Whistleblowing and the Whistleblowers Protection Bill 1994

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Legislation such as the American Whistleblowers Protection Act 1989 and the South Australian Whistleblowers Protection Act 1993 has attempted to protect employees who disclose confidential information without authorisation from their employer. The information has been obtained by virtue of the employment relationship and is subject to the normal protections afforded to confidential information and a relationship of trust. One of the main problems associated with the whistleblowing scenario is deciding whether the breach is justified and in the public interest.

Early in 1994 whistleblowing became the subject of much controversy and publicity in New Zealand, due to the actions of Neil Pugmire and the Honourable Phil Goff. As a consequence, the Whistleblowers Protection Bill 1994 was introduced into Parliament. The aim of this article is to analyse the law as it pertains to whistleblowing, and to determine whether the Bill in its present form is, in fact, required.

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I: WHAT IS A WHISTLEBLOWER?

1. In Search of a Definition

> It is significant that the English language is rich in words like 'rat', 'squeal' and 'sneak' – but that no word exists to describe the justified, even commendable, passing on of information. The nearest thing to it is the American word 'whistleblowing'. 'Whistleblowing' means passing on of information from a conviction that it *should* be passed on despite (not because of) the embarrassment it could cause to those implicated.[1]

This statement outlines the essence of whistleblowing. The underlying presumption is that the information is confidential, and that whistleblowing can be a positive and worthwhile action. The statement does not indicate whom the information should be passed to, nor does it outline the threshold of confidentiality which the information must meet before it can be justifiably passed on. Such a threshold involves the arguably arbitrary balancing act of deciding when the public interest in disclosure outweighs the interest of the organisation.

Whistleblowing conflicts with other interests which have been succinctly outlined by Dr Cripps:[2]

> In addition to an individual's interest in confidentiality, there are public interests in the efficient operation of public corporations, private industry and central and local government.

She suggests that such efficiency "will depend on the preservation of official secrets and the confidentiality of trade secrets and corporate practices".[3] Westman states that:[4]

> The term whistleblower may apply to employees in a wide variety of circumstances. The most common conception of a whistleblower is probably of an employee who reports his or her employer's violation of law to an appropriate law enforcement agency .... Whistleblowing may also be a report, not of an illegal act, but of an act in violation of a code of professional ethics, or of an act which an employee believes might be technically legal, but which might nevertheless be dangerous to the public health and safety. Further, whistleblowing will also refer to employees who choose not to make allegations through internal channels or to the appropriate authorities, but instead make reports directly to the news media, to professional associations, to political groups, or to other organisations not responsible for law enforcement. For present purposes, whistleblowing is defined in the broadest sense to include employees who oppose, either internally or externally, their employer's conduct.

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1 Cripps, *The Legal Implications of Disclosure in the Public Interest* (1986) 257.

2 Ibid, 258.

3 Ibid.

4 Westman, *Whistleblowing: The Law of Retaliatory Discharge* (1991) 19.

Studies have shown that whistleblowing is not an action taken lightly, and is more likely to occur if the individuals concerned are:[5]

(i) committed to the goals of the organisation or the project they are on;
(ii) committed to the organisation; and
(iii) have a strong sense of professional responsibility.

Similarly, studies have shown that those individuals who were still working for their organisation went to their superiors first before contacting outside agencies.[6]

Obviously there are many variations in the definition of whistleblowing. For the purpose of this article the following definition is proposed:

> *Whistleblowing* involves the conscious and overt reporting by an employee of perceived wrongful conduct within the workplace, to a supervisor or to an authority outside the workplace (which is *exclusive* of the media). The information is given because of a reasonably held belief that it is in the public interest to do so. It is information which pertains to "unlawful, corrupt, or unauthorised use of public resources", or which "constitutes a significant risk or danger" to "public health, public safety, the environment, or the maintenance of law and justice." The information is not to be disclosed merely because it satisfies the public's curiosity. Such information is gained as a result of the employment relationship. By blowing the whistle, the employee has deliberately broken the implied or express duty of confidentiality between the employee and employer.

As mentioned, whistleblowing may occur in the public or private sector. It may involve degrees of justification. Those individuals who choose to leak information for personal gain, or trade information which is inaccurate or malicious, are less justified in breaching confidentiality than those who have spoken out for public safety alone. However, it is not always possible to delineate in this fashion, as the individual may sell information, and thereby profit from his or her actions, while revealing information which relates directly to the public good.

2. A New Zealand Example: The Pugmire Affair

Neil Pugmire is employed as a Charge Nurse of the National Security Unit ("NSU") for Good Health Wanganui. He has ten years of work experience in the psychiatric field, and has spent two years researching the prediction and statistical analysis of readmission rates over the past twenty years of the NSU.

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5 Bowman and Elliston, *Ethics, Government, and Public Policy: A Reference Guide* (1988) 57.
6 Ibid, 58.

Pugmire had specific concerns regarding the Mental Health (Compulsory Treatment and Assessment) Act 1992 when it was introduced. He voiced these concerns at a meeting discussing the release of a patient, and a report was consequently to be written on the topic. This never occurred, so Pugmire drafted a letter (which was checked by his Manager) to the Minister of Health and the Director of Mental Health outlining his concerns about the new Act. The Minister's reply simply acknowledged his concerns, but did not go any further. Pugmire sent further copies to the Minister of Police and the District Inspector, with no response.

A former patient of Lake Alice Hospital, who had recently been released, was then convicted for assaulting a child. Pugmire sent Phil Goff, the Member of Parliament for Roskill, a copy of his letter after Goff called for an inquiry into the event. In a subsequent phone call, Pugmire stressed to Goff the need for confidentiality. Goff then released the letter to the news media, and although the name was deleted, the media still managed to access it.

Good Health Wanganui responded by holding an inquiry into the allegation that there had been an improper disclosure of confidential information. It suspended Pugmire pursuant to a provision in his contract. Pugmire successfully applied for an interim injunction of this suspension. Pugmire's employers then offered him a choice between demotion or dismissal following the investigation into his alleged serious misconduct, despite contradictory advice from three leading constitutional scholars. Pugmire successfully applied for a second injunction, and he has now been reinstated.

The Pugmire affair is widely perceived as a classic whistleblowing scenario, however Judge Colgan stated that the *Pugmire* case was:[7]

> [Not] about the rights or wrongs of disclosure of information about hospital patients. Nor [was] 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 "whistle blowing".

The reluctance to comment on the whistleblowing aspects of the *Pugmire (No 1)* case is understandable as the interlocutory nature of the case meant there was inadequate evidence. In *Pugmire (No 2)*, Judge Castle referred to the need for a "substantive judicial hearing" to outline the position of whistleblowing in New Zealand. He indicated that due to Pugmire's sincerity, integrity, skill as a charge nurse, and genuine motive, it would be in the interests of justice to restore him to his original position. He went on to comment that the concept of fair dealing had been abused by the actions of Good Health Wanganui.

The circumstances and issues involved in this case bring up pertinent points. Pugmire had exhausted all avenues of internal management before he felt com-

7 *Pugmire v Good Health Wanganui Ltd (No 1)* [1994] 1 ERNZ 58, 60; *Pugmire v Good Health Wanganui Ltd (No 2)* [1994] 1 ERNZ 174. Both judgments were interim and procedural.

pelled to bring the matter to the attention of an opposition spokesperson. He honestly, and arguably, reasonably believed that the disclosure of such confidential information was necessary to support the criticism he had of the Mental Health Act 1992. If there had been a formal complaint procedure available for Pugmire, the consequences could have been different. As it was, Pugmire breached patient confidentiality, and enabled Goff to go to the media with the information Pugmire had obtained by way of his employment. The fact that Goff chose to release the information to the media, however, makes *him* the less discerning whistleblower.

II: THE EMPLOYMENT RELATIONSHIP

1. Background

Traditionally the relationship between employer and employee was one of master and servant. This relationship was regulated by contract, and as such was subject to the conditions and obligations imposed by the common law. A bias towards the employer resulted, with a breach of the contract justifying dismissal. The common law action of wrongful dismissal did not require proof that dismissal was justified. The only requirement was that "reasonable" or contractual notice was given. As a consequence, actions for wrongful dismissal were rare.

2. The Conditions and Obligations Surrounding the Relationship

In New Zealand, the basis of the employment relationship is still freedom of contract, with an overlay of statutes such as the Holidays Act 1981, the Minimum Wage Act 1983, and the Employment Contracts Act 1991 ("the ECA"). The latter covers such areas as union membership, grievance procedures, and dispute procedures. The ECA works from the premise that, if left to market forces, the employer and employee will work on a level playing field. Efficiency is emphasised as the new arbiter of justice.

The common law establishes conditions common to all employment contracts by implying terms which impose obligations on employers and employees. The employer is under a duty to treat the employee with trust and respect. This would include ensuring that the requirements of natural justice are observed when dealing with the employee.[8] The employee is correspondingly under an implied duty of good faith and fidelity. Within this obligation is the implied term (in the absence

8 It appears that Good Health Wanganui did not follow the requirements of natural justice as closely as they could have with Mr Pugmire. They arguably did not listen to the contradictory advice regarding Mr Pugmire with a sufficiently open mind.

of an express term) not to misuse confidential information belonging to the employer. A breach of this term may be good cause for dismissal.[9] The duty can be outweighed in cases where the employee has breached the implied term and disclosed the information in the public interest.[10] Generally the greater the degree of trust reposed in the employee, the higher the level of duty expected from him or her. This is important in the whistleblowing context, as most whistleblowers are in positions of middle management or higher.

Countering the duties of good faith and confidentiality are those duties which exist for the individual citizen. Individuals are encouraged by at common law to report criminal conduct to the appropriate authorities; for many, it is also an ethical consideration.[11]

3. The Common Law and Statutory Remedies Available

The employment contract can be terminated if there has been a breach of its terms. At common law a breach can have two main consequences:[12]

(i) If it goes to the substance of the contract, the contract can be discharged.
(ii) If it does not go to the substance of the contract, but makes the employment relationship difficult, it can either be repudiated or affirmed by the innocent party.

As mentioned earlier, the common law remedies for breach of contract are seen to be inadequate, and will succeed only where dismissal occurs without the appropriate period of notice. The ECA provides a personal grievance procedure extending the right of action to all employees, making the common law action for wrongful dismissal somewhat redundant. Under the ECA, an action for personal grievance can be taken even if the employer had cause to dismiss and had given proper notice. The employer must have substantive grounds to justify the dismissal, and carry it out in a procedurally fair manner. The ECA provides different forms of remedies, including reimbursement and reinstatement.[13]

In whistleblowing scenarios, the breach of confidentiality will often substantially affect the working relationship between the employer and employee. Reinstatement may not always be realistic or desirable if the whistleblower has made an unreasonable disclosure. American studies have also shown that whistleblowers who have lost their jobs do not always find it easy to be re-employed.[14]

9 *Faccenda Chicken Ltd v Fowler* [1987] Ch 117.
10 *Initial Services Ltd v Putterill* [1967] 3 All ER 145 (CA).
11 Particularly when it has been written into a professional code of conduct.
12 Szakats, *Introduction to the Law of Employment* (3rd ed 1988) 273.
13 Sections 40-42 of the ECA.
14 Supra at note 5, at 58.

III: PROTECTIONS AVAILABLE TO THE EMPLOYEE AT COMMON LAW

The protections available to the employee and employer in the New Zealand whistleblowing context vary in their application, with most acting retrospectively. The most common forms of protection include the public interest defence, and protection of the source. Freedom of expression has not been used as a defence in England and New Zealand as frequently as it has in America. However, the New Zealand Bill of Rights Act 1990 ("NZBORA") may change this. These defences may protect the individual from retaliation in employment, shield the individual from prosecution for breach of confidence, and guard the informer from identification.

1. The Relationship of Confidence

An employee who receives information in confidence during the course of employment remains under a duty not to disclose this information after the contract has ended. This doctrine does not always depend on the existence of a fiduciary relationship, nor the existence of a contractual relationship between the parties. It is said to be an essentially *sui generis* doctrine, but has been defined in terms of property, equity, contract, bailment, trust, and the fiduciary relationship by the courts.[15] Despite the combination of legal principles which make up the action for breach of confidence, it seems that the strongest jurisdictional claim to such an action lies in equity. Equity provides the flexibility necessary for an action of breach of confidence to a third party. The remedies will be unaffected by this, due to the perceived intermingling of law and equity.[16]

An action for breach of confidence will succeed where:[17]

(i) the information which is communicated was confidential and not in the public domain;[18]

15 Tsaknis "The Jurisdictional Basis, Elements, and Remedies in the Action for Breach of Confidence" (1993) 5 Bond LR 18.

16 *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 per Cooke P; *Day v Mead* [1987] 2 NZLR 443 per Cooke P. There is some debate as to whether the Employment Court and the Employment Tribunal have jurisdiction to decide on equitable matters and the involvement of third parties. In *Medic Corporation Ltd v Barrett and Others* [1992] 2 ERNZ 1048, the High Court allowed an interim injunction restraining the use of confidential information. In the Employment Court [1992] 3 ERNZ 523, Chief Judge Goddard did not uphold the express term of the contract. He held, at 524, the Employment Court's jurisdiction applied only if "[a]n action is 'founded on' or 'relates to' an employment contract under s 104 of the Employment Contracts Act if it cannot succeed without relying on either the existence of such a contract, present or past, or upon a term of the contract."

17 Maxton, "Equity Update" (1993) New Zealand Law Society Seminar 40.

18 *Saltman Engineering Co v Campbell Engineering Co* (1948) 65 RPC 203, 215.

(ii) there was an obligation of confidence and no circumstances existed which negated this;[19] and
(iii) the information was used for a purpose other than that which is intended.

In order to establish whether the purported disclosure has amounted to a breach of the duty of confidentiality within the employment relationship, it is necessary to consider the factors set out in *Faccenda Chicken Ltd v Fowler*:[20]

(i) The nature of the employment.[21]
(ii) The nature of the information itself.
(iii) Whether the employer impressed on the employee the confidentiality of the information.[22]
(iv) Whether the information can be easily isolated from other information which the employee is free to use or disclose.

Problems may arise where the employer is not aware of what information is already in the public domain or, in the absence of a written agreement, where the employee is unaware of the importance of maintaining confidentiality.[23] However, such problems are minimal. The most prominent issue is the importance of disclosing information in the public interest, which overrides any need to protect the employment relationship.

2. Third Party Liability in Breaches of Confidence

The position of a third party, to whom confidential information has been disclosed, has been summarised by Gurry.[24] If, at the time the information was received, the third party had actual, imputed, or constructive knowledge as to the confidential nature of the information, he or she will be affixed with an obligation of confidence.[25] If the third party was unaware of the breach of confidence, an obligation will be affixed once he or she becomes aware of the breach.[26] The third party will then be liable for its unauthorised use.

19 *Coco v AN Clark Engineers Ltd* [1969] RPC 41, 48.
20 Supra at note 15.
21 The obligation extends further than just executives or senior employees, although they will often be the ones who have more frequent access to such information. See *New Zealand Needle Manufacturers Ltd v Taylor* [1975] 2 NZLR 33.
22 *Allco Agencies Ltd v Naidoo* [1988] 2 NZELC 95,923.
23 Reid, *Confidentiality and the Law* (1986) 28.
24 Gurry, *Breach of Confidence* (1984) 283.
25 *Prince Albert v Strange* [1849] 2 De Gex & Sm 652; 64 ER 293.
26 *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344.

3. The Public Interest Defence

The main defence to an action for breach of confidence is that disclosure was in the public interest.[27] In *Initial Services Ltd v Putterill*, Lord Denning stated that the implied obligation not to disclose information received in confidence:[28]

> [I]s subject to exceptions ... It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others .... The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always, and this is essential – that the disclosure is justified in the public interest.

The high-tide mark of the public interest defence appears to have occurred with the English decision *Woodward v Hutchins*.[29] Lord Denning applied the defence to the advertising industry, extending his definition in *Initial Services*, because there was a public interest in "knowing the truth".[30] This case involved the publication of articles about the personal details of a group of singers, written by their former publicity agent.

This extension has not yet been followed in New Zealand or Australia. Justice Gummow, criticising the decision, stated:[31]

> [A]n examination of the recent English decisions shows that the so called "public interest" defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or override the obligation of confidence, and equitable principles are best developed by reference to what conscionable behaviour demands of the defendant.

Lowe v Tararua District Council[32] throws light on the interaction of breach of confidence and freedom of expression in New Zealand. Ms Lowe was a community development adviser and party to confidential information which she was requested not to disclose until a council meeting. Prior to the meeting, she discussed the issue with another councillor. When asked her opinion at the meeting, Ms Lowe severely criticised the Council's stance on the issue. She was subsequently dismissed on the grounds that she had a duty to tell her employer of

27 Supra at note 24, at 325. The public interests outlined were the interests of justice and the disclosure of iniquity.

28 Supra at note 10, at 148. The case involved a former laundry company manager leaking files he had taken with him to the press when he left the job. The company sued him for breach of confidence, and the newspaper for the return of the papers and sought an injunction restraining further use of them. He succeeded with his defence of public interest.

29 [1977] 2 All ER 751 (CA).

30 Lord Denning indicated that truth in advertising equated with truth in publicity. He re-emphasised his belief in knowing the truth in *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, 329.

31 *Smith Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87, 125.

32 [1994] 1 ERNZ 887.

any public statements she intended to make, and that she had deliberately tried to undermine council policy by publicly criticising it. She claimed unjustified dismissal, and the Tribunal dismissed her claim.

On appeal to the Employment Court, it was held that Ms Lowe had not breached her employer's confidence by imparting the information to a fellow councillor. The directions of confidentiality had not specified that she could not discuss such matters internally. It was also held that her statements at the meeting were not contrary to council policy as the issue at hand was only a proposal, and the purpose of the meeting was to discuss it.

It is unfortunate that the Employment Court decided to stand back from definitively holding that there was a public interest exception to a duty of confidentiality in an employment relationship. However, their decision indicates that there is an "appreciable element of such a likelihood in the circumstances of the case."[33]

The public interest in publication is also an important defence for the media in an action for breach of confidence. In *Snepp v United States*,[34] the majority of the Supreme Court of the United States imposed a constructive trust in relation to the profits obtained by an ex-CIA agent, from the publication of information about the CIA. There was an express condition in his contract of employment that he would not publish confidential or classified information about the CIA without their approval. The United States Government sought both a declaration that Snepp had breached his contract, and an injunction requiring the ex-agent to submit future writings for review. It is interesting that the information in the book was neither confidential nor classified. The government based their action on the fact that the agent had abused the high level of trust reposed in him. They felt the case involved issues "detrimental to vital national interests", and noted that other agencies had since stopped co-operating with them, although they could not prove the causal link. Further, the CIA felt that the public would react adversely to an insubordinate former agent.

The District Court found that the agent had breached his relationship of trust with the CIA, and had misled officials to believe that he would clear the information with them.[35] The District Court consequently applied a constructive trust. The Court of Appeal allowed recovery of nominal damages, and the possibility of punitive damages if the government could prove a tort action.[36] However, unlike the lower court, they did not find a constructive trust, as they believed the agent's fiduciary duty extended only to the preservation of classified material.

The Supreme Court was divided in its opinion. The majority based their decision on the fact that the relationship was based on a high degree of trust. The violation of that trust was not the publication of the classified material, but the fact that the agent believed he could decide whether it should be classified or not. The

33 Ibid, 900.

34 444 US 507, 62 L Ed 2d 704, 100 S Ct 763 (1980).

35 United States District Court for the Eastern District of Virginia (456 F Supp 176).

36 United States Court of Appeals for the Fourth Circuit (595 F2d 926).

decision seems to have been based on a belief that it would protect the government from further incidents. The Court did not, however, impose an injunction against the publication of similar books in the future.

The minority criticised this reliance on fiduciary aspects, and saw the action as lying in contract. They considered the CIA's need to protect their information, the employee's right to work in other areas such as writing, and the protection of the First Amendment right to freedom of expression. They decided the balance fell in favour of the defendant. The minority did not believe that it was appropriate to impose a constructive trust, as there had been no breach of confidential information. Insubordination was a difficult basis on which to rest the action, as it would be difficult to prove that the agencies who had stopped co-operating had done so on this basis.

This case is similar to the English decision of *Attorney-General v Guardian Newspapers (No 2)*,[37] which involved a former security service agent wanting to publish information obtained during his service. Like *Snepp*, the plaintiffs wanted an account of profits. In the *Guardian Newspapers (No 2)* case, the Chancery Division held that the Sunday Times had been in breach of its duty of confidence, and was thus accountable for the profits resulting from the serialisation. Future publication of information obtained by agents in the service was not affected.

On appeal, the House of Lords held that in such an action the information should not only be confidential, but that it should be in the public interest to refrain from publication.[38] The Court did not impose a constructive trust on the proceeds. As an injunction is not intended to prevent wrongdoing in general, but should be used for specific wrongs, the plaintiff obtained an account of profits for the present publication, but not for any future ones.

In the New Zealand *Spycatcher* case,[39] the Court of Appeal held that it was in the public interest to allow publication of a book written by Wright, a former member of the British Security Service, containing information about the malpractice of the Service. Burrows suggests that the decision may have been different had the action been taken against the author, rather than the newspaper.[40] He further notes the limitations of the defence for the newspapers, the strongest being that disclosure to the proper authorities is more appropriate.

The New Zealand *Spycatcher* case and the English decision in *Attorney-General v Guardian Newspapers (No 2)* can be distinguished on their facts. Wright's book had already been published outside of England, and had caused the damage the injunctions were seeking to prevent. On the other hand, the information in Wright's book was seen to be more damaging to the national interest than it was in *Snepp*. Prior to the House of Lords judgment, the New Zealand Court of Appeal had discussed the issue in relation to conflict of laws, and whether it was in

37 [1988] 3 All ER 545.

38 Ibid.

39 *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129.

40 Burrows, *News Media Law in New Zealand* (1990) 171.

the public interest of New Zealand that the information should be published. The New Zealand case was further complicated by the international aspect of the action. However, Wright was still found to be under a lifelong duty of confidence which he broke with the publication of "Spycatcher". The fact that he was under this duty to a foreign state did not hinder the ability of that state to bring an action in New Zealand. The public interest defence was taken from the New Zealand perspective, as opposed to the British, which created a problem for the British government. It was held that the published information was of interest to New Zealand's own security service to ensure that similar problems did not arise.[41]

It appears, therefore, that the public interest defence extends beyond crimes and civil wrongs to a category of actions which are "destructive of the country or its people."[42] This has been taken to include information which relates to medical matters,[43] and conduct which is misleading to the public.[44]

In *Attorney-General v Jonathan Cape Ltd*[45] the Court held that the law on breach of confidence did not place public and private sector confidences in separate categories. However, the Australian courts do not seem to follow this stance. Justice Gummow in *Smith Kline* stated:[46]

> [T]he relationship between the modern state and its citizens is so different in kind from that which exists between private citizens that rules worked out to govern the contractual, property, commercial and private confidences of citizens are not fully applicable where the plaintiff is a government or one of its agencies. Private citizens are entitled to protect or further their own interests, no matter how selfish they are in doing so. Consequently the publication of confidential information which is detrimental to the private interest of a citizen is a legitimate concern of a court of equity. But governments act, or at all events are constitutionally required to act, in the public interest ... Public and not private interest, therefore, must be the criterion by which equity determines whether it will protect information which a government ... claims is confidential.

4. Protection of the Source

An informant in a whistleblowing scenario will often try to conceal his or her identity, since anonymity is one way of avoiding the repercussions these actions will often invoke. The courts have the ability, however, to order the person who has received certain types of information to disclose the name of the informant.[47]

41 Supra at note 39.

42 Supra at note 24, at 334. Gurry comments that the defence would appear to only work when it involved a detriment to the community, rather than a benefit.

43 Supra at note 30.

44 See *Putterill*, supra at note 10, and *Woodward*, supra at note 29. But cf *British Steel Corporation v Granada Television Ltd*, infra at note 48, which indicated that the defence could only be used if the conduct is fraudulent, rather than incompetent.

45 [1976] 1 QB 752.

46 Supra at note 31, at 112.

47 This is based on the equitable bill of discovery, and often involves an interlocutory part of the proceedings. It may also be treated as the trial of the action, as was apparent *British Steel*, infra at note 48.

In determining whether or not an informant should be revealed, the courts must undertake a balancing act, as observed in *British Steel Corporation v Granada Television Ltd.*[48] This case involved the use of confidential documents by a current affairs programme covering a national steel strike. The documents were obtained from a mole within the organisation who had been assured confidentiality. British Steel brought the action against Granada in an attempt to identify the source, and obtain an undertaking that the papers would not be publicised further.

Sir Robert Megarry held that there were insufficient grounds for finding a public interest defence for the media to hide the identification of the source. He distinguished the protection of sources at the interlocutory stage through the "newspaper rule"[49] from discovery at the trial stage, and allowed disclosure of the source. A promise of confidentiality was held not to protect an informant's identity. The Court was not so sympathetic to the cause of the mole in this case because there appeared to be an element of sculduggery.[50] Sir Megarry VC noted that what matters in this area is the public interest, which he viewed in this case as the interest in "getting the truth out in the administration of justice."[51] Lord Denning relied on American and English case law in discussing the correct balance between the ability of the press to protect its sources, and an employer's right of redress for breach of confidence:[52]

> Much of the information gathered by the press has been imparted to the informant in confidence. He is guilty of a breach of confidence in telling it to the press. But this is not a reason why his name should be disclosed. Otherwise much information, that ought to be made public, will never be made known.

This is not an absolute principle. It must be determined whether the information was used "responsibly" by the press. This is often a very difficult line to draw, and leaves scope for different results in individual cases. Lord Denning, for unknown reasons, decided in this case that the information was used "irresponsibly", and that this was a sufficient reason to destroy the confidential relationship between the paper and its source. This is despite the fact that the source appeared to have good reason to disclose the information, specifically, concern for the public purse. This judgment was upheld by the House of Lords.[53]

Lord Salmon, the sole dissenter in the House of Lords, discussed the need for freedom of the press in a democratic society.[54] His Lordship stressed the impor-

48 [1980] 3 WLR 774.

49 The "newspaper rule" protects newspapers and other media forms from being compelled to disclose their sources, but it is only applicable in the interlocutory stage of discovery for libel or slander, and not the trial. The court in this case did not see fit to extend it to an action for breach of confidence. See *British Steel*, ibid, 848-851, for a more extensive explanation.

50 Ibid, 805.

51 Ibid, 781.

52 Ibid, 803-805.

53 Ibid.

54 Ibid, 836.

tance of the public's right to know that a national industry was operating at a great loss. He found no evidence of sculduggery on behalf of the informer, whom he believed was acting out of a genuine concern to protect the industry. Consequently, Lord Salmon viewed the reasons for disclosure as within the public interest defence. He also criticised the ability of the plaintiff to identify the source through the ancient action of discovery, when this identification cannot be achieved in other actions against the press.[55] In support of this criticism Lord Salmon cited the New Zealand Court of Appeal.[56] He also questioned the lower court's reliance on *Attorney-General v Clough*[57] and *Attorney-General v Mulholland*,[58] as these cases involved issues of national security, which were not relevant here. Lord Salmon considered that the actions of the newspaper were not irresponsible, as there was good reason to believe that Granada disclosed the information in the public interest.[59]

Tonga Development Bank v Akilsi Pohiva[60] is a Tongan case in which the government-run Tonga Bank took action against the editor and publisher of the newspaper Kele'a. The newspaper had published an article alleging that the bank had shown favouritism and incompetency, and disclosed the accounts of individuals with the bank to substantiate its claim. The information had been supplied by an employee within the bank who had signed an express secrecy agreement as part of his contract of service. The bank wanted to identify the informant because a breach of confidence was grounds for summary dismissal. They also sought a permanent injunction against the editor from further publishing the information.

Justice Dalgety explored the jurisdictional basis for the remedy of the action for a breach of confidence, and stated that:[61]

> The remedy is 'judge-made law' and demonstrates the 'willingness of the Judges to give a remedy to protect people from being taken advantage of by those who they have trusted with confidential information .... '

In *Tonga Development Bank* it was held that the editor was subject to an obligation of secrecy and confidence, and that he should be restrained from publishing like information in the future. The editor's obligation was found to be analogous to that of a banker's obligation of confidentiality to customers. This duty of confidence is vital to the efficacy of the relationship. Justice Dalgety also

55 Ibid, 840.

56 *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163. Justice Woodhouse indicated that the "newspaper rule" should not be confined to libel or any other form of action.

57 [1963] 1 QB 773.

58 [1963] 2 QB 477.

59 Supra at note 48, at 837.

60 Supreme Court of Tonga, unreported, 30 November 1992, Civil Case 192/92, Dalgety J.

61 Ibid, 9; citing Lord Griffiths in the House of Lords in *Attorney-General v Guardian Newspapers Limited (No 2)*, supra at note 37, at 648.

held that a journalist can be required to disclose a source where the court is satisfied that the disclosure is necessary in the interests of justice.

The *Tonga Development Bank* case concentrated on the duty to the public to disclose. The circumstances in which this would be justified included where there is a danger to the state or the public, or where disclosure is necessary to prevent fraud or crimes. After extensive exploration of the case law on the "public interest disclosure" defence,[62] Dalgety J held that it could not apply in *Tonga Development Bank* because no crime, fraud, or other serious misdeed could be established. As there was no evidence of any financial loss suffered by the plaintiff, Dalgety J restricted his judgment to awarding an injunction and nominal damages.

In reaching this decision, Dalgety J took account of the considerations which the Court in *Lion Laboratories Limited v Evans* [63] felt were relevant to this issue:[64]

(i) the duty of confidence is a restriction on the freedom of the press;
(ii) the duty to publish so that the public is informed of matters of public concern contravenes privacy;
(iii) there is a difference between what is interesting to the public and what they should know;
(iv) the media often has its own agenda of self-interest;
(v) the public interest can be served best by the informer going to an appropriate body rather than the media; and
(vi) confidences cannot be expected to be kept if serious misdeeds or grave misconduct are involved.

The Australian response to the needs of the media has been to set up a committee to look into the regulation and freedom of the press. This has followed an increase in prosecutions of journalists who refuse to reveal their sources. The New Zealand Law Commission has also discussed the extension of protection afforded to journalists who want to retain the anonymity of their sources.[65] Section 35 of the Evidence Amendment Act (No 2) 1980 may aid journalists through its protection of confidential relationships, but there have been no reported cases relying on this.

62 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461; *Weld-Blundell v Stephens* [1919] 1 KB 520; *Francome v Mirror Group Newspapers Limited* [1984] 2 All ER 408; *Lion Laboratories Limited v Evans* [1984] 2 All ER 417.

63 *Lion Laboratories*, ibid. In this case, the defendant disclosed confidential information which related to the functioning of an electronic breathalyser. There was doubt as to the accuracy of the machine. The disclosure was held to be in the public interest.

64 Supra at note 60, at 18-19.

65 New Zealand Law Commission "Evidence Law: Privilege" (Preliminary Paper no 23, May 1994) 132.

5. Freedom of Expression

The New Zealand courts have not placed as much emphasis on freedom of expression as the American courts have. This is not surprising, considering the different constitutional structures. Any decision concerning freedom of expression must weigh up the laws regulating breach of confidence, privacy, copyright, and official secrets.

A United States decision, *New York Times Co v United States*,[66] raised some of these issues. In 1967 Robert McNamara, Secretary of Defence for the United States, ordered a historical review of the American involvement in South East Asia. Many historians were employed for this task, including Daniel Ellsberg. He became disillusioned with the American role in Vietnam, and believed that the public should be fully informed of the extent of the United States involvement. In 1969, Ellsberg went to William Fulbright of Arkansas, Chairman of the Senate's Foreign Relations Committee and an open opponent of the war. However, Fulbright did not want to release the papers because he felt he could not justify the risk of being charged with releasing secret government documents.

In 1971 Ellsberg sent the papers to the New York Times. On publication, the Justice Department sought an injunction against the Times, which was denied by the lower courts and the Supreme Court. It was held that the Government could not establish justification for the imposition of a prior restraint of expression.

The First Amendment barred the Court from prohibiting publication of material, even where the disclosure would pose a perceived threat to national security.[67] Justice Black stated that the "press was to serve the governed, not the governors"[68] and that freedom of the press was more important in these circumstances than the security the Government believed was being breached. Justice Brennan concurred, and stated that the Government had not been able to prove that disclosure of the information would lead to a calamitous event.

It is the writer's opinion that freedom of expression should serve the interests of the whistleblower. It should be available as a justification or defence for the individual who chooses to blow the whistle. The Australian cases tend to take this view, as is evidenced in *Attorney-General v Jonathan Cape Ltd* [69] and *Commonwealth of Australia v John Fairfax and Sons Ltd.*[70] In the latter case, Mason J indicated that there is a strong public interest in freedom of expression, in relation to government information.

66 403 US 713, 29 L Ed 822, 91 S Ct 2140 (1971).
67 Ibid, 840.
68 Ibid, 826.
69 [1976] QB 752.
70 (1980) 147 CLR 39.

In New Zealand, s 14 of the NZBORA states:

> 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.

Section 5 provides that such a right is subject to those reasonable limits prescribed by law as can be justified in a free and democratic society.

In *Lowe*,[71] s 14 was raised as a defence, placing an onus on the Council to show that the s 5 limit applied in this particular case. The Court stated:[72]

> It is dangerous to confuse rules of polite behaviour with rules of law or binding practice. Obviously, it will often be unproductive and could incur displeasure for the employee to go public without attempting to have the matter dealt with in-house, but sometimes there is no real alternative as the whistle-blower cases show. A supervisor's feelings of displeasure cannot, of course, convert the employee's lawful actions into misconduct .

The Court was dubious as to how far the Council could go in prohibiting councillors from speaking to others about Council business, particularly to those within the organisation. They indicated that "councils making such rules will need to be aware that their ability to enforce them by disciplinary action may be treated by the Court as subservient to the public interest".[73]

In *Hobbs v North Shore City Council,*[74] a council employee was dismissed on the grounds of insubordination and disloyalty, as a result of publishing statements in a newspaper that criticised his employers. The NZBORA was raised as a defence, but not emphasised. Judge Newman decided that the reasonable limits to s 14 included other enactments, contracts which existed between parties, the common law, and other needs for confidentiality. He found that the NZBORA had a minimal effect, although he did not explain his reasoning. Judge Newman based his decision on the fact that Hobbs had written most of the letters as a concerned ratepayer, and should not be dismissed from his job for acting on those concerns. The Judge indicated that "internal criticism must be kept internal until all possible avenues are explored and exhausted and that outside agencies should be used only then".[75] He found that in this case the internal avenues for complaint were ill-defined and little used.

It is difficult to create a law which will shield those who speak out in the public interest. The more blatant reprisals such as demotion, dismissal, or even denial of promotion would be easier to address than those which are more subtle and psychological, yet just as demoralising for the employee. These include close scrutiny of working practices, refusal to assign work within the competence of the

71 Supra at note 32.
72 Ibid, 900.
73 Ibid, 901.
74 [1992] 1 ERNZ 32.
75 Supra at note 32, at 900.

employee, and lack of credit for ideas and work.[76] As noted previously, the price that the whistleblower pays may often be out of proportion to the perceived good that they have afforded society.

A whistleblower may also have a less than altruistic motive to blow the whistle. This is arguably the case with the Pugmire affair, when Goff went to the media. It would have been more effective for him to have taken a less dramatic avenue, before allowing the hype of the media to take over.[77] However, the focus should be on results rather than the underlying motivation. If there is a wrong being committed, it should be exposed, notwithstanding the original motive of the whistleblower.

Whistleblowing must be examined from a wider perspective than just the perceived wrong. It involves weighing up whether disclosure is necessary in light of several factors, and this would be best determined by the courts. Justice Kirby noted that:[78]

> Obviously, people in positions of trust should normally keep the secrets of that trust. Equally clearly, it cannot be left to individual employees to be the final arbiters of the public interest that would excuse disclosure. Likewise, it cannot be left exclusively to the holders of the secrets. They may be blinded by self interest, tradition or the covering up of wrongdoing – so that they do not see where the true public interest lies. That is why, in the end, the responsibility of judging whether the whistleblower was justified, lies with the courts.

V: THE LEGISLATIVE RESPONSE

The disparate nature of whistleblowing makes it difficult to protect, and protection in a variety of forms may consequently be required. It has been suggested that professional societies should encourage the production of codes of ethics and internal mechanisms for negotiating and conciliating disputes which may arise between whistleblowers and employers.[79] Legislation and parliamentary committees are avenues to be explored when internal mechanisms are exhausted. Whistleblowing statutes are usually confined to the public sphere, and concentrate on efficiency and proper management.

76 Fox, "Protecting the Whistleblower" (1993) 15 Adel LR 137, 143.

77 540 NZPD 1760 (15 June 1994).

78 Kirby, Book Review of Cripps, "The Legal Implications of Disclosure in the Public Interest" (1988) 62 ALJ 397.

79 Ibid.

1. The American Response

The United States was the first jurisdiction to introduce legislative protection for the whistleblower, and the term itself is American in origin. The federal response was the Civil Services Reform Act 1978 ("CSRA") as amended by the Whistleblowers Protection Act 1989. The legislation also provides for two organisations, the Office of Special Counsel ("OSC"), which deals with complaints about waste, fraud, and abuse, and the Merit Systems Protection Board ("MSPB") which is an appellate body.

The OSC has the power to prosecute federal supervisory employees for discriminating against those who blow the whistle. Once the complaints are received, the OSC can either investigate the matter, or refer it on. If there has been an unjustified reprisal against the employee, the OSC can then ask the employer to rectify their action. If this is not followed, the case can be taken to the MSPB.

The aim of the Whistleblowers Protection Act 1989 was to ensure that the MSPB no longer worked to the detriment of the federal whistleblower, and it modified the OSC's powers to ensure the maximum benefit for the whistleblower. These changes have been severely criticised.[80]

There are broad exemptions from the whistleblower protections, mainly for agencies which deal with issues of national security, but also for some government corporations. In addition, the increased emphasis on confidentiality in the OSC has made it more difficult for whistleblowers themselves to obtain information. The OSC, as the official avenue for federal workers to report waste and abuse, screens the complaints to determine their merit, and refers them back to the agency concerned if required. Fisher views the fact that the investigation and writing of the report responding to the whistleblower's allegations is given to the agency on which the whistle was blown as a major flaw.[81] While this will encourage the organisation to look at the problem objectively, and to develop suitable solutions, there must be some supervision of this process.

The Whistleblowers Protection Act 1989 has, however, lessened the burden of proof for the whistleblower, and given the whistleblower an independent right to bring a claim should the OSC not do so.

2. The Australian Response

At present the Australian Federal Government is considering whistleblower protection legislation which proposes the establishment of a Whistleblower's authority, certain protections for whistleblowers, and the possibility of compensa-

80 For a more in-depth analysis of the workings of the Federal system, see Fisher "The Whistleblowers Protection Act of 1989: A False Hope for Whistleblowers" (1991) 43 Rutg L Rev 355, 386.

81 Ibid.

tion payments to those whistleblowers who are discriminated against.

Queensland introduced the Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1989,[82] and then a more extensive Whistleblowers Protection Bill in 1992, which focused on public interest disclosures. A similarly named Whistleblowers Protection Bill 1992 was introduced in South Australia, and passed in 1993. This Act "facilitates the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally, by providing means by which such disclosures may be made and appropriate protections for those who make such disclosures."[83] The South Australian Act contains fewer structural provisions than the Queensland one, and is not solely confined to the public sector.

In New South Wales, the Whistleblowers Protection Bill (No 2) was introduced in 1992, and in June 1994, the Protected Disclosure Bill was also introduced. The latter provides for disclosures to be made through internal mechanisms, or to one of three agencies which already exist. No protection is given if the informer goes straight to the media, or if the disclosures are critical of government policy.

VI: IS THERE A NEED FOR LEGISLATION IN NEW ZEALAND?

The response in New Zealand to the needs of whistleblowers has not been the result of inquiries such as those in Australia. Rather, the Whistleblowers Protection Bill 1994 ("the Bill") was introduced as a reaction to the circumstances which arose out of the Pugmire affair. The Whistleblowers Protection Bill is based on the South Australian Act, and applies to both public and private spheres.

1. An Outline of the Whistleblowers Protection Bill 1994

Whistleblowing has not been defined in the Bill, probably because it is difficult to do. Clause 4 states that the purpose of the Bill is to:

> [F]acilitate 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:

82 It made it an offence to victimise anyone assisting the Criminal Justice Commission which was set up to investigate government corruption.

83 *Australian Legal Monthly Digest* (March 1993) para 2427.

(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.

Part II of the Bill sets out the manner in which a disclosure of public interest information is to be made. Public interest information is described in cl 5 as information which relates to any conduct or activity set out in cl 4. Clause 5 goes on to define the parameters of an appropriate disclosure. Information which is protected by the Official Information Act 1982 (and its Local Government counterpart), the Privacy Act 1993 (or a code of practice issued under s 63 of that Act), a duty of confidence (unless it would be covered by the public interest), or any other enactment, is a protected disclosure if it is made to the Whistleblowers Protection Authority.

Clause 6 states that 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 the information to the Authority ....

the disclosure would constitute an appropriate one. The Bill, therefore, avoids the problem of less than altruistic motivates by ensuring that the informer "believes on reasonable grounds that the information is true." Clause 8 makes it an offence to disclose the whistleblower's identity.

These requirements do not really add anything new to those which have been developed through the common law. Clause 5, however, is extremely broad, and by allowing disclosure to a variety of authorities, places a lot of faith in the discretion of those authorities.

Part III of the Bill sets up the Whistleblowers Protection Authority ("the Authority"), and its functions are outlined as encompassing:

(i) investigation;
(ii) advice;
(iii) monitoring disclosures which have been made in the public interest;

(iv) reporting to the House of Representatives;
(v) reviewing the operation of the Act; and
(vi) undertaking any other necessary action outlined in the Bill.

Part IV of the Bill outlines the procedures for advice and counselling, the investigatory process, and the exclusion of specific criminal offences. The Authority is empowered to refer a matter on to the person involved in the investigation, or to an appropriate enforcement agency, to ensure that corrective action occurs. A list of those enforcement agencies is provided, and includes the Commissioner of Police, the State Services Commissioner, the Audit Office, the Public Health Commission, and the Hazards Control Commission.

Part V provides remedies for injury to protected informants. Unlawful discrimination is defined in relation to the employment relationship, unions, and education, and is inclusive of the grounds set out in the Human Rights Act 1993.

2. Discussion

Despite the recent publicity concerning whistleblowers, and the fact that the submissions on the Bill have been received and some made publicly available, it appears that the Bill's momentum has evaporated.

Supporters of the Bill believe that legislation which would provide guidance and protection for the public-spirited employee is worthwhile. Employees may be unaware of the protections provided by the common law.

Criticism of whistleblowing legislation revolves around a belief that such statutes are no more effective in encouraging appropriate whistleblowing or providing protection, than the common law. It is argued that the common law, and other available avenues, are more flexible, and are therefore more reasonable solutions than legislation.

Also of concern is the fact that the Authority is authorised to refer the matter on to an appropriate enforcement agency, but cannot disclose to the agency the information they already have in relation to the situation, thereby making the process a costly one. The creation of an agency for the protection of a bona fide whistleblower could also be criticised for removing the courts as arbiters of the public interest.

In many ways the common law appears to be sufficient in New Zealand, as illustrated by Pugmire's reinstatement. However, as Mr Short, the President of the Queensland Law Society, commented:[84]

> [T]he present law is unsatisfactory .... If there is to be a new law, be it judge made law, or law made by the Parliament, covering private employees, then it should clearly mark out the limits of the

84 Electoral and Administrative Review Commission (Qld) "Report on the Protection of Whistleblowers" (Oct 1991) 46.

employees duty of confidentiality by outlining legitimate exceptions to that duty, providing a mechanism for disclosure, and protecting the honest and fair employee from reprisal.

The fact remains that, as for most whistleblowers, Pugmire's situation raised extremely difficult and complex issues for him. Pugmire was fortunate to be reinstated, but the personal cost of blowing the whistle was still extremely high.

3. The Bill – A Final Analysis

It remains to be answered whether the Bill is required. The goals of the Bill reflect those of the common law. The legislation tries to categorise what a disclosure in the public interest is, and when such disclosure should be exempted from the employee's duty of confidentiality. If such a defence is too wide, there is a danger that it will swallow up the obligation of confidence. The law relating to relationships of confidence is a burgeoning area which is open to change and development. The common law has shown how delicate the balancing act needs to be.

The predominantly equitable basis for the action has enabled the courts to give flexible and case-specific remedies. If the Bill is enacted it may stifle the development of such a response. Amendments can be cumbersome and are too late for the individual or institution which has been wronged in the meantime.

On the other hand, to have the law laid down in statute is a most attractive option. The Bill appears to have simply codified the common law response[85] and provided mechanisms through which the process is streamlined. As mentioned, the degree to which the public interest defence in cl 5 has been expanded may need to be examined further.

The guidance and protection guaranteed through an Authority set up for the needs of whistleblowers would be very useful. If the Whistleblowers Authority proves to be too costly and unwieldy as a separate entity, it may be more pragmatic to develop extensions within other appropriate authorities, such as the Office of the Ombudsman, the Human Rights Commission, or the Police Complaints Authority. Such authorities have the resources and specialised knowledge of their areas to deal with complaints. The Ombudsman could be given an overseeing authority. Encouraging the use of internal mechanisms within individual organisations is also required.

85 The remedies available are merely an outline of what the common law and relevant legislation offer already. See Part V of the Bill, where the remedies for the protected informants include those outlined in Part II of the Human Rights Act 1993, which pertain to unlawful discrimination, the reliance on a Complaints Division which consists of Human Rights Commissioners, and the provision of the Complaints Review Tribunal which exists under the Human Rights Act (and which the Privacy Commissioner has access to).

VII: CONCLUSION

As can be seen from the preceding discussion, whistleblowing involves legal and ethical considerations which can be difficult to balance. As a consequence, exceptions to an obligation of confidentiality have developed at common law. The primary exception is the protection given to a bona fide whistleblower who has disclosed information in the public interest.

The law is far from certain as to when and how those protections are afforded to the whistleblower. There have certainly been some unusual results, such as the *British Steel* and *Woodward* cases, which focus on factors other than the level of wrongdoing of the employer. While these two cases may be justified, considering the complexity of the balancing act, they appear to have been a rather idiosyncratic response. The remedies afforded are also not uniform, as illustrated by the *Snepp* and *Spycatcher* cases.

It appears that the American jurisdiction is on the way to streamlining its position. The focus on the public sector has possibly made it easier to effect the changes required. Before applying the legislation to both the public and private sectors in New Zealand, consultation with the private sector is definitely required.

Maintaining the status quo of the common law is also a good idea. Its flexibility enables the law to develop more freely. However, it is the writer's opinion that some statutory protection and guidance is required for the bona fide whistleblower. With the law as it stands, there is very limited support for genuine whistleblowers who disclose the information in the public interest. This does not mean that information which satisfies the public's *curiosity* should be included.

By introducing legislation there is a danger that the flexibility inherent in the common law will be lost. Yet cases like the Pugmire affair illustrate the fact that some systemised guidance and protection needs to be available for whistleblowers. Of course it is not realistic to expect the whistleblower to be protected for disclosures in every instance, especially when matters of national security are involved.

The writer therefore submits that the Bill should be modified. To have a sequence of events and an investigative authority set out for whistleblowers is both pragmatic and highly appropriate. Further, it would be sensible to retain, in an adapted form, the notion of a Whistleblowers Authority. Its investigatory, advisory, and review procedures should remain. The Whistleblowers Authority should be able to advise the potential whistleblower of their common law rights relating to the particular circumstances. Such a response is not as black and white as that proposed by the Bill. Empowering the Authority with a quasi-judicial responsibility may not be an attractive option for many, but it does appear to attain a better equilibrium.

However, the section in the Bill which defines a disclosure in the public interest is not required. The common law has developed its own satisfactory response to the multi-faceted context of whistleblowing. To confine this to statute

is unnecessary and avoids the potential problem of inflexibility. The purpose of the Bill can be retained, but the manner in which it is achieved should be altered.

It remains to be seen whether the Bill will proceed any further through Parliament. It is the writer's hope that it does, but with the appropriate changes made, so that some form of advice and protection is provided for the bona fide whistleblower.

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