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Research Series

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**A Comparative International Analysis
of Regimes for the Disclosure of
Wrongdoing
("Whistleblowing")**

Canada The wordmark for Canada, with a small red maple leaf icon integrated into the letter 'a'.

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Foreword

The purpose of this report is to provide a general overview of several prominent public interest disclosure regimes throughout the world. Seven jurisdictions will be compared and analyzed in this paper: the United Kingdom, Australia, New Zealand, South Africa, the United States, Korea and Israel. This selection will demonstrate significant contrasts between the public service cultures in Commonwealth countries versus non-Commonwealth countries. Furthermore, the differences between specific mechanisms and the general nature of each of these disclosure regimes will provide insight into their respective advantages and disadvantages.

The analyses provided in this report are not meant to be entirely conclusive, since many of these disclosure regimes are relatively new and constantly evolving. Several of these jurisdictions have themselves indicated that they have had difficulty assessing their own successes and failures. Hence, the tentative nature of this evaluation is due to various reasons, including low caseload, lack of central tracking mechanisms, or simply the fact of being in the initial stages of development.

Nevertheless, the results of this comparative study will provide a thorough picture of some of the most developed public interest disclosure regimes in operation today. The structure and organization of each regime is presented, including relevant legislation, operating bodies and significant policies. Also in this report are evaluative insights based on comparisons between jurisdictions, available statistics and annual reports discussing the regime's operations and results. Moreover, there is an attempt to offer objective analysis; thus highlights are offered of some of the basic advantages and disadvantages of different techniques, rather than drawing definitive conclusions as to which approach is the best. Ultimately, this report provides a solid foundation for understanding the operations and depth of the international public interest disclosure scene.

There are three distinct sections of this report. First, there is a general "Comparative Overview" of the seven disclosure regimes according to specific criteria that will aid in evaluating the effectiveness and fairness of each system. Second, an "In-Depth Review" of the principal components of each individual country's disclosure regime is included. Finally, a "Quick-Reference Database"¹ was developed to aid in the reference to and comparison of the seven countries profiled.

In conclusion, I would like to thank Genevieve Chiu, Student at Law, for her research and work with this study. This document is the result of months of study and reflection. It prompted many discussions and contributed significantly to proposals made in my 2002-2003 Annual Report to Parliament.

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¹ For the sake of consistency and clarity, neutral terms were chosen to define different elements in each disclosure regime. An explanation for each term can be found in the preceding footnotes.

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Part One – Comparative Overview

The following is a general overview, comparing various elements of seven different “public interest disclosure regimes”.² The countries, “disclosure entities”³, and disclosure statutes included in this comparison are:

Country	Entity	Legislation
The United Kingdom	The Office of the Civil Service Commissioners (OCSC)	<i>Public Interest Disclosure Act (PIDA)</i>
Australia	The Public Service Commissioner (PSC) and the Merit Protection Commissioner (MPC)	<i>Public Service Code of Conduct (PSCC) within the Public Service Act (PSA)</i>
New Zealand	The Ombudsmen, the Solicitor-General, the Auditor-General and other similar investigative/complaint bodies	<i>Protected Disclosures Act, 2000 (PDA)</i>
South Africa	The Public Protector (PP) and the Auditor-General (AG)	<i>Protected Disclosures Act, 2000 (PDA)</i>
The United States	The Office of Special Counsel (OSC) and the Merit System Protection Board (MSPB)	<i>Whistleblower Protection Act, 1989 (WPA)</i>
Korea	The Korean Independent Commission Against Corruption (KICAC)	<i>Anti-Corruption Act, 2000 (ACA)</i>
Israel	The Ombudsman, within the State Comptroller’s Office	<i>State Comptroller Law (SCL)</i>

The elements of comparison are broken down into two categories:

Effectiveness:

1. Legislation: Clear Objective and Message
2. Independent Entity: Specific Role and Mandate
3. Appropriate Categorization of Wrongdoing: Public Interest vs. Personnel Issues
4. Adequate Protection from Reprisal: Scope and Efficacy
5. Thorough Investigations: Reactive and Proactive Abilities
6. Enforcement Ability: Scope of Mechanisms
7. Remedies and Sanctions: Appropriateness and Clarity

² Referring to the system, scheme or mechanisms set up to receive and handle whistleblowing reports and/or protect whistleblowers from job reprisal. Hereinafter referred to as “regimes”.

³ Referring to the entity responsible for receiving or handling disclosures and/or protecting whistleblowers from job reprisal. Hereinafter referred to as “entities”.

Fairness:

1. Scope of Jurisdiction: Equal Coverage and Protection
2. Consistent Standards: Fairness and Principles of Natural Justice
3. Accessibility: Threshold of Procedural and Substantive Requirements
4. Encouragement of Disclosures: Confidentiality, Anonymity, Reward
5. Accountability: Appeal and Review

Effectiveness

1. LEGISLATION: CLEAR OBJECTIVE AND MESSAGE

Each of the seven countries profiled has a body of legislation to deal with “public interest disclosures”.⁴ A brief survey of over a dozen countries was conducted and these seven were found to have the most established and legislated disclosure regimes. Their respective statutes and entities have been in operation for two years or more. Furthermore, several other prominent organizations involved in combating corruption or protecting persons making the disclosure have highlighted these countries in their studies. There are other countries, such as Japan and France, that have some legislative mechanisms to protect persons making a disclosure from reprisal.⁵ However, the protection in these cases is limited to a few provisions in broader criminal legislation and they do not have specific legislation dealing exclusively with public interest disclosures. Finally, when surveying the other disclosure regimes, no jurisdictions were found with a policy-based system like Canada’s.

The message conveyed from a piece of legislation is not restricted to its explicit written provisions. Rather, the structure of the regime and the choice of statutory language are significant when considering the Act’s objective. After comparing the policy objectives being conveyed by the seven disclosure statutes, it was concluded that three distinct messages were being expressed. One message emphasized the significance and nature of the disclosure itself; another focused on the person making the disclosure; and the last targeted the elimination of the wrongdoing.⁶

- ▶ Focus on the Disclosure: The legislative schemes of the four Commonwealth countries generally highlight the importance of the disclosure and the need to remove the negative stigma of the person making the disclosure as a “whistleblower”. The legislation of these four jurisdictions tends to include heavier procedural and substantive requirements for a disclosure to be protected. Furthermore, these jurisdictions define protection from reprisal based on the disclosure itself qualifying for protection under the statute by satisfying various procedural or substantive criteria. For example,
 - The United Kingdom’s *Public Interest Disclosure Act (PIDA)* characterizes the person making the disclosure as a witness rather than a complainant, in an attempt to direct the attention to the significance of the disclosure rather than the stigma of being a

⁴ Referring to the whistleblowing report or disclosures of wrongdoing. Hereinafter referred to as “disclosures” or “disclosures of wrongdoing”.

⁵ Referring to any form of retaliation taken against a person making the disclosure for making a disclosure. Includes personnel actions such as transfer, deployment, reduction of classification, etc.

⁶ Referring to any wrongful, illegal, improper or corrupt act that may be the subject of a disclosure.

- “whistleblower”. The *PIDA* also carries extensive procedural requirements for the disclosure to be protected.
- In Australia, the *Public Service Act (PSA)* encompasses all elements of public service employment, with some specific provisions related to disclosures included in a sub-document, the *Public Service Code of Conduct (PSCC)*. In these two documents, the focus is on general principles of integrity and conduct in the public service. Of the seven jurisdictions, Australia is the only one without a specifically tailored national act for handling disclosures. However, it should be noted that there are several well-developed regional disclosure statutes within Australia that also highlight the significance of the disclosure itself, through procedural and substantive requirements.
 - In New Zealand and South Africa, the very title of their legislation, in both cases *Protected Disclosures Act (PDA)*, implies that the focus is on whether the disclosure was made according to the provisions of the Acts and will therefore be protected.
 - In South Africa, the *PDA*’s preamble goes so far as to explicitly state that the significance and purpose of the statute is to facilitate disclosures to eradicate wrongful behaviour in the public service. Furthermore, there is a related South African policy emphasizing the need to combat the cultural stigma of “whistleblowers” being seen as “impimpis”, a term associated with apartheid-era informants who betrayed their comrades.⁷
- ▶ Focus on the Person Making the Disclosure: By focusing on the importance of the person making the disclosure, the legislative message tends to imply that any disclosure, regardless of its nature or procedure, will be accepted. Furthermore, it is the person making the disclosure that is protected—not the disclosure.
- The United States focuses on the person making the disclosure because *the Whistleblower Protection Act (WPA)* includes both strong protections from reprisal and stringent confidentiality provisions. Furthermore, there are fewer substantive requirements for making a disclosure in the United States. Also, by making it easier to make disclosures, the United States regime is in keeping with the American system as being “predicated on the ideology of freedom of speech”.⁸
- ▶ Focus on the Wrongdoing:
- In Korea and Israel, the statutes emphasize the acts of wrongdoing by focusing on the eradication of corruption in general. Generally, there are no stringent procedural or substantive requirements for protection under their respective Acts. Furthermore, internal

⁷ Lala Camerer, “Protecting Whistleblowers in South Africa: The Protected Disclosures Act, no 26 of 2000”, *Anti-Corruption Strategies*, Institute for Security Studies, Occasional Paper No 47-2001, at 1; <http://www.iss.co.za/Pubs/Papers/47/Paper47.html>.

⁸ Public Service Commission of Canada, “Three Whistleblower Protection Models: A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom”, by Sheryl Groeneweg, Research Directorate (Ottawa: Public Service Commission, 2001), at 19.

reporting is not encouraged or required. In Korea, under the *Anti-Corruption Act (ACA)*, disclosures are just one of several mechanisms included in the regime that target wrongdoing. In Israel, the *State Comptroller Law (SCL)* encompasses disclosure mechanisms as well as serving as an umbrella statute for targeting corruption in general; this is most evident in the structure of its entity.

Comparisons of the details of each country's legislation will be discussed according to each element below.

2. INDEPENDENT ENTITY: SPECIFIC ROLE AND MANDATE

All seven entities are independent in their own respect. Generally, these are bodies or individuals appointed by their respective governments, parliaments or executives, and they are accountable and responsible for reporting to the same. Nevertheless, there are some broad differences between the nature of the Commonwealth entities and those of the United States, Korea and Israel. Essentially, the Commonwealth entities are mostly pre-existing bodies or individuals that have prior roles according to their own enabling statute and have been granted additional responsibilities by the disclosure legislation. In comparison, the statutes of the non-Commonwealth countries establish either the entity itself or the entity's primary mandate, namely the handling of disclosures and reprisal protection.

- ▶ Commonwealth Pre-Existing Entities: Generally, the responsibilities of the Commonwealth entities include more than handling disclosures and reprisal protection. The Commonwealth entities are pre-existing bodies such as the Ombudsman, the Auditor-General or the head of the civil service. Therefore, the functions of these entities may include overseeing the public service in general, receiving other complaints or auditing government systems based.
 - In the United Kingdom, the Office of the Civil Service Commissioners (OCSC) is responsible for handling disclosures; in Australia, the Public Service Commissioner (PSC) and the Merit Protection Commissioner (MPC) have this responsibility. However, they have a broader oversight function of public service employment in general, including monitoring the proper conduct of competitions.
 - In both New Zealand and South Africa, their respective *PDA*'s allow for several pre-existing entities to receive and handle disclosures. These entities also have pre-established functions such as that of Auditor-General.
- ▶ Non-Commonwealth Specialized Entities: Although the entities in the United States, Korea and Israel have some differences, they are quite similar by virtue of the fact that their core function is to handle disclosures. They are not simply pre-existing oversight bodies whose responsibilities have merely been increased by a supplemental disclosure statute.
 - In the United States, the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) serve a dual prosecutorial and adjudicative function and specialize in handling disclosures and protecting individuals from reprisal. However, they

also handle “personnel issues”,⁹ specifically in relation to their role concerning reprisal protection.

- The Korean Independent Commission Against Corruption (KICAC) is primarily responsible for disclosures, but under a broader mandate of combating corruption in general. Furthermore, the KICAC’s mandate encompasses every facet of the disclosure regime, from education to policy development to dealing with specific disclosure or reprisal cases. Ultimately this structure is beneficial for thorough enforcement of the disclosure legislation and related policies.
- Israel’s Ombudsman is distinct because it serves under the umbrella of the Office of the State Comptroller. While the Ombudsman is exclusively responsible for receiving and handling disclosures, the Comptroller audits government systems, partially based on data generated by disclosures received by the Ombudsman. This system is also beneficial because it allows for proactive investigations and recommendations by the Comptroller, as will be discussed in the later section, “Thorough Investigations”.

Another significant distinction between the Commonwealth and non-Commonwealth entities is that the Commonwealth entities are generally not the first recipients of disclosures because internal reporting is either required and/or encouraged. In comparison, the non-Commonwealth entities are generally the first recipients of disclosures. The details of this distinction will be discussed in “Accessibility”.

3. APPROPRIATE CATEGORIZATION OF WRONGDOING: PUBLIC INTEREST VS. PERSONNEL ISSUES

Wrongdoing in relation to public interest disclosures generally refers to acts that may hinder, harm or cause detriment to the public, directly or indirectly, through the public or private body in which they occur. Hence, reporting these wrongful acts will invariably serve the public interest. There are countless acts that could qualify as wrongdoing. After examination of the many definitions of wrongdoing in each country’s legislation, the acts of wrongdoing were divided into four different categories:

- ▶ Primarily Serious Wrongdoing/Public Interest Matters: These types of wrongdoing are those that are typically the subject of public interest disclosure regimes due to their wide scope of potential impact beyond the individual employee or the employee’s employment.
 - In New Zealand and South Africa, the legislation and entities handle only the traditional definition of serious public wrongdoing; this is similar to the Public Service Integrity Office’s (PSIO) policy. Personnel issues are not included in their statutes or in their

⁹ Referring to matters generally characterized as grievance or personnel matters, such as harassment or discrimination.

entities' policies; however, whether the entity has received such inquiries is not revealed in their reports.

- The efficacy of clearly defined serious wrongdoing is unclear in these two cases as they are both relatively new disclosure regimes and have very few, if any, reported cases.
- ▶ Primarily Employment/Personnel Issues: This category of activity is generally the subject of human resource complaints or grievance matters, due to the limited scope of their impact on the individual employee and/or their employment status.
 - In Australia, the characterization of wrongdoing is more principled, insofar as it speaks of integrity and the general appropriate conduct of public service employees. Moreover, the *PSCC* is more focused on personnel issues, but in principle encompasses serious wrongdoing in its broad definitions.
 - On the one hand, it is beneficial that a uniform body and legal framework cover a wide range of wrongdoing, given the principled definitions. However, this approach may lead to a lack of specialization and attention in serious wrongdoing. As evidence of this, last year most of the reported wrongdoing in Australia was under the heading of personnel issues.¹⁰
- ▶ Both Serious Wrongdoing and Employment/Personnel Matters: Some disclosure regimes are broader in mandate, covering all public service complaint issues from wrongdoing to personnel issues.
 - In the United States and the United Kingdom, the legislation covers wrongdoing and personnel issues. In the United States, the law includes specific acts of wrongdoing that may be disclosed and characterizes reprisal as a personnel issue. In the United Kingdom, a Code of Conduct, associated with the disclosure statute, deals with personnel issues including reprisal.
 - In both regimes, disclosure matters are not simply lumped in with personnel issues; rather, there is one overarching system for public servants that is responsible for resolving all such complaint matters. Therefore, both the United States and the United Kingdom have specialized mechanisms to handle either disclosure or personnel cases, but the advantage is that the employee's redress in either situation can be found within one organization.
 - However, there is a significant distinction between the United Kingdom's categorization of wrongdoing and that of the United States. The United Kingdom's *PIDA*, which specifically legislates matters concerning wrongdoing, disclosures and reprisal protection for the public and private sectors, also includes a Code of Conduct that provides general obligations and explanations of inappropriate conduct for public service employees. In

¹⁰ Australia, Public Service Commissioner's Annual Report 2001-2002, at 128.

this Code, public service employees are explicitly required to “owe their loyalty to the Administrations in which they serve”.¹¹ Hence, it may be implied that a breach of the Code, including “disloyalty”, may be considered a form of wrongdoing. This scenario could create a serious conflict of interest for public servants making disclosures about their own employers having committed wrongdoing. Although such conflicts have not been reported by the United Kingdom’s OCSC, the perception of a conflict of interest is a serious issue that should be considered in regard to how willing persons making the disclosures might be to risk their own interests by bringing forth disclosures.

- ▶ Corruption in General: Some regimes categorize wrongdoing in broad definitions of corruption, thereby capturing all forms of wrongdoing from inappropriate to illegal acts.
 - Korea and Israel define wrongdoing in their respective legislation as “acts of corruption”. Both Korea and Israel have much higher caseloads than the other regimes, with the exception of the United States. Korea’s disclosure system is relatively new, but already has reported over 100 cases,¹² while Israel has reported an average of 6000-7000 cases annually over the last 10 years.¹³ One reason for these high numbers may be the fact that they broadly define wrongdoing as “acts of corruption”. However, despite a broader description than most regimes, the acts of corruption revealed in Korean and Israeli cases are similar to those defined in the traditional category of wrongdoing, such as abuse of authority, budget waste, irregularities in contract bidding, etc.

In Israel, the distinction is that the corruption must have directly affected the person making the disclosure, unless that person is a member of the country’s government (Knesset); if that is the case, the person may make a disclosure about an “act of corruption” that affected a third party.

4. ADEQUATE PROTECTION FROM REPRISAL: SCOPE AND EFFICACY

The efficacy of a disclosure regime depends largely on the ability of the legislation or entity to protect from reprisal potential persons making a disclosure. In order for individuals to feel safe making disclosures concerning government authorities or their own employers, they need to be assured that they will not suffer retaliation for their disclosures. Moreover, if reprisal is not prohibited or redressed, the objective of a disclosure regime will lose its legitimacy. Protection from reprisal can be accomplished by legislative prohibitions, strong sanctions or wide remedial powers. Some regimes may choose to use tailored procedures for reprisal cases, from prohibitions to sanctions, while others may leave reprisal cases to be handled in the regular court systems.

¹¹ United Kingdom, *Civil Service Code 1999*, section 2; www.cabinet-office.gov.uk/central/1999/cscode.htm.

¹² Korea, Korean Independent Commission Against Corruption, Annual Report 2002, at 131.

¹³ Israel, The Ombudsman, Annual Report 28 (2000-2001), Graph 8: Multi-Year Comparison of Number of Complaints Received by the Ombudsman, 1991-2001.

▶ Explicit Protections and/or Prohibitions against Reprisal:

- In the United States, the *WPA* contains explicit provisions that prohibit employers from retaliating, through acts of reprisal, against persons making disclosures. The United States is the only jurisdiction that includes this symbolic message of prohibition. The Act also explicitly authorizes the entity to issue corrective, disciplinary and compensatory action, or even litigation, in order to remedy or sanction reprisal. Furthermore, the OSC has specific mechanisms and procedures for handling reprisal cases. The strength of the American approach to reprisal stems from the combined prosecutorial and adjudicative function of the OSC and MSPB. This combination is the foundation for a clear and thorough method of upholding and enforcing reprisal protections, along with all other aspects of the *WPA*.
- Reprisal protection is a strong component of the Korean disclosure regime. This is evident by the fact that the KICAC's policies and the *ACA* contain explicit procedures, remedies and sanctions specifically tailored for dealing with reprisal. Moreover, the Korean approach is distinct because the KICAC investigates and reviews reprisal cases within itself, allowing individuals to come forth with legitimate allegations of reprisal, even if they themselves are not the person making the disclosure. Accordingly, the Korean system is the only one that offers protections from reprisal to cooperators to investigations and witnesses to wrongdoing.
- While reprisal is not specifically prohibited in the United Kingdom's *PIDA*, an affirmative right to be protected is included in the Act. Furthermore, the statute includes an explicit requirement for government departments to ensure reprisal is not committed. However, despite this symbolic message, the OCSC does not appear to have specific procedures or guidelines for dealing with reprisals. Furthermore, since the OCSC is essentially an appeal body for internal decisions, reprisals will generally be handled internally by the government department in question.

▶ Alternate and/or Pre-Existing Mechanisms for Reprisals:

- When a disclosure is made according to the procedural and substantive requirements in the Australian *PSCC* and *PSA*, the person making the disclosure will automatically be protected from reprisal. However, the enforcement of this protection is accomplished in a manner similar to that of the United Kingdom—by the internal decisions of the government departments. This internal approach does not send a very reassuring message to potential person making the disclosure. Ultimately, in this situation, an individual must make their disclosure to their own employer or government department where the wrongdoing likely occurred, and then trust those authorities to be noble enough to protect them from reprisal for making that very disclosure. While some authorities may uphold that responsibility, the reality is that some will not, and that the perception of protection is weak in the eyes of a potential person making the disclosure.

- In New Zealand, individuals may seek redress for any reprisal through the traditional personal grievance route. The *PDA* merely provides for a right of action for a victim of reprisal to launch a grievance action. The efficacy and success of this approach is unclear, since this is a very new regime and has yet to report such cases. However, the perception of efficiency is questionable, since protection from reprisal is integral to a disclosure regime, but these cases are passed off to a separate procedural mechanism. When one considers that New Zealand does not have a separate entity solely responsible for handling disclosures and reprisals, but that this role is performed by a pre-established body such as the Ombudsman or the Solicitor-General, it is not surprising that this regime has chosen to leave reprisals to be handled through the grievance procedure rather than to design a separate and distinct process.
 - South Africa also leaves reprisal cases to be handled by a pre-existing mechanism, namely the relevant court of jurisdiction. While the *PDA* provides for various disciplinary actions for reprisal, the enforcement and distribution of these remedies depends on whether an individual will seek a separate court action. The results thus far are uncertain because there have been very few reprisal cases in the courts. Furthermore, none have actually applied the *PDA* nor involved the public sector.
- ▶ Other:
- In Israel, the *SCL* permits the Ombudsman to issue disciplinary or corrective measures, such as transfers or reinstatement to redress a reprisal case. However, beyond these few remedies, there is not much discussion by way of policy or procedures for handling reprisal cases in Israel. The reason for this is unknown, but it may be indicative of Israel's legislative priority of eradicating corruption rather than dealing with the concerns of the person making the disclosure.

5. THOROUGH INVESTIGATIONS: REACTIVE AND PROACTIVE ABILITIES

For a disclosure regime to conduct its operations thoroughly, the person making the disclosure should be able to turn to a neutral entity with the ability to investigate disclosures or reprisals without any outside influence. A complete and objective investigation is the foundation for any findings, recommendations or decisions to be made regarding the existence of wrongdoing or reprisal action. Hence, a disclosure entity's investigative ability is one of the key elements for ensuring that a disclosure regime functions effectively and justly. Some entities have proactive powers to investigate or remedy wrongdoing or reprisal, while others may only be able to conduct reactive investigations of the disclosures they receive. Either of these investigative approaches may be based on the distinct disclosure statute or on their separate enabling statute, such as an Ombudsman or Solicitor General. Furthermore, some entities may be limited to supervisory roles over internal investigations.

▶ Proactive Abilities:

- In Korea, the KICAC may make recommendations on how government departments should improve their anti-corruption measures. While the *ACA* does not explicitly state that the KICAC has a proactive power to investigate, the provision does state that the entity may make such recommendations “when it deems necessary”¹⁴, thereby implying a proactive ability. Nevertheless, even though proactive investigations are not explicitly permitted, the KICAC clearly has enough authority to significantly influence how departments deal with anything related to corruption.
- In Israel, the Ombudsman may conduct reactive investigations only, but the Ombudsman’s findings directly influence the State Comptroller’s decision to audit and investigate government departments and systems. Therefore, the structural and functional makeup of Israel’s entity allows for proactive investigations. Such an approach has great benefit with respect to the ability to compile the data from individual disclosure investigations and evaluate departments or systems on a broader level based on the information discovered in each individual case.
- In Australia, the PSC and MPC have broader mandates concerning public service employment in general. Therefore, while these entities have reactive investigative abilities in regard to disclosures, they are also able to review and evaluate management and employment practices in general.

▶ Reactive Abilities:

- The entities in South Africa and New Zealand have reactive investigative abilities, according to their respective pre-existing enabling statutes. However, since neither entity has reported any activity of this nature, the efficacy of this process is unclear.
- In the United Kingdom, the OCSC is essentially an appeal body for internal decisions; therefore most investigations will be conducted internally by the government departments themselves. However, should an appeal be conducted by the OCSC, it does have the ability to conduct investigations.

▶ Limited Supervision:

- In the United States, the OSC may investigate personnel issues only, which include reprisal. However, in disclosure cases, the OSC is not permitted to conduct the actual investigation; rather it can require the head of the department involved to investigate the matter internally. This approach severely compromises the perception of a neutral and thorough investigation and could be detrimental to the successful protection from reprisal.

¹⁴ *Korean Anti-Corruption Act 2001*, article 20.

These distinctions may vary even further, depending on the scope of the enforcement powers of each entity in regard to its investigations.

6. ENFORCEMENT ABILITY: SCOPE OF MECHANISMS

The ability of a regime to implement the policies and provisions of its disclosure legislation depends on two types of enforcement mechanisms:

(i) *Enforcement of Investigations*: If an entity is unable to enforce cooperation and compliance with its investigation, it will be difficult to arrive at the truth. Hence an entity's enforcement ability can be partially evaluated based on whether the entity has powers such as the ability to subpoena.

▶ Traditional Investigative/Enforcement Tools: Several entities hold specific investigative powers that enable them to enforce the objectives of their inquiry. These powers are similar to those available to prosecutorial bodies, such as the ability to compel testimony from witnesses, etc. For example,

- In the United Kingdom and in Korea, the entities have traditional investigatory powers such as the ability to hear witnesses and require information to be presented. Furthermore, in the United Kingdom, the OCSC has the ability to determine its own investigative procedures.
- In New Zealand and South Africa, the investigative powers of their entities are based on their pre-existing mandate and function, and according to their enabling statute.
- In the United States, in regard to personnel issues including reprisal, the OSC has investigative powers, including the ability to issue subpoenas, order depositions and require employees to testify under oath or respond to questions.¹⁵

▶ Broad Investigative/Enforcement Mandate: In some cases, specific investigative powers of enforcement may not be explicitly mentioned in the legislation or the entity's policies. However, this does not necessarily mean that the entity does not have the ability to conduct enforceable or effective investigations. For example,

- In Australia, the legislation and policies of the PSC and MPC do not indicate any specific investigative powers of enforcement. However, as previously mentioned, they have a broader mandate permitting the inquiry and review of management and employment in general.

▶ Unlimited Investigative/Enforcement Ability: While most entities conduct their investigations based on adversarial principles, allowing for all parties to respond while the entity plays a neutral role, this is not always the case.

¹⁵ United States, *Whistleblower Protection Act 1989*, section 1212.

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- The investigative role of Israel’s Ombudsman is unique because it conducts explicitly inquisitorial investigations. Furthermore, these investigations are not bound by the traditional rules of evidence.
 - ▶ Nevertheless, regardless of the discrepancies between the regime’s investigative powers of enforcement, most entities have reported little if any difficulty in maintaining cooperation and compliance with their investigations.
 - (ii) *Enforcement of Decisions and Recommendations*: Without this ability, an entity’s remedial directives would be useless. Initially, orders would seem more effective in comparison with recommendations, but recommendations can have considerable weight if they can be enforced. Most of the seven entities make recommendations as opposed to actual binding orders. However there are differences between jurisdictions in terms of the effective discharge of these recommendations.
 - ▶ Legislative Compliance: Some regimes include a legislative requirement for departments or other bodies to comply with the provisions of the legislation and the procedures of the entity.
 - In the United Kingdom, South Africa, Korea and Israel, a strong message of enforcement is sent by a statutory requirement of compliance. In principle, this approach may seem mostly symbolic. However, each jurisdiction with this method has reported little difficulty with compliance.
 - Moreover, South Africa’s *PDA* preamble and Korea’s *ACA* include two important positive obligations: (1) individuals must make disclosures if they are aware of wrongdoing; and (2) employers must ensure protection from reprisal.
 - ▶ Public Reporting Compliance: Most entities are required to make a public report of their yearly operations and findings, to be submitted to their respective governments or leaders. This may be seen as a mechanism for encouraging compliance, because non-cooperation and failure to remedy wrongdoing by a department will be publicized and higher authorities may issue disciplinary action. For example,
 - Israel’s Ombudsman policies highlight public reporting as an effective means of convincing government departments to cooperate with the entity’s directives.¹⁶
 - In Australia, the PSC and MPC’s powers are recommendatory only. But if the departments do not comply, the PSC or MPC can report this to the relevant minister, the prime minister and Parliament. Ultimately specific enforcement is left to the government departments themselves.
 - ▶ Internal Enforcement of Compliance: Where internal reporting is the norm, enforcement of the legislation and any remedies will depend on the internal decision makers.

¹⁶ Israel, “Spotlight on Israel: The State Comptroller and Ombudsman”; <http://www.mfa.gov.il/mfa>.

- In New Zealand, the government departments themselves are responsible for enforcing procedures and recommendations, since the entities play a secondary role in terms of receiving disclosures.
- ▶ Adjudicate Compliance: The ultimate enforcement mechanism is an ability to require entities to comply via legislation and to prosecute any contravention of a directive.
 - In addition to a legislative requirement for compliance, the United States includes other specific enforcement mechanisms. Mainly, the prosecutorial-adjudicative nature of the OSC and MSPB allows the MSPB to enforce the OSC’s remedies or sanctions through litigation if necessary. Despite these powers, the OSC has reported that it rarely needs to enforce corrective or disciplinary actions by adjudication through the MSPB.¹⁷

Finally, there are two other important aspects to enforcement: (1) the availability of clear and appropriate remedies or sanctions, to be discussed in the following section; and (2) the consistent application of principles of fairness and justice, to be discussed in the later section, “Consistent Standards”.

7. REMEDIES AND SANCTIONS: APPROPRIATENESS AND CLARITY

Generally, the specific remedies and sanctions for wrongdoing or reprisal are not explicitly defined in disclosure statutes. At most, some jurisdictions mention that “disciplinary or corrective action” may sanction wrongdoing, or that “reinstatement or transfers” may remedy acts of reprisal. Essentially there is significant discretion available to the entity responsible for providing redress. Finally, in a few jurisdictions, reprisal cases may be resolved only through pre-existing routes such as grievance actions or relevant courts of jurisdiction.

- ▶ Specific Guidelines Regarding Available Sanctions or Remedies:
 - In Australia, the *PSCC* and the *PSA* provide for six specific types of sanctions for wrongdoing, including termination, reassignment and reprimand. However, as mentioned above, specific enforcement of these sanctions is left to the internal decisions of the departments.
 - In the United States, corrective and/or disciplinary action may be ordered by the OSC or MSPB based on a “contributing factor” test. The United States is the only regime that included a legislative standard in terms of available remedies. The legislation “defines precisely what quantum of proof is required to justify corrective action”.¹⁸ The threshold burden is to establish that the making of the disclosure was a “contributing factor” to the act of reprisal.

¹⁷ United States, Office of Special Counsel Annual Report 2002, at 7.

¹⁸ Bruce D. Fong, “Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s”, 40 *Am. U.L.Rev.*1015, at 1061-1062.

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- ▶ Largely Discretionary Sanctions or Remedies for Wrongdoing or Reprisal:
 - In both Korea and Israel, sanctions for wrongdoing are not outlined in any provisions of their disclosure legislation. This omission sends a conflicting message to the strong anti-corruption focus of their respective regimes. However, both countries do include in their statutes some remedies, such as reinstatement or transfers, for reprisal cases. It should also be noted that in Israel, the *SCL* only limits the range of remedies available to the Ombudsman according to the relief or rights accessible to a regular court or tribunal.
 - ▶ Sanctions or Remedies to be Distributed outside of Disclosure Scheme:
 - Reprisal cases in the United Kingdom are left to regular employment tribunals. An individual must make a claim to such a body to seek compensation based on the losses the individual has suffered. Furthermore, the OCSC has recommendatory power only in regard to sanctions for wrongdoing. However, the OCSC has reported that recommendations they have made to departments have generally been accepted.¹⁹
 - In New Zealand, an individual who wishes to seek a remedy for reprisal must do so via a personal grievance action. The *PDA* allows a right of action for an individual who suffered reprisal in certain cases. However, the *PDA* does not indicate what specific sanctions may be issued for wrongdoing. Furthermore, the ultimate enforcement of any discipline will depend on the individual policies of one of the many entities responsible for disclosures of wrongdoing under the *PDA*.
 - In South Africa, redress in a case of reprisal is left to any relevant court of jurisdiction, particularly the Labour Court. Again, sanctions for wrongdoing are not outlined in the legislation.

Fairness

1. SCOPE OF JURISDICTION: EQUAL COVERAGE AND PROTECTION

Jurisdiction is an important component to assessing the scope of protection offered by any disclosure regime. Jurisdiction can be divided into two categories: (1) who may be protected from reprisal when making a disclosure; and (2) where the wrongdoing must have occurred in order to be subject to a disclosure. The extent to which disclosure legislation covers or protects the public or private sector is significant to providing fair and equal recourse for individuals in either area.

¹⁹ United Kingdom, Civil Service Commissioners' Annual Report 2001-2002, at 12.

- ▶ Public Sector Protection and Coverage:
 - In Australia and in the United States, the disclosure legislation protects public service employees who make qualifying disclosures and covers wrongdoing occurring in the public sector only.
- ▶ Public and Private Sector Protection and Coverage:
 - In the United Kingdom, New Zealand and South Africa, the legislation protects all qualifying disclosures made by persons making disclosures in the public or private sector and covers wrongdoing occurring in the public or private sector. Generally, a body of legislation that provides consistent protection and coverage between the public and private sector will be perceived as fairer and more equal than statutes that offer different rules for different sectors. However, it should be noted that in the United Kingdom, the authority of the *PIDA* over the public service is combined with the Code of Conduct that specifically governs obligations and protections of public sector employees.
- ▶ Open Protection and Public Sector Coverage:
 - In Korea and Israel, individuals in the public or private sector may make disclosures and qualify for protection under their respective statutes. However, the coverage of both regimes extends only to wrongdoing that occurred in the public sector.

The specific elements of a disclosure regime will impose further restrictions on the scope of protection and coverage in either the public or private sector. For example, even when public sector wrongdoing is covered under a disclosure statute, not every public body will be included; for instance, intelligence organizations are often excluded. Other exceptions will be discussed further in the various sections to follow.

2. CONSISTENT STANDARDS: FAIRNESS AND PRINCIPLES OF NATURAL JUSTICE

Generally, disclosure statutes do not include detailed standards or principles of natural justice that entities or government departments must follow. However, some regimes include some standards to apply to an entity's investigation.

- ▶ Explicit Standards and/or Application of Principles of Natural Justice:
 - The Australian *PSCC* and *PSA* include explicit standards and guidelines. The *PSC* and *MPC* may also issue directives regarding standards for internal procedures that departments must follow when conducting internal operations regarding disclosures or reprisals. Furthermore, many of the Australian regime's policies emphasize the importance of the principles of natural justice and fairness. The *PSC* and *MPC* also outline the standard criteria used to determine the existence of wrongdoing and its impact on the department in which it was committed. Generally, the Australian regime is one of the best examples of a scheme that includes standards and guidelines to ensure procedures are conducted consistently and fairly.

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- In New Zealand, the *PDA* includes explicit standards that government departments must follow when conducting internal procedures or investigations.²⁰ These standard internal procedure guidelines also include a requirement to comply with principles of natural justice.

▶ No Strict Standards and/or Application of Principles of Natural Justice:

- In the United Kingdom, United States, South Africa and Korea, there are no legislative provisions or explicit policies requiring the entities to establish standards of procedures for operations and investigations, or to comply with principles of natural justice. Furthermore, these four entities generally do not conduct the initial investigation into disclosures. Hence, internal procedures will likely vary between departments.

▶ Standards and/or Principles of Natural Justice are Not Applicable:

- In Israel, the *SCL* explicitly states that the Ombudsman does not have to follow rules of evidence and procedure since the investigations conducted are inquisitorial. While this approach may result in efficient and thorough operations, fairness to the individual or organization being investigated may be in jeopardy.

3. ACCESSIBILITY: THRESHOLD OF PROCEDURAL AND SUBSTANTIVE REQUIREMENTS

The most significant features of any disclosure regime are the legislative requirements for protection under the relevant legislation. These criteria set the procedural and/or substantive threshold for which a person making the disclosure and/or the disclosure must satisfy.

(i) *Procedural Criteria:* This category determines who must receive the disclosure in order for legislative protection to be granted. Generally, the more that disclosure procedures require internal reporting, the more difficult it is for the person making the disclosure to be protected from reprisal, since the person may be making the disclosure to their own employer, who may also be involved in the wrongdoing.

▶ Internal Reporting is Required or Encouraged: Generally the Commonwealth regimes require or emphasize internal reporting in the first instance, with very few or stringent exceptions. Typically the substantive criteria also become more complex the further outside one's own employer the person making the disclosure goes to make a disclosure. In most of the Commonwealth regimes, before making a disclosure directly to the entity, the person making the disclosure must have exhausted the internal procedures, or the entity must be satisfied that an internal disclosure was not appropriate.

²⁰ *New Zealand Protected Disclosures Act 2000*, section 11.

- Despite these strict requirements for internal reporting, the disclosure statutes in the United Kingdom and South Africa are the only ones that potentially offer protection of public interest disclosures, even if they are potentially made to the media. However, these “general disclosures” will not be protected in every instance; rather, they are accompanied by a severe set of substantive requirements that must be met by the person making the disclosure.
- In Australia, internal disclosure is not a legislative requirement, but related policies indicate that it is expected and encouraged. Ultimately, when deciding whether a disclosure will be accepted, the PSC or MPC will consider whether the disclosure could or should have been more appropriately handled internally.
- ▶ External Reporting is the Norm: In some regimes, the entity itself is characterized as the primary body responsible for handling disclosures.
 - In the United States, protection from reprisal is generally granted once a person makes a disclosure. Hence, since there are no specific procedural criteria for protection, any public interest disclosure will qualify, possibly even if made to the media. Some cases of public or media disclosures have fallen under protection of the *WPA*, but neither the provisions nor the policies discuss what criteria such disclosures must satisfy.
 - In Korea, protection is extended to all disclosures made to the KICAC and there are no requirements for internal reporting.
 - In Israel, the *SCL* does not indicate the procedural requirements for protection to be granted. Generally, any disclosure made to the Ombudsman will be accepted, as long as the substantive requirements are satisfied.
- ▶ There appears to be a striking difference in the number of cases handled under Commonwealth, internal reporting regimes versus the United States, Korea and Israel, where direct reports to the entity are the norm. The Commonwealth entities report only a handful of disclosure cases per year, in comparison to hundreds or thousands of cases received by the entities in the United States, Korea and Israel. The difference in caseload may be attributed to various reasons, including whether the regime emphasizes internal or external reporting. For example, the United States OSC is much older than the Commonwealth entities; the entities in Korea and Israel deal with “general corruption” as opposed to only specific categories of wrongdoing; and they all receive a higher number of cases than the Commonwealth regimes. Another strong contributing factor is the fact that most Commonwealth cases are resolved internally and disclosures will rarely reach the entity, while in the United States, Korea and Israel, almost all disclosures will go directly to the entity.
- (ii) *Substantive Criteria*: Internally reported disclosures generally have little, if any substantive criteria. However, the substantive prerequisites for external disclosures made to the entity, the public or the media are generally more cumbersome. The logic behind this approach is to ensure the integrity of the disclosure regime by promoting legitimate reports and discouraging

false claims. However, the net effect of increasing the threshold of substantive requirements for external disclosures is a stronger emphasis on the internal reporting of disclosures.

▶ Low to Medium Level of Substantive Criteria for Protection:

- In the United Kingdom, while the procedural requirements are quite complex, insofar as they require internal disclosures with few exceptions, the substantive requirements are minimal. The only prerequisite is for the disclosure to be made in good faith and with reasonable belief.
- The Australian regime does not include any strict substantive criteria for a disclosure to be considered under the *PSCC* or the *PSA*.
- Substantive conditions may be found in New Zealand’s *PDA*, but they are not severe. The disclosure must concern an act of wrongdoing, occurring in the workplace of the person making the disclosure, and the person making the disclosure must have a reasonable belief that the information is true or likely to be true. Furthermore the person making the disclosure must be making the claim because they desire the wrongdoing to be investigated and they wish their disclosure to be protected. Essentially this last requirement is a means of deterring individuals from making frivolous claims.
- There are virtually no substantive requirements for making a disclosure in the United States. Generally the *WPA* will accept all disclosures. As mentioned earlier, this approach is rooted in the free-speech culture of the American system.
- In Korea, the substantive conditions for making a protected disclosure are minimal. While the *ACA* includes a specific requirement of good faith, the KICAC’s Annual Report implies that good faith is presumed by the fact that an individual has chosen to make a disclosure of wrongdoing.²¹

▶ Higher Level of Substantive Criteria for Protection:

- In the South Africa *PDA*, generally any disclosure, even if made internally, must be made with reasonable belief and show or tend to show the existence or likely existence of wrongdoing. However, this level rises to require good faith according to the identity of the recipient, and even complex requirements must be satisfied if the disclosure is made directly to the public or to the media.
- In South Africa, a disclosure under this “general” category can be made if one of the following conditions are met: (1) the person making the disclosure believes they would be subject to reprisal if they disclosed internally; or (2) there is no prescribed entity to handle the relevant wrongdoing and the person making the disclosure believes the evidence will be destroyed; or (3) the person making the disclosure has previously made substantially the same disclosure to their employer or prescribed entity and no action was

²¹ *Supra note 12 at 129.*

taken within reasonable time; or (4) the wrongdoing is of an exceptionally serious nature. Furthermore, in order for this “general” disclosure to be protected under the South African *PDA*, the person making the disclosure must have made the disclosure with (1) good faith; (2) a reasonable belief that the information is substantially true; and (3) not for personal gain, excluding any legal reward. This double burdened criteria of the proper circumstances for making a “general” disclosure and the substantive proof required of the person making the disclosure is quite extensive and may serve to deter individuals from taking their allegations directly to the public unless such extenuating circumstances actually exist.

- A first impression of Israel’s *SCL* does not give any indication of heavy substantive requirements. However, there is an important condition that must not be overlooked. Any disclosure made to the Ombudsman must be in regard to wrongdoing that had a direct impact the person making the disclosure, unless he or she is a member of the Israeli parliament. The fact that an individual must have been directly affected by the wrongdoing creates a strong personal connection requirement for protection under the statute.

4. ENCOURAGEMENT OF DISCLOSURES: CONFIDENTIALITY, ANONYMITY AND REWARD

There are two general techniques that can be employed to encourage individuals to make disclosures of wrongdoing: (1) instill in the public the belief that they can trust the system to handle their concerns efficiently, confidentially and with integrity; or (2) provide rewards for those who do make disclosures. Also, the extent to which a regime protects individuals from reprisal will have significant influence. Another important aspect of encouraging disclosure is the level of accessibility one has to the system. The significance of these additional encouraging factors was discussed in the above sections.

- ▶ Provisions and Policies that Instill Trust and Protection: Protection of confidentiality and acceptance of anonymous claims encourage trust in a disclosure regime.
 - Confidentiality is not explicitly protected in the United Kingdom’s *PIDA*. However, the OCSC aims to protect the confidentiality of the person making the disclosure where possible. Nevertheless, since internal reporting is the principal means of reporting, the confidentiality of the person making the disclosure is at risk and anonymity seems nearly impossible.
 - In Australia, breach of confidentiality is considered a form of wrongdoing under the *PSCC*. This sends a strong message of protection and trust to a person who is considering making a disclosure. Acceptance of anonymous disclosures is not discussed.
 - There are explicit provisions for the protection of confidentiality in New Zealand’s *PDA*. These legislative provisions stipulate that explicit consent is required to reveal the

identity of the person making the disclosure, and it can only be done if it is essential to prevent serious risk to public health, safety or the environment, or necessary to adhere to the principles of natural justice. Furthermore, if the identity of the person making the disclosure will be compromised by a request for information under the relevant access to information act, such a request may be refused. However, the *PDA* does not indicate if anonymous claims will be accepted.

- In South Africa, confidentiality and anonymity do not appear to be a major priority. Confidentiality is not protected in the *PDA*, but the Public Protector’s policy is to keep the identity of the person making the disclosure confidential if necessary and possible. Also, anonymous claims are not mentioned in the Act or related policies.
 - Protection of confidentiality is explicitly included in the provisions of the United States *WPA*. The only time confidentiality may be breached is in a case of imminent danger or illegality. If confidentiality is breached outside these exceptions, the breach will be reported to the National Security Advisor and dealt with accordingly. However, the OSC’s policies explicitly indicate that they are not required to consider anonymous disclosures.
 - The Korean *ACA* extends strong protections for confidentiality. Furthermore, a breach of confidentiality may be investigated and disciplined by the KICAC in a similar manner as other acts of wrongdoing. However, the acceptance of anonymous claims is not discussed.
 - Confidentiality is not discussed in Israel’s *SCL* nor in related policies. Furthermore, individuals must disclose their identities when making reports; therefore it appears that anonymous disclosures are not accepted.
- ▶ Reward Systems:
- Only Korea has a specific reward system under its disclosure regime. If government resources are saved on account of the disclosure, then a reward may be awarded based on a certain percentage of that amount. Rewards are given after a review board considers the case. Furthermore, the KICAC may nominate individuals who make disclosures to receive a national award for integrity and fairness in the public service.
 - However, it should be noted that the United States has a separate body of legislation entitled the *Federal False Claims Act*, which allows for citizens to file civil suits on behalf of the government, typically entitled *Qui Tam*. This mechanism is distinct from the disclosure regime; however it allows a private citizen who has knowledge of fraud

against the government to bring the action on behalf of the State to receive, if successful, a percentage of the recovery.²²

5. ACCOUNTABILITY: APPEAL AND REVIEW

In order for a disclosure regime to operate with due process, the entities must be accountable. Therefore a person making the disclosure or the target of the alleged wrongdoing should have legal recourse, in the form of appeal or review, to challenge the decision of the entity.

▶ Available for Challenge under Disclosure Regime:

- In the United States, the entity’s decisions may be appealed to the adjoining “adjudicative body”. The decisions of that “adjudicative body” may be appealed to the courts. The unique dual function of the United States entity is advantageous because it provides a self-contained specialized system to handle disclosure matters, from the initial report, to the investigation, to the remedies, to the appeals. However, even though this system is self-contained, it is still accountable to basic legal rules and principles because the adjudicative body’s decisions may be appealed to the courts. In its many years of existence, the United States disclosure regime has seen many cases travel through the process within the self-contained scheme, and also on to appeals in the court.

▶ Available for Challenge Outside of the Disclosure Regime:

- In Australia an individual may seek an application for judicial review of the PSC or MPC’s decision on a point of law.
- As discussed in the previous sections, in South Africa, remedies for reprisal may only be sought through the regular courts. Therefore any available appeal or review would depend on the judgements of the courts.
- In Korea, cases involving “High Ranking Public Officials” are prosecuted through the courts and therefore any appeal or review will also be conducted via that route. However, there are no explicit provisions or policies regarding the availability of appeal or review for decisions rendered by the KICAC in relation to non-high-ranking public officials.
- In Israel, the Ombudsman’s decisions are explicitly not available for review or appeal to the courts. However, the head of the department subjected to the Ombudsman’s decision may request the Ombudsman to review its own decision. The Civil Service Commissioner and the Attorney General may also make the same request. The accountability of this mechanism is questionable however, since the review is conducted by the same body that made the initial decision.

²² Estelle Feldman, “Protection for Whistleblowers”, School of Law, Trinity College, University of Dublin, 9th Annual International Anti-Corruption Conference, at 7; http://www.transparency.org/iacc/9th_iacc/papers/day3/ws7/d3ws7_efeldman.html.

▶ Not Available for Challenge:

- In the United Kingdom, the OCSC's decisions are explicitly barred from being reviewed or appealed by courts. This is the only jurisdiction that does not offer any form of challenge. However, an explanation for this approach may be the fact that the OCSC's role is primarily that of an appeal body that reviews the internal decisions of government departments.
- In New Zealand, there is no clear indication whether the entity's decisions are reviewable or whether they may be appealed.

Part Two – In-Depth Review

An in-depth examination of each of the seven disclosure regimes follows. First, each element of the disclosure regime will be broken down into the specific function and relevant legislative provision or policy involved. Second, each element will be discussed according to its significance and any relevant statistical results.

The elements of the disclosure regime have been broken down as follows:

1. Legislation
2. Entity
3. Jurisdiction
4. Wrongdoing
5. Criteria for Protection
6. Disclosure Procedures
7. Investigative Authority
8. Enforcement Mechanisms
9. Protection from Reprisal
10. Confidentiality and Anonymity
11. Remedies and Rewards
12. Discouraging False Claims and Encouraging Disclosure
13. Appeal and Review

UNITED KINGDOM

Legislation

Function:

The United Kingdom's *Public Interest Disclosure Act (PIDA)* focuses on protection and facilitation of disclosures in the public or private sector. The *PIDA* aims to protect the person making the disclosure from reprisal when disclosures meet the criteria for protection under the *Act*. The related *Civil Service Code* specifically covers public sector employees and has a broader mandate than the *PIDA*. Two important elements of the Code are as follows. First, the Code allows for public sector employees to appeal internal disclosure decisions under the *PIDA*. Second, it also contains general principles of conduct, accountability, duties and loyalties of all public servants.

Analysis:

The legislative structure in the United Kingdom is distinctive insofar as the *PIDA* is an umbrella statute covering disclosures and reprisal protection for public or private sector employees, while the Code provides more specific mechanisms for public sector employees. The Code not only outlines the appeal procedure to reach the OCSC, but also provides a stricter set of obligations for public servants, including loyalty to their employer.

The *PIDA* clearly focuses on the disclosure, rather than the person making the disclosure, as evidenced by the title of the statute, and on the extensive procedural requirements for a disclosure to qualify as protected under the Act. Moreover, the *PIDA* characterizes the person making the disclosure as a “witness” rather than a “complainant”, which serves to detract from the stigma of a “whistleblower”, and demonstrate the importance of serving the public interest by reporting wrongdoing.²³

Entity

Function:

The Office of the Civil Service Commissioners (OCSC) is the entity responsible for handling disclosures in the United Kingdom. Commissioners are appointed by the Crown, under Royal Prerogative. They are not civil servants; rather they are completely independent of government and report annually to the Queen. The OCSC's responsibilities are outlined in two key documents: the *Civil Service Code* and the *Public Interest Disclosures Act*. Commissioners may

²³ Public Concern at Work, “Whistleblowing: The New Perspective”; http://www.pcaaw.co.uk/policy_pub/newperspective.html.

hear appeals of internal decisions regarding the Code and *PIDA*. Other duties of the OCSC include general supervision of the merit system in civil service recruitment and competitions.

Analysis:

The most significant aspect of the OCSC is that it is not the primary body responsible for receiving and dealing with disclosures since the United Kingdom disclosure regime is centered on internal reporting; this will be discussed further in later sections.

Jurisdiction

Function:

The *PIDA* covers wrongdoing in the public and private sector, and protects disclosures made by the public and private sector employees. However, the Code deals specifically with public sector wrongdoing and disclosures.

Analysis:

The dual coverage and protection of the *PIDA* is a strong component of the United Kingdom’s disclosure regime. By combining jurisdiction, the *PIDA* sends an important message that all employees are equally deserving of protection from reprisal.

Wrongdoing

Function:

The *PIDA* contains specific heads of wrongdoing, which are included under general descriptions of appropriate conduct in the Code. Wrongdoing under the *PIDA* includes crimes, breach of legal obligations, miscarriage of justice, endangering health, safety or the environment or the concealment of any information pertaining to such acts. Accordingly, the Code indicates that public servants must not act in any way that is illegal, improper, in breach of constitutional conventions or professional codes, or in any other way that is inconsistent with the Code.

Analysis:

The categories of wrongdoing in the *PIDA* generally similar to those traditionally found in other jurisdictions disclosure regimes, including that of the Public Service Integrity Office (PSIO). A potential problem with wrongdoing that could be derived from a breach of the Code is the requirement for public servants to “owe their loyalty to the Administrations in which they serve”.²⁴ Therefore, it could be argued that disloyalty could be considered form of wrongdoing

²⁴ *Supra* note 11, at section 2; www.cabinet-office.gov.uk/central/1999/cscode.htm.

insofar as it is a breach of the Code. Such a scenario could discourage public servants from making disclosures. Furthermore, while the Commissioners are responsible for merit system issues, they are not responsible for any traditional personnel issues such as harassment or dismissal. Hence, in 2001-2002, when the OCSC received six matters concerning personnel issues they were ultimately unable to consider them as cases, since they were outside of the OCSC's mandate of wrongdoing.²⁵

Criteria for Protection

Function:

The United Kingdom's *PIDA* includes substantive and procedural criteria for making a protected disclosure. The substantive criteria simply require the person making the disclosure to make their disclosure in good faith and with reasonable belief. Procedurally there are strict requirements for a person making the disclosure to disclose via the internal mechanisms of their employer, before being able to be protected from reprisal or report to the OCSC. Specifically, disclosures may only be made to the OCSC after internal procedures have been exhausted and the person making the disclosure feels the response if their employer is not reasonable. The details of the disclosure process are discussed in the proceeding section.

Analysis:

Substantively, the standard a person making the disclosure is required to meet is generally similar to most other jurisdictions. However, the procedural criteria is a much higher than most other disclosure regimes. A person considering making a disclosure who wishes to appeal to the OCSC is required to submit their correspondence with their employer, in order to demonstrate that they have satisfied internal procedures and why the matter has not been resolved.

The stringent internal procedural requirements may impose undue burdens on any person considering making a disclosure and deter them from making a disclosure altogether. However, the OCSC has reported that currently there is no central tracking mechanism and thus there is little data on each individual employer's experience with disclosures. Hence, the reality of this premise is difficult to assess, but based on the relatively low number of appeal cases before the OCSC, one may be able to conclude that this is indeed the case. Nevertheless, an external organization entitled Public Concern at Work, has calculated that 1200 disclosure claims have been registered in the first three years of the *PIDA*'s existence, with 400 cases at employment tribunals being successful for the person making the disclosure.²⁶ However, still only a handful of public sector disclosure appeals to the OCSC have arisen over the last few years according to their 2001-2002 Annual Report.

²⁵ *Supra* note 19, at 37.

²⁶ Public Concern at Work, "Whistleblowing Cases"; http://www.pcaw.co.uk/policy_pub/case_summaries.html.

Disclosure Procedures

Function:

The process for reporting disclosures under the *PIDA* can be divided into four categories. First, for standard “internal disclosures”, employees must report initially to their employer. Second, the *PIDA* makes special provisions for “regulatory disclosures” made to prescribed persons. These disclosures tend to involve regulators such as the Health and Safety Executive and the Financial Services Authority. Third, there are “wider disclosures” made to bodies such as the police, the media or MPs. Such disclosures will be protected if both the internal and regulatory criteria are satisfied, and the person making the disclosure satisfies one of the following requirements: (a) he reasonably believed he would be victimized if he had raised the matter internally or with a prescribed regulator; or (b) there was no prescribed regulator, and he reasonably believed the evidence was likely to be concealed or destroyed; or (c) the concern had already been raised with the employer or a prescribed regulator; or that (d) the concern is of an exceptionally serious nature. Finally, there are “disclosures of exceptionally serious matters”, which will be protected if they meet the criteria for “regulatory disclosures” and are not made for personal gain. The reasonableness and the identity of those who received the disclosure will also be considerations.

Analysis:

There is a strong possibility that such complex disclosure procedures, including the requirement to report internally in the first instance, would deter people disclosing at all. This premise is coupled by the fact that the *PIDA* does not include a statutory requirement for government departments to institute any standards or guidelines for receiving disclosures. However, it is notable that the Committee on Standards in Public Life has endorsed key elements that should be implemented by employers, including respect for confidentiality; an opportunity to raise concerns outside the line of management; access to independent advice; an indication for how concerns may be raised outside the organization; and penalties for making false allegations maliciously.²⁷ Nevertheless, these are merely suggestive elements and there is no legislative requirement for employers to adopt them.

The practical result of the United Kingdom’s internal-reporting disclosure regime is difficult to assess given the lack of evidence at the Commissioner level and the lack of a central tracking mechanism. Reasons for this may depend on various factors, some of which may include (a) there are not many disclosures made internally because employees do not feel confident that they will be dealt with; or (b) there are disclosures made internally, but not many reach the appeal stage because they are settled internally; or (c) there are disclosures made internally but they do not reach the appeal stage because they are silenced internally. While it is not clear what the

²⁷ United Kingdom, “Explanatory Notes on *PIDA*”, Committee on Standards in Public Life – *PIDA*.

definitive reason is, it is evidence that these are significant issues to be considered when deciding what disclosure procedures are the most effective.

Investigative Authority

Function:

The primary investigative responsibility for disclosures of wrongdoing belongs to each individual employer who receives the initial disclosure. However, if a disclosure matter does reach the appeal stage at the OCSC, the Commissioners have the power to investigate. Furthermore, according to the Civil Service Order in Council 1995, the Commissioners may regulate their own procedures for hearing and determining appeals under the Code, including requiring information to be presented in an investigation.²⁸

Analysis:

Since the United Kingdom disclosure regime is premised on an internal reporting system, most investigations will be conducted by the employer of the person making the disclosure. Furthermore, since employers are only encouraged to set up procedures for receiving disclosures, there will not necessarily be any consistency or standards in the various employers' investigative procedures site. Moreover, the investigative powers of the OCSC are so broad that the specifics may also vary from case to case. Nevertheless the enforcement mechanisms may balance the discretionary investigative authority.

Enforcement Mechanisms

Function:

Enforcement mechanisms in the United Kingdom's disclosure regime are neither specified in the *PIDA* nor standardized between each employer who receives a disclosure. However, according to the OCSC's Web site, if a disclosure is appealed to the OCSC, then government departments have a duty to cooperate with the Commissioner's investigations.²⁹

When a matter is brought for an appeal before the Commissioners, they have the ability to decide based on the facts and their investigation whether or not to uphold the appeal. According to the Civil Service Order In Council, the OCSC may make recommendations to the government departments regarding an appeal matter.³⁰

²⁸ United Kingdom Civil Service Order In Council 1995, section 4(5).

²⁹ United Kingdom, Civil Service Appeal Leaflet; <http://www.civilservicecommissioners.gov.uk/appeal/appeal3.htm>.

³⁰ *Supra* note 29, at section 4(5)(c).

Analysis:

Ultimately, enforcement of the *PIDA* will undoubtedly be left to the internal decisions of each individual employer. Once again, the non-standardized and unregulated nature of these procedures makes it difficult if not impossible to decipher how and whether or not remedies to disclosures and reprisals are enforced. At the appeal level, there does not appear to be many problems concerning enforcement by the OCSC. According to their 2001-2002 Annual Report, the “departments involved have co-operated with the Commissioners’ enquiries and have accepted [their] recommendations”.³¹

Education appears to be the main concerns of enforcement, specifically the government departments lack of awareness of the *PIDA* and the Code’s principles and implications. The 2001-2002 Annual Report goes on to cite these problems, including a tendency to regard persons making disclosures as “troublemakers”.³² These issues are directly linked to the efficacy of the disclosure regime as a whole. Undoubtedly, these issues will not encourage individuals to report wrongdoing. Hence, in light of these problems, the OCSC has taken measures to increase promotion of the Code amongst public servants, particularly during their induction. Also, it is prudent to note that the OCSC has specified in their 2001-2002 Annual Report that it will be necessary to conduct an assessment of the disclosure procedures in government departments in order to fully determine how the Commissioners’ roles are being fulfilled.³³

Finally, the OCSC only has the authority to make recommendations, according to their 2001-2002 Annual Report; government departments that have been involved in appeal cases “have co-operated with the Commissioners’ enquiries and have accepted [their] recommendations”.³⁴

Protection from Reprisal

Function:

The *PIDA* includes a provision for the affirmative protection from reprisal for all employees who make a qualified disclosure according to the procedural requirements of the Act.³⁵ Apart from this positive right, an individual who makes a disclosure and is victimized or dismissed can seek redress by bringing a claim before an employment tribunal for compensation.

³¹ *Supra* note 19, at 12.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *United Kingdom Public Interest Disclosure Act*, section 2, 47B.

Analysis:

The success of protecting persons making disclosures from reprisal in the United Kingdom is largely left to the internal assurances of the employers. There are no explicit statutory punishments for employers who commit acts of reprisal, but there are compensatory provisions in the *PIDA*. These provisions will be discussed further in later sections.

Confidentiality and AnonymityFunction:

The *PIDA* does not provide for explicit protection of confidentiality. Although the Civil Service Order In Council requires the OCSC to give an account of the number of appeals made under the Code, with a summary of their nature, the Commissioners aim where possible to report in a way that does not disclose the identities of those involved.³⁶ An examination of the summary of appeal cases in the 2001-2002 Annual Report demonstrates this position to be true.

Analysis:

Since internal reporting is the central mechanism of bringing forth disclosures, it is difficult to see how the identity of the person making the disclosure can be kept confidential from the employer or government department. However, although the Commissioners reserve the right to disclose the identity of the government department and person making the disclosure if necessary, generally they would only do so if the government department were to decline to accept the OCSC's recommendations.

Remedies and RewardsFunction:

Furthermore, an employment tribunal may award compensation based on the losses suffered by a person making the disclosure. Furthermore, if a person making the disclosure is unfairly dismissed, the person may apply for an interim order to keep his job.

Analysis

In compensation cases brought under the *PIDA* to employment tribunals, the highest award granted was £805,000 and the lowest was £1000, while the average was £107,117. Furthermore, in the first three years of the *PIDA*, employees lodged over 12000 claims alleging reprisal, two-thirds of these cases were settled or withdrawn without any public hearing. Since these claims may have involved both public and private sector employers receiving the internal disclosures under the *PIDA*, it is unclear whether these matters were actually resolved via

³⁶ *Supra* note 19, at 36.

internal procedures. For cases that did reach full hearings by employment tribunals, 54% of claimants lost, 23% won under other employment law, while 23% won under the *PIDA*.³⁷

Discouraging False Claims and Encouraging Disclosure

Function:

The *PIDA* does not impose penalties for making false or malicious allegations; however the Committee for Standards in Public Life has suggested that employers should adopt such an approach in their internal procedures.³⁸

Analysis:

While there are not any explicit prohibitions against false claims, the internal nature of the United Kingdom’s disclosure regime may implicitly deter individuals from doing so since they must generally report to their own employer in the first instance.

Appeal and Review

Function:

Once a public sector disclosure has been appealed to the OCSC under the Code and the *PIDA*, it may not be appealed further.

Analysis:

Since the evidence shows that there are more claims for compensation under employment tribunals than there are appeals to the OCSC, the tribunals may be the recourse of choice for most persons making a disclosure. One reason for this outcome may be the fact that the decisions of the OCSC are not available for review or appeal.

³⁷ *Supra* note 27.

³⁸ *Supra* note 28.

AUSTRALIA

Legislation

Function:

The Australian *Public Service Act (PSA)* is the primary legislative source for the protection of disclosures and the person making the disclosure. However, the objective of the statute is much broader, covering nearly all employment aspects of the federal public service. The specific provisions relating to disclosures are found in the Australian *Public Service Code of Conduct*, under section 13 of the *PSA*, along with Part 5 and Part 6, respectively covering the functions of the entity responsible for receiving and handling disclosures.

Analysis:

The legislative focus of the Australian disclosure regime emphasizes general principles of conduct and integrity of public servants. This is evidenced by manner in which the Code prescribes attitudes and principles for public servants to follow, rather than explicitly prohibiting acts of wrongdoing. Also, the fact that the Code is included in the broad mandate of the *PSA* demonstrates that the focus of the statute is not primarily disclosures of wrongdoing. The following analyses will also support the premise that the Australian system is focused on upholding general principles of integrity within the public service.

Entity

Function:

The Australian Public Service Commissioner (PSC) and the Merit Protection Commissioner (MPC) are the entities that may receive and handle disclosures. However the roles of the PSC and MPC are much larger than simply handling disclosures. The PSC is responsible for the overall supervision, review and evaluation of Australian Public Service employment policies and practices. The MPC is a separate body within the PSC and is also responsible for reviewing personnel actions.

Analysis:

The fact that the PSC and MPC have obligations beyond disclosures is indicative of the Australian disclosure regime's focus on principles over specific prohibitions of wrongdoing and protection from reprisal. Furthermore, while the PSC and the MSC may receive disclosures directly from person making the disclosure, internal reporting is strongly encouraged. The significance of this issue will be discussed in later sections.

Jurisdiction

Function:

The Australian *Public Service Act* and the *Code of Conduct* apply to all Australian Public Service employees, including all ongoing and non-ongoing employees.³⁹

Analysis:

The Australian system has a traditional approach to jurisdiction, insofar as the *PSA* and Code deal specifically with the public sector. Structurally, the reason for this is that the *PSA*'s mandate is the Australian Public Service. The benefit of such an approach is that nearly all public service employment issues are covered by one statute, thus promoting consistency and uniform application of the relevant laws and regulations.

Wrongdoing

Function:

The definition of wrongdoing in the Australian disclosure regime encompasses any breach of the Code. However, if a provision contains more than one element it may not be necessary for the employee to breach all elements to be found in breach of the Code.⁴⁰ The Code of Conduct includes affirmative provisions for public service employees to comply with such as (1) acting with honesty and integrity, care and diligence; (2) complying with lawful and reasonable directions; (3) using Commonwealth resources in a proper manner; (4) not providing misleading information; and (5) not misusing inside information or one's duties, status, power or authority.⁴¹

Analysis:

The Australian categories of wrongdoing differ significantly from other jurisdictions because they in the form of an affirmative Code of Conduct. According to the 2001-2002 Annual Report, 12 disclosures were made to the PSC in that year. Types of wrongdoing that were raised included alleged interference in a contracting exercise, improper use of legislative powers, inappropriate use of the Code, breaches of privacy principles, and not making certain information available to the public. Of these 12 disclosures that reached the PSC, only three qualified for investigation by the PSC, while the other nine were either out of the jurisdiction of the *PSA* disclosure scheme, or

³⁹ Australia, "Managing Breaches of the APS Code of Conduct", Australian Public Service Commission, at 1.

⁴⁰ *Ibid.* at 2.

⁴¹ *Australia Public Service Code of Conduct*, section 13.

they were cases that were more appropriately dealt with internally by the government departments.⁴²

During 2001-2002, disclosures dealt with by government departments dealt with wrongdoing such as misuse of departmental resources or official roles, unacceptable behaviour and language towards the public and colleagues, unsatisfactory work performance, unauthorized access to records, unsatisfactory attendance and timekeeping and unauthorized absence from duty.⁴³ These types of wrongdoing demonstrate a wide variety of misconduct that could fall under the jurisdiction of the Code—ranging from traditional wrongdoing to employment matters. The advantage of this approach is that it provides a uniform legal framework to handle issues of employment, personnel, conduct and wrongdoing. However, a disadvantage is that it may lack the expertise and specialization to deal with the complex issues of wrongdoing and reprisal.

Criteria for Protection

Function:

In the Australian disclosure regime there are generally no stringent substantive or procedural criteria for a disclosure to be protected under the statute. The only necessity is disclosures be made to the PSC, the MPC, the relevant government department head, or person authorized for the purposes of this section by one of the above-mentioned authorities.⁴⁴ Moreover, according to Circular 2001/04 on Whistleblowers' Reports, frivolous or vexatious disclosures will not be investigated.⁴⁵

Regarding the standard of proof for the existence of wrongdoing, there are three different levels of connectedness: (1) in the course of employment, (2) in connection with employment, and (3) at all times.⁴⁶ The PSC handbook *Managing Breaches of the Code of Conduct* also states that in order to comply with administrative law principles, the standard of proof for determining whether a breach of the Code has occurred is on the balance of probabilities.⁴⁷

Analysis:

Australia's disclosure regime is distinct from other jurisdictions insofar as standards are explicitly outlined either in legislation, policies or guidelines. The standard of proof for determining a finding of wrongdoing is the best example of this premise; however standards

⁴² *Supra* note 10, at 77.

⁴³ *Ibid.* at 28.

⁴⁴ *Supra* note 41, at section 16.

⁴⁵ Australia, "Circular 2001/04: Whistleblowers' Reports"; <http://www.apsc.gov.au/circulars/circular014.htm>.

⁴⁶ *Supra* note 39, at 2.

⁴⁷ *Ibid.* at 12.

regarding investigations, hearings and general fairness can also be found throughout the PSC’s relevant legislation and policies. This will be discussed in the proceeding sections.

Disclosure Procedures

Function:

Disclosures may be reported to the PSC or the MPC in accordance with the *PSA* and Regulations in two circumstances. First, if the PSC or MPC agree that the disclosure would not be appropriate to report to the government department where the wrongdoing is alleged to have occurred, or second, if the person making the disclosure is not satisfied with the outcome of the government department’s internal inquiry into the wrongdoing, then disclosures may be made to either Commissioner. However, according to the language of the procedural guidelines, based on Public Service Regulations 11(c) and 11(f), disclosures are expected to be handled internally, by the relevant government department.⁴⁸

Moreover, the *PSA* requires every government department to establish procedures for determining whether an employee department has breached the Code of Conduct.⁴⁹ The directions included in the *PSA* outline the basic procedural requirements that the government department must comply with, such as informing the employee of the suspected breach and the range of sanctions that may be imposed, along with providing a reasonable opportunity to respond to the suspected breach of the Code.⁵⁰

Analysis:

Although the *PSA* and the Code do not require internal reporting at the first instance, the language of the procedural guidelines requires the PSC to agree that internal disclosure is not appropriate before a person making the disclosure may report externally. The regulatory tone may cause employees to feel they cannot report directly to the PSC with ease.

Currently the *PSA* only requires departments to establish procedures according to these guidelines to deal with disclosures or breaches of the Code. However, apart from the statutory prohibition against reprisal in the *PSA*, there are no guidelines explaining how departments can ensure employees are protected from reprisal.

⁴⁸ <http://www.apsc.gov.au/publications98/whistleblowing.htm>.

⁴⁹ *Australia Public Service Act*, subsection 15(3).

⁵⁰ *Ibid.* at paragraph 15(3)(a), clause 5.4 of Directions.

Investigative Authority

Function:

The PSC has the ability to conduct investigations of disclosures, and also general proactive inquiries, evaluations and reviews of management and employment practices of the Public Service. The MPC may only conduct reactive inquiries into alleged breaches of the Code when they receive disclosures.

Administrative law and procedural fairness are highlighted in the PSC's policies for inquiries into disclosures. Notably, the PSC handbook *Managing Breaches of the APS Code of Conduct* outlines the various requirements for procedural fairness that must be satisfied by government departments when investigating alleged wrongdoing.⁵¹

Analysis:

While both the PSC and MPC have the authority to conduct inquiries into disclosure matters, it should be noted that their ability to compel government departments is limited to making recommendations. The significance of this will be discussed in the proceeding section, "Enforcement Mechanisms". However, despite the fact that the PSC and MPC have limited powers of enforcement, it is significant that principles of fairness and administrative law have a strong presence in their policies and procedures.

Enforcement Mechanisms

Function:

While both the PSC and the MPC have the power to inquire into disclosure matters, they do not actually have the power to determine if wrongdoing occurred. Their roles are limited to deciding whether to recommend to a government department that they should commence their own procedures into determining if wrongdoing occurred. Accordingly, the department head may impose sanctions for wrongdoing, not the PSC or MPC.⁵² While the powers of the MPC are generally recommendatory, if they are not satisfied with department's response, they may report to the department's minister, the prime minister or Parliament, after consulting the Public Service Minister.

The *PSA* allows for the PSC to issue explicit Directions regarding internal procedures that departments must satisfy. Under the *PSA*, current requirements that departments must follow include: (1) complying with basic procedural requirements in the *PSA*; (2) having due regard to procedural fairness; and (3) allowing for different procedures for different categories of public

⁵¹ *Supra* note 39, at 11.

⁵² *Supra* note 49, at section 15.

service employees. Amongst other basic procedural elements, the current Directions include a requirement for entities to ensure that the individuals responsible for assessing the breach is and appears to be independent and unbiased.⁵³

Analysis:

The fact that the MPC's powers are only recommendatory may pose a problem of effective enforcement when it comes to reviewing the decisions of the government departments. Although other mechanisms exist, such as reporting to Parliament, these may be insufficient. For example in 2001-2002, the MPC recommended in three cases that a department set aside their decision that a wrongdoing occurred; however the department complied with the MPC's recommendations in only one of the three cases. The 2001-2002 Annual Report indicates that the MPC is currently still considering how to handle the other two cases.⁵⁴ Hence the MPC may not have the requisite powers to effectively implement their mandate.

Awareness of the Code and PSC are also an important aspect of effective enforcement. On that note, the PSC has a strong education program geared towards raising awareness and evaluating the integration of the Code and Public Service values within government departments.⁵⁵ This approach is another example of the Australian regime's focus on encouraging appropriate behaviour and attitudes, rather than explicitly prohibiting wrongdoing.

Protection from Reprisal

Function:

Section 16 of the *PSA* explicitly prohibits reprisal against a public service employee who has reported wrongdoing or alleged breaches of the Code to the PSC, the MPC, the relevant government department head, or the person authorized for the purposes of this section by one of the above-mentioned authorities.⁵⁶ Since the provisions prohibiting acts of reprisal are included in the Code, it can be inferred that a breach of the Code includes committing an act of reprisal. Therefore, reprisal may be sanctioned by any of the below-mentioned penalties for breach of the Code under section 15 of the *PSA*.⁵⁷

⁵³ *Supra* note 49, at paragraph 15(3)(a), clause 5.4 of Directions.

⁵⁴ *Supra* note 10, at 128.

⁵⁵ *Ibid.* at 26.

⁵⁶ *Supra* note 49, at section 16.

⁵⁷ *Ibid.* at section 15.

Analysis:

This aspect of the *PSA* is significant insofar as reprisal is qualified as a breach of the Code. Treating reprisal as a form of wrongdoing may instill confidence in the mind of a person considering making a disclosure, since he or she will know that reprisal will be equally penalized as the wrongdoing.

Confidentiality and Anonymity

Function:

According to section 13(10) of the *PSA*, the Code of Conduct prohibits the improper use of “inside information”. Therefore, it can be interpreted that a breach of confidentiality would ultimately qualify as a form of wrongdoing and punishable in a manner similar to other breaches of the Code.⁵⁸ According to Good Practice Guidelines on the PSC’s Web site, anonymous disclosures may be investigated if justified by sufficient evidence.⁵⁹

Analysis:

Including breach of confidentiality as a form of wrongdoing is an important message to those responsible for maintaining confidence and those who seek to have their confidentiality protected.

Remedies and Rewards

Function:

Section 15 of the *PSA* outlines sanctions for a breach of the Code, including reprisal. Available penalties include (1) termination, (2) reduction of classification, (3) re-assignment of duties, (4) reduction in salary, (5) deductions from salary or fine, and (6) reprimand. The PSC handbook *Managing Breaches of the APS Code of Conduct* specifies the guidelines for issuing these remedies. A determination of a breach of the Code does not necessarily mean that a sanction must be imposed. Government departments have the discretion to deal with matters more informally, such as through counseling.⁶⁰ As mentioned in the above sections, department heads have the power to enforce these sanctions, but the PSC and MPC do not.⁶¹

⁵⁸ *Ibid.* at subsection 13(10).

⁵⁹ Australia, “Public Interest Whistleblowing: Provisional Advice for Entities”; <http://www.apsc.gov.au/publications97/whistleblow.htm>.

⁶⁰ *Supra* note 49, at section 15.

⁶¹ *Ibid.*

Analysis:

The remedial provisions in the Australian regime are significant because the PSC and MPC do not have the power to issue sanctions. This approach may put the entity at odds with the government department, especially since the powers of enforcement of the PSC and the MPC are limited to recommendations. Evidence of this conflict was discussed in the earlier sections, regarding the two of three cases where the MPC made recommendations to set aside findings of wrongdoing, but the department disagreed. Such conflicts and the fact that departments have the only power to issue sanctions will pose difficulty for the success of the *PSA*'s remedial provisions.

Discouraging False Claims and Encouraging Disclosure

Function:

As a means of discouraging false disclosures, the Code includes an affirmative requirement to behave honestly and with integrity.⁶² Therefore it could be argued that disclosure made in bad faith would qualify as a breach of the Code and be a form of wrongdoing. Furthermore, the department and PSC or MPC will not investigate frivolous and vexatious claims.

Analysis:

While false claims are discouraged by not accepting frivolous or vexatious claims, disclosures are generally encouraged by the relatively accessible system of the Code of Conduct and *PSA*. However, even without strict requirements for protection, the fact that internal disclosures are strongly encouraged and the fact that only departments have the authority to enforce sanctions, may discourage some individuals from bringing forth their claims.

Appeal and Review

Function:

Under section 33 of the *PSA*, public service employees are entitled to review Public Service action that relates to his or her public service employment, except their termination.⁶³ As such, individuals who have been found by their government department to be in breach the Code, may seek to have the decision reviewed by the Merit Protection Commissioner. Applications for review concerning a finding of breach of the Code or a sanction imposed for such breach must be filed directly with the MPC.

⁶² *Ibid.* at subsection 13(1).

⁶³ *Ibid.* at section 33.

However, review of suspension decisions are generally made in the first instance to the government department.⁶⁴ As a general policy, departments must first try to resolve the review issues through mediation or conciliation. If these informal procedures are not successful, the department may then arrange for the matter to be formally reviewed.⁶⁵ Review may also be available if a person making the disclosure is dissatisfied with the outcome of the department's review or if the investigation within the department is inappropriate. Furthermore, when the MPC reviews a decision of a department concerning an alleged wrongdoing, the MPC still only has recommendatory power. Beyond the right of review action to the MPC, there is no further right of review under the *PSA* or its regulations. If an individual wishes further review, they must apply to a court for judicial review on a question of law.

Analysis:

According to the 2001-2002 Annual Report, the MPC received 43 applications for review that year, 26% more applications than the previous year.⁶⁶ The report indicates that the number reviews has remained steady over the last few years, with 43 applications being the largest number received in the last five years.⁶⁷ However, in practice, review proceedings are usually conducted through informal mechanisms of negotiation and dispute resolution between the MPC and relevant department. According to the 2001-2002 Annual Report, parties involved in such reviews have generally complied with the agreements reached with the MPC.⁶⁸

⁶⁴ *Supra* note 39, at 16.

⁶⁵ <http://www.apsc.gov.au/merit/reviewactions.htm>.

⁶⁶ *Supra* note 10, at 110.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 122.

NEW ZEALAND

Legislation

Function:

The *Protected Disclosures Act (PDA)* outlines the mechanisms for reporting disclosures of wrongdoing and protecting the person making the disclosure from reprisal. The purpose of the *PDA* is to protect the public interest by facilitating disclosures of wrongdoing in the public sector and protecting the person making the disclosure.⁶⁹

Analysis:

The *PDA* focuses on the procedural and substantive criteria for making disclosures. These criteria will be discussed in the later section “Criteria for Protection”. Unlike some other jurisdictions, the *PDA* deals specifically with disclosure matters.

Entity

Function:

Under New Zealand’s *PDA*, several entities are permitted to receive and handle disclosures of wrongdoing. However, the scheme of the legislation requires that disclosures must generally be made internally in the first instance, with few exceptions. The details of this procedural scheme will be discussed further in later sections. The entities responsible for disclosures are categorized in the *PDA* as “appropriate authorities”, including the Commissioner of Police, the Controller and Auditor-General, the Director of the Serious Fraud Office, an Ombudsman, the Parliamentary Commissioner for the Environment, the Police Complaints Authority, the Solicitor-General, the State Services Commissioner, and the Health and Disability Commissioner. Furthermore, in certain specified instances, the Minister of the Crown may receive disclosures of wrongdoing.

For the purposes of this analysis, the Office of the Ombudsmen will be the focus as the “appropriate authority” that deals with disclosures. The Ombudsmen are independent Officers of Parliament appointed by the Governor-General on the recommendation of the House of Representatives; they report annually and are accountable to Parliament. The role of the Ombudsmen extends beyond handling disclosures. The *PDA* is just one of several statutes under which the Ombudsmen have jurisdiction, others include the *Ombudsmen Act*, the *Official Information Act* and the *Local Government Official Information and Meetings Act*. Under the

⁶⁹ New Zealand, “About Protected Disclosures”, <http://www.ombudsmen.govt.nz/makinga.htm>.

PDA, Ombudsmen are able to receive public sector disclosures and only if they haven't already been raised to the Ombudsmen under the status of "appropriate authority".⁷⁰

Analysis:

A comparison of the operations of the various "appropriate authorities" under the *PDA*, it is apparent that the Office of the Ombudsmen is the primary recipient of disclosures, hence reason for focusing this analysis on the Ombudsmen. The Ombudsmen are responsible for providing information and guidance on the kinds of disclosures that are protected, the manner in which the information may be disclosed, the protections and remedies available under the *PDA* and the *Human Rights Act* if reprisal occurs, and the right to refer the disclosure to another appropriate authority.⁷¹ Furthermore, the Ombudsmen have four distinct roles under the Act: (1) supply information and guidance on request to the person making the disclosure, (2) acting as an "appropriate authority", (3) receiving disclosures after internal reporting at the first instance in respect of public sector organizations, (4) acting as the only "appropriate authority" for disclosure from specific departments including the prime minister, Cabinet, Foreign Affairs and Trade and Defence.⁷² However, even though the Ombudsmen are the main external recipients of disclosures, their role is limited since the *PDA* requires internal reporting in the first instance.

According to the Ombudsmen's 2001-2002 Annual Report, after the first full year of the operation of the *PDA*, they have yet to conduct any formal inquiries of disclosures, and the "legislation seems to be used only sparingly".⁷³ Nevertheless, the Ombudsmen have tracked approximately 2000 inquiries to the *PDA* section of their Office's Web site, and there have been 10 approaches to the Ombudsmen, regarding the Act. While there were no formal inquiries in the first year of the Act's operation, the Office of the Ombudsmen is currently reviewing a case that may lead to a reference to another "appropriate authority" of a more appropriate jurisdiction. Finally, another case revealed a disclosure matter that lacked the substantive element of a wrongdoing.⁷⁴

Other important "appropriate authorities" include the Comptroller and Auditor-General, the Solicitor-General and the State Services Commissioner because they have broad supervisory roles over the public sector, as compared to the rest of the "appropriate authorities" whose mandates are more specialized in police services, the environment, etc. Nevertheless, although these authorities have important roles over the public service, none have as strong a focus on

⁷⁰ *New Zealand Protected Disclosures Act 2000*, section 10(2).

⁷¹ New Zealand, Office of the Ombudsmen Website: "Laying a Complaint or Making a Disclosure"; <http://www.ombudsmen.govt.nz/makinga.htm>.

⁷² New Zealand, Office of the Ombudsmen Annual Report 2001-2002, at 32.

⁷³ *Ibid.* at 9.

⁷⁴ *Ibid.* at 32.

disclosures as the Ombudsmen. The Auditor-General received only two disclosures in the last year, neither of which was discussed in their Annual Report.⁷⁵ Moreover, the role of the State Services Commission under *PDA* is relatively unknown, but they are currently conducting a review of the operation of the Act, to be published in October 2003.

Jurisdiction

Function:

The *PDA* covers both the public and private sector persons making disclosures and wrongdoing. Essentially, all employees, including former employees and contractors, in the public or private sector, may make a disclosure of wrongdoing. The Office of the Ombudsmen may receive disclosures as an “appropriate authority” from the public or private sector. However, when receiving secondary disclosures, if the person making the disclosure was dissatisfied with their employer’s internal handling of the matter, then the Ombudsmen can only receive disclosures from the public sector.

Analysis:

The *PDA*’s jurisdiction over public and private sector is significant because it provides a consistent and equal mechanism for which all employees can make disclosures and be protected from reprisal.

Wrongdoing

Function:

Section 3 of the *Protected Disclosures Act* outlines the categories of wrongdoing under the definition of “serious wrongdoing”. The definition includes (1) an unlawful, corrupt, or irregular use of public funds or public resources; (2) a serious risk to public health or public safety or the environment; (3) a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; (4) an offence; and (5) an act or omission by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.⁷⁶

⁷⁵ New Zealand, “The State Sector Ethos”; <http://www.ssc.govt.nz/display/document.asp?docid=2856>.

⁷⁶ *Supra* note 70, at section 3.

Analysis:

The forms of wrongdoing in the *PDA* are similar to most other jurisdictions categories of wrongdoing. The *PDA* includes neither personnel issues nor affirmative conduct requirements in their provisions for wrongdoing.

Criteria for Protection

Function:

The criteria for protection under the *PDA* are both substantive and procedural. First, section 6 of the Act outlines the substantive standards: (1) the disclosure is about a form of wrongdoing committed in or by the organization in the private or public sector; (2) the person making the disclosure reasonably believes that the information is true or likely to be true; (3) the person making the disclosure wishes to disclose the information so that the serious wrongdoing can be investigated; and (4) the person making the disclosure wishes the disclosure to be protected.⁷⁷ The procedural criteria are discussed in sections 7 to 10; the details of these methods will be discussed in the proceeding section.

Analysis:

The substantive standards under the *PDA* do not pose a harsh burden on the person making the disclosure. A requirement of “reasonable belief of truth” is a practical method of discouraging frivolous and vexatious claims.

Disclosure Procedures

Function:

There are several sections in the *PDA* detailing the procedures for making a disclosure. Under section 7, disclosures must be reported internally in the first instance, with very few exceptions. The first exception is when the organization has no internal procedures established, or the person making the disclosure believes on reasonable grounds that the person receiving the disclosure is or may be involved in the wrongdoing, or by reason of association with someone who may be involved in the wrongdoing, then the disclosure may not be received internally.

The second exception is to make disclosures to the “appropriate authorities”, when the person making the disclosure believes on reasonable grounds that the head of the organization may be involved in the wrongdoing, or immediate disclosure to an “appropriate authority” is justified by reason of the urgency of the matter to which the wrongdoing relates or some other exceptional

⁷⁷ *Ibid.* at section 6.

circumstance, or there has been no action on the disclosure within 20 working days after the report was made.

The final exception is to make disclosures to the minister of the Crown or the Ombudsmen if the person making the disclosure has already made substantially the same disclosure in accordance to internal procedures or to the head of the organization, or the person making the disclosure believes on reasonable grounds that the person or appropriate authority who received the disclosure has decided not to investigate or investigated but has not made progress within a reasonable time, or has not taken any action in respect of the matter.

Furthermore, the *PDA* includes procedural guidelines that government departments must use in their internal operations. Section 11 provides for standards for the departments' internal procedures including (1) complying with principles of natural justice; (2) identifying the persons in the department who may receive disclosures; and (3) include references to the disclosure procedures, both internally and to the "appropriate authorities".

Analysis:

The procedural requirements for making a disclosure under the *PDA* are quite extensive compared to those in other jurisdictions. There is a strong emphasis on internal reporting and procedures. Furthermore, the fact that external disclosures can be made only in certain circumstances enhances the requirement and encouragement to report disclosures internally.

Investigative Authority

Function:

The Ombudsmen have full investigative authority according to their mandate under their enabling statute, the *Ombudsmen Act*.

Analysis:

The efficacy of the Ombudsmen's abilities to investigate into disclosures is unknown since there have yet to be any formal inquiries initiated under the Act.

Enforcement Mechanisms

Function:

As mentioned in the above section, section 11 of the *PDA* outlines the specific criteria that organizations' internal procedures must satisfy.

Analysis:

The effective enforcement of the *PDA* is difficult to assess for several reasons. First, the scheme of the Act focuses on internal reporting at the first instance. Therefore, employers have discretion in handling disclosures; nevertheless, there are standardized procedures in place. Second, the Office of the Ombudsmen has yet to launch any formal inquiries under the Act. Finally, the Ombudsmen has admitted in their Annual Report that an accurate picture of the *PDA*'s first year of implementation is difficult to assess because there is no centralized monitoring of the actual use of the Act and based on their impression, the *PDA* system has rarely been used.⁷⁸ Nevertheless, a clearer picture of the *PDA*'s impact should be available in the next year when the formal review of the Act is set to take place.⁷⁹

Protection from Reprisal

Function:

If individuals suffer reprisal, section 17 of the *PDA* allows them to seek a personal grievance according to criteria in the provision. Section 18 of the *PDA* also offers immunity from civil and criminal proceedings for those who make disclosures according to the Act.

Analysis:

Redress for reprisal in New Zealand may only be sought through the standard labour mechanisms of grievance actions. This may be problematic insofar as having two separate routes to deal with two related issues. Disclosures are handled internally or by an “appropriate authority”, but reprisals are handled through grievance actions where the issues and complexities of the related disclosure matter may not be familiar.

Confidentiality and Anonymity

Function:

The *PDA* contains explicit protections for the confidentiality of the individual who makes a disclosure. Section 19 stipulates that confidentiality should be maintained unless the person making the disclosure consents in writing or the recipient of the disclosure reasonably believes that revealing the identity of the person making the disclosure is essential to the effective investigation of the wrongdoing, or essential to prevent serious risk to public health, safety or the environment, or essential to the principles of natural justice. Furthermore, section 19(2) states that requests for information under the *Official Information Act* may be refused if it might identify the individual who makes a protected disclosure.

⁷⁸ *Supra* note 72, at 32.

⁷⁹ *Ibid.* at 33.

Analysis:

The protections of confidentiality in the *PDA* are quite strong in comparison to other jurisdictions. The most interesting element being the exception to New Zealand’s relevant access to information statutes. Such an exception provides a strong message of confidence and should instill trust into minds of those who contemplate making disclosures. Furthermore, the provisions for releasing the identity of the person making the disclosure have a relatively high threshold. The only problem may be provision allowing for the release of the person making the disclosure’s identity if it is deemed essential to the principles of natural justice. While it is understandable for the principles of natural justice to supercede the protection of confidentiality, one has to wonder in theory that any case of alleged wrongdoing would produce the need to reveal the identity of the person making the disclosure. However the reality of this premise is unknown since there have been no cases on which to base such an assessment. Nevertheless, while the provision seems reasonable, in reality it may be too vague and hinder the protection of confidentiality.

Remedies and Rewards

Function:

There are no specific remedial provisions under the *PDA* that relate to a separate distinct system for handling disclosures by either the organizations or “appropriate authorities”. The crux of the remedial power of the *PDA* lies in the provisions providing for the protection from reprisal, insofar as a potential victim of reprisal may seek a grievance remedy through the standard methods.

Analysis:

Since there have been no formal disclosure inquiries at the Office of the Ombudsmen, there are few means of assessing the efficacy and impact of the remedial elements of the system.

Discouraging False Claims and Encouraging Disclosure

Function:

The *PDA* expressly prohibits false allegations under section 20, whereby an individual who makes a disclosure of wrongdoing knowing it to be false or otherwise in bad faith will not be protected under the statute.

Analysis:

The *PDA* scheme offers strong prevention mechanisms to combat false claims. Not only are false or bad-faith disclosures expressly denied protection, but the substantive protected disclosure requirement for the “reasonable belief of truth” also aids in combating their occurrence.

Appeal and ReviewFunction:

The Office of the Ombudsmen has the ability to hear secondary disclosures under the *PDA*, after internal reporting has resulted in an unsatisfactory resolution. However, the Ombudsmen do not have the power to review the operations of other bodies under the category of “appropriate authority”. In cases where an “appropriate authority” is suspected of wrongdoing under the *PDA*, the person making the disclosure would have to be referred to the available civil remedies.

Analysis:

While it is not explicit in the *PDA*, the general structure of New Zealand’s disclosure regime implies that the Office of the Ombudsmen and the other “appropriate authorities” ultimately serve as the last resort to receive disclosures under the *PDA*.

SOUTH AFRICA

Legislation

Function:

The *Protected Disclosures Act (PDA)* provides the legislative mechanism by which employees can make disclosures and be protected from reprisal. The preamble of the Act states that its purpose is to create a culture to facilitate disclosures of wrongdoing and promote the eradication of criminal and irregular conduct in the public and private sector.

Analysis:

Prior to the *PDA*, neither South African common or statutory law had any means of allowing employees to make disclosures without fear of reprisal. The focus of the *PDA* is to (1) protect the person making the disclosure from reprisal and (2) provide a secure and legislated mechanism for disclosures to be made. Furthermore, related policies reaffirm this purpose.

An interesting aspect of the *PDA* is that the purpose and object is not only explicitly included in the preamble, but also in section 2(1). The effect of explicitly stating that the purpose of the legislation is to protect employees from reprisal and to provide for disclosure is symbolically significant in a culture where whistleblowing is traditionally very stigmatizing and negative. In South Africa, whistleblowers are often referred to as “impimpis”, the term for apartheid-era informants who betrayed their comrades.⁸⁰

While the *PDA* came into force in February of 2001, it is still difficult to assess the impact of the act since there is very little record of its use. First, there are no reported *PDA* actions launched by either the Public Protector or the Auditor-General. While both entities policies discuss the existence of the statute, neither has reported receiving any disclosures. Furthermore, since there is no central tracking mechanism to record operations under the Act, it is difficult to determine the level of activity by individual employers in the public or private sector. However, there have been a few cases related to the *PDA* that have come before the courts, but they have yet to actually apply the provisions of the Act. Several judgements have made general references to the *PDA* in relation to personnel issues.⁸¹ One case discussed the *PDA* at length and ultimately made an interim order conditional upon the applicant in the case launching proceedings under the *PDA* for resolution of the dispute in question.⁸² All of these cases that discussed the *PDA* concerned private sector employers.

⁸⁰ *Supra* note 7 at 1.

⁸¹ *Azawu obo Khanyile (Ntokoza Archibald) v. Hillside Aluminum*, KN12778-01, CCMA, 2002-19-03; <http://www.caselaw.co.za>.

⁸² *Kieth Grieve v. Denel (PTY) Ltd*, C7-2003, Labour Court, 2003-01-15; <http://www.caselaw.co.za>.

Finally, it should be noted that the South Africa Law Commission is currently conducting a review of the *Protected Disclosures Act*, with a view to determining whether the scope of its application should be extended beyond the employee-employer context.

Entity

Function:

There are two entities designated to handle and receive disclosures. The Public Protector and Auditor General may receive disclosures according to the procedures outlined in section 8 of the *PDA*. Both are national bodies with responsibilities beyond disclosures, including receiving and investigating other types of complaints, under their respective mandates.

The Public Protector was formerly known as the Ombudsman. This Office is independent of the government and is appointed by Parliament. The powers of the Public Protector include the ability to investigate, recommend corrective action and issue reports. Other responsibilities include investigations into improper prejudice, maladministration, dishonesty regarding public funds, etc.⁸³ The Auditor-General is an independent position appointed by the President. The primary role of the Auditor-General involves monitoring and combating economic crime in South Africa.

Analysis:

Neither the Public Protector nor the Auditor-General has reported any significant activity under the jurisdiction of the *Protected Disclosures Act*.

Jurisdiction

Function:

The *PDA* protects person making the disclosure and covers the wrongdoing in the public or private sector.

Analysis:

The significance of the dual jurisdiction of the *PDA* in the private and public sector is that it provides equal protection and sanction regardless of the source of the disclosure or the wrongdoing.

Wrongdoing

Function:

⁸³ South Africa, Public Protector Website: <http://www.polity.org.za/html/govt/pubprot/pubprot.html>.

Section 1(i) of the *PDA* describes wrongdoing as any conduct of an employer or an employee of that employer that shows or tends to show in actuality or likelihood of any of the following: (1) criminal offence; (2) failure to comply with a legal obligation; (3) miscarriage of justice; (4) danger of health or safety of an individual; (5) damage to the environment; (6) unfair discrimination; or (7) deliberate the concealment information pertaining to any of the above matters.⁸⁴ The *PDA* defines wrongdoing as “impropriety” and will be considered such whether or not it occurred in the Republic of South Africa or elsewhere.⁸⁵

Analysis:

Wrongdoing in the *PDA* is similar to the categories found in other jurisdictions. Personnel issues are not included, nor is a Code of Conduct. However, the operation and impact of these provisions is difficult to evaluate since neither the courts, the Public Protector nor the Auditor General has reported any significant activity under the legislation.

Criteria for Protection

Function:

There are procedural and substantive requirements for a disclosure to be considered protected under the statute.

The procedural standards for a protected disclosure depend on who receives the report. Section 1(ix) indicates that a “protected disclosure” is a disclosure that is made to (1) a legal advisor; (2) an employer; (3) a member of Cabinet or the Executive Council; or (4) a person or body in accordance with the Act; or (5) that is made generally. The specific procedural details for each of these types of disclosures will be discussed in greater detail in the proceeding section.

Generally the substantive standards can be found in section 1, in the definition of categories of wrongdoing, namely that the person making the disclosure must have a reasonable belief that the information being disclosed shows or tends to show the existence or likely existence of a form of wrongdoing.⁸⁶ Other substantive elements depend on the nature of the recipient of the disclosure. For example, disclosures, except those made to legal advisors, must be made in good faith and “general protected disclosures” have an even higher substantial threshold, which will be discussed in the details of the proceeding section.⁸⁷

⁸⁴ *South Africa Protected Disclosures Act 2000*, section 1(i).

⁸⁵ *Ibid.* at section 1(iv).

⁸⁶ *Ibid.* at section 1(i).

⁸⁷ *Ibid.* at sections 5-9.

Finally, the *PDA* outlines the substantive criteria for the evaluation of “general protected disclosures”. In section 9(3), such a “general disclosure” will be considered reasonable, giving consideration to such factors as (1) the identity of the recipient; (2) the seriousness of the wrongdoing; (3) whether the wrongdoing is continuing or likely to occur in the future; (4) whether the disclosure is made in breach of a duty of confidentiality of the employer to another person; (5) any action that the first recipient of the disclosure might have taken; (6) whether any prescribed procedure was followed; and (7) the public interest.⁸⁸

Analysis:

The *PDA*'s procedural and substantive requirements for protection are not significantly different from other jurisdictions. Nevertheless, the increase in the substantive threshold depending on the recipient of the disclosure is an interesting element in the Act. If a disclosure is made to a legal advisor, there is little if any apparent substantive standard. However, if a disclosure is made generally, to the public or to the media, the substantive standard is much higher, including amongst other things, good faith and the existence of a serious wrongdoing. This approach demonstrates South Africa's emphasis the nature of the recipient of the disclosure. By increasing the substantive threshold according to how far outside the realm of the person making the disclosure's employment the disclosure is reported, the *PDA* implicitly reinforces the importance of internal reporting and handling of disclosures.

The impact of making disclosures according to these procedural and substantive criteria is difficult to assess, again due to the lack of reported activity under the legislation.

Disclosure Procedures

Function:

The *PDA*'s procedures for making disclosures fall under five distinct categories. First, a disclosure will be protected if it is made to a legal practitioner or a person whose occupation involves giving legal advice, if the disclosure is made with the object of obtaining legal advice. Second, a good-faith disclosure made to one's employer within any prescribed procedure, or made to a person authorized by the employer will be considered protected. Third, a disclosure will be protected if made in good faith to a member of Cabinet or Executive Council, if the employer of the person making the disclosure is employed by such an individual or body. Also protected will be a disclosure made in good faith to the Public Protector, the Auditor-General or a prescribed entity whom the person making the disclosure believes usually deals with the relevant wrongdoing and the information disclosed is substantially true.

⁸⁸ *Ibid.* at subsection 9(3).

Finally, any disclosure made in good faith, with reasonable belief that the information is substantially true, and not made for personal gain, excluding any legal reward, will be considered a “general protected disclosure” if any of the following conditions are met: (1) the person making the disclosure has reason to believe they will be subject to reprisal if they disclose to their employer; (2) where no entity is prescribed to handle the relevant wrongdoing and the person making the disclosure has reason to believe evidence will be destroyed; (3) the person making the disclosure has previously made substantially the same disclosure to their employer or prescribed entity and no action was taken within reasonable time; or (4) the wrongdoing is of an exceptionally serious nature.

Analysis:

The significance of South Africa’s disclosure procedures lies in the category of “general protected disclosure”. Under this category, public disclosures, even those made to the media, may potentially be protected.⁸⁹ However, this is an exception to a scheme that predominantly emphasizes internal handling of disclosures.⁹⁰

Investigative Authority

Function:

While the *PDA* does not specify investigative authorities for any particular organization, the Public Protector and the Auditor-General have investigative powers under their respective mandates and separate enabling statutes.

Analysis:

Despite the fact that both the Public Protector and the Auditor-General have investigative abilities under their powers, it is difficult to evaluate their operation in terms of the *PDA*, since there has been no reported activity under this statute in either office.

Enforcement Mechanisms

Function:

The preamble of the *PDA* includes a positive obligation for both employer and employee to report any criminal or irregular conduct in their workplace. Furthermore, employers have a legislative responsibility to ensure that employees are protected from reprisal.

⁸⁹ *Supra* note 7, at 7.

⁹⁰ *Ibid.*

Analysis:

The obligation in the preamble is therefore both symbolic and practical. Such a provision is analogous to the fiduciary duty of corporate directors, insofar as employees and employers are responsible for acting in the public interest to prevent wrongdoing by making disclosures.

Protection from ReprisalFunction:

Section 1(vi) of the *PDA* outlines and prohibits forms of reprisal, otherwise known as “occupational detriment”. According to the statute, reprisal includes disciplinary action, dismissal, suspension, demotion, harassment, transfer, refusal of promotion, and various other forms of personnel actions.⁹¹ Furthermore, section 3 of the *PDA* prohibits “occupational detriment” against an employee “on account or partly on account”⁹² of having made the protected disclosure.

Analysis:

While the Act does not include personnel issues in its categorization of wrongdoing or in the form of a Code of Conduct, the *PDA* does characterize reprisal as related to personnel issues. First, the forms of reprisal are invariably personnel actions, whether they are those listed in the Act itself or just by the nature of reprisal or retaliation in the workplace. Second, under the remedial provisions of the Act, the primary method of recourse is through the Labour Court.

Confidentiality and AnonymityFunction:

Confidentiality is not protected within the *PDA*, however the Public Protector’s policy is to keep the name of a complainant confidential when necessary and if possible.⁹³

Analysis:

The impact of this lack of statutory protection is unclear since there has not been any significant reported activity under the *PDA* thus far.

⁹¹ *Supra* note 84, at section 1(vi).

⁹² *Ibid.* at section 3.

⁹³ *Supra* note 83.

Remedies and Rewards

Function:

The remedies available to individuals subject to reprisal can be found under section 4 of the *PDA*. Essentially, any employee who has or may be subjected to “occupational detriment” may seek recourse through any court of jurisdiction, particularly the Labour Court. Furthermore, any employee who feels they may be adversely affected as a result of making a protected disclosure must be transferred if he or she requests.⁹⁴

Analysis:

The only remedies specifically included in the *PDA* are in relation to reprisal. The *PDA* does not indicate how wrongdoing should be sanctioned. Furthermore, the Act does not specify the actual remedy for reprisal, but rather indicates that individuals may seek redress through the courts. The accessibility and efficacy of such an approach is questionable in comparison with jurisdictions that have specific remedial mechanisms in their disclosure regimes.

However, due to the lack of reported activity under the *PDA* by either the Public Protector, the Auditor General or the courts, it is difficult to measure the success of this approach towards remedies and sanctions.

Discouraging False Claims and Encouraging Disclosure

Function:

There are no explicit provisions in the *PDA* prohibiting false claims.

Analysis:

Despite the lack of an explicit prohibition against false claims, the extensive substantive and procedural requirements for making a protected disclosure may be effective in preventing false claims.

Appeal and Review

Function:

The court system is the main route to seek redress for instances of reprisal.

⁹⁴ *Supra* note 84.

Analysis:

Given the fact that remedies and sanctions under the *PDA* are sought within the court system and/or in labour court, it is logical that any appeal or review would be accessible if and when it applied in that court's jurisdiction.

UNITED STATES

Legislation

Function:

The United States’ legislation dealing with disclosures for public servants is the *Whistleblower Protection Act* of 1989 (s20).

Analysis:

The United States’ legislation has a stronger focus on the actual wrongdoing, compared with the statutes of other countries, which focus more on requirements for protecting the disclosure. This difference is evidenced by the fact that the *WPA* does not include any provisions that require a disclosure to meet certain criteria. The significance of this point will be discussed in further sections. The motivation behind the focus of the *WPA* may be due to the United States’ regime being “predicated on the ideology of freedom of speech”, as discussed in Sheryl Groeneweg’s paper “Three Whistleblower Protection Models”.⁹⁵

Entity

Function:

There are two joint entities responsible dealing with disclosures in the United States. The Office of Special Counsel (OSC) is primarily responsible for receiving, prosecuting and remedying disclosures, while the Merit Systems Protection Board (MSPB) is responsible for enforcing remedies issued by the OSC and even for adjudicating or reviewing the OSC’s decisions.⁹⁶

Analysis:

The joint prosecutorial and adjudicative nature of the OSC and MSPB make these entities distinct from other jurisdictions. The United States is the only disclosure regime that includes a specialized mechanism for reviewing or appealing the decision of the primary entity. The existence of a distinct body like the MSPB is beneficial because it can theoretically deal with disclosure issues more effectively and expertly. The role of the OSC is also unique because its jurisdiction also covers personnel issues. This concept will be discussed further in the proceeding sections.

Public awareness of the OSC can be effectively measured by the Annual Survey Program, which is conducted to gain feedback from persons whose cases were closed during the previous fiscal

⁹⁵ *Supra* note 8 at 19.

⁹⁶ *Supra* note 16 at section 3, subchapter II, section 1213; see also “The Role of the US Office of Special Counsel Handbook” and “MSPB Original Jurisdiction”; www.mspb.gov/anintrotomspbaug01.html.

year. This survey allows the OSC to evaluate its own procedures and determine what improvements need to be made. The survey is divided into two sections, one dealing with the person making the disclosure of prohibited personnel practices, for which the response rate was 36%, and the other with disclosures of wrongdoing, for which the response rate was 34%. Although the response rates do not seem high, they are successful in terms of demonstrating a steady increase; in fact, the combined response rate of 36% was the highest overall since the surveys began in 1995.⁹⁷

Jurisdiction

Function:

The *WPA*'s jurisdiction covers only the public sector. Nevertheless, some government organizations do not fall under the *WPA*'s mandate, including various national defence and intelligence bodies such as the Central Intelligence Agency; the General Accounting Office; the US Postal Service and government corporations. However, certain government corporations are protected from reprisal under the *WPA*. Under the United States statute, all present and former federal employees, or applicants for federal employment may qualify for protection from reprisal. Finally, the OSC does not have jurisdiction to receive disclosures from employees operating under federal grants or contractors, or those paid through non-appropriated funds.

Analysis:

The *WPA*'s jurisdiction is similar to that of most other jurisdictions insofar as it covers and protects only the wrongdoing and the person making the disclosure in the public sector.

Wrongdoing

Function:

The *WPA* includes personnel issues under the definition of "prohibited personnel practices" (PPPs), and traditional categories of wrongdoing. PPPs include discrimination, nepotism, taking or failing to take certain personnel actions that would violate a regulation concerning the merit system, and reprisal. Wrongdoing includes violations of law, gross mismanagement, gross waste of funds, abuse of authority, and substantial or specific danger to public health or safety.

Analysis:

The United States regime is distinct in that it explicitly includes personnel issues in its disclosure legislation.

⁹⁷ *Supra* note 17, at 23.

Criteria for Protection

Function:

The *WPA* does not include specific criteria that disclosures must satisfy before being protected under the Act. On the contrary, the statute indicates that any individual making a disclosure should be protected from PPPs, including reprisal. However the OSC’s Web site indicates certain factors will be considered when the Disclosure Unit is evaluating the disclosures to determine whether or not there is a substantial likelihood of wrongdoing. These factors include whether (1) the disclosure includes reliable first-hand information; (2) there is more than mere speculation of the existence of misconduct; (3) there is information to support the assertion; and (4) there is a substantial likelihood that the information discloses one or more of the categories of wrongdoing.⁹⁸ Moreover, if the person making the disclosure is reporting an alleged case of reprisal, there are certain legal elements that must be present before the OSC can establish that a legal violation has occurred. First, a disclosure must have been made, and second the government department must have actually taken, or threatened to take, or failed to take a personnel action because of the disclosure.⁹⁹

In the case of appeals to the MSPB, the burden of proof is a strong indication of what qualifies as reprisal under the *WPA* scheme. The person making the disclosure must prove on a preponderance of the evidence that the disclosure was a contributing factor in the personnel action that was threatened, taken or not taken as an act of reprisal. In order to qualify as a “contributing factor”, the person making the disclosure must show that (1) the official taking the action knew about the disclosure and (2) the action occurred within a period of time such that a reasonable person would conclude that the disclosure was a contributing factor.¹⁰⁰

Analysis:

Without significant criteria for disclosures or person making the disclosure to satisfy substantively or procedurally, it is likely that the content of the disclosure itself will then determine the actions of the OSC. There are some factors that the OSC uses to evaluate disclosures; these will be discussed further in the later sections.

Even though there are certain evaluative criteria used by the Disclosure Unit to determine the substantial likelihood of wrongdoing, the lack of an explicit legislative burden or standard is indicative of the American focus on the person making the disclosure rather than on the content and nature of the disclosure. This lenient standard would ultimately serve to encourage

⁹⁸ <http://www.osc.gov/wbdisc.htm>.

⁹⁹ United States, Office of Special Counsel, “Complaint of Possible or Prohibited Personnel Practice or Other Prohibited Activity”; Part 2 Reprisal for Whistleblowing, at 4.

¹⁰⁰ <http://www.mspb.gov/q&awhistbloweaug01.html>.

individuals to make disclosures, since there are fewer criteria to satisfy. Moreover, the MSPB's burden of proof for reprisals is unique because it explicitly indicates what qualifies as a reprisal.

Disclosure Procedures

Function:

There is no requirement in the *WPA* for the person making the disclosure to report internally before making a disclosure to the OSC.

Analysis:

The significance of the American disclosure regime's procedures for making disclosures is that the OSC is characterized as the primary body for receiving disclosures. This is an indication that the *WPA* encourages individuals to make disclosures by making the system more accessible. This premise is also demonstrated by the fact that disclosures made to the media are frequently covered under the *WPA*. For example, when the OSC concluded that two border patrol agents, who had made disclosures to the media regarding border security lapses in the wake of the September 11 attacks, had suffered reprisal from the Immigration and Naturalization Service, full corrective relief was ordered and complied with under the *WPA*.¹⁰¹

Investigative Authority

Function:

The OSC's powers of investigation for PPP complaints include the ability to issue subpoenas, order depositions and require employees to testify under oath or respond to formally written questions.¹⁰² However, disclosures of wrongdoing may not be investigated by the OSC. Instead, when the OSC receives a disclosure of wrongdoing, it can only require the head of the department concerned to investigate the matter. The department is required to submit a report of its findings to the OSC.

The evaluation of disclosures of wrongdoing and PPPs is divided in the OSC into two separate units: the Disclosure Unit is responsible for evaluating disclosures of wrongdoing, while the Complaints Unit receives and reviews PPP complaints. Furthermore, the OSC does not have any explicit proactive investigatory powers.

¹⁰¹ *Supra* note 17, at 9.

¹⁰² *Supra* note 15, at section 1212.

Analysis:

The fact that the OSC cannot conduct its own investigations of disclosures of wrongdoing may result in biased and incomplete investigations by the departments involved, since they would undoubtedly have a vested interest in downgrading the existence of wrongdoing. However, the *WPA* includes enforcement mechanisms for the OSC to compel the departments to conduct investigations and submit reports.

Another important issue concerning the investigatory powers of the OSC is the nature of reprisal investigations. The *WPA* considers reprisal to be a PPP; therefore, the investigation will be conducted by the OSC, but the related wrongdoing will be conducted internally by the department involved. The division of these two related matters into two separate external and internal investigations could result in confusion.

Finally, apart from requesting a department to conduct a formal investigation into a disclosure received by the OSC, they may also require the department head to simply conduct a review of the matter and inform the OSC of what action has been or is being taken, under section 1213(g)(2) and with the consent of the person making the disclosure.¹⁰³ This type of procedure indicates that the OSC is thorough and diligent when dealing with disclosures of wrongdoing even in cases that may not produce full investigations; it will attempt to ensure that the matter is dealt with.

Enforcement Mechanisms

Function:

In terms of enforcing the OSC's investigatory powers, the *WPA* includes an explicit provision requiring government departments to comply with the investigations and actions of the OSC. Furthermore, if a government department fails to submit its investigation report, the OSC will notify the President, congressional oversight committees and the Comptroller General, who then have the power to deal with the matter. The OSC can also enforce its investigatory powers by issuing subpoenas for documents or testimony of witnesses. Regarding enforcement of corrective or disciplinary action issued by the OSC, if departments refuse to comply, the matter may be enforced by the MSPB. The MSPB may either enforce corrective or disciplinary action through litigation if a department fails to comply on the request of the OSC. Furthermore, in 2002 the OSC implemented a certification program that outlines a five-step process for departments to use to meet their statutory mandate to inform and educate their employees about the *WPA* and related policies.

¹⁰³ *Supra* note 17, at 18.

Analysis:

The legislative requirement for departments to comply with the OSC is a common mechanism used in many jurisdictions. It is both practical and symbolic of affirming the entity's authority. Furthermore, the OSC generally proceeds to immediately file a complaint with the MSPB when a department refuses to comply. Thus, the deterrent effect has been enhanced by the consistent use of the MSPB to enforce the OSC's directives for corrective and disciplinary action.¹⁰⁴

This deterrence effect is demonstrated in two ways. First, in the past three years the OSC has rarely needed to enforce compliance from departments via MSPB litigation; in 2000 there were only two such cases, in 2001 there were none, and in 2002 there was only one such occurrence. Second, there has been a dramatic decrease in reprisals over the last three years—from 773 reported reprisals in 2000, to 553 in 2002. This indicator, coupled with nearly double the number of favourable actions obtained in reprisal matters, is a strong demonstration of the effective enforcement of the *WPA*'s procedures.

In the first year of its implementation, 12 different government departments have enrolled in the certification program to educate their employees about the *WPA*. According to this measure of participation, it would appear that the OSC is doing relatively well in enforcing its mandate via education and awareness mechanisms. Furthermore, OSC's 2002 Annual Report indicates that the Office of Personnel Management has highlighted participation in the program as a "suggested performance indicator" for success in regard to the President's Management Agenda.¹⁰⁵

Protection from Reprisal

Function:

The *WPA* specifically prohibits acts of reprisal, insofar as "engaging in reprisal for whistleblowing" is one of the 12 listed prohibited personnel practices in the *Role of the US Office of Special Counsel* handbook.¹⁰⁶ Furthermore a person making the disclosure has an individual right of action to seek corrective actions from the MSPB with respect to certain acts of reprisal.¹⁰⁷ The Disclosure Unit of the OSC is responsible for receiving and evaluating disclosures of wrongdoing, which are "separate and distinct from complaints of reprisal"¹⁰⁸, which are reviewed by the Complaints Examining Unit as a PPP.

¹⁰⁴ *Ibid.* at 7.

¹⁰⁵ *Ibid.* at 3.

¹⁰⁶ United States, *Role of US Office of Special Counsel* (Handbook), at 3.

¹⁰⁷ *Supra* note 15, at subchapter III, section 1221.

¹⁰⁸ <http://www.osc.gov.wbdisc.htm>.

Analysis:

The *WPA*'s scheme for protecting from reprisal the person making the disclosure is distinctive insofar as it lists reprisal as a PPP rather than including an explicit provision within the statute that prohibits reprisals generally. Including reprisals as a form of PPP could result in confusion in that the OSC may investigate the reprisal, but not the related wrongdoing, as a PPP.

Confidentiality and Anonymity

Function:

The *WPA* provides that the identity of the person making the disclosure may not be revealed by the OSC without the consent of that person unless the OSC determines that it is necessary because of an imminent danger to public health or safety or an imminent violation of any criminal law.¹⁰⁹ A breach of confidentiality will be made known to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate for appropriate resolution. The OSC is not required to consider anonymous disclosures; any received are generally referred to the Office of the Inspector General in the appropriate government department.

Analysis:

The *WPA*'s protection of confidentiality is strong in comparison to other jurisdictions examined.

Remedies and Rewards

Function:

The OSC may impose corrective and disciplinary actions to remedy findings of wrongdoings or reprisals. If departments do not comply with these actions, the MSPB can enforce them. Furthermore, if anyone is found to have committed a PPP, the MSPB is authorized to remove him or her, reduce their grade, suspend them, reprimand them, bar them from federal employment for up to five years, or fine them up to \$1,000. There is no indication as to whether a person making the disclosure is permitted or prohibited from seeking further or alternate civil remedies in the courts.

Analysis:

The scope of remedial power under the OSC and MSPB is comparable to that of other jurisdictions. However, the ability to issue fines is relatively unique, since the only other jurisdiction to have this ability is Australia. Furthermore, the efficacy of the corrective and

¹⁰⁹ *Supra* note 15, at section 1213(h).

disciplinary actions issued by the OSC stems from the ability to enforce them through MSPB litigation, as discussed above, this has provided a successful deterrent effect for the successful implementation of remedies.

According to the OSC's 2002 Annual Survey on disclosures, 92% of respondents were unsuccessful in obtaining the action sought through the OSC. Nevertheless, approximately half of those respondents indicate that they were relatively satisfied with the services they received on behalf of the OSC. Hence, although the OSC may not always be able to resolve disclosure matters to the satisfaction of the person making the disclosure, generally they are still serving their mandate by providing a competent system for reporting disclosures.

Finally, it should be noted that the United States has a separate piece of legislation entitled the *Federal False Claims Act*, 1986, which allows for citizens to file civil suits on behalf of the government, typically entitled *Qui Tam*. Essentially, a private citizen who has knowledge of fraud against the government may bring the action on behalf of the state to receive, if successful, a percentage of the recovery.¹¹⁰

Discouraging False Claims and Encouraging Disclosure

Function:

There are no explicit provisions in the *WPA* that prohibit the reporting of disclosures made under false pretences or in bad faith.

Analysis:

Since the statute does not contain any criteria or burden of proof in order for the disclosure to be considered protected, there are inadequate measures for discouraging false claims. However, the fact that the OSC does not accept anonymous disclosures may serve that very purpose. Arguably, if the person making the disclosure is required reveal their identity when making disclosures, it would discourage them from making claims without a reasonable belief that wrongdoing existed. This premise is balanced by the fact that the *WPA* scheme is a relatively accessible disclosure regime that permits direct reports to the OSC, includes a low level of criteria for protection and the possibility of protection of the person making the disclosure even when reported to the media.

¹¹⁰ *Supra* note 22.

Appeal and Review

Function:

The decisions and actions of the OSC may be appealed to the MSPB by two means. First, as an “Otherwise Appealable Action” certain acts of reprisal may be directly appealed to the MSPB. Second, other acts of reprisal not directly appealable, may be appealed to the MSPB as part of an “Individual Right of Action” if the individual has already made an allegation to the OSC and the OSC has not sought corrective action on their behalf.

Furthermore, decisions of the MSPB may be reviewed via two mechanisms. The individual making the disclosure may either make a “Petition for Review” and ask the MSPB to review its initial decision, or may request a review of the final MSPB decision by the US Court of Appeals for the Federal Circuit Court. A final exception is that first cases involving allegations of discrimination may be appealed to a US District Court or the Equal Employment Opportunity Commission.

Analysis:

The availability of appeal and review in the United States disclosure regime is generally wider in scope than most other jurisdictions.

KOREA

LegislationFunction:

The *Anti-Corruption Act (ACA)* of 2001 is the legislative basis for Korea's disclosure regime. The purpose of the Act is to create a mechanism for reporting disclosures and protecting the person making the disclosure from reprisal, in the hopes of ridding the civil service and society of corruption in general. Apart from including prohibited acts of wrongdoing in the statute, the *ACA* also includes a *Code of Conduct for Public Officials*. The Code is meant to promote honour, integrity and encourage public officials to refrain from corruption.

Analysis:

The Code does not refer to personnel issues, as do the codes of most other jurisdictions. Rather, the Code in the *ACA* serves as an added obligation for public officials to maintain the integrity of the public sector. The *ACA* has been in operation for only a year, and although records of its impact and effect are thorough, the Korean Independent Commission Against Corruption (KICAC) has conceded in its first Annual Report that "it is difficult to evaluate the performance of a pioneering system that has been operating for less than a year".¹¹¹ Thus far the foundation for a strong disclosure regime in Korea has included the development of the Administrative Operation Guidelines for Whistleblower Protection, the distribution of the *Manual on Whistleblower Protection and Reward*, and the implementation of Comprehensive Measures to Improve the Whistleblower Protection system. Furthermore, the KICAC has commissioned a professional research institute to identify best practices by studying whistleblower protection systems in other countries.¹¹²

EntityFunction:

Article 10 of the *ACA* establishes the Korean Independent Commission Against Corruption. Members of the KICAC are appointed by the President, based on criteria set by presidential decree. They, along with the Chairman, serve terms of three years, and may be reappointed only once. Article 15 of the *ACA* states that the Commission shall perform its work independently. The KICAC is responsible for various forms of corruption monitoring and reporting procedures and rectification operations, including whistleblowing. The Commission includes a Legal Affairs Management Officer, a Policy Planning Officer, a Public Relation Cooperation Bureau and a Report Inspection Bureau. Ultimately, the KICAC is responsible for handling corruption reports,

¹¹¹ *Supra* note 12, at 155.

¹¹² *Ibid.*

protecting the person making the disclosure, operating the compensation and reward systems and investigating disclosures of wrongdoing and reprisal.

Analysis:

The distinction between the KICAC and the external entities of other jurisdictions is that the KICAC is explicitly empowered by the *ACA*. The external entities of other jurisdictions are established by a separate enabling statute and simply mentioned in their respective disclosure legislation as being a party eligible to receive disclosures under specific provisions. Furthermore the KICAC’s organizational structure demonstrates that the Commission is responsible for almost every facet of implementing the policies and provisions of the *ACA*, from education and awareness, to policy development, to the handling of disclosures.

Jurisdiction

Function:

The *ACA* covers acts of wrongdoing committed by civil service employees and public officials. The KICAC has divided this area of its jurisdiction into sectors including the Administrative Sector, Judicial Sector, Political Sector, Corporate Sector, Civil Society and International Cooperation Sector, Execution and Assessment System of Corruption Prevention Measures. However, while the *ACA* covers only wrongdoing in the public sector, the jurisdiction of who may report disclosures extends to anyone aware of wrongdoing—whether in the public or private sector.¹¹³

Analysis:

The jurisdiction of the *ACA* is distinct because the statute focuses on wrongdoing that arises in the public sector but is open to receiving disclosures from anyone, be it private or public sector. This approach reaffirms the message that the priority of the Korean legislative scheme is to uncover corruption. By dividing up their mandate into these specific categories, the KICAC is able to tailor its policies and procedures accordingly.

Wrongdoing

Function:

The acts of wrongdoing in the *ACA* are defined as “acts of corruption”. Included in the definition of “acts of corruption” are (1) any act of a public official to seek gain for himself or any third party by abusing his position or authority or violating acts and subordinate statutes in connection with his duties; and (2) any act causing damage to the property of any public entity in violation

¹¹³ *Supra* note 14, at chapter 3, article 25.

of acts and subordinate statutes, in the process of executing the budget of the relevant public entity, acquiring, managing, or disposing of the property of the relevant public entity, or entering into and executing a contract to which the relevant public entity is a party.¹¹⁴

Analysis:

The categorization of wrongdoing in the *ACA* is distinct because the Act groups together various types of wrongdoing under all-encompassing definitions. Also, the definitions are significant because they highlight corruption as a general prohibited act that could take various forms. In the first year of its enactment, the *ACA* has produced 137 cases reported to the KICAC. Of the 137 reports, 27.7% or 38 cases were found to be substantiated disclosures of wrongdoing; of those, 34 cases have been completed. As a result, the KICAC referred 27 to relevant authorities, while the remaining 7 were resolved without referral.¹¹⁵ Some of the issues raised in the disclosures at the KICAC include: neglect of duty by officials, waste of budget, irregularities in public corporation bidding, profiteering of local government officials, illegal lending, unjust operation of staff, unfair operation by a public official, abuse of authority, receipt of gratuities and gifts, and dishonest reimbursement.¹¹⁶

Criteria for Protection

Function:

Under article 27 of the *ACA*, the person making the disclosure is required to make disclosures in good faith. When making disclosures, evidence attesting to the wrongdoing must be included.¹¹⁷

Analysis:

The criteria for a disclosure to qualify for protection under the *ACA* is not very strict. While good faith is included explicitly within the *ACA*, it is interesting to note that the KICAC's Annual Report makes reference to the presumption of good faith by the mere fact that an individual has chosen to make a disclosure. Furthermore, although there are no internal mechanisms explicitly provided for in the *ACA*, it appears that such procedures do exist—but the main purpose of the Act is to facilitate outside disclosures to the KICAC. These suggestions are evidenced by the Annual Report statement to the effect that an individual who makes a disclosure of wrongdoing to the KICAC is seen to have “decided with reasonable judgement that the internal mechanism for reporting the issue at hand serves as an obstacle in addressing the situation”.¹¹⁸

¹¹⁴ *Ibid.* at article 2.

¹¹⁵ *Supra* note 12, at 131.

¹¹⁶ *Ibid.* at 134-137.

¹¹⁷ *Supra* note 14, at article 28.

¹¹⁸ *Supra* note 12, at 129.

Disclosure Procedures

Function:

Under the *ACA*, individuals may make disclosures directly to the KICAC. The statute does not contain any requirement or encouragement to disclose internally. There are two categories of procedures for the receipt and handling of disclosures. First, when a “High-Ranking Public Official” is involved, the KICAC will receive and confirm the facts of the disclosure and then file the accusation with the Public Prosecutor’s Office (PPO)—if it is substantiated. The PPO will then conduct the investigation and notify the KICAC of the results. The KICAC may then apply for adjudication with the High Court, if the PPO’s findings warrant such an action. Finally, the KICAC will notify the person making the disclosure of the actions taken. Second, if a “Non-High-Ranking Public Official” is involved, the KICAC will refer the substantiated disclosure to the relevant “investigative body”, who will conduct the investigation and notify the KICAC of the results. The KICAC may then request a reinvestigation, if necessary, or take measures to remedy the situation and notify the person making the disclosure of the actions taken.¹¹⁹

Standard procedures for the KICAC’s internal operations for handling disclosures have been implemented, including trace logs on investigation records, a standardized investigation process, ensuring no conflicts of interest in investigations, safeguarding confidentiality and the involvement of the person making the disclosure in the prosecution of applicable disclosure cases.¹²⁰

Analysis:

The overall scheme of the *ACA* is tailored to encourage external reporting directly to the KICAC. The policy reasons for external reporting, as given in the Annual Report, are to “reinforce horizontal and bottom-up administrative responsibility, and prevent civil servant corruption”.¹²¹ This statement demonstrates the desire to encourage public servants to make disclosures as part of their service to the public and their government.

¹¹⁹ Korea, “How to Handle Whistle-Blowings – KICAC Procedures”; http://www.kicac.go.kr/PORTAL/Eng/How/how_01.jsp.

¹²⁰ *Supra* note 12, at 153.

¹²¹ *Ibid.* at 120.

Investigative Authority

Function:

The *ACA* empowers the KICAC with a proactive power to recommend to heads of departments to improve their institutions for the prevention of corruption.¹²² These recommendations may be accompanied with a deadline.¹²³ Furthermore, article 21 of the *ACA* provides the KICAC with traditional investigatory powers such as hearing witnesses and opinions.¹²⁴ Article 29 outlines the general investigative authority of the KICAC in terms of how disclosures may be handled. The Commission will refer cases to the appropriate authorities, defined as “investigative agencies”, or to the authority responsible for supervising the relevant department.¹²⁵ This “investigative agency” is responsible for completing the inspection of the case within 60 days and for notifying both the department involved and the KICAC with its report. The KICAC will then relay a summary of the results to the person making the disclosure. Essentially, the KICAC plays a supervisory role in the investigation of disclosures by the “investigative agency” and may ask for the agency to launch the inspection again and present reasonable grounds or new evidence if the Commission is unsatisfied with the initial results.¹²⁶ Furthermore, under article 33, allegations of reprisal and requests for remedy for reprisal may also be investigated by the KICAC as an event distinct from the investigation into the disclosure of wrongdoing.¹²⁷

Analysis:

Although the *ACA* does not explicitly state that the KICAC has the proactive ability to investigate, the provision does allow the Commission to recommend “when it deems necessary”. Hence article 20 essentially implies that the KICAC may draw its own conclusions based on its own research and make its recommendations accordingly. The KICAC’s approach to investigating reprisals is unique because it permits them to protect other parties to the disclosure, such as witnesses, from reprisal. This element will be discussed further in the later sections.

¹²² *Supra* note 14, at article 20.

¹²³ *Ibid.* at article 13.

¹²⁴ *Ibid.* at article 21.

¹²⁵ *Ibid.* at article 29.

¹²⁶ *Ibid.* at article 30.

¹²⁷ *Ibid.* at article 33.

Enforcement Mechanisms

Function:

The Korean disclosure regime includes various methods of enforcing the policies and provisions of the *ACA*. First, article 6 places an obligation on citizens to cooperate with public organizations’ anti-corruption policies and programs.¹²⁸ Articles 20(2) and (3) impose a responsibility on departments to take into account the recommendations made by the KICAC. The investigative powers of the KICAC are enforced by article 21(4) of the *ACA*, which stipulates that departments are required to comply with requests for information.¹²⁹ Furthermore, public officials are obligated under article 26 to make disclosures should they become aware of such “acts of corruption”.¹³⁰ The KICAC has also established implementation guidelines for the *ACA* that each department must follow.

Analysis:

The enforcement mechanisms in the *ACA*’s provisions and the KICAC’s procedures are extensive. The significance of these tools is that they act on both sides of the issue, from proactive obligations to reactive requirements.

Protection from Reprisal

Function:

The person making the disclosure, witnesses to wrongdoing, and cooperators in disclosure investigations are explicitly protected from reprisal under article 32 of the *ACA*. Any of these individuals who has suffered reprisal may request the Commission to take measures to guarantee their position, including reinstatement or transfer. Furthermore, *ACA* extends their protection to physical protection by the police, upon request to the Commission.¹³¹

Analysis:

The reprisal protection scheme in Korea is unique because cooperators or witnesses are explicitly protected in the *ACA* and the Act offers physical protection to individuals who make such a request. Korea’s disclosure regime stands out in offering the most protection to individuals under the *ACA*. Requests for employment protection were relatively low in the first year of the *ACA*’s enactment. In total, there were only seven requests for protection, four for employment and three for physical safety. Protection issues are handled and investigated separately from the initial

¹²⁸ *Ibid.* at article 6.

¹²⁹ *Ibid.* at article 21.

¹³⁰ *Ibid.* at article 26.

¹³¹ *Ibid.* at article 33.

disclosure of wrongdoing. Ultimately, the KICAC will investigate and review requests for protection from reprisal or physical protection and determine if and what action should be taken.

Confidentiality and Anonymity

Function:

The *ACA* contains an explicit prohibition against the release of any confidential information by members or staff of the Commission or other individuals designated to perform the work of the Commission.¹³² Also, article 33(1) of the *ACA* prohibits the Commission and any employee of an “investigative entity” from disclosing or suggesting the identity of the person making the disclosure without their consent.¹³³ If confidentiality is breached, the KICAC will request an investigation into the breach and take disciplinary action against the offender.

Analysis:

The confidentiality provisions of the *ACA* are much stronger than those found in many other jurisdictions. Although there has yet to be any information reported on the effectiveness of the confidentiality provisions, the legislation sends a strong message that the person making the disclosure can make disclosures with trust in the KICAC.

Remedies and Rewards

Function:

Specific remedies available in the *ACA* include transfers or reinstatements for those who are subject to reprisal. Furthermore, the KICAC may ask the relevant disciplinary officer to take disciplinary action against anyone who commits an act of reprisal in violation of the Act.¹³⁴ Korea also has a distinct reward system included in its disclosure legislation. Article 36 of the *ACA* establishes a reward and compensation mechanism for substantiated disclosures of wrongdoing. Individuals may apply to the KICAC for a reward if a disclosure results directly in the recovery of money or assets by, or increases revenues or reduces the costs of, government departments. The Commission’s Reward Deliberation Board will review the request and determine whether there was actual recovery of money or assets, an increase in income, or cost savings. The size of the reward ranges from 2 to 10% of the actual gains. Finally, the KICAC also has an award system that applies to the person making the disclosure. The KICAC will

¹³² *Ibid.* at article 15.

¹³³ *Ibid.* at article 33(1).

¹³⁴ *Ibid.* at article 32(8).

nominate candidates to receive the government award based on criteria in the *Awards and Decorations Act*.¹³⁵

Analysis:

Of the 28 disclosure cases handled by the KICAC, five requests were made for protection or rewards. In one case, a person making the disclosure was compensated for a disclosure of a dishonest reimbursement of travel expenses. The KICAC has various initiatives in place to improve their unique reward system. First the Commission plans to ease the qualifications for reward payments and increase the amount available to the person making the disclosure.¹³⁶ The KICAC is also looking into developing a system to offer personnel-related incentives, such as promotions to the person making the disclosure, that meet certain criteria for upholding integrity in the public service.¹³⁷ Another initiative is to extend the offering of rewards beyond situations of money recovery to instances where disclosures have prevented losses for a government department or served the public interest, such as enhancing anti-corruption awareness.¹³⁸

Discouraging False Claims and Encouraging Disclosure

Function:

To discourage false claims, article 27 imposes an obligation to make disclosures in good faith and expressly indicates that individuals who make false reports, and who knew or could have known that their report was false, will not be protected under the *ACA*.¹³⁹ Furthermore, the punishment for making a false claim ranges from imprisonment for not less than one year to not more than 10 years. A strong encouragement for individuals to make disclosures is the reward and compensation system.¹⁴⁰

Analysis:

The establishment of the KICAC and the *ACA* has encouraged individuals to report disclosures, as evidenced by an 11% increase in disclosures of wrongdoing over general complaints to the KICAC. Furthermore, the KICAC has firm programs in place to “strengthen education and promotional activities to enhance the participation of the public in the anti-corruption drive”.¹⁴¹

¹³⁵ *Supra* note 12, at 162.

¹³⁶ *Ibid.* at 40.

¹³⁷ *Ibid.* at 159.

¹³⁸ *Ibid.* at 167.

¹³⁹ *Supra* note 14, at article 27.

¹⁴⁰ Korea, “Function and Roles of the KICAC”, http://www.kicac.go.kr/PORTAL/Eng/About/about_03.jsp.

¹⁴¹ *Supra* note 12, at 139.

The *ACA*'s prohibitions against false claims—especially the significant punishments available—are much stronger than many other jurisdictions'.

Appeal and Review

Function:

There are no explicit provisions regarding whether or not the decisions of the KICAC are available for review or appeal.

Analysis:

The KICAC referral approach may provide an explanation for a lack of information on review or appeal procedures. The KICAC refers investigations of wrongdoing to relevant “investigative agencies” or to the Public Prosecutor if a high-ranking public official is involved. Therefore, at least in the case of high-ranking public officials, any review or appeal will be conducted according to the relevant court procedures once the prosecution has begun.

ISRAEL

Legislation

Function:

The *State Comptroller Law (SCL)* lays out the rules for Israel’s disclosure Regime. The Law outlines the structure of the State Comptroller and the Office of the Ombudsman, along with the procedures for making disclosures of wrongdoing and protecting individuals from reprisal.

Analysis:

The difference between the *SCL* and the legislation of other jurisdictions is that Israel’s legislation adopts a broad principled approach, targeting corrupt or improper acts in general. This premise is evidenced by the characterization of wrongdoing in a general definition of corruptive acts.

Entity

Function:

The Office of the Ombudsman is responsible for receiving and handling disclosures. The Ombudsman is a distinct entity within the State Comptroller’s Office. The State Comptroller audits government systems in general, while the Ombudsman deals specifically with investigations of wrongdoing, as reported in disclosures. The Ombudsman must submit an Annual Report to the Knesset accounting for the year’s activities and disclosures.¹⁴²

Analysis:

The relationship between the State Comptroller and the Ombudsman is beneficial because the disclosures received by the Ombudsman can point to systemic problems in government operations that the Comptroller can identify as requiring an official audit.¹⁴³ This relationship has a significant effect on the investigative powers of the Ombudsman, along with the general enforcement of the *SCL* and the Ombudsman’s recommendations.

¹⁴² *Israel State Comptroller Law*, section 46(a).

¹⁴³ Israel, The Ombudsman Web site: The State Comptroller and Ombudsman; <http://www.mevaker.gov.il/serve/site/english/eombuds-intro.asp>.

Jurisdiction

Function:

The Office of the Ombudsman may receive disclosures from anyone in the public or private sector.¹⁴⁴ Disclosures of wrongdoing may be made against any organization or their employees that qualify for audit by the State Comptroller's Office, which includes most government departments.

Analysis:

The jurisdictional scheme of the *SCL* and the Ombudsman is similar to that of Korea, insofar as only wrongdoing in the public sector is covered, but disclosures from either sector are acceptable. Similar to Korea, this structure indicates a policy that emphasizes the eradication of corruption in general, rather than any specific emphasis on types of wrongdoing or on the person making the disclosure.

Wrongdoing

Function:

Section 37 of the *SCL* defines what types of wrongdoing may be the subject of a disclosure. There are two broad categories of wrongdoing in this provision: (1) an act directly injurious to, or directly withholding a benefit from, the person making the disclosure; and (2) if the person making the disclosure is a Member of the Knesset, an act directly injurious to, or withholding a benefit from, another person, contrary to law or done without lawful authority or contrary to good administration, or involving too inflexible an attitude.

Analysis:

In the last 10 years, since the provisions for making disclosures and reprisal protection have been in place, the Ombudsman has received a generally consistent number of disclosures at 6000-7000 per year.¹⁴⁵ Half of those cases were decided on the matter at issue, with 35% of disclosures found to be justified.¹⁴⁶ A survey of some cases highlighted in the 2000-2001 Annual Report revealed that types of wrongdoing included termination as reprisal and the unauthorized use of power.¹⁴⁷

¹⁴⁴ *Supra* note 142, at section 33.

¹⁴⁵ *Supra* note 13.

¹⁴⁶ *Supra* note 13.

¹⁴⁷ *Supra* note 13.

Israel is the only jurisdiction with a specific requirement for the person making the disclosure to be the direct target of the wrongdoing; other jurisdictions permit disclosures to be made about general acts of wrongdoing that the person making the disclosure has knowledge or a substantial belief in. As a result, the wrongdoing complained of in Israel is more personal in nature. However, the balance to this narrow approach to wrongdoing is that the Ombudsman's investigations into these more personal acts of wrong will influence the decisions of the State Comptroller to audit departments that demonstrate larger systemic acts of wrongdoing.

Criteria for Protection

Function:

Section 40(a) of the *SCL* states that the Ombudsman will not investigate vexatious and frivolous disclosures, thereby implying that disclosures require reasonable belief and good faith. Moreover, disclosures are subject to a *locus standi* requirement, namely that the wrongdoing must have somehow directly affected the person making the disclosure, unless the person making the disclosure is a member of the Knesset.

Analysis:

The *SCL*'s criteria for protection are not particularly rigid. Apart from a general good-faith requirement, the legislation requires only that the disclosure be related to an act of wrongdoing. However one important distinction between Israel's criteria and those of other jurisdictions is the requirement that the wrongdoing have a direct relation to the person making the disclosure, unless the person making the disclosure is a member of the Knesset. The significance of this distinction was discussed in the previous section.

Disclosure Procedures

Function:

The procedures for making a disclosure under the *SCL* are simply to make a complaint to the Ombudsman. The statute does not require any form of internal reporting. The Ombudsman will receive a good faith disclosure of wrongdoing from anyone.

Analysis:

The procedure for making disclosures in Israel is similar to the Korean and American disclosure regimes because internal reporting is neither required nor encouraged. Instead, the Ombudsman is characterized as the principle entity for receiving and handling disclosures of wrongdoing. Ultimately, this makes for greater accessibility for the person making the disclosure.

Investigative Authority

Function:

Section 41(a) of the *SCL* grants the Ombudsman the power to investigate wrongdoing as he thinks fit. The Ombudsman is not bound by rules of procedure or rules of evidence when conducting his investigation¹⁴⁸. Upon completion of his investigation, the Ombudsman will summarize his findings and notify the person making the disclosure and the individual alleged to have committed the wrongdoing of what, how and by when the matter needs to be rectified.¹⁴⁹

Analysis:

The Ombudsman's investigative procedures are distinct from those of other jurisdictions because they are explicitly "inquisitorial"; hence, the strong enforcement mechanisms and the fact that rules of procedure and evidence do not apply. Although the Ombudsman's office does not have explicit proactive investigative powers, its work in conjunction with the State Comptroller's office serves a proactive function. While the Ombudsman focuses on reactive investigations into the disclosures it receives, these investigations influence the Comptroller's proactive decisions regarding which systems require audits.

Enforcement Mechanisms

Function:

The *SCL* requires individuals to comply with the Ombudsman's investigations.¹⁵⁰ The body that receives the Ombudsman's findings after an investigation must notify the Ombudsman of the steps that will be taken, and if it fails to do so, the Ombudsman may bring the matter to the relevant minister or committee responsible for that body.¹⁵¹

Analysis:

As with most of the entities responsible for handling disclosures and reprisal, the credibility of the Ombudsman's Office lies in the public perception of his authority and effectiveness. Hence, "much of the force of his/her recommendations emanates from his/her standing in the eyes of the bodies concerned".¹⁵² Accordingly, enforcement of the *SCL* and the Ombudsman's directions can be influenced by the Ombudsman's annual report to the Knesset, since "the possibility of inclusion in the report, with the subsequent confrontation in the Committee on State Audit

¹⁴⁸ *Supra* note 142, at section 41(a).

¹⁴⁹ *Ibid.* at section 43(a).

¹⁵⁰ *Ibid.* at section 41(b), (c) and (d).

¹⁵¹ *Ibid.* at section 43(b).

¹⁵² Israel, "Spotlight on Israel: The State Comptroller and Ombudsman"; <http://www.mfa.gov.il/mfa>.

Affairs and publication in the media... carries its weight".¹⁵³ Although the Ombudsman's decisions and remedies are limited recommendations, there have been only a few exceptions over the years where government departments did not comply.¹⁵⁴

Protection from Reprisal

Function:

In 1991 the Ombudsman was granted the authority to protect the person making the disclosure from reprisal, if the person made a disclosure in good faith.¹⁵⁵

Analysis:

The *SCL*'s provisions for protection from reprisal are not very strict. The statute provides for protection in the form of discretionary remedies by the Ombudsman, including transfers or reinstatements. However, prohibition against reprisal and protection in the form of specific mechanisms are relatively weak. Essentially, this approach reinforces the perception that the purpose of the disclosure regime in Israel is to eliminate corruption in general, rather than specifically handle disclosures and reprisals.

Confidentiality and Anonymity

Function:

The State Comptroller Law requires the person making the disclosure to indicate their name and address when making a disclosure; thus it is unlikely that the Ombudsman will accept an anonymous claim.

Analysis:

Confidentiality is not explicitly discussed in the *SCL*, nor is the receipt of anonymous claims.

Remedies and Rewards

Function:

The range of remedies available to the Ombudsman includes any relief or right available to a court or tribunal.¹⁵⁶ In a case of reprisal, the Ombudsman may grant reinstatement or transfers.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Supra* note 143.

¹⁵⁶ *Supra* note 142, at section 45(a)(1).

Furthermore, special compensation may be awarded to the employee, in the form of money or rights, as a remedy for reprisal.¹⁵⁷

Analysis:

The remedies available to the Ombudsman in regard to wrongdoing are not specified at all; rather, the Ombudsman has discretion to grant any right or remedy so long as it does not exceed that which would be otherwise available in court. This discretion is quite vague for a system such as Canada's. However, in Israel, where the Ombudsman operates under an inquisitorial model, such wide-reaching discretion over remedial provisions may not be a problem.

Discouraging False Claims and Encouraging Disclosure

Function:

The Ombudsman will not investigate vexatious or frivolous claims intended merely to annoy.¹⁵⁸

Analysis:

While there are no explicit prohibitions against false claims in the *SCL*, they are discouraged by the fact that the Ombudsman will not consider such disclosures. However, since the Ombudsman does not place restrictions on who may make disclosures, individuals are also generally encouraged to come forward with reports of wrongdoing.

Appeal and Review

Function:

The Ombudsman cannot prevent a person making the disclosure from exercising any right or applying for any other relief to which the person is entitled.¹⁵⁹ Section 45(b) indicates that the Ombudsman's decisions or findings regarding disclosures are not reviewable by a court.¹⁶⁰ However, specific bodies may request the Ombudsman to review his or her own decision in some circumstances. First, the Attorney General may request the Ombudsman to reconsider a remedial decision. Second, the Civil Service Commissioner may make the same request in the case of a disclosure by a public service employee. Finally, the head of the audited body may make the same request when the person making the disclosure is not a public servant.

Analysis:

The Ombudsman has not reported any apparent cases of review or appeal.

¹⁵⁷ *Supra* note 143.

¹⁵⁸ *Supra* note 142, at section 40(a) .

¹⁵⁹ *Ibid.* at section 45(a)(2).

¹⁶⁰ *Ibid.* at section 45(b).

Part Three – Quick-Reference Database

Criteria	United Kingdom	Australia	New Zealand	South Africa	United States	Korea	Israel
Legislation	<p><i>Public Interest Disclosure Act</i></p> <p>The Act's purpose is to allow for disclosures to be made and offer protection from reprisal.</p>	<p><i>Public Service Act</i></p> <p>The Act's purpose is to govern all matters of public service employment.</p>	<p><i>Protected Disclosures Act</i></p> <p>The Act's purpose is to allow for disclosures to be made and offer protection from reprisal.</p>	<p><i>Protected Disclosures Act</i></p> <p>The Act's purpose is to allow for disclosures and to eradicate illegal and irregular activity.</p>	<p><i>Whistleblower Protection Act</i></p> <p>The focus of the Act is on the actual wrongdoing and protecting the person making the disclosure.</p>	<p><i>Anti-Corruption Act</i></p> <p>The purpose of the Act is to eliminate corruption in general from the public service.</p>	<p><i>State Comptroller Law</i></p> <p>The purpose of the Act is to establish the structure for handling complaints, audits and corruption issues and to eliminate corruption from the public service.</p>
Entity	<p><i>Office of the Civil Service Commissioners</i></p> <p>Independent, appointed by the Crown, receives public sector disclosures as a last resort.</p>	<p><i>Public Service Commissioner and Merit Protection Commissioner</i></p> <p>Both have larger mandates concerning employment in the public service.</p>	<p><i>Ombudsmen, Auditor-General, Solicitor General and more...</i></p> <p>Several pre-existing entities are permitted to receive disclosures.</p>	<p><i>Public Protector and Auditor-General</i></p> <p>Several entities may receive disclosures, these two being the principle external bodies. Both are independent and have broader pre-existing mandates.</p>	<p><i>Office of Special Counsel and Merit Systems Protection Board</i></p> <p>Both are independent. The OSC prosecutes and receives disclosures, while the MSPB adjudicates applicable decisions.</p>	<p><i>Korean Independent Commission Against Corruption</i></p> <p>An independent body, appointed by the President, responsible for all facets of the disclosure regime,</p>	<p><i>Office of the Ombudsman and State Comptroller's Office</i></p> <p>Both independent bodies. The Ombudsman receives and handles specific disclosures, while the Comptroller functions as the government auditor.</p>

Criteria	United Kingdom	Australia	New Zealand	South Africa	United States	Korea	Israel
Jurisdiction	Public and private sector are covered for wrongdoing and protected from reprisal.	Public service employees are covered for wrongdoing and protected from reprisal.	Public and private sector are covered for wrongdoing and protected from reprisal.	Public and private sector are covered for wrongdoing and protected from reprisal.	Public service employees are covered for wrongdoing and protected from reprisal.	Public service wrongdoing is covered. However, all individuals, regardless of sector, are protected from reprisal.	Public service wrongdoing is covered. However, all individuals, regardless of sector, are protected from reprisal.
Wrongdoing	Traditional categories of serious wrongdoing are prohibited in the Act, and other inappropriate conduct is included under a Code of Conduct.	Appropriate and inappropriate forms of conduct are outlined in a Code of Conduct.	Traditional categories of serious wrongdoing are prohibited in the Act.	Traditional categories of serious wrongdoing are prohibited in the Act.	Traditional categories of serious wrongdoing are prohibited in the Act and other inappropriate conduct. Reprisal is considered a breach of the Act.	Traditional categories of serious wrongdoing are prohibited under general broad definitions of “acts of corruption”.	Traditional categories of serious wrongdoing are prohibited under general broad definitions of “acts of corruption”.
Substantive Criteria	Good faith and reasonable belief.	The wrongdoing should have occurred in some connection with the employment.	The person making the disclosure must have reasonable belief and is disclosing so that the wrongdoing can be investigated and wants the disclosure to be protected.	Good faith and reasonable belief were the basic substantive requirements. The more external the disclosure, the higher the substantive criteria, including the seriousness of the wrongdoing.	No explicit substantive criteria. However, the burden of proof for a reprisal is merely that the disclosure was a “contributing factor”.	Good faith is the basic criteria.	Good faith and reasonable belief are the basic requirements. However, the wrongdoing must have directly affected the person making the disclosure, unless he is a member of the parliament, then he may make disclosures about 3 rd parties.

Criteria	United Kingdom	Australia	New Zealand	South Africa	United States	Korea	Israel
Procedural Criteria	Internal reporting at the first instance is required, with few exceptions. Documentation must be shown to the OCSC to demonstrate internal procedures were exhausted.	Internal reporting is not required, but is encouraged in the procedural guidelines and related policies.	Internal reporting at the first instance is required with few exceptions. The Act includes the criteria for making disclosures at each level, from internal to the external entity.	Internal reporting is encouraged but not required. The Act sets out five procedures for making disclosures, starting from an internal to a general public disclosure.	No internal reporting is required at any instance.	No internal reporting is required at any instance.	No internal reporting is required at any instance.
Investigation	Reactive ability to investigate when disclosures are received.	The PSC has the ability to conduct reactive and proactive reviews of public service matters, but the MPC may only conduct reactive inquiries into disclosures.	The entities permitted to receive disclosures may investigate according to their individual, pre-existing enabling statutes.	The investigative abilities of the entities who receive disclosures would depend on their individual, pre-existing enabling statutes.	The OSC only has the ability to supervise the departments' internal investigations into wrongdoing. However, it can investigate reprisals themselves.	The KICAC has reactive abilities to investigate disclosures it receives, and proactive recommendatory power over the departments.	The Ombudsman has the power to investigate as he sees fit. These investigations are explicitly inquisitorial in nature.
Enforcement	Recommendatory power to government departments.	Recommendatory power to government departments.	Government departments must comply with internal procedures according to the Act.	The Act includes a positive obligation for individuals to report wrongdoing and for employers to protect their employees from reprisal.	The Act includes an obligation for departments to comply with the OSC; if they refuse, the MSPB may enforce certain decisions with adjudication.	The Act includes a positive obligation for individuals to comply with the provisions. Departments are also legislatively required to comply with recommendations made by the KICAC.	The Act requires compliance with the Ombudsman's investigations.

Criteria	United Kingdom	Australia	New Zealand	South Africa	United States	Korea	Israel
Reprisal	Affirmative protection from reprisal included in <i>PIDA</i> . Only the person making the disclosure is protected from reprisal.	Reprisal is explicitly prohibited and is included as a breach of the Code. Only the person making the disclosure is protected from reprisal.	A right to grievance action is provided as a protection from reprisal. Only the person making the disclosure is protected from reprisal.	Reprisal is explicitly prohibited in the Act. Various sanctions are included. Only the person making the disclosure is protected from reprisal.	Reprisal is explicitly prohibited in the Act. Only the person making the disclosure is protected from reprisal.	Reprisal is explicitly prohibited in the Act. Cases of reprisal are investigated and handled as distinct events. The person making the disclosure, cooperators and witnesses are all protected.	Reprisal is protected, but not a major priority in the policies and provisions concerned.
Standards	No explicit mention of standards of fairness or natural justice.	Principles of fairness and natural justice are explicitly included in policies and procedures.	The internal procedures for government departments to satisfy include principles of natural justice.	No explicit mention of standards of fairness or natural justice.	No explicit mention of standards of fairness or natural justice.	No explicit mention of standards of fairness or natural justice.	The Act explicitly exempts the Ombudsman from having to comply with rules of evidence and procedures.
Confidentiality	No explicit provision for protection of confidentiality in <i>PIDA</i> . Policies of OCSC state that confidentiality will be protected where possible.	Confidentiality is explicitly protected, and a breach qualifies as a breach of the Code.	Confidentiality is explicitly protected in the Act. Consent from the person making the disclosure is required, with few exceptions. An exemption to the <i>Access to Information Act</i> is available if the person making the disclosure does not wish to be identified.	The Act does not explicitly protect confidentiality. However the policies of the Public Protector indicate confidentiality will be protected when necessary and if possible.	The Act expressly requires the consent of the person making the disclosure in order to reveal the person's identity, with few exceptions. A breach of confidentiality will be investigated and handled by authorities.	The Act explicitly protects confidentiality. Any breach will be investigated and handled like a form of wrongdoing.	Confidentiality is not explicitly discussed.

Criteria	United Kingdom	Australia	New Zealand	South Africa	United States	Korea	Israel
Anonymity	No indication as to whether anonymous claims will be accepted.	No indication as to whether anonymous claims will be accepted.	No indication as to whether anonymous claims will be accepted.	No indication as to whether anonymous claims will be accepted.	The Act expressly indicates the OSC is not required to consider anonymous claims.	No indication as to whether anonymous claims will be accepted.	No indication as to whether anonymous claims will be accepted.
Remedy and Sanction	An employment tribunal may award compensation or an interim order to restore employment.	Six specific penalties are included in the Act to sanction a breach of the Code.	A grievance action is the principal remedy for reprisal. Other remedies are left to the discretion of each individual entity that might receive a disclosure.	Remedies under the Act may be sought through applicable courts of jurisdiction, such as labour court.	Corrective and disciplinary actions may be imposed by the OSC. The MSPB may enforce these actions and issue other sanctions including suspension and fines.	The Act includes specific remedies available for reprisal.	The Act restricts the available remedies and sanctions only to those that would normally be available to the courts.
Reward	No reward system.	No reward system.	No reward system.	No reward system.	No reward system for the disclosure regime. However there is a separate <i>Qui Tam</i> statute.	Rewards may be offered if disclosures save resources.	No reward system.
False Claims	No explicit prohibition against false claims.	Policies state that frivolous and vexatious disclosures will not be investigated.	False claims are expressly prohibited in the Act.	No explicit prohibition against false claims.	No explicit prohibition against false claims.	The Act explicitly states that false claims will not be protected.	The Act explicitly states that false claims will not be investigated.

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Appeal and Review	No further appeal of an OCSC decision.	Judicial review on error of law is available.	Any available appeal or review would likely depend on the enabling statute and jurisdiction of each individual entity entitled to handle disclosures.	Since remedies are sought only through the courts, any available appeal or review would depend on procedures of that venue.	MSPB is the first stage of review. Those decisions may be reviewed by the US Court of Appeals or the Federal Circuit Court.	Some disclosures may be appealed, since they are handled by the Public Prosecutor. Generally there are no explicit provisions concerning appeal or review.	No court review, but the Attorney General, Civil Service Commissioner or the body being audited may request the Ombudsman to review his or her decision.

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