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Meeting of Commonwealth Law Ministers and Senior Officials

Edinburgh, Scotland, 7-10 July 2008

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Provisional Agenda Item 3(g) **LMM(08)7 [Provisional]**

COMMONWEALTH SECRETARIAT ANTI-CORRUPTION PROJECT: 'WHISTLEBLOWING' MODEL LEGISLATIVE PROVISIONS

Paper by the Commonwealth Secretariat

1. A 'whistleblower', for present purposes, is an individual who, in good faith, reports corruption or other wrongdoing (which, usually, has come to his/her notice in the course of employment or engagement) to an appropriate authority. Depending on a State's domestic law, that appropriate authority might be the employer, a regulatory or oversight body, a law enforcement agency or even, in cases of last resort, the media.

2. Those states which are parties to the UN Convention Against Corruption (UNCAC) have an obligation to consider whether to introduce measures to protect such individuals against unjustified treatment, such as discrimination, Article 33 of UNCAC states that:

> "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

3. The whistleblower should be distinguished from the protected witness. The former has reported, but may or may not become a witness before a court or other tribunal. In the event that such a person is required to testify, whistleblowing legislation, as generally understood, will not provide protection against risks or threats to the person who gives, or is about to give, evidence. Rather it will be confined to treatment received, almost inevitably from an employer or other employees, as a result of making a report.

4. Indeed, UNCAC specifically provides (under Articles 25 and 32 respectively) that State Parties must criminalise acts that obstruct justice, and must provide effective protection for witnesses.

5. The draft model legislative provisions, presented herewith for the consideration of Law Ministers, aims to provide a framework of protection for the person who reports in good faith and with reasonable grounds, and to set out a series of avenues for reporting, beginning with the employer and only moving beyond that when such reporting is impracticable. Therefore, by their very nature, these provisions seek to encourage the

employer to take action in response to a report and expect the employee, ordinarily, to make a report without hiding his or her identity from the employer.

6. The provisions, as drafted, reflect work and legislative drafting undertaken in a number of Commonwealth jurisdictions; in particular, New Zealand, South Africa and the United Kingdom. Reliance has also been placed on the expertise of specialist non-governmental organisations, including the United Kingdom's 'Public Concern at Work'.

7. The Legal and Constitutional Affairs Division of the Commonwealth Secretariat has had the opportunity of canvassing the views of an expert working group convened in December 2006 (for the purposes of considering guidance on UNCAC). That group concluded that, in its view, the present draft provisions would assist those Commonwealth states considering legislation in this often difficult area.

8. The provisions were placed before Senior Officials at their October 2007 meeting. Further to that meeting, comments and suggestions have been received from Canada, Malaysia, Singapore, South Africa, Swaziland and the UK. The amended draft has sought, where possible, to reflect those submissions. Senior Officials are asked to recommend to Law Ministers for their approval.

8. Law Ministers are consequently invited to consider the draft provisions as set out in the attached **Annex**.

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ANNEX

WHISTLEBLOWING LEGISLATION: MODEL LEGISLATIVE PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates –

(i) 'disclosure' *(or 'qualified disclosure')* means any disclosure of information **(Suggestion by Malaysia: add the words " either orally or in writing")** regarding any conduct of an employer, or an *employee* of that *employer*, made by an *employee* who has reason to believe that the information concerned shows or 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 that person is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur[1];
(d) that the health and safety of an 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;
(f) unfair discrimination *(this depends on whether State has anti-discrimination legislation)*
(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

- **Canada suggests adding 2 further grounds: (i) gross mismanagement; (ii) a serious breach of a code of conduct.**

(ii) '*employee*' means –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an *employer*;

(iii) '*employer*' means any person –

(a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
(b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such *employer*.

(iv) '*impropriety*' means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of disclosure irrespective of whether or not –

(a) the impropriety occurs or occurred within [insert name of State] or elsewhere; or

[1] Suggestion by Malaysia that 'miscarriage of justice' be the subject of a guidance note

(b) the law applying to the impropriety is that of [insert name of State] or of another country; or

(c) the law applying to the impropriety is that of [insert name of State] or another country;

(v) *'Minister'* means

:

(a) an individual appointed under any enactment by a Minister, or
(b) a body any of whose members are so appointed, and
(c) the disclosure is made in good faith to a Minister;

(vi) *'occupational detriment'*, in relation to the working environment of an employee means –

(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated;
(c) being transferred against his or her will;
(d) being refused transfer or promotion;
(e) being subjected to a term or condition of employment or retirement which is altered to his or her disadvantage;
(f) being refused a reference or being provided with an adverse reference, from his or her employer;
(g) being denied appointment to any employment, profession or office;
(h) being threatened with any of the actions referred to in paragraphs (a) to (g) above; or
(i) otherwise being adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

(vii) *'organ of state'* means –

(a) any department of state or administration in the national or provisional sphere of government or any municipality in the local sphere of government; or
(b) any other functionary or institution when –
exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
exercising a public power or performing a public function in terms of any legislation;

(viii) *'prescribed'* means prescribed regulation or subordinate legislation (will need to be State-specific)

(ix) *'protected disclosure'* means a disclosure made to –

(a) a legal adviser in accordance with section 7;
(b) an employer in accordance with section 8;
(c) a member of Cabinet or... *(State specific drafting required here))* in accordance with section 9;
(d) a person in accordance with section 10 ; or
(e) any other person or body in accordance with section 11, but does not include a disclosure –
- in respect of which the employee concerned commits an offence by making that disclosure; or
- made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 7.

Objects and applications of Act

2. (1) The objects of this Act are to:

(a) protect an employee, in the public or private sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
(b) provide certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
(c) provide procedures whereby an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

(2) This Act applies to any protected disclosure made after the date on which this section comes into operation, irrespective of whether or not the impropriety concerned has occurred before or after the said date.

(3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it –

(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
(b) purports to preclude the employee or has the effect of discouraging the employee from making a protected disclosure.

Disclosures qualifying for protection

3. (1) In this Part, 'disclosures qualifying for protection' are those falling within paragraphs (a) to (g) of section 1(i).

(2) For the purposes of sub-section (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the State or elsewhere, and whether the law applying to it is that of the State or of any other country or territory.

(3) A disclosure of information is not a disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part 'the relevant failure', in relation to a disclosure, means the matter falling within paragraphs (a) to (g) of section 1(i).

Explanatory Note

Section 3(i)
Section 1(i) sets out the information which is subject to protection, provided that the particular disclosure meets the other conditions of the Act. It is important to note that it does not matter whether the person to whom the disclosure is made is already aware of the information. This ensures that the worker does not unwittingly lose protection against victimisation where the recipient of the information was already aware of the situation.

The degree of belief - the requirement that the worker has a 'reasonable belief' means that the belief need not be correct but only that the worker held the belief and it was reasonable for him or her to do so. Accordingly, it can qualify as a disclosure if the worker reasonably

but mistakenly believed that a specified malpractice was occurring: see the United Kingdom case of Darnton v University of Surrey 2002 (EAT/882/01). There the Employment Appeals Tribunal (EAT) observed that a qualifying disclosure might include what a worker had seen or heard or what had been reported to him by others. It also held that an assessment of the factual accuracy of the concern would be no more than an important tool in determining whether the belief was reasonable. Equally, if some malpractice were occurring which did not involve a breach of a legal obligation, the disclosure would still qualify if the worker reasonably believed it was such a breach. The test in the Act is lower than a straight "reasonable belief" that the malpractice is occurring - due to the phrase "tends to show" - and the test is more akin to one of reasonable suspicion.

Malpractice - for the information to come within the definition of a disclosure, it matters not whether the malpractice was past, present or prospective. Nor does it matter whether the concern related to particular conduct or to a state of affairs.

As to the scope of several of the categories of information, the following points should be noted:

Failure to comply with a legal obligation includes a breach of any statutory requirement; contractual obligation; common law obligation (e.g. negligence, nuisance, defamation); or an administrative law requirement. Examples from Employment Tribunals (ETs) in the United Kingdom include a breach of a duty of care owed to a resident in a care home (Chubb v First Care Partnership) and a breach of consumer rights (Staples v Royal Sun Alliance). However, a concern about a failure to comply with an accountant's professional obligation in itself was held not to qualify (Butcher v Salvage Association). As to government and public authorities, this sub-section would include an official's reasonable belief that a decision of the authority could be overturned following judicial review (for example because of a procedural impropriety). It is submitted it would also cover the concern of a public servant who had been asked to act in a way that breached a provision of the Civil Service Code (e.g. the requirement to act with "integrity, impartiality and honesty"). **(make this State specific)**

Miscarriage of justice would include matters likely to lead to a wrongful conviction, such as reliance on unsound forensic techniques, a failure to disclose evidence to the defence, or perjury (though this would come both under this heading and that covering crimes).

Health and safety risks apply whether they threaten a worker or any individual. As such, this provision includes risks to patients in a hospital, passengers on a train, children in care, consumers of electrical products or customers in a restaurant.

Information deliberately concealed - this category provides that qualifying disclosures include information not only about the substantive malpractice, but information which tends to show the deliberate concealment of information about the malpractice.

Sub-section (3)

Where the disclosure of the information is itself a crime (e.g. because it would amount to a breach of an Official Secrets Act or similar legislation), it will not qualify for protection.

Where the disclosure was unauthorised and criminal proceedings were in progress or anticipated, it is expected that an employment tribunal or court would postpone any hearing under this Act. If the worker was acquitted at trial, he would then be able to invoke protection under this Act. Where no such proceedings are anticipated, the standard of proof the tribunal should apply is effectively a criminal one.

Sub-section (4)

This provision means that if a legal adviser cannot be compelled in court to give evidence about a matter, neither he nor the staff in his office can make a protected disclosure about it. Naturally, this does not affect the lawyer's ability to make disclosures on the instructions of a worker who is his client.

Section 4: Employee making protected disclosure not to be subjected to occupational detriment

No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

Explanatory Note

This section protects employees from action short of dismissal and protects other workers (who cannot be dismissed, as they are not technically employees) from any victimisation, including the termination of their contract. Protection for employees against dismissal is provided in section 5.

The section does not confer a right of action against any third party who victimised the worker, such as fellow employees, individual managers or clients of the employer. However, the failure of the employer to protect the worker against such action by others might itself be a detriment.

Detriment

An employer subjects a worker to a detriment not only if he acts to the worker's detriment (for example, offering less work to a casual worker, Almond v Alphabet Children's Services; disciplining the whistleblower, Kay v Northumberland Healthcare NHS Trust; threatening to destroy the whistleblower, Bhatia v Sterlite Industries; re-advertising of the whistleblower's job, Brown v Welsh Refugee Council; withdrawing the promise of a permanent post, Bhadresa v SRA; or disclosing the whistleblower's identity contrary to assurances, Carroll v Grt. Manchester County Fire Service) but also if he causes him detriment by deliberately failing to act. Examples of the latter have included failing to investigate a concern (see A v B & C and Boughton v National Tyres) and failing to inform the whistleblower of the progress of the investigation (Knight v LB Harrow).

Tribunals have held the following did not, on their facts, amount to a detriment: moving the whistleblower to an open plan office, Chattenton v Sunderland CC; the continuation of bad relations with a manager, Allison v Sefton MBC; or the demotion and transfer of the manager complained about, Chubb v Care First Partnership.

Detriment, it is submitted, also includes the threat of a detriment. As the Government spokesman (Hansard HL, 5 June 1998, col. 634) said "An employee who has made a disclosure to his employer could be threatened with relocation to a remote branch of a company, for instance, where promotion prospects are poorer. That kind of threat is a detriment and even though the worker can be assured that the employer could not lawfully carry out the threat, the fear of the threat may well amount to detrimental action. Any threat which puts a worker at a disadvantage constitutes in itself detrimental action".

Section 5: Unfair dismissal

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Explanatory Note

This provision makes the dismissal of an employee because or principally because he made a protected disclosure automatically unfair, see ss.99-103 Employment Rights Act. The effect is that the tribunal is not to consider whether or not the employer's actions were reasonable.

Causation: If there were a number of reasons for the dismissal, it is still automatically unfair if the protected disclosure was the principal or core reason - see Aspinall v MSI Mech Forge where the EAT adopted the causation approach from discrimination law and said that for the Public Interest Disclosure Act (PIDA) to apply the protected disclosure must be "the real reason, the core reason, the *causa causans*".

Burden of proof: If the worker has been employed for one year or more, the burden of proof rests with the employer to show that the reason, or principal reason, for the dismissal was an admissible reason within s.98(1)(b) or (2) of the Employment Rights Act. See, for example, Fernandes v Netcom where the ET found that the employer's reasons were a smokescreen; Leonard v Serviceteam where the employer gave no adequate explanation for the dismissal; Lewer v Railtrack where the employer failed to provide evidence for its stated reason; and Pipes v Brideford Lodge where the employer failed to attend the hearing.

Dismissal within first year: Where an employee has been employed for less than one year, however, he needs to establish the jurisdiction of the tribunal to hear the complaint. This means the burden rests with the employee to establish, on a balance of probabilities, that the reason or principal reason for dismissal was because he or she made a protected disclosure (see Smith v. Chairman & Councillors of Hayle Town Council [1978] IRLR 413). In Brothers of Charity Services Merseyside v Eleady-Cole the EAT said that where the tribunal rejects the employer's stated reason for a dismissal within the first year, it should set out clearly its reasons and the facts relied on. Examples from ET decisions include Azmi v Orbis Charitable Trust (where the evidence conflicted with the alleged poor performance); and Scott v Building Management Service (where the employer had responded angrily to the disclosure).

Several reasons: Where there is more than one reason for the dismissal, what matters is what was the real reason (see Aspinall, *supra*) and this will be a question of fact. Guidance can be found in the approach of the EAT in Hossack v Kettering Borough Council (where the manner in which a protected disclosure had been made was cited as one of several examples of conduct justifying dismissal). See also the ET decisions in Hayes v Reed Social Care & Bradford MDC and Pimlott v Meregrove.

Interesting points on causation:

- *anonymity*: where a concern had been raised anonymously and there was no evidence that the employer knew of the disclosure, the tribunal was unable to infer that the disclosure had been the cause of the dismissal, Eastelow v Taylor,

- *several whistleblowers*: where no action had been taken against colleagues who had blown the same whistle more vociferously, causation was not established, March v The Holiday Place (redundancy within 12 months).

Termination of a worker's contract:

Where the worker was not an employee (or if he was an employee on a fixed term contract and s.197 ERA applies), and his contract was not renewed because he made a protected disclosure his protection is set out under ss.3 and 4, *supra*

6. Remedies

(1) An employee who has been subjected, is subject or may be subjected, to a breach of section 3, may –

(a) approach any court having jurisdiction for appropriate relief; or
(b) pursue any other process allowed or prescribed by any law (check State's labour laws)

(2) Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible and practicable be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state.

7. Protected disclosure to legal adviser

Any disclosure made –

(a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and
(b) with the object of and in the course of obtaining legal advice;

is a protected disclosure.

Explanatory Note

This provision enables a worker to seek legal advice about a concern and to be fully protected in doing so. It should be noted that this is the only disclosure within the Act which does not have to be made in good faith to be protected. This signals that someone with a concern who is intending to disclose it solely for some ulterior motive or leverage is safely able to obtain advice that such conduct jeopardises the protection afforded under the Act.

The lawyer, in turn, cannot of his or her own volition make a protected disclosure of the information: s.3(4). Of course, he or she can make such disclosure as the client instructs him to make on his behalf. As such, the disclosure will be judged as made by the client and it will only be protected if it is made in accordance with the other provisions of this Act.

While it is expected that, where a union is recognised in a workplace, disclosures to trade union officials will be protected under the whistleblowing procedures in s.11(2), the implications of this provision (and others) for general disclosures to union officials was considered at some length in the House of Lords at the Committee and subsequent stages.

Lord Borrie did make the point (Hansard HL 5 June 1998, col. 624) that a disclosure by a union member for the purpose of obtaining legal advice from the union solicitor will, in any event, be protected under this section.

8. Protected disclosure to employer

(1) Any disclosure made in good faith –

(a) and substantially in accordance with any procedure prescribed, or authorised by the *employee's employer* for reporting or otherwise remedying the impropriety concerned; or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to-

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than the employer has legal responsibility to that other employee; or

(c) to the employer of the employee, where there is no procedure as contemplated in paragraphs (a) and (b);

is a protected disclosure.

(2) Any employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her *employer*, is deemed, for the purposes of this Act, to be making the *disclosure* to his or her *employer*.

Sub-section (1)

Good faith -- A disclosure is made in good faith if it is made honestly, even where it is made negligently or without due care.

Where the disclosure is demonstrably made for an ulterior and undesirable purpose (e.g. something approaching blackmail), it is submitted it would not be made in good faith. This approach has been taken in several ETs: Aziz v Muskett & Tottenham Legal Advice Centre, where the disclosure made as a means to exert pressure for a pay rise was considered to have been made without good faith.

Sub-section (1)(a)

To his employer - this would, it is submitted, include a disclosure to any person senior to the worker, who has been expressly or implicitly authorised by the employer as having management responsibility over the worker. It would not cover a disclosure to a colleague.

Sub-section (1)(b)

This sub-section protects, for instance, a nurse employed by an agency who, in the care home where she works, raises a concern about malpractice. It would also protect a worker in an auditing firm who raises a concern with the client.

It is important to note that while a disclosure under sub-section 1(b) is protected; (a) it does not amount to raising the matter with the employer for the purposes of a subsequent wider disclosure (under s11); (b) this Act does not place any obligation on the person responsible

to respond to the concern; and (c) if the worker is victimised for making a disclosure under this sub-section, any claim he may have is against his employer and not against the person to whom he made this disclosure.

Sub-section (2)

Where the organisation has a whistleblowing procedure which authorises raising the concern with someone other than the employer (for example authorising a disclosure to a health and safety representative, a union official, its parent company, a retired non-executive director, its lawyers or external auditors, or to a commercial reporting hotline) a disclosure to that person will be treated as if it were a disclosure to the employer. See Brothers of Charity Services Merseyside v Eleady-Cole (EAT) where Mr Eleady-Cole reported misuse of drugs and the internet at his workplace to a confidential telephone support service (commonly known as an Employee Assistance Programme). This service was offered to employees of the Brothers by an independent agency and it was a term of the agreement that the agency would report to the Brothers any allegation of criminal activity, while preserving the confidentiality or anonymity of the informant. The EAT held that such a procedure was an authorised one within the PIDA and that "if despite the attempts to maintain confidentiality, the employer subsequently became aware which employee had been responsible for the matters coming to light and that employee was then immediately dismissed for that reason, we have little doubt that such a dismissal [would be] contrary to section 103A".

It should be noted that the reasonableness of the response to the concern is relevant in determining whether a subsequent wider disclosure may be protected: s.9(3)(e). While the Act does not require employers to set up whistleblowing procedures, a worker who makes a wider, public disclosure is more likely to be protected if there was no such procedure, or he was unaware of it, or it was not reasonable to expect him to use it: s.9(3)(f).

9. Protected disclosure to a Government Minister

A disclosure made is made in accordance with this section if -

(a) the worker's employer is —

(i) an individual appointed under any enactment by a Minister; or
(ii) a body any of whose members are so appointed, and

(b) and the disclosure is made in good faith to a Minister.

Explanatory Note

Section 9 provides that workers in government appointed bodies are protected if they report their concerns in good faith to the sponsoring Department rather than to their employer. Legally a disclosure to a Department is what this section refers to as a disclosure to a Minister.

This section applies to bodies where the employer is an individual appointed under statute by a Minister (e.g. the utility regulators), or where one or more of the members of the body are appointed by a Minister (e.g. Hospital Trusts, tribunals and non-departmental public bodies). While no requirement is placed on the Minister to respond to the concern, it does strengthen the accountability of Ministers for the conduct of bodies for which they are responsible. It is also reasonable to expect that they will ensure the matter is investigated and any malpractice corrected.

As under section 8(1)(b), a disclosure under this section is not treated as one to the employer for the purposes of any subsequent, wider disclosure (s.11). It is also important to note that if the worker is victimised for making a disclosure under this sub-section, any claim he may have is against his employer and not against the Minister to whom he made the disclosure.

10. Disclosure to prescribed person

(1) A qualifying disclosure is made in accordance with this section if the worker –

(a) makes the disclosure in good faith to a person prescribed by order made by the Secretary of State/Minister for the purposes of the section, and

(b) reasonably believes –

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

Explanatory Note

Section 10 protects a worker who makes a disclosure to a person prescribed by the Secretary of State for Trade and Industry by Order *(needs to be State specific)*. Where a regulator has been prescribed, it is important to note that there is no requirement that: (a) the particular disclosure was reasonable; (b) the malpractice was serious; or (c) the worker should have first raised the matter internally. However, the worker must meet a higher evidential burden than in s.8, which protects internal whistleblowing - and the disclosure must be made in good faith.

The following are examples of some of the key regulators that might be prescribed under the Act: *(needs to be State specific)*

1. *Health & Safety risks*:
2. *Utilities/Sectors*:
3. *Financial Services*:
4. *Tax irregularities*:
5. *Public finance*:
6. *Company law*: Trade Ministry or similar.

The preferential position this section affords to disclosures made to prescribed regulators over other external disclosures reflects the position under the law of confidence. For example, in In Re A Company (1989) 3WLR 265, Mr Justice Scott, as he then was, said:

> "It may be the case that the information proposed to be given, the allegations to be made by the defendant to FIMBRA (Commentator's note: whose functions are now performed by the Financial Services Authority), and for that matter by the defendant to the Inland Revenue, are allegations made out of malice and based upon fiction or

invention. But if that is so, then I ask myself what harm will be done. FIMBRA may decide that the allegations are not worth investigating. In that case no harm will have been done. Or FIMBRA may decide that an investigation is necessary. In that case, if the allegations turn out to be baseless, nothing will follow from the investigation. And if harm is caused by the investigation itself, it is harm implicit in the regulatory role of FIMBRA."

It should be noted, however, that not all regulators are prescribed and that disclosures to such other regulators (and incidentally those to the police) will need to satisfy the provisions in ss.11 or 12 if they are to be protected.

Other classes of persons capable of being prescribed under this section could include certain trade union officials.

If it is not clear whether the matter should be raised internally or with a prescribed person, one practical approach to bear in mind will be for the worker or his adviser to contact the particular regulator informally first. They can then check if it is prescribed and, without initially identifying the employer, discuss the nature of the concern and explore what action the regulator considers appropriate. If the matter is to be pursued internally, the worker may wish to point out that he has spoken to the regulator without identifying his employer.

Sub-section (1)(b)(ii)

To be protected under this section, the worker must reasonably believe "that the information disclosed, and any allegation in it, are substantially true". While this is a higher evidential burden than that required for raising the concern internally (under s.6), provided the belief was reasonable the worker will not lose protection if his belief was mistaken - see Holden v Connex (where the ET rejected Connex's claim that Holden had not met this test, in part because it had failed to produce evidence that the concerns were not true and also because it had failed to respond when Holden had raised the concern internally).

11. Disclosure in other cases

(1) A disclosure is made in accordance with this section and is a *protected disclosure* if –

- (a) the worker makes the disclosure in good faith,
- (b) he or she reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
- (c) he or she does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;
- (d) one or more of the conditions referred to in sub-section (2) apply; and (n.b. (a) to (e) are conjunctive)
- (e) in all the circumstances of the case, it is reasonable to make the *disclosure.*

(2) The conditions referred to in sub-section (1)(d) are -

- (a) at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 10;
- (b) in a case where no person is prescribed for the purposes of section 10 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) the employee making the disclosure has previously made a disclosure of substantially the same information to –

(i) his or her employer; or
(ii) a person referred to in section 10, in respect of which no action was taken within a reasonable period after the *disclosure*; or

(d) the impropriety is of an exceptionally serious nature.

(3) In determining for the purposes of sub-section (1)(e) whether it is reasonable for the employee to make the disclosure, consideration must be given to-

(a) the identity of the person to whom the *disclosure* is made;
(b) the seriousness of the *impropriety*;
(c) whether the impropriety is continuing or is likely to occur in the future;
(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;
(e) in a case falling within sub-section (2)(c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;
(f) in a case falling within sub-section (2)(c)(i), whether in making the disclosure to the employer, the employee complied with any procedure which was authorised by the employer; and
(g) the public interest.

(4) For the purposes of this section a subsequent *disclosure* may be regarded as a disclosure of substantially the same information referred to in sub-section (2)(c) where such subsequent *disclosure* extends to information concerning an action taken or not taken by any person as a result of the previous *disclosure*.

Explanatory Note

This section sets out the circumstances in which other disclosures, including those to the media, may be protected. Such disclosures must meet three tests to be protected. The first of these (s.11(1)(a)-(c)) deals with the evidence and motive of the whistleblower. The second (s.11(2)) sets out three preconditions, one of which must be met if the disclosure is to be subject to protection. Finally, to be protected the disclosure must be reasonable in all the circumstances (s11(1)(e) and (3)).

Sub-section (1)(a) *Good faith* - See comment on section 8(1)(a).

Sub-section (1)(b)

reasonable belief - See comment on section 8(1)(b)(ii). If the concern had been raised internally beforehand or with a prescribed regulator, the reasonableness of the worker's belief should be assessed having regard to any response he had received from management or the prescribed regulator.

Sub-section (1)(c)

personal gain - This provision - that the whistleblower will not be protected if the purpose of the disclosure was personal gain - is aimed primarily at cheque book journalism. It covers not only payments of money, but benefits in kind. It would also catch a situation where the

benefit did not go directly to the worker but to a member of his family, provided that its purpose was personal gain.

Sub-section (1)(e)

In all the circumstances of the case - In determining whether the disclosure was reasonable in all the circumstances, the tribunal will have regard to the factors in s.11(3).

Sub-section (2)

The presumption is that, before any wider disclosure is protected, the concern will have been raised with the employer or with a prescribed regulator. This is reflected in three preconditions in this sub-section, one of which must be met if a public disclosure under this section can be protected. These are that the worker reasonably believes he will be victimised; or that he reasonably believes there is likely to be a cover-up; or that the matter had previously been raised internally or with a prescribed regulator.

Sub-section (2)(a)

The first precondition is that the worker reasonably believes he or she will be victimised if the matter were raised internally or with a prescribed regulator. See for example Everett v Miyano Care Services where the Applicant stated she had not raised her concern internally because she had not thought of telling her employers and that, had she thought of it, she would have done so as they had always been approachable. The belief must exist at the time he makes the external disclosure, it must be objectively reasonable, and it must be that he *will* be victimised (note, by contrast, in subs. 2(b) that the test is reasonable belief that there is *likely* to be a cover-up).

To reduce the risk that this precondition is easily satisfied, it is suggested that organisations should: (a) establish, deliver and promote a whistleblowing procedure; (b) ensure that everyone knows victimisation is unacceptable; and (c) make it clear that going to a prescribed regulator is acceptable. It is also suggested that organisations review how they have handled any such matter in the recent past. This is because a worker is more likely to be able to satisfy this precondition if he can show, by reference to a previous whistleblowing incident, that the employer's conduct could reasonably be seen as victimisation.

Sub-section (2)(b)

This precondition deals with circumstances where the worker reasonably believes a cover-up of the malpractice is likely to occur.

It can only be satisfied where there is no appropriate regulator prescribed under s.9. Accordingly where there is a prescribed regulator, the Act suggests that a concern about a cover-up be raised with that regulator before any wider disclosure might be capable of protection (see subs. 2(c), below) unless the matter is exceptionally serious (s.12).

For those advising workers before any disclosure is made, it is important to note that even though reasonable fear of victimisation may justify the protection of a wider disclosure, reporting to a prescribed regulator in such circumstances more readily secures protection for the client. However, where the worker has good reason to believe that, as a result of the unacceptably close relationship between the prescribed regulator and the employer, he will be victimised, a wider disclosure will be protected provided it is reasonable in the circumstances.

Sub-section (2)(c)

This provides that wider disclosures may be protected where the matter has previously been raised internally or with a prescribed regulator. However, for such disclosures to be protected the tribunal must have particular regard to the reasonableness of the response of the employer or regulator (s.11(3)(e)). It should be noted that the disclosure does not have to be of exactly the same information, provided it is substantially the same. In ALM Medical Services v Bladon the EAT - though overturned on other grounds - urged tribunals "to adopt a common-sense broad approach" to this question.

Sub-section (2)(c)(i)

Where the concern had previously been raised with the employer, in determining whether the particular disclosure should be protected, the tribunal must have particular regard (s.11(3)(f)) to whether the worker had complied with any whistleblowing procedure the organisation had.

Sub-section (3)

In deciding whether the disclosure was reasonable in all the circumstances, the tribunal should have particular regard to the issues set out in this sub-section. Where the disclosure was of non-confidential information, it is submitted that this reasonableness test should be more readily satisfied.

Where the information was confidential, it may be helpful to bear in mind the way the courts have weighed the same issue under the law of confidence. However, while the Act does not require that these are followed, it is submitted that tribunals should not apply this reasonableness test more restrictively than the courts permit disclosures of confidential information. This is because to be protected under this Act, the worker must meet certain criteria (good faith; some reliable evidence; and one of the preconditions in subs. (2) above) which do not apply to the decisions at common law. If the tribunal is satisfied that these criteria are met, the Act does no more than require the tribunal to consider whether the disclosure was reasonable in all the circumstances. The only explicit reference in the Act to any confidentiality in the information is where the confidences of a third party have been breached: s.11(3)(d).

Sub-section (3)(a)

The range of people to whom such a disclosure might be made is potentially vast. It could include the police, a professional body, a non-prescribed regulator, a union official, an MP, the relatives of a patient at risk, a contracting party whose rights were being flouted, shareholders or the media.

In ALM Medical Services v Bladon the EAT - though overturned on other grounds - accepted that a disclosure of concerns about the care of residents to the Social Services Inspectorate (which was not prescribed under s.10), made nine days after the matter had been raised internally, was reasonable.

As to the identity of the recipient, in Staples v Royal Sun Alliance an ET held it was reasonable to tell a customer of a breach in consumer law. As to media disclosures, tribunals have decided three cases, all involving the NHS. In Bright v Harrow & Hillingdon NHS Trust a disclosure to the press of a concern, that a nun who saw psychiatric patients while wearing her habit was a safety risk, was held to be unreasonable, the Applicant having asserted that it was for her, not her employer, to decide what was in the public interest. In

Kay v Northumberland Healthcare NHS Trust a media disclosure was held reasonable where the Applicant wrote a satirical open letter to the Prime Minister in his local press about the shortage of beds for elderly patients. In Mounsey v Bradford NHS Trust it was held that it was reasonable for the Applicant to go on television to rebut criticisms of a colleague which she considered to be unfair.

On the basis that the identity of the recipient of the disclosure may be in contention between the parties, we also summarise the decisions where this issue has been considered in the courts under the law of confidence. In 1984 the Court of Appeal, in Francome v Daily Mirror [1984] 1WLR 892, held that the Daily Mirror could not publish confidential information which suggested that a jockey had been engaged in misconduct as the public interest would be just as well served by a disclosure to the police or the Jockey Club. This position was explained in Spycatcher no. 2, [1987] 3WLR p 776, (per Lord Griffiths p 794): "In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry."

As to cases where disclosures of confidential information to the media were justified, the following may be noted. In Initial Services v Putterill [1968] 1QB 396 a disclosure to the Daily Mail about price-fixing was held to be lawful by the Court of Appeal because the public were being misled. Similarly in Lion Laboratories v Evans [1984] 3 WLR 539 a case about suspect roadside breathalysers, the Court of Appeal held the press was an appropriate recipient of the information as it was important that people had the information needed to challenge criminal charges and it seemed that the Home Office - which had approved the breathalyser - was an interested party. In Cork v McVicar [1985] TLR 31/10/1985, the High Court allowed the Daily Express to publish allegations of corruption in the Metropolitan Police.

Sub-section (3)(b)

It is submitted that a lower level of seriousness would be expected where a disclosure of confidential information was made to the police or a non-prescribed regulator, than if the same information was disclosed to the media (see reference above to Spycatcher no. 2).

Sub-section (3)(c)

This provision implies it is more likely to be reasonable if the disclosure is about an ongoing or future threat. This picks up a theme from the jurisprudence on the law of confidence (Weld-Blundell v Stephens [1919] 1 KB 520; Malone v Met Police [1979] 2WLR 700, p 716; Initial Services v Putterill [1968] 1QB 396, p 405; Schering Chemicals v Falkman [1981] 2WLR 848, p 869). Where the threat has passed, there needs to be a clear public interest in any confidential information being disclosed. In Spycatcher no 2 [1987] 3WLR p 776, Lord Griffiths (at p 804) said such a public interest might be to bring those responsible to account.

Sub-section (3)(d)

This provision was inserted by the Committee in the Commons to ensure that tribunals took account of the interests of a third party about whom confidential information had been disclosed. In moving the amendment, the Minister explained (Parliamentary Debates HC, Standing Committee D, 11 March 1998, cols. 8 / 9) that it was to deal with information subject to a banker-client or doctor-patient confidence. In such cases, tribunals would - it is submitted - do well to have close regard to the decision that would be reached if the third party sued the employer for breach of confidence. At Report stage in the Commons, the Minister (Hansard HC 24 April 1998, col. 1137) stated that "it is certainly not the intention

that, where a bank has acted diligently, it should be liable for a breach of confidence by a client when a bank employee has made a public interest disclosure."

Its effect is not that the disclosure of such information should not be protected, rather that it is material in determining the reasonableness of the particular disclosure. A helpful example of this is in W v Egdell [1990] 2 WLR 471, where the Court of Appeal held that it was lawful for a consultant psychiatrist to disclose information about an in-patient to the medical director at the patient's hospital, where the consultant genuinely believed that a decision to release the patient was based on inadequate information and posed a real risk of danger to the public. However the court held that the sale of his story to the media would not have been justified, nor would an article in an academic journal unless it had concealed the patient's identity.

Where the disclosure did breach a duty of confidence owed by an employer to a third party, in determining the reasonableness of the disclosure it will be important to assess the effect of the breach on the rights of the third party and, in particular, any unjustifiable damage it caused him (Mr Shepherd, Parliamentary Debates HC Standing Committee D, 11 March 1998, col. 9).

Sub-section (3)(e)

If the employer has investigated the concern and taken all reasonable action in respect of it but has left the whistleblower in ignorance of this, this may allow the worker to reasonably believe that no appropriate action was taken and to make a further disclosure. It is therefore desirable that the whistleblower is given feedback on, or is made aware of action taken, as a result of his concern and that this is provided within a reasonable period of time.

It is important to note that this section also applies where the concern has been raised with a prescribed regulator. As this has implications for employers, it is suggested that the organisation might sensibly request or instruct the prescribed regulator to communicate its findings to any whistleblower and to seek confirmation that this has been done.

Turning to the implications for prescribed regulators, this means that they too should be willing to consider providing the whistleblower with any appropriate feedback. If so, it would be sensible that they advise the organisation that they propose to do this. Insofar as the secrecy offences which govern parts of the work of prescribed regulators may inhibit the provision of such feedback, it should be noted that most such offences permit disclosures to be made with the consent of the person from whom the information has been obtained (and hence the employer can authorise the regulator to give feedback to the whistleblower). For these reasons, it is suggested that the prescribed regulator and the organisation should co-operate on how to ensure that reasonable feedback is made known to the whistleblower.

Sub-section (3)(f)

Under a grievance procedure it is for the worker to prove his case. Under a whistleblowing procedure, however, the worker raises the matter so that others may investigate it; it is not for the worker to prove the case or to dictate what the response should be from those in charge. One of the main benefits of such a procedure is that it helps workers and managers to understand that a whistleblower is a witness rather than a complainant.

It will not be enough to introduce such a procedure in a workplace if reasonable steps are not also taken to promote it to the workforce: see Kay v Northumberland Healthcare NHS Trust. Ideally once such a procedure is introduced, its use should be monitored and its role

should be highlighted to the workforce (routinely depending on the size of the organisation), for example through team briefings, newsletters or posters.

Sub-section (4)

This means that the worker will not lose protection if - in addition to disclosing the original concern - he comments on why he considers the initial response (be it of the employer or a prescribed regulator) was inadequate or unreasonable.

12. Disclosure of exceptionally serious failure

(1) A qualifying disclosure is made in accordance with this section if –

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information is disclosed, and any allegations contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

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

(2) In determining for the purposes of sub-section (1) (e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

Explanatory Note

This section provides that other disclosures of exceptionally serious matters may be protected, even though they do not meet the conditions in the previous section.

Sub-section (1)(a) - See comment on sub-section 8.

Sub-section (1)(b) - See Explanatory Note on s.10 and comment on sub-section 10(1)(b)(ii).

Sub-section (1)(c) - See comment on 11(1)(c), *supra*.

Sub-section (1)(d) - This means that, if substantiated, the concern would be of an exceptionally serious nature.

Sub-sections (1)(e) and (2)

When these provisions were inserted by a Government amendment (Parliamentary Debates HC, Standing Committee D, 11 March 1998), the Minister said "The Government firmly believes that where exceptionally serious matters are at stake, workers should not be deterred from raising them. It is important that they should do so, and that they should not be put off by concerns that a tribunal might hold that they should have delayed their disclosure or made it in some other way. That does not mean that people should be protected when they act wholly unreasonably: for example, by going straight to the press when there could clearly have been some other less damaging way to resolve matters".

It is submitted that a care worker genuinely concerned that a child was being sexually abused would be protected under this section if he went direct to the police. The EAT suggested a similar approach be adopted in ALM Medical Service v Bladon.

13. Contractual duties of confidentiality

(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and an employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

Explanatory Note

This provides that any clause or term in an agreement between a worker and his employer is void insofar as it purports to preclude the worker from making a protected disclosure. The agreement may be in an employment contract, in a contract of a worker who is not an employee or in any other agreement between a worker and employer. In particular it should be noted that it covers settlement or compromise agreements.

The section applies to 'gagging clauses' only insofar as they preclude a protected disclosure. In practical terms, their most significant effect will be in clauses in settlement agreements where the employer seeks to stop the worker from contacting a prescribed regulator under s.10. This provision would apply with equal strength where a public body sought to stop workers contacting the sponsoring department under s.9.

Where important issues are at stake and the employer is seeking an injunction to restrain the disclosure of confidential information, it is suggested that the key issue for the court will be the identity of the recipient of the disclosure. This is because under the common law, courts are most unlikely to restrain a worker disclosing confidential information to a regulator or to the police, even where it is unclear the worker is acting in good faith or with reliable evidence (see Note on s.10). Where the employer fears the worker will make a media disclosure, it will be open to the employer to seek an order or a declaration from the court that such a disclosure was not a protected one within this Act, even assuming the worker met the conditions in s.11(1) and (2).

Insofar as media disclosures go, this section will (obviously) have no application where a media disclosure has already been made or where a tribunal's decision has been published that some other disclosure was protected. However, it might apply where a worker was dismissed in a particularly unpleasant way for making a protected disclosure to a prescribed regulator and where the employer, in settling the claim included a clause preventing the whistleblower from repeating his concern publicly. While employers and their advisers will recognise that such a clause can, even when lawful, be difficult to enforce in practice, the effect of this section is that it may not even be possible to enforce such a clause in law. This is because if the whistleblower did tell the media, the clause would be invalid if it was found this subsequent disclosure would have been PIDA protected.

The risk to (and in) such gagging clauses is particularly clear where the employer's response to a concern raised internally is to dismiss the whistleblower and to cover-up the malpractice. If there was no prescribed regulator, then there is a high chance that a clause in the settlement of the whistleblower's claim which sought to prevent him telling the media would be unenforceable.