prescribed person or to the designated authority.

44. Procedures for dealing with disclosures internally are required to identify a designated officer to whom disclosures may be made. The designated officer will be required to keep a reporting employee updated on the status of an investigation of the disclosure. An employer is also required to give information on procedures for making a disclosure to be circulated among employees on a regular basis.

45. The mandatory reporting to an employer in the first instance has also been criticised as being against international best practice.[23] It was suggested that the Act should have included instead a provision enabling an employee to make a disclosure to any of the persons authorised under the Act to accept a disclosure.

46. The procedures for investigating and otherwise dealing with an investigation internally are also set out in the Act. Where it is decided to proceed with an investigation periodic updates must be given within 30 days, every effort should be made to ensure that investigations are carried out fairly and the findings of the investigation must be reported to the relevant employee and to anybody appearing to the person receiving the disclosure to be appropriate (having regard to the relevant improper conduct and the area of responsibility of that body). Recommendations to correct the improper conduct should be made and the required action must be taken in respect of an improper conduct.

47. An employer or other person to whom a disclosure may be made may refuse to investigate a disclosure on the grounds, inter alia, that the subject matter of the disclosure is being dealt with adequately or more appropriately by another person, the disclosure is

[21] ibid
[22] ibid
[23] ibid

frivolous or not sufficiently important to warrant an investigation. Reasons for failing to investigate must be given to the employee in writing.

48. The Act provides for a designated authority to monitor compliance with the legislation and in March 2013 the Government named the Corruption Prevention Commission as that authority.

49. The legislation requires that a person who has received and who is dealing with a disclosure must keep the identity of the employee secret and confidential as well as any document or other information given to him. A failure to keep such confidentiality carries a penalty of a fine of two million dollars,[24] imprisonment for up to two years or both.

50. The Act provides in section 16 that an employee shall not be subjected to any occupational detriment on the basis that the employee seeks to make, has made, or intends to make, a protected disclosure. An employee who is dismissed as a consequence of seeking to make, making or intending to make, a protected disclosure shall be treated as being unjustifiably dismissed. Further, where an employee suffers occupational detriment at or about the same time that he makes a protected disclosure, the occupational detriment shall be presumed to be a consequence of the protected disclosure, unless the employer shows that the act that constitutes the occupational detriment is otherwise justified.

51. While the Jamaican legislation is far more comprehensive in its approach to protecting whistleblowers than the legislation of the Cayman Islands it has been considered as not going far enough. The Act does provide for its review and under section 27 it is provided that it shall be reviewed by a committee of both Houses of Parliament appointed for that purpose. The first review must be conducted not later than three years after the commencement of the Act.

United Kingdom

The Public Interest Disclosure Act

52. The Public Interest Disclosure Act of the UK is similar to the Jamaican Act in that it deals with the disclosure of information both in the public and private sector. The Act was enacted in 1998 by a private member Bill[25] and came into force in July 1999 following many health and safety disasters in the UK. One paper opines that in relation to scandals and disasters in the UK in the 1990's "[almost] every public inquiry found that workers had been aware of the danger but had either been too scared to sound the alarm or had raised the matter in the wrong way or with the wrong person."[26]

[24] About $20,000 US
[25] After consultation with the charity Public Concern at Work and the lobbying group Campaign for Freedom of Information
[26] "Public Interest Disclosure Act 1998- Annotated guide from Public Concern at Work", Feb 2003

53. Examples of the types of disasters and scandals the paper were referring to included the following-

(a) the Clapham Rail crash (where the Hidden Inquiry heard that an inspector had seen the loose wiring but had said nothing because he did not want 'to rock the boat');
(b) the Piper Alpha disaster (where the Cullen Inquiry concluded that "workers did not want to put their continued employment in jeopardy through raising a safety issue which might embarrass management"); and
(c) the collapse of BCCI (where the Bingham Inquiry found an autocratic environment where nobody dared to speak up).[27]

54. The need to provide greater protection for whistleblowers was highlighted during this period and the Public Interest Disclosure Act was enacted thereafter as an amendment to the Employment Rights Act 1996 ("the ERA").

55. The stated purpose of the Public Interest Disclosure Act is to protect workers who disclose information about certain types of matters from being dismissed or penalised by their employers as a result.[28] The Act introduces the concept of a "protected disclosure" which is a qualifying disclosure (as defined by section 43B of the Act) made by a worker in accordance with any of sections 43C to 43H of the legislation.

56. A "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged; or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

57. A disclosure may be protected where it relates to a matter occurring outside the UK or where any offence or breach of a legal requirement involves the laws of another country. The matter disclosed may have occurred in the past and there needs be no link between the matter disclosed and the employee's job. A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making

[27] ibid
[28] Explanatory memorandum to the 1998 Bill

it. For example, if the person makes the disclosure by breaching the Official Secrets Act 1989.

58. For an employee to get protection of the Act, the disclosure must qualify for protection. Up to 2013, to qualify for protection, the employee must have made the disclosure while acting in good faith throughout, and must have had reasonable grounds for believing that the information disclosed indicates the existence of one of the above problems. Except in the case of a disclosure for the purpose of seeking legal advice under section 43D (where the good faith test did not apply) a disclosure which did not meet both of these tests could not be protected under the Act. Good faith is a question of fact and is not equated with honesty. [29]

59. There were many objections to the good faith requirement. In an analysis of the Act five years after its commencement two commentators[30] noted as follows-

> "However, there are principled objections to looking at a worker's motive in this context…..First, the possibility of motivation being examined might deter some important disclosures, for example, in relation to health and safety or serious crime. Second, if motive is relevant, would it not be more consistent with the notion of a human right to freedom of expression if the onus was placed on employers to prove that the worker had acted in bad faith? Third, it could be argued that if a worker reasonably believes that the information is true, the motive for reporting it is irrelevant. This would not necessarily expose employers to great harm. Malicious allegations could be deterred by making it a serious disciplinary offence to report a concern where there were no reasonable grounds for believing that the information supplied was accurate.".

60. The Enterprise and Regulatory Reform Act which came into force in 2013 amended the 1998 Act by removing the requirement that a disclosure must be made in good faith. However, the Act provides that where an employment tribunal finds that a disclosure has not been made in good faith compensation awards could be reduced by up to 25%.

61. The Act made further amendments by providing for a public interest test, changing the definition of worker and for the vicarious liability of employers. The policy paper provided by the Department for Business Innovation and Skills spoke of the need for closing a loophole in the ERA which relate to the types of claims which could made under that Act. The reasons behind the changes in the Enterprise and Regulatory Reform Act were summarised in the paper as follows[31]-

> "A loophole in the existing whistleblowing protections in the Employment Rights Act 1996 ("ERA") will be closed. This loophole has allowed individuals to lodge

[29] ibid
[30] D. Lewis and S. Homewood- "Five years of the Public Interest Disclosure Act in the UK: Are whistleblowers adequately protected?", 2004
[31] Enterprise and Regulatory Reform Act 2013- policy paper

a whistleblowing claim at an employment tribunal in relation to matters of purely private rather than public interest e.g. a breach of their own employment contract that does not engage the public interest.

The protections inserted into the ERA by the Public Interest Disclosure Act 1998 are designed to protect workers from being unfairly dismissed by their employer or suffering other detriment whenever they report their concerns about matters that affect the public interest to their employer, regulatory authorities or other designated persons.

In future, whistleblowing claims will only be valid where an employee blows the whistle in relation to a matter for which the disclosure is genuinely in the public interest. This will exclude breaches of individuals' employment contracts and breaches of other legal obligations which do not involve issues of a wider public interest.

The good faith test is a test which needs to be satisfied by claimants bringing a whistleblowing claim. With the introduction of the public interest test, it was considered that the existence of two tests would have a deterrent effect and reduce the number of disclosures. This Act changes the application of the good faith test, so it will now be considered by the tribunal when deciding on remedy, rather than liability. The tribunal will have the power to reduce any compensation award by up to 25% where a disclosure has been made predominantly in bad faith.

In the light of evidence from the Mid Staffs Inquiry, the principle of vicarious liability will be introduced into the whistleblowing provisions of the ERA. This means that, where a worker is subjected to a detriment by a co-worker done on the ground that the worker had blown the whistle, and this detriment is done in the course of the co-worker's employment with the employer, that detriment would be a legal wrong and would be actionable against both the employer and the co-worker. The employer would only be liable for a detriment where it is done by a worker in the course of employment or by an agent of the employer with the employer's authority. Employers who take all reasonable steps to protect workers from the actions of their co-workers will be able to rely on this as a defence and may not be liable. However, the co-workers may still be personably liable.".

62. The amendments to the Act followed several years after the case of *Parkins v Sodexo Ltd* in which the Employment Appeals Tribunal held that whistleblowing protection extended to complaints about the breach of an employee's own contract of employment.[32] Some commentators were of the view that the UK Government is seeking by the amendments, more particularly the public interest test, to create greater hurdles for whistleblowers. Concerns were expressed that such changes would damage the UK's reputation as a model in whistleblowing legislation and would, by subjecting all

[32] Legal opinion, "Whistleblowing and new public interest test", David Israel, 2013

disclosures to a public interest test, potentially discourage people from speaking out against wrongdoing.[33]

63. Qualifying disclosures are protected if they are made to the employer or other person responsible for the matter; to a Minister of the Crown, in relation to certain public bodies; to a regulatory body designated for the purpose by order and for the purpose of seeking legal advice. Other disclosures may be protected where in the particular circumstances they are reasonable. Special provision is made for disclosures relating to exceptionally serious problems.

64. Section 43C (Disclosure to employer or other responsible person) also provides that a disclosure to a third party under a procedure established by the employer which the worker is authorised to use is protected. Where the matter causing concern is the responsibility of someone other than the employer, a disclosure to that person is protected.

65. A person must satisfy different conditions based on the person to whom the disclosure is made and in this regard, among others, the legislation appears unnecessarily complex and indeed difficult for the ordinary person to understand whether he will be acting correctly. Thus to qualify for protection-

(a) if the disclosure is made to his employer or other responsible person the condition which the employee must satisfy is reasonable belief,

(b) if the disclosure is made to a legal adviser, the employee must make the disclosure in the course of obtaining legal advice;

(c) if the disclosure is made to a government minister who has responsibility for his employer- the condition which the employee must satisfy is with reasonable belief;

(d) if the disclosure is made to a prescribed person, the person must reasonably believe that the prescribed person is designated to deal with the matter and that the information disclosed and any allegation contained in it are substantially true;

(e) if a disclosure is made to other persons such as the police or the media, the person must-

(i) reasonably believe that the information disclosed, and any allegation contained in it, are substantially true;

(ii) not make the disclosure for purposes of personal gain;

(iii) meet either of the following conditions-

(A) that, at the time he makes the disclosure, he reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or to a prescribed person in accordance with section 43F of the Act;

(B) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, he reasonably believes that it is likely that evidence relating

[33]The Bureau of Investigative Journalism- "Whistleblower laws under threat"

to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer; or

(C) he has previously made a disclosure of substantially the same information to his employer, or to a prescribed person in accordance with section 43F; and

(iv) in all the circumstances of the case, it is reasonable for him to make the disclosure.

66. In relation to a disclosure falling under paragraph (e) above, the disclosure will only be protected if, in all the circumstances, it was a reasonable one to have made. The factors of which particular note will be taken in deciding its reasonableness are: the identity of the person to whom it was made; the seriousness of the problem; whether it is continuing or likely to recur; and whether the employer owes a duty of confidentiality, in relation to that information, to a third party.

67. Section 43H of the Act deals with disclosures of exceptionally serious failures and provides that where a problem is "exceptionally serious" a disclosure will be protected whether or not it has first been raised with the employer or a prescribed regulatory body provided it is reasonable to have made it in the circumstances, and in particular whether it was reasonable to have disclosed the information to the person concerned. [34]

68. Section 43J provides that any term of a contract which attempts to prevent a worker making a disclosure in accordance with the provisions of the Act will be void. However, a clause which prevents the disclosure of information about a type of wrongdoing which is not listed in the Act would still be enforceable.

69. "Worker" under the Act includes past employees, certain kinds of agency workers, homeworkers, National Health Service doctors, dentists, ophthalmologists and pharmacists and trainees on vocational or work experience schemes and the definition of employer has been changed accordingly.

70. The Act establishes that it is a worker's right not to be penalized (not to be subject to any detriment) by his employer for making a protected disclosure. The 1998 Act was amended by the 2013 Act to provide that employers are vicariously liable for any bullying or harassment of whistleblowers by their co-workers, unless the employer took all reasonable steps to prevent it – mirroring the vicarious liability provisions in existing discrimination law. Previously the legislation only protected employees from any bullying or harassment on the part of the employer itself. It now however provides a defence for an employer who is able to show that it took all reasonable steps to prevent the detrimental treatment.

71. A worker may complain to an employment tribunal that he has been penalised for making a protected disclosure. Section 4 of the Act provides that where the penalty falls short of dismissal, the provisions of section 49 of the ERA will apply. These provide that compensation is awarded for any loss that the complainant has suffered where this is just

[34] The words "exceptionally serious" are not defined

and equitable. Where the complainant is an employee who has been dismissed, compensation shall be awarded under the Act. Where the contract of a worker who is not an employee is terminated, the compensation awarded under section 49 of the ERA cannot exceed any maximum sum available to an employee who is dismissed. Re-employment orders are not available for such workers.

72. The Act makes it clear that an employee who is dismissed for making a protected disclosure is unfairly dismissed and an employee who is selected for redundancy for making a protected disclosure is also unfairly dismissed.

73. Section 9 extends the ERA's provisions for interim relief to employees making protected disclosures. If the employee seeks interim relief within 7 days and the tribunal considers it likely that it will find that he was dismissed for making a protected disclosure, it may order the employer to reinstate him (ERA, section 129). If the employer fails to comply with such an order, the employee is deemed to remain in employment until the hearing, and entitled to continue to be paid as such (ERA section 132(2)).

74. The Act applies to Crown servants, other than members of the armed forces; it does not apply to the security services and to those whose work is certified as safeguarding national security nor to workers who normally work outside the UK.

75. The Act has been criticised on the ground, inter alia, that it is too restrictive especially in light of the fact that it focuses attention on the whistleblowers' motive. The language of the Act itself is not easily understood. As the Act is also an amendment of the ERA it is necessary to go back to that latter Act in order to get the full understanding of the legislation. In a review of the Act three years after its commencement 1200 disclosure claims were registered and there were approximately one hundred full decisions of employment tribunals during that period. There were awards in some cases of aggravated damages and in one case, compensation of £50,000 was given for injury to feelings. Some cases brought before employment tribunals settled for over a million pounds.

Canada

The Public Servants Disclosure Protection Act

76. Six provinces in Canada have legislation regulating the reporting of confidential information but the legislation summarised under this Part is that of Federal Canada, i.e. the Public Servants Disclosure Protection Act (PSDPA). Unlike the legislation in the UK it applies only to government workers.[35]

[35] A useful summary of the legislation was published by the Federal Accountability Initiative for Reform ("FAIR) a registered Canadian charity and some of this Part is mostly extracted from such publication.

77. The Act was assented to in 2005 and was created to protect Canadians who blow the whistle on Federal government wrongdoing. The Act creates a new Agent of Parliament, the Public Sector Integrity Commissioner (PSIC), whose role is to investigate allegations of wrongdoing and to protect federal government whistleblowers from reprisals.

78. The Act applies to wrongdoing within most parts of the Federal public service. Excluded from the scope of the Act are the Canadian Forces, and the Security Agencies. The Royal Canadian Mounted Police is covered by the Act, but with numerous exceptions: e.g. RCMP personnel cannot report wrongdoing directly to the Commissioner, but must first exhaust the RCMP's internal processes. The Act does not apply to provincial governments.

79. Every deputy head or chief executive officer of any portion of the public sector is mandated by the Act to establish a code of conduct applicable to the portion of the public sector for which he is responsible. The code of conduct must promote ethical practices in the public sector and a positive environment for disclosing wrongdoings by disseminating knowledge of the Act and information about its purposes and processes.[36]

80. The list of wrongdoings to which the Act applies is set out in section 8 of the Act. Based on the language of the legislation it appears to be a closed list which is as follows-

(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19[37] of this Act;
(b) a misuse of public funds or a public asset;
(c) a gross mismanagement in the public sector;
(d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
(e) a serious breach of a code of conduct established under section 5 or 6; and
(f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

81. Each chief executive must establish internal procedures to manage disclosures made under the Act by public servants and a senior officer must be designated to be responsible for receiving and dealing with disclosures of wrongdoings made by public servants. Each chief executive must also-

(a) protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

[36] Section 6
[37] Deals with prohibition against reprisals

(b) establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings; and

(c) if wrongdoing is found as a result of a disclosure promptly provide public access to information that-

(i) describes the wrongdoing, including information that could identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing, and

(ii) sets out the recommendations, if any, set out in any report made to the chief executive in relation to the wrongdoing and the corrective action, if any, taken by the chief executive in relation to the wrongdoing or the reasons why no corrective action was taken.

82. However a chief executive is not required to provide public access to information the disclosure of which is subject to any restriction created by or under any Act of Parliament.

83. In accordance with section 12 of the Act, a public servant may disclose to his supervisor or to the senior officer designated for the purpose by the relevant chief executive, any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing. Internal procedures for handling disclosures must be in accordance with guidelines issued by the Treasury Board. The Act does not however specify how these procedures will work. Whistleblowers are not obliged to use these internal procedures and may disclose information to the Commissioner instead.[38]

84. Where a disclosure that a public servant is entitled to make concerns the Office of the Commissioner it may be made to the Auditor General of Canada who has, in relation to that disclosure, the powers, duties and protections of the Commissioner under this Act. Despite sections 12 to 14 of the Act, a public servant employed in a portion of the public sector that has a statutory mandate to investigate other portions of the public sector and that is named in Schedule 2[39] may disclose information under any of those sections only if the wrongdoing to which the information relates involves the portion of the public sector in which he or she is employed.

85. Information may be disclosed by a public servant to a member of the public if there is not sufficient time to make the disclosure to his employer or to the Commissioner and the public servant believes on reasonable grounds that the subject matter of the disclosure is an act or omission that-

(a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or

[38] Section 13

[39] For example the Office of the Auditor General of Canada and Office of the Information Commissioner of Canada

(b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

86. A whistleblower must provide 'no more information than is reasonably necessary' to make the disclosure, and must follow established procedures for handling the disclosed information.

87. Chief executive officers are required within 60 days after the end of each financial year to prepare and submit to the Chief Human Resources Officer a report for that financial year on the activities, in the portion of the public sector for which the chief executive is responsible, respecting disclosures made to the chief executive officer under section 12. Within six months after the end of each financial year, the Chief Human Resources Officer must prepare and submit to the President of the Treasury Board a report for that financial year that provides an overview of the activities, throughout the public sector, respecting disclosures made under section 12.

88. In relation to disclosures to the Commissioner, the Commissioner must decide whether to begin an investigation or not. The Commissioner has considerable latitude to exercise judgment in making this decision. In accordance with section 24 of the Act the Commissioner may refuse to deal with a disclosure or to commence an investigation and he may cease an investigation if he is of the opinion that-

(a) the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament;
(b) the subject-matter of the disclosure or the investigation is not sufficiently important;
(c) the disclosure was not made in good faith or the information that led to the investigation of another wrongdoing was not provided in good faith;
(d) the length of time that has elapsed since the date when the subject matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;
(e) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or
(f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.

89 If the Commissioner refuses to deal with a disclosure or to commence an investigation, he must inform the person who made the disclosure and give reasons why he did so.

90. Section 25 of the Act provides that the Commissioner may provide access to legal advice to-

(a) any public servant who is considering making a disclosure of wrongdoing under the Act;
(b) any person who is not a public servant who is considering providing information to the Commissioner in relation to any act or omission that may constitute a wrongdoing under the Act;
(c) any public servant who has made a disclosure under the Act;
(d) any person who is or has been involved in any investigation conducted by a senior officer or by or on behalf of the Commissioner under the Act;
(e) any public servant who is considering making a complaint under the Act regarding an alleged reprisal taken against him; or
(f) any person who is or has been involved in a proceeding under the Act regarding an alleged reprisal.

91. If the decision is made to conduct an investigation, the Commissioner must inform the chief executive of the department and indicate the substance of the disclosure. The Commissioner may also inform anyone else, including those accused of wrongdoing.

92. In accordance with the legislation[40] it is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner. However, if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any portion of the public sector, the Commissioner must, before completing the investigation, take every reasonable measure to give to that individual or the relevant chief executive a full and ample opportunity to answer any allegation, and to be assisted or represented by counsel, or by any person, for that purpose.

93. The Act gives the Commissioner the powers required to conduct an investigation, for example to subpoena witnesses.[41] If the Commissioner is of the opinion that a matter under investigation would involve obtaining information that is outside the public sector, he must cease that part of the investigation and he may refer the matter to any authority that he considers competent to deal with it.[42]

94. After the investigation, if the Commissioner concludes that there is insufficient evidence of wrongdoing, the appropriate persons must be notified. If the investigation indicates that wrongdoing has been committed, the Commissioner must report these findings (and recommendations) to the relevant chief executive, possibly with a timeframe to respond and it then becomes this chief executive's responsibility to address the problem. The Commissioner may also, if he considers it appropriate, report the matter to the Minister responsible.

[40] Section 27
[41] Section 27
[42] Section 34

95. Where an investigation reveals wrongdoing the Commissioner must provide a case report to Parliament within 60 days, setting out the wrongdoing, any recommendations and the response of the responsible chief executive.

96. The Act prohibits the taking of reprisals against a public officer for making a disclosure. There is a complaints process if an officer alleges that he is the subject of reprisals. A whistleblower who believes that reprisals are being taken may approach the Commissioner with a complaint. On receipt of a complaint, the Commissioner must decide within 15 days whether to investigate or not. As with disclosures, the Commissioner has considerable latitude in exercising this discretion. If the complaint is accepted, the Commissioner may appoint an investigator who investigates it in much the same way as a disclosure.

97. At any time during an investigation the Commissioner may appoint a conciliator, whose job is to try to arrive at a settlement. This settlement may include a remedy for the whistleblower and/or disciplinary action for those involved in retaliation. The terms of a settlement must be referred to the Commissioner for approval or rejection and the Commissioner must, without delay after approving or rejecting them, so certify and notify the parties to the settlement. If the Commissioner approves a settlement that relates to the remedy to be provided to the complainant, the complaint to which it relates is dismissed.

98. When the investigation is complete the Commissioner must decide whether the complaint should be referred to the Public Servants Disclosure Protection Tribunal. In arriving at this decision, several factors are to be taken into consideration, but again the Commissioner has considerable discretion. If the Commissioner believes that an application to the Tribunal is "not warranted in the circumstances", the appropriate people are notified and the case is dismissed.

99. The Public Servants Disclosure Protection Tribunal deals with complaints of reprisals referred to it by the Commissioner. The Tribunal deals only with alleged reprisals against whistleblowers, not with the original wrongdoing. If the Commissioner refers an application to the Tribunal, the Tribunal must determine whether or not a reprisal was taken against the complainant and may order a remedy for the complainant or disciplinary action against those carrying out reprisals.

100. The Tribunal may order some or all of the following remedies for the whistleblower-

(a) restoration to his or her original job, or payment in lieu if this is not feasible;
(b) reimbursement for any pay lost due to reprisals;
(c) reversal of disciplinary actions, and reimbursement for any financial loss caused by these actions;
(d) reimbursement for expenses and financial losses incurred as a direct result of the reprisals; and

(e) compensation for pain and suffering up to a limit of $10,000.

101. Any of the parties to a complaint being heard by the Tribunal can request a judicial review under the Federal Courts Act.

102. Within three months after the end of each financial year, the Commissioner must prepare an annual report in respect of the activities of the Commissioner during that financial year.[43] The annual report must set out-

(a) the number of general inquiries relating to the Act;
(b) the number of disclosures received and complaints made in relation to reprisals, and the number of them that were acted on and those that were not acted on;
(c) the number of investigations commenced under the Act;
(d) the number of recommendations that the Commissioner has made and their status;
(e) in relation to complaints made in relation to reprisals, the number of settlements, applications to the Tribunal and decisions to dismiss them;
(f) whether there are any systemic problems that give rise to wrongdoings;
(g) any recommendations for improvement that the Commissioner considers appropriate; and
(h) any other matter that the Commissioner considers necessary.

103. The Canadian legislation is very detailed but is easier to understand, more "user-friendly" than that of the UK. However, it has been the criticised on several grounds. The fact that it does not relate to the private sector has been a source of concern. It is argued for example by the charity Federal Accountability Initiative for Reform (FAIR) that -

> "the scope is further narrowed because important government agencies are wholly or partially excluded (Canadian forces, security agencies and the RCMP); because government misconduct that involves the private sector cannot be investigated properly; and because it does not address private sector misconduct at all.".

104. Other criticisms submitted by FAIR include the following-

(a) the law's purpose, objectives and assignment of responsibilities are unclear;
(b) the law fails to establish institutional integrity as the objective;
(c) the law does not recognise the primacy of the public interest;
(d) the law does not state what tangible results are expected;
(e) the law does not specify useful performance measurements;
(f) there are major gaps in implementation responsibilities and in oversight;

[43] Section 38

(g) for members of the Armed Forces, CSIS and the RCMP, the protection from reprisals is either limited or non-existent;
(h) the avenues for seeking investigation and redress have been restricted rather than expanded; and
(i) whistleblowers are now blocked from access to the normal courts.[44]

ESSENTIALS OF EFFECTIVE WHISTLEBLOWER LEGISLATION

105. It is clear from a brief examination of the above laws that the Cayman Islands have only taken a very small step in providing legislative protection for whistleblowers. Section 50 of the Freedom of Information Law and section 24 of the Standards in Public Life Law seem to be operating in a vacuum as there are no supporting processes to ensure the protection given by those sections.

106. In considering the need for more comprehensive legislation it is necessary to consider what are the minimum requirements for such legislation. What are the matters to be considered in providing effective legislative protection? Based on an examination of the above legislative precedents it is suggested that the following are matters which should be considered[45]-

(a) to whom should the legislation apply-who should be eligible for protection under the Law?
(b) how should disclosure be defined?
(c) what are the types of wrongdoings/improper conduct on which disclosures can be made?
(d) should public and private sector whistleblowing be covered by the same legislation?
(e) should the motivation or intention of the reporting person be relevant?
(f) to whom should disclosures be made?
(g) how should disclosures be received, handled and investigated?
(h) what legal protection should there be for whistleblowers?
(i) what penalties should there be for employers and other persons who victimise whistleblowers?
(j) how should confidentiality be dealt with?
(k) should employers be compelled to provide internal guidelines on whisteblowing to all employees?
(l) how should the legislation be monitored and by whom?
(m) should legal aid or special financial assistance be available for victims of reprisals?

[44] See "What's Wrong with Canada's Federal Whistleblower Legislation"
[45] See "Public interest disclosure legislation in Australia: Towards the next generation?"- A J Brown, Griffith Law School, Griffith University Discussion Paper 25/06 (August 2006); also "Best-practice whistleblowing legislation for the public sector: the key principles", A. J. Brown, Paul Latimer, John McMillan and Chris Wheeler, Australia

(n) is there a role for mediation when dealing with complaints of reprisals? and
(o) should there be periodic review of the legislation and by whom?

107. The research shows that of particular importance in enacting whistleblower legislation are providing guidelines for the internal disclosure procedures of an organization and the encouragement of a culture where employees do not feel fearful to report unethical and illegal practices. Employees need to know that an organisation is serious about adherence to codes of conduct and that their reports will be taken seriously by management.[46]

108. Many workplaces in for example the UK, New Zealand and the United States pursuant to their legislation provide written internal disclosure policies for employees and the common features of such policies include-

- specifying the aims and scope of the policy;
- providing for formal processes for disclosing and investigating disclosures;
- identifying the persons to whom disclosures can be made;
- providing for confidentiality of disclosures;
- providing safeguards for employees who make disclosures;
- specifying the legal effects of deliberately making false/unfounded allegations; and
- providing for the monitoring an reviewing of the policy.

109. Attached in Appendix B are samples of the internal policies of some overseas employers.[47]

Legal assistance/ legal aid in cases of whistleblowing

110. One of the questions the LRC is submitting for consideration is whether the legislation should, like the Canadian legislation discussed above, provide specifically for the provision of legal financial assistance in whistleblower cases such as those specified in section 25 of the Canadian Act.[48]

111. It should be noted that notwithstanding the fact that there are provisions for legal assistance in the Canadian legislation, the Act has been criticised as not providing any meaningful legal assistance for whistleblowers. FAIR[49] in its commentary on the Act stated as follows-

> "The second problem is lack of legal counsel. Those accused of retaliation will almost certainly be defended by a team of Justice Department lawyers, with

[46] "Encouraging Internal Whistleblowing in Organizations", L. Ravishankar, Santa Clara University
[47] All can be found on the relevant websites
[48] See para 90 above
[49] Ante note 35

seemingly unlimited time and resources, all paid for by the taxpayer. Unless the union has agreed to accept the case (and they usually decline), the whistleblower will have to pay for a lawyer. Such legal proceedings are very costly, often running into hundreds of thousands of dollars. Moreover, finding good legal counsel familiar with litigating against the government (and willing to do so) is very difficult.

The Commissioner can provide the whistleblower with access to legal assistance – up to the limit of $1,500 (or $3,000 in 'exceptional circumstances'). This is an absurdly small amount, and even this is entirely at the discretion of the Commissioner. Former Commissioner Christiane Ouimet never approved a penny in legal assistance during her 3½ years in office.

Yet the Justice Department can and does routinely spend millions of dollars defending the accused, entangling the whistleblower in legal manoeuvres for years while their legal costs mount up and their health and personal relationships are damaged by the stresses of an abusive legal process.

In the case of Joanna Gualtieri, the Foreign Affairs real estate specialist who exposed massive waste and extravagance in the provision of accommodations for diplomats abroad and then sued her bosses for harassment, the Justice Department legal team – which outnumbered Gualtieri's by eight to one – dragged out her case for almost 12 years, in the process forcing her to answer more than 10,500 questions during pre-trial discoveries. The Justice Department's legal files on this one case totalled more than 50 linear feet of paperwork – taller than a five-storey building.

Clearly there is nothing in this Act to level the playing field as far as legal muscle is concerned – even thought the whistleblower is acting on behalf of the public interest – and without substantial funds to provide legal assistance the whistleblower has no chance.".

112. Legislation in Ontario i.e. Part VI of the Public Service of Ontario Act[50], also provides that, subject to regulations, the Integrity Commissioner may arrange and pay for the provision of legal services to a public servant or other person involved in any investigation or other proceeding under that Part of the Act.

113. Are the legal problems in this area so unique that there should be a special carve out for legal assistance in the legislation?

Financial incentives for making disclosures

114. There are common features of the legislation in the above-mentioned jurisdictions as they all provide for most of the essentials set out in paragraph 106. Also in common, is the fact that none of the laws examined above provide for one matter which the

[50] Section 147

Commission believes is worthy of examination, and that is the encouragement of a culture of whistleblowing by the provision of financial incentives.

115. The Commission, in its deliberations on this area of the law, has discussed whether the Cayman Islands should provide financial incentives for making disclosures. Such incentives may be of great assistance in improving the current situation in the Islands where many employers fail to pay insurance and pensions for employees and employees are understandably too afraid to report such breaches of the Law. With the fear of reprisals and the ineffective monitoring of these areas such continued breaches can pose serious economic and social issues for the Islands. It has also been posited that providing incentives may also be an effective way of improving tax collection such as the collection of customs duties.

116. Providing incentives to private individuals to assist in the fight against crime is not a new approach and dates back to the Middles Ages with "qui tam" writs. At common law, a writ of *qui tam* is a writ whereby a private individual who assists a prosecution can receive all or part of any penalty imposed. The United States provided statutorily for such incentives in colonial times in laws such as the *Colonial Law of Massachusetts 8* (1686) which provided that penalties for fraud in the sale of bread were to be distributed one-third to the inspector who discovered the fraud and the remainder for the benefit of the town where the offence occurred. Also, *1 Statutes of Connecticut (*1672) which provided for penalties of 10 shillings for permitting a night-time assembly under one's roof to be distributed half to the town and half to the individual who filed the complaint.[51]

117. While such types of legislation fell into disuse and faced constitutional challenges, incentives for disclosures can still be found under the False Claims Act enacted in 1863 after "unscrupulous contractors sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition and rancid rations and provisions"[52] and more recently under legislation such as the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

118. The False Claims Act permits private individuals not associated with the U.S. government to file claims against federal contractors who they allege have committed fraud against the government itself. Whistleblowers can receive between 15% to 35% of any award that the government receives.[53]

119. Under section 748 of the Dodd-Frank Act, whistleblowers who bring violations of securities law, commodities law or the Foreign Corrupt Practices Act to the attention of the government authorities- the SEC, or Commodities Futures Trading Commission- are entitled to between 10% to 30% of any government recovery in excess of $1 million. The determination of the award is in the discretion of the Securities and Exchange

[51] 'Qui Tam: The False Claims Act and Related Federal Statutes", Charles Doyle, CRS Report for Congress August 6, 2009
[52] Also known as the Lincoln Act, 31 U.S.C. § 3729; see also Forbes.com, Ben Kerschberg
[53] Forbes.com, Ben Kerschberg,

Commission who are required to take into account the following criteria in determining an award-

(a) the significance of the information provided by the whistleblower to the success of the relevant judicial or administrative action;
(b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action; and
(c) the extent to which the government wants to deter the violations in question.

120. In December, 2012 the former Financial Services Authority of the UK[54] in a presentation to the House of Commons considered the issue of providing incentives to persons who report on misconduct in the banking industry. In a written submission, the Authority noted, among other things, the moral hazards which could occur in incentivising disclosures. In discussing those hazards the Authority identified the possibility of malicious reporting, entrapment and conflicts of interest in courts. On these three moral hazards the Authority stated as follows-

> "(a) *Malicious reporting:* The introduction of financial incentives may lead to more approaches from opportunists and uninformed parties passing on speculative rumours or public information. We already receive a small number of such reports, and have processes in place to filter out low value information, although, on occasion, investigations prompted by what proved to be wrong information from a whistleblower have taken place. Reputations of innocent parties may be wrongly damaged as a consequence.
>
> (b) *Entrapment:* It is conceivable that some market participants may seek to "entrap" others into an insider dealing conspiracy in order to then blow the whistle and benefit financially. Not rewarding offenders and only acting when reports are corroborated by further, independently gathered, evidence would obviate this danger.
>
> (c) *Conflicts of interest in court:* If a whistleblower's disclosure led to a criminal prosecution (such as in an insider dealing case) the court could call into question the reliability of their evidence because the witness stood to gain financially. Our case would not rest solely on the whistleblower's testimony, as we would present our own investigatory evidence, however the fact the

[54] The Financial Services Authority (FSA) was a quasi-judicial body responsible for the regulation of the financial services industry in the United Kingdom between 2001 and 2013. On 19 December 2012, the *Financial Services Act 2012* received royal assent, abolishing the FSA with effect from 1 April 2013. Its responsibilities were then split between two new agencies (the Prudential Regulation Authority and the Financial Conduct Authority) and the Bank of England

whistleblower stood to gain financially from their disclosures may undermine the prosecution's case."

121. The Authority was of the view that on the evidence available to it at the time, any potential benefit from incentivising is to be outweighed by the disadvantages. They had also considered how such incentives would be funded. They were of the view that using the Authority's budget which was raised by fees on regulated firms to fund whistleblower incentives would require the Authority to make an assessment each year of what it thinks the costs of whistleblowing will be and levy that fee in advance. The Authority was not convinced that the best use of any rise in general fees would be incentivisation of whistleblowing.

122. The Authority concluded that serious moral hazards associated with such a change in policy could be reduced by only rewarding whistleblowers with clean hands whose information leads to action. Nevertheless, it opined that an increase in spurious reporting would also be likely.

123. Notwithstanding the views of the former Financial Services Authority, as recently as October 2013 the Home Office, in its Serious and Organised Crime Strategy policy paper which was presented to Parliament by the Secretary of State, announced its intention and that of the Ministry of Justice and the Department of Business Innovations and Skills to consider "the case for incentivising whistleblowing, including the provision of financial incentives to support whistle blowing in cases of fraud, bribery and corruption". The Home Office stated that it will examine the successful "Qui Tam" provisions in the US where individuals who whistleblow and work with prosecutors and law enforcement can receive a share of financial penalties levied against a company guilty of fraud against the government.[55]

124. The Organization of American States in draft model legislation[56] prepared for its members in 2012 provided for whistleblower incentives. Article 15 provides as follows-

"Article 15. Benefits for reporting acts of corruption

The competent authorities may extend economic benefits to whistleblowers of acts of corruption when the information provided by them made it possible to impose fines payable to the State to redress damage done, or helped identify and locate resources, rights, or assets related to or potentially associated with acts of corruption.

The amount of the benefits shall be up to the equivalent of … % of the value of what is recovered or reimbursed, according to the assessment performed by experts and the decision of the competent authorities assessing the importance of

[55] Serious and Organised Crime Strategy, October 2013

[56] "Model Law to facilitate and encourage the reporting of acts of corruption and to protect whistleblowers and witnesses"- September, 2012

the information provided. If necessary, specific notices regarding the content of this article shall be published in the mass media.

These benefits shall not be awarded if during the investigations it is established that the whistleblower was in any way involved in the act of corruption through which he benefited directly or if such a circumstance was not initially reported.

Government officials who report acts of corruption shall be entitled to benefits of a nonfinancial nature."[57]

125. Should the Cayman Islands provide financial incentives for disclosures? Is there a need for this? Would the benefits of having such an incentives scheme outweigh any negative factors it may bring? If financial incentives are to be provided how would they be funded?

THE PROTECTED DISCLOSURES BILL, 2014

Summary of the provisions

126. As indicated earlier in this paper as a part of this review the Commission has prepared for discussion a draft Protected Disclosures Bill which is set out in Appendix A. The Bill seeks to provide protection for whistleblowers both in the private and public sector and contains provisions relating to the following-

(a) the persons to whom should the legislation apply and who should be eligible for protection under the legislation;
(b) the definition of disclosures which qualify for protection; definition of improper conduct on which a disclosure can be made;
(c) the persons to whom disclosures may be made including employers, the Anti-Corruption Commission and the Cayman Islands Monetary Authority;
(d) the procedures to be followed when making disclosures;
(e) the procedures to be followed for the investigation of disclosures;
(f) protection against reprisals in the form of court action, criminal complaint and resolution by labour tribunals;
(g) penalties for reprisals against whistleblowers;
(h) confidentiality relating to disclosures;
(i) the provision of a supervisory body to oversee the operation of the legislation; and
(j) the periodic review of the legislation by a committee of the Legislative Assembly.

Reasonable belief

127. The draft legislation seeks to protect disclosures where the person making the disclosure has a reasonable belief that the information disclosed shows or tends to show

[57] Paragraph to be considered in light of each country's legal system.

that improper conduct has occurred, is occurring or is likely to occur. While it is posited that the provision that a disclosure should be made in good faith or in the public interest is necessary to reduce frivolous claims and the promotion of private interests, reasonable belief has been argued to be sufficient to satisfy a good faith requirement. The approach taken in the Bill in this respect is similar to that of the Whistleblower Protection Act of the US. Under that Act a protected disclosure is any disclosure of information that an employee covered by the Act reasonably believes evidences a violation of any law, rule or regulation or evidences gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.

Matters for consideration

128. Members of the public are invited to respond to the issues identified in this paper, to indicate whether there are other areas of this topic which should be examined and to submit comments on the Protected Disclosures Bill.

Monday, April 14, 2014

APPENDIX A

Protected Disclosures Bill, 2014

APPENDIX B

Samples of whistleblower internal policies