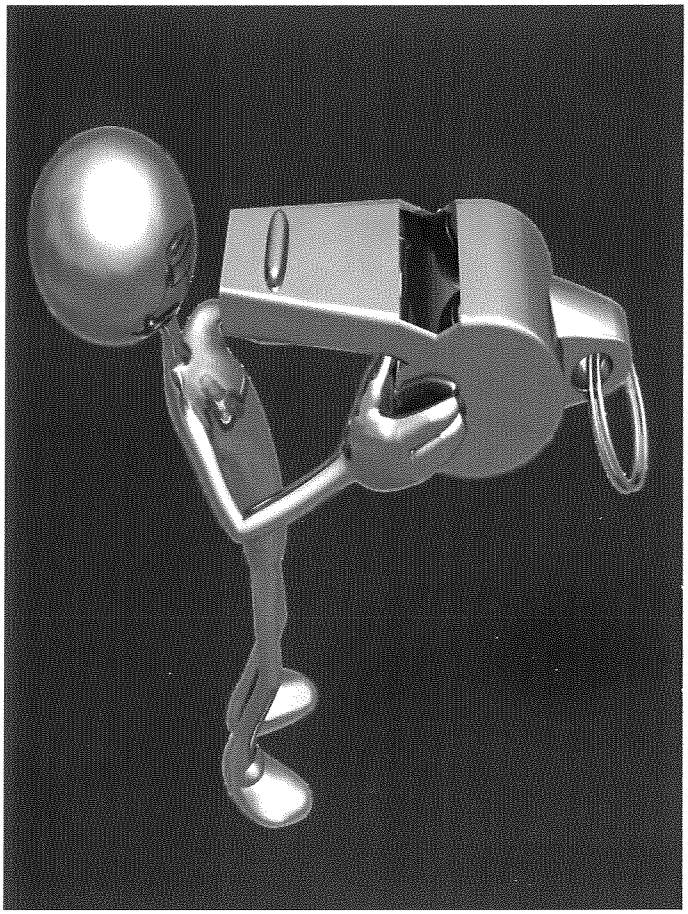
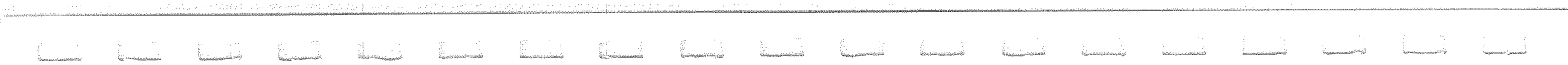


"LET THE WHISTLE BLOW"

Own Motion Investigation by the Office of the Complaints Commissioner

February 2014



"LET THE WHISTLE BLOW"

"LET THE WHISTLE BLOW"

"An investigation to ascertain whether there are adequate protections or protective measures for Reporters of Wrongdoing (also known as Whistleblowers) within the Cayman Islands Government - including, but not limited to, legislation; policy; and work culture custom and practice."

COMMISSIONER'S INTRODUCTION

In 2013, the issue of whistleblowing was reported on widely across the globe – in particular the cases concerning Bradley Manning and Edward Snowden. But this is not a modern problem; in September 2013, an article in the Sunday Times described Col. Georges Picquart, a former head of the French army secret intelligence service, as 'The Original Whistleblower' for his part in the libel trial of the novelist Emile Zola, who had written about the 1894 Dreyfus affair.

Whistleblowing was one of the matters examined and reported on in the 2008 Clifford Report. However, despite the recommendation in this area, there is still little or no protection for potential whistleblowers, or reporters of wrongdoing, who are employed by the Cayman Islands Government.

Whistleblowing recommendations have been made before by the OCC since the Office was established in 2004 - most recently in the OCC Reports on Pensions (2010) and Health and Safety in the Construction Industry (2012), both of which stated that the law should be changed to allow penalties for victimization in order to protect whistleblowers – but these concerned discrete government entities. The absence of a comprehensive, safe, confidential and effective process, underpinned by legislation which is robustly enforced, does not just affect government employees and their families; **effective whistleblowing protection for both the public and private sector makes good business sense.** For example, in November 2012 Forbes magazine ranked New Zealand first on its most recent list of the Best Countries for Business thanks to a transparent and stable business climate. According to Phil O'Reilly Chief Executive of Business New Zealand, *"New Zealand's high trust public sector is its greatest competitive advantage."*

All recommendations will be monitored for compliance.

Nicola Williams
Complaints Commissioner

EXECUTIVE SUMMARY

a) TERMS OF REFERENCE

As stated on the Title Page, this is "An investigation to ascertain whether there are adequate protections or protective measures for Reporters of Wrongdoing (also known as Whistleblowers) within the Cayman Islands Government."

The Terms of Reference for this Own Motion Investigation and Report include, but are not limited to, the following:

- Legislation - existing legislation and the adequacy of same; is new legislation needed, and if so, what?
- Policy – what, if any, policies currently exist? Are they adequate? Are new or additional policies needed?
- Current work culture, custom and practice – is there an existing work culture that leads to a tolerance of wrongdoing in the first place? What actually happens to whistleblowers in each government entity? Are investigations carried out? If so are they properly conducted in accordance with existing policy, rules of Natural Justice, and/or Human Rights?
- Best practice from other jurisdictions.

b) FINDINGS

1. FINDING – Civil and Public Servants, whether Caymanian or non-Caymanian, are extremely reluctant to report wrongdoing both for fear of reprisal, either direct or indirect (i.e., fear of repercussions on family members) and because of a strongly held belief that the wrongdoer will not be punished.
2. FINDING – Whilst Civil Servants, past and present, who were interviewed for this Report recounted many instances of intimidation, victimization or reprisal against

whistleblowers, civil servants at Chief Officer level and above largely claimed to be unaware of any such issues.

3. FINDING - There is no effective and rigorously enforced whistleblowing policy within the Cayman Islands Government. The absence of same undermines the ability of civil and public servants to fully comply with Part II of the Public Service Management Law (currently 2013 Revision).

4. FINDING - The proper treatment of whistleblowers is a "good governance" issue, as well as a human rights issue. This also has an impact on private sector business as well.

5. FINDING - The protection from victimization will depend on the robustness of the body to which the whistleblower is reporting.

c) RECCOMMENDATIONS

Law

1. RECOMMENDATION - Enact stand-alone legislation to deal with whistleblowing as in Jamaica, Australia, New Zealand and elsewhere (see Section 13 of this Report). Although, according to senior lawyers employed within the Government Legal Service, there are a few sections in individual laws that could be relied upon by whistleblowers, the OCC is firmly of the view that people should not have to trawl through legislation to cherry-pick sections of applicable legislation, which is especially difficult for ordinary members of the public, and does not assist transparency. The protection should extend to volunteers as well as to employees and others receiving payment for their services.

2. RECOMMENDATION - There should be a Positive Duty to Report as *per* the Money Laundering and Anti-Corruption Laws.

Civil Service Policy and Practice

3. RECOMMENDATION - Change the culture of the Civil Service to encourage whistleblowing and support whistleblowers – to see whistleblowers properly as Reporters of Wrongdoing.

4. RECOMMENDATION and FINDING - Hand in hand with 3 above is accountability for the perpetrators of wrongdoing. If they are not appropriately punished no-one will come forward.

5. RECOMMENDATION – Government should draft a Whistleblowing Policy document containing the points raised in Section 8(b) of this Report.

6. RECOMMENDATION - Keep the Public Service Values and Public Servant's Code of Conduct front and centre for all who work in any government entity or carry out government business, even if not directly employed by government.

7. RECOMMENDATION – Establish a confidential hotline or tip line for whistleblowers, properly funded and resourced on an ongoing basis.

8. RECOMMENDATION - Confidentiality for whistleblowers must be ensured.

Public Education and Outreach

9. RECOMMENDATION – Establish a programme of public education to advise people on what amounts to whistleblowing, and as to what legislation and protections are currently, or will imminently be, in place.

Other

10. RECOMMENDATION – consideration should be given to a Government Minister holding the portfolio for the Public Service and Integrity, in much the same way as Australia.

POWERS OF THE OCC

The aim of the Office of the Complaints Commissioner is to investigate complaints against government in a fair and independent manner, in order to determine whether injustice has been caused by improper, unreasonable, or inadequate government administrative conduct, and to ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law.

Sec.11(1) of the Complaints Commission Law (2006 revision) empowers the Commissioner to launch an investigation without first receiving a written complaint (i.e. of the Commissioners Own Motion) for a particular issue that is deemed as having special importance which then makes an investigation by the Commissioner desirable in the public interest.

WHY WHISTLEBLOWING? BACKGROUND TO THE INVESTIGATION.

There is no legal or official government definition of whistleblowing, not even in parts of legislation that specifically deal with whistleblowing – S.50 of the Freedom of Information Law 2007, and Clause 23 of the Standards in Public Life Bill 2013. Many interviewees were asked what they considered this concept to be; there was a general broad understanding but nothing precise.

At its simplest, a whistleblower, or reporter of wrongdoing, is a person who exposes wrongdoing within an organization in the hope of stopping it. **This should and must be viewed in a constructive and positive way.** Those who have an interest in demeaning whistleblowers describe them in a number of pejorative ways - as informants, gossips, "grasses", "snitches" or traitors. For this reason, throughout the Report, the terms 'reporters of wrongdoing' and 'reporting wrongdoing' will be used interchangeably with 'whistleblowers' and 'whistleblowing'.

Everyone in the Cayman Islands has a potential interest in ensuring *bona fide* whistleblowers are protected. Where Government workers and their families are concerned, this is self-explanatory.

With regard to both the private and business sector:

1. If government does not work properly in this area, everyone suffers, including the business community – and there is arguably a greater world focus on Cayman because of its major offshore status.
2. Many of the whistleblowers interviewed by the OCC reported financial irregularities as being mainly or entirely the reason or subject about which they felt compelled to report wrongdoing.

With regard to ordinary members of the public – what happens in government affects us all, directly or indirectly, so if a ROW is punished for doing the right thing, government maladministration or corruption will continue unchecked. This issue has already been highlighted by Dr. Epp to Attorney-General Sam Bulgin in his e-mail dated 23 September 2008 entitled "Anti-Corruption and Ottawa seminar".

The timeframe covered by this Report is from 2008 (the date of the Clifford Enquiry Report and Recommendations) to 2013, and spans two political administrations. Unlike previous OCC Own Motion Investigations, this is not limited to one government entity, but is across the entire Public Service, including all government entities as defined in S.2(1) of CCL 2006 – i.e., a government Ministry, government company, government department, government portfolio, statutory board or authority.

PROCESS AND METHODOLOGY

The investigation was formally launched on 5 April 2013, following preliminary research in order to assess both the viability of such an investigation, and to determine whether such an investigation was in the public interest. (In fact, this OCC investigation has been welcomed by Civil Servants past and present, including those amongst the most senior ranks of the Service).

To demonstrate complete fairness and impartiality, the OCC has taken a 360 degree holistic approach to this investigation, interviewing and conducting research not only among past and present civil servants at all levels of seniority; but also with the Civil Service Association; judges, lawyers and lawmakers; Ombudsmen and academics; and internationally known experts in the field. We also interviewed a number of whistleblowing victims, who were carefully screened for mixed motives, and to exclude whistleblowers who are themselves complicit in bad practices or dishonesty.

Information and research has been gathered from, amongst other sources, the Clifford Report; best practice in other jurisdictions; legal articles; press articles; and internal Government documents, including those generated at Cabinet level.

Approximately 1400 hours of OCC investigator and Commissioner time has been spent on researching, evidence gathering, interviewing, writing and editing this Report.

THE CLIFFORD ENQUIRY AND REPORT 2008:

A Commission of Enquiry into the allegations surrounding the removal of files from the Ministry of Tourism by the Former Permanent Secretary. Findings and Recommendations.

This Commission of Enquiry, and in particular its Findings and Recommendations in relation to whistleblowing, is the starting point for this OCC Investigation.

On 24th November 2007, the then Governor of the Cayman Islands, His Excellency Stuart Jack through gazetted proclamation (Cayman Islands Gazette, Extraordinary No. 38/2007, December 2007), appointed Sir Richard Tucker to conduct a Commission of Enquiry ("Clifford Enquiry") into the allegations that a former Permanent Secretary in the Ministry of Tourism (Charles Clifford) took confidential documents with him when he resigned from office in 2004. The allegation also claimed that the Permanent Secretary passed those confidential documents and information to the media.

Sir Richard Tucker's Commission colleagues were Mr. Colin Ross, Commission Secretary and a Chair of the Civil Service Appeals Association; and Mr. Peter Jones, now Mr. Justice Jones, Grand Court Judge.

This enquiry and its subsequent findings and recommendations rest squarely within the subject of whistleblowing, and therefore offers significant insight to be used in the examination of whistleblowing practices and protections in the Cayman Islands government.

Of the many interviews conducted of government officials pursuant to this investigation, none of the interviewees had substantive knowledge or recollection of the recommendations made, or of what policies might exist being consistent with the recommendations made in the Clifford Enquiry report.

The Terms of Reference for the Enquiry set out six main areas to be examined:

i. *That the former Permanent Secretary in the Ministry of Tourism, took with him, when he resigned from office in 2004, confidential or other documents pertaining to the Royal Watler Port; Cayman Airways; Turtle Farm and the Boggy Sands Project.*

ii. *That the Former Permanent Secretary passed confidential documents/information to the media (Cayman Net News).*

iii. *Reports and editorials in the Cayman Net News alleging that "prior to the 2005 General Elections... Mr. Desmond Seales, publisher and Editor-in-Chief of the Cayman Net News confirmed that supporting documents for articles which appeared in his newspaper were hard copies of minutes and other documents supplied to the newspaper by Mr. Clifford" (Cayman Net News – September 26, 2007)*

iv. *Whether there was a breach of any relevant public/civil service Codes of Conduct or any conduct relating to the practices of Government and Statutory boards, or any policies of the respective boards, or breach of any public interest, or of any relevant laws or regulations.*

v. *Current.....laws and regulations including their effectiveness, pertaining to the handling, retention, possession and use of board and government documents by serving as well as former Civil Servants, Board Members and Government Ministers.*

vi. ***Existing procedures and protections, if any, for the public disclosure of Board and Government or other information where such disclosure is deemed to be in the public interest ('whistle-blowing")*** (OCC emphasis).

In addition to the allegations, the Commission was also tasked with making recommendations for:

a. *Possible legal or disciplinary action, if any.*

b. *Suggested reforms of the legal or regulatory framework to enhance the protections of Board and Government documents or other information, to ensure the full accountability of serving and former Civil Servants, Board Members and Government Ministers in handling such documents.*

c. *Legal or regulatory changes that will provide appropriate best practice protections for those who make public disclosure of Board and Government documents or other information on the grounds of public interest.*

d. *In order to limit the risks of conflict of interest, the imposition of a reasonable hiatus between civil servants resigning or retiring and subsequently pursuing representational politics.*

For the purpose of the OCC Report only the areas pertaining directly to whistleblowing will be examined.

In the Commission Report Sir Richard Tucker early on examined the issue of making a formal complaint where one suspects wrongdoing. Although there was a significant lack of evidence to show whether any complaint was made, the Commission made it clear that if there was a real expectation for some action to be taken, a formal complaint must be made giving evidence of specific wrong doing. The Commission found it "*.....inconceivable that if serious and specific complaints were made, nothing was put into writing to record them and no request for supporting documentation was made*".

This comment raises the question of what the process for whistleblowing should be. When interviewed for this report, Mr. Ezzard Miller, first elected representative for the District of North Side stated that:

"The biggest concern I get from people when they want to talk about what's going on with what they perceive is wrong, is - first of all it is not easy for them to have a conversation particularly with their superiors or even their peers as to if it is wrong."

Additionally, he said, there is the *"understandable evaluation of risk"*. The question that the would-be whistleblower undoubtedly will ask themselves is, "What will happen to me?"

In considering the actions of Mr. Clifford, the Commission considered the provisions under the Public Service Management Law (PSML) 2006 and Personnel Regulations 2006. Since then there have been several revisions. The current Law and Regulations are both 2013 revisions.

As of the date of the Enquiry, the Freedom of Information (FOI) Law 2007 had yet to come into force. The Commission considered the anticipated impact of the FOI Law in great detail, to the extent that it recommended that the Public Service Management Law (PSML) (then 2006 Revision; currently 2013 Revision) should be amended to reflect S.50 of the FOI Law which specifically deals with whistleblowing. However, although S.5 (2) (h) of the Public Servant's Code of Conduct within the PSML (2013 Revision) states:

"A public servant shall not directly or indirectly disclose information which comes into his possession in his official capacity unless authorised or allowed to do so under this section, the Freedom of Information Law, 2007 or any other Law".

the wording is not as unequivocal as that in S.50 (1) of the FOI Law (see page 15 of this Report, *ante*), and serves more to protect the Civil Service than to clearly set out the protections for civil and public servants who are potential whistleblowers.

With regard to the alleged act of "whistleblowing" by Mr. Clifford and how that was dealt with, the Commission recommended that:

1. A person to whom the whistle could be blown should be identified
2. The Personnel Regulations (then 2006) should make clear that reports need not be made in writing because putting something in writing may be a disincentive for potential whistleblowers.

The Commission reviewed the impending Freedom of Information Law, which came into effect *post* Enquiry, and noted that section 50 of that law would introduce a "more general public interest defence to both criminal and civil liability for breach of a duty of confidentiality."

Section 50, Freedom of Information Act 2007

This specifically deals with whistleblowing and states:

50. (1) No person may be subject to any legal, administrative or employment related sanction, regardless of any breach of a legal or employment-related obligation, for releasing information on wrong-doing, or that which would disclose a serious threat to health, safety or the environment, as long as he acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrong-doing or a serious threat to health, safety or the environment.

(2) For the purposes of subsection (1), "wrongdoing" includes but is not limited to-

(a) the commission of a criminal offence;

(b) failure to comply with a legal obligation;

(c) miscarriage of justice; or

(d) corruption, dishonesty, or serious maladministration.

The Commission was of the opinion that S.50 provided adequate protection for whistleblowers. However they recommended that the then Chief Secretary should consider implementation of procedures in the Personnel Regulations and other policies (as stated above) to inform the process of whistleblowing. Despite this recommendation being made in 2008, **as of 31 January 2014, there is no whistleblowing policy for civil and public servants within the Cayman Islands Government.**

There is a grievance procedure contained in the Personnel Regulations, both the 2006 revision that was in place at the time and the current 2013 revision. "Grievance" is defined as:

(a) a matter of concern to a staff member which-

(i) relates to workplace conditions or safety, the behaviour of another staff member in the workplace, or the compliance of other staff members with the Public Servant's Code of Conduct; and

(ii) the staff member wishes to be addressed through a formal grievance process rather than through normal informal interaction with his immediate supervisor"; and

(b) not a matter which is the subject of the appeal process specified in sections 53 and 54 of the [Public Service Management] Law.

Regulation 51(1) also sets out the chain of command to be used when reporting as per the recommendations. However according to sub-regulation (ii) above, it appears to restrict informal reporting.

There is, however, a clear difference between an employee using the grievance procedure, with its formal structure and lack of confidentiality, and a whistleblowing policy or procedure as described in Section 8 of this Report.

Such provisions as currently exist under S.50 FOI Law 2007 and Clause 23 of the Standards in Public Life Bill 2013 can, together with the appropriate policy guidance, be used to attempt to change the culture of the Public Service in this regard. However, such protections as currently exist are inadequate, and do not avoid the need for specific, stand-alone, comprehensive whistleblowing legislation.

KEITH LUCK REPORT AND RECOMMENDATIONS; AND H.R. FORUM MEETING

Mr. Keith Luck was formerly (as of December 2010) the Director General, Finance, for the Foreign & Commonwealth Office.

In 1997 the Government of the Cayman Islands embarked on an ambitious package of financial and personnel reforms. Referred to as the "reform agenda", these were designed to bring about a culture of improved performance across the whole of government. Mr. Luck was tasked with reviewing the Financial and Human Resource Management System operated by the Cayman Islands Government, and as part of his Terms of Reference was specifically asked by the Cayman Islands Government to:

1 Examine if these reforms had met their strategic objective
2 Propose any amendments to the Laws, Regulations
3 Examine if the IRIS system is fit for purpose, and
4 Propose recommendations and an implementation plan

He subsequently produced a Report in 2012 for then Governor Taylor, then Premier McKeeva Bush, and Deputy Governor and Head of the Civil Service Mr. Franz Manderson.

In the Preamble to his Report, he stated:
"*I wish to record that this review has been welcomed by almost everyone I saw or spoke to. I have found a number of different groups – politicians, the private sector, civil and public servants and some public commentators – who all agree that the current system is not working as intended. All want to work for a better Cayman, but to different degrees feel frustrated with the current systems. There is a clear desire for change. My discussion with the Cabinet reinforces this perception.....*"
He also observed that:

".....the Premier amongst others has correctly reminded me that there are difficulties in operating in a small island where everyone can know everyone else and no-one can be entirely independent. This brings its own challenges and difficulties in Governing....."

This of course is of particular concern where whistleblowing is concerned – see comments of civil servants and whistleblowing victims respectively in sections 10 and 11 of this OCC Report.

In Appendix 3 of his Report, entitled "Detailed Review of PSML" (Public Service Management Law), Mr. Luck considered, amongst other aspects, Part II of this Law concerning the Public Service Values and Code of Conduct. He stated (OCC emphasis in **bold**):

"I strongly endorse these principles. There is, though, no reference to sanctions at this point. The section on disciplinary action follows in Section 44.

There is no reference to a 'speaking out' or 'whistle blowing' procedure while discussing these values. I believe something exists in the FoI Law. Is this sufficient? Should more be said here?

I recommend that this section should set out what staff, external parties and any other interested persons should do if they believe that these values and the code of conduct is not being complied with."

Mr. Luck also attended a quarterly HR Forum at the Portfolio of the Civil Service for Human Resources professionals within the civil service. During this meeting, those present informed him of a number of significant and worrying experiences and concerns:

- They were "often walking on eggshells"
- There was often political interest, even interference
- As Civil Servants they did not feel protected, despite what the law said
- Crossing politicians it is felt would result in their jobs being on the line
- Any formal complaint would be career suicide

- The recruitment system can be perceived as unfair despite the provisions in the Law.

As a result of this meeting, he recommended the need for a "whistleblowers" hotline and/or "speaking out" charter, further amplifying his observations in his substantive Report. **The OCC agrees with this – see Recommendation 7.**

LAW AND POLICY

Law

The Cayman Islands Government wishes to be seen as both transparent, and one in which both individuals and businesses can repose a high degree of trust. Ideally, that reputation would be held not only locally, but also internationally. Appropriate whistleblowing legislation would go a long way toward achieving this.

i) General legislation

According to the Attorney-General, there are a number of sections within existing legislation that can be relied upon by any reporter of wrongdoing or in any whistleblowing allegation. These include:

1. S.20 Anti-Corruption Law 2008
2. S.20 Insurance Law 2010 – where auditors who find dishonesty should make a report to CIMA;
3. S.13 Bank and Trust Companies Law 2009 – similar to the Insurance Law provisions above;
4. S.50 Monetary Authority Law 2011, which makes it an offence to breach confidentiality. See especially S.50(2)(g)(i)
5. S.120 Police Law 2010, especially ss.(1)(2) and(4)
6. S.9 Proceeds of Crime Law 2008

7. S.16 Complaints Commissioner Law 2006, which (according to the Attorney-General) is a shield for victims

However, the OCC considers this a very unsatisfactory state of affairs. People should not have to trawl through legislation to cherry-pick sections of applicable legislation. This is especially difficult for ordinary members of the public, and does not assist transparency.

ii) Legislation specific to whistleblowers

There are currently only two sections in existing and pending legislation that deal with whistleblowing – Section 50, Freedom of Information (FOI) Law 2007, and Clause 23, Standards in Public Life Bill (SIPL) 2013. As of 7 January 2014, the latter has not yet been passed into law.

The Freedom of Information Law 2007 is described as "a Law to give to the public a general right of access to records; and to make provision for incidental and connected purposes". Section 50, specifically deals with whistleblowing and states:

50. (1) No person may be subject to any legal, administrative or employment related sanction, regardless of any breach of a legal or employment-related obligation, for releasing information on wrong-doing, or that which would disclose a serious threat to health, safety or the environment, as long as he acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrong-doing or a serious threat to health, safety or the environment.

(2) For the purposes of subsection (1), "wrongdoing" includes but is not limited to-

(a) the commission of a criminal offence;

(b) failure to comply with a legal obligation;

(c) miscarriage of justice; or

(d) corruption, dishonesty, or serious maladministration.

The Standards in Public Life Bill 2013 is described as "a Bill for a Law to preserve and promote the integrity of public officials and institutions; and for incidental and connected purposes'. Clause 23 is also specific to whistleblowing and states:

23. (1) No person may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment-related obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as he acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For the purposes of subsection (1), "wrongdoing" includes -

(a) the commission of a criminal offence;

(b) failure to comply with a legal obligation;

(c) miscarriage of justice; or

(d) corruption, dishonesty, or serious maladministration.

However, there are problems with both of these provisions:

- With the exception of the additional words "but is not limited to" included in S.50(2) of the FOI Law, **the 2 sections are verbatim; no apparent thought has been given to the particular needs of the later legislation**
- The whistleblowing provision in Clause 23 of the Bill is arguably of limited effect, as it is primarily designed to deal with public service.
- "Whistleblowing" not defined in either legislation.

iii) New stand-alone legislation

The OCC recommends that stand-alone legislation be enacted to deal with whistleblowing as in Jamaica, Australia, New Zealand and elsewhere (see Section 12 of this Report). The protection should extend to volunteers as well as to employees and others receiving payment for their services. As already stated, people should not have to trawl through legislation to cherry-pick sections of applicable legislation. This is especially difficult for ordinary members of the public, and does not assist transparency. By all means what little there currently is in local legislation – as well as in other jurisdictions – should be used to draft stand-alone legislation if applicable.

The relevance of appropriate whistleblowing legislation

Appropriate whistleblowing legislation and the means to enforce it are essential to support a culture of compliance and integrity. Several international conventions – including Art. 33 of the UN Convention on Corruption - recognise whistleblowing as an effective tool for fighting corruption, fraud and mismanagement, and commit the signatory countries to implement appropriate legislation.

There may also be an over-reliance on general criminal laws that oblige individuals to report criminal offences to law enforcement authorities. In such circumstances, the assumption is that individuals would automatically be exempted from any form of retaliation if a crime was involved. **Practice has shown, however, that the existence of a legal duty to report is seldom a satisfactory alternative to a proper whistleblowing policy and protective measures.** The same problem applies to the reliance on witness protection mechanisms. Not all whistleblowers are witnesses. They often do not have any concrete evidence, but only suspect wrongdoing. As a result, witness protection mechanisms do not provide sufficient protection to whistleblowers, nor do they pursue the same goal.

At the same time, the overall legislative framework needs to provide sufficient protections and compensation for those wrongly accused, even by whistleblowers who report in good faith. The assumption of innocence needs to be respected until responsibility is sufficiently proven.

Whilst recognizing that the Cayman Islands Government has the right to draft legislation as it sees fit, the OCC recommends that the following be taken into account, in line with international best practice and as highlighted by Transparency International (TI):

A single, comprehensive legal framework is most effective

To ensure a safe alternative to silence for whistleblowers, the legal framework should be clear, comprehensive and easy to use for protecting the whistleblower. In all cases, the legislation should cover the public, private and not-for-profit sectors, as well as those outside the traditional employee-employer relationship (e.g. consultants, temporary workers, trainees, etc.) and should provide for reliable reporting channels to communicate concerns. Legislation should include a broad range of issues, from criminal offences to the potential harm that wrongdoing can cause, such as to the health and safety of citizens and the environment (These last two issues are already in the whistleblowing provisions in the FOI Law and the SIPL Bill). Whistleblowing legislation should also provide that organisations in the public and private sector establish, maintain, and routinely publicise appropriate mechanisms for internal reporting.

Safety should be ensured for whistleblowers

All potential whistleblowers should be protected from reprisal for honestly reporting concerns. Protection should also be extended to those attempting to report or corroborating reports and include a right to refuse participation in wrongdoings. As Cayman is such a small jurisdiction, any individuals closely associated with the whistleblower, such as family members, should be covered as well. **In case of retaliation against the whistleblower, the burden of proof to show that this discrimination is not related should lie with the employer.** These protections should be guaranteed by access to normal court procedures.

Whistleblowers should be protected against any damages suffered as a consequence of their disclosure. Consideration should be given to *bona fide* whistleblowers receiving some kind of professional or social recognition for having prevented excessive harm to the organisation or society, thus promoting whistleblowing as a good thing.

Three tiers of reporting

In many jurisdictions with standalone whistleblowing legislation, there are three tiers of reporting wrongdoing, starting within the organization – all of which are protected by legislation:

Whistleblowing within the organization - As far as is both possible and appropriate, reports of wrongdoing should first be raised internally, with assurances that whistleblower confidentiality is clearly established. This would allow a government entity, for example, the opportunity to investigate the nature and substance of a report without unfairly exposing the alleged wrongdoer to unfounded allegations.

Whistleblowing externally to a regulator or appropriate authority – However, the OCC recognizes that, in many instances, initial internal reporting might not be possible or even advisable. Whistleblowers may fear retaliation, the report may not be followed up internally for various reasons (e.g. where malpractices are institutionalised or where managers are concerned about the negative impact on the image of the institution or on themselves), or the public interest may be best served by immediately filing the report externally outside the particular government entity, or even outside the core civil service. Whistleblowers should therefore have the option to report externally to the regulator, enforcement authority or to other competent oversight bodies.

Whistleblowing to the media - Disclosures to the media should also be protected *provided that* this is used as an option of last resort.

Enforcement is essential

Legislation without a proper, effective, and clearly established mechanism for enforcement, and clearly stated penalties, will not work. Such a mechanism should be clearly stated both within the law itself, and also in any policy, regulations or guidance emanating from that law. Confidential reporting must be ensured. Confidentiality is needed to establish trust with the whistleblower who faces numerous risks when

reporting, while also allowing the organisation to establish the facts of a case. The whistleblower's identity should be protected and only be disclosed if she or he agrees to this or if it is required by law. Reporting channels in an organisation should offer the opportunity to report concerns confidentially - or even anonymously.
At the same time, it is also important to remember that confidentiality also helps to protect the fundamental rights of the person suspected of wrongdoing.

Any investigation into a report of wrongdoing also needs to be both impartial and accountable. Whistleblowing allegations should be fully and fairly investigated; while the entity should also take appropriate corrective action if the allegation is proven. It is important that the entity concerned should focus on the nature and substance of a report, and not on the person making it.

iv) The potential impact of the Bill of Rights

In Guja v Moldova (2008) a whistleblowing case that came before the European Court of Human Rights, the Court considered that the public interest in the provision of information on undue pressure and wrongdoing (in this particular instance, within the Prosecutor's Office) was so important in a democratic society that it outweighed the interest in maintaining public confidence in that Office. The Court was of the opinion that Mr. Guja had acted in good faith, and noted that the heaviest sanction possible (dismissal) had been imposed on him. This not only had negative repercussions on his career, but could also have a serious chilling effect on other employees and discourage them from reporting any misconduct – not only from the Prosecutor's Office, but also on other civil servants and employees.

Being mindful, *inter alia*, of the importance of the right to freedom of expression on matters of general interest, and of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the Court concluded that Guja's right to freedom of expression under Article 10 of the European Convention on Human

Rights, in particular his right to impart information, had been violated. Accordingly, there had been a violation of Article 10 of the Convention.

Locally, the right to Freedom of Expression is protected under the Bill of Rights, Freedoms and Responsibilities contained in the Cayman Islands Constitution, and can therefore arguably be used to protect whistleblowers.

Policy

From the discussion on law in Section 8(a) above it is clear that the Cayman Islands has little or no legislative protections for whistleblowers. Consequently, this is evident in the lack of policies and procedures necessary to inform behaviors of public servants save for the guidance published pursuant to the Freedom of Information Law 2007. However, this guidance primarily deals with obligations regarding the retention, handling and public disclosure of records and information, and whilst this may be a component of whistleblowing, it does not amount to adequate whistleblowing protection.

The adoption of whistleblower policies by the Cayman Islands Government would serve to protect or shield entities against losses and employee fraud that would be reported as wrongdoing; to build local trust; and to demonstrate to the international community that both Government and the civil service are committed to good governance and accountability practices.

In creating any policy, it is important to implement procedures that subjects are likely to be able to comply with consistently long term. It must also be properly policed and enforced; no policy can protect an entity or its personnel from liability if it is not followed.

Transparency International (TI) has recommended a number of matters to be considered when drafting a Whistleblowing Policy, which can be adapted for use by the Cayman Islands Government:

Strong and transparent internal policies

Trustworthy and effective policies and procedures are essential to create the right environment for honest reporting. As part of well-designed ethics and anti-corruption codes, organisations should implement a clear and distinct whistleblowing policy. Whistleblowing procedures should provide for a variety of easy and accessible channels that can be used to disclose information, such as to the line manager, an ethics committee, the Ombudsman or Complaints Commissioner, internal hotlines or web-based reporting tools. Policies and procedures should also clearly separate personal grievances from whistleblower reports, offer guidance and procedures for internal and external reporting, provide sufficient feedback to the whistleblowers, establish appropriate follow-up mechanisms with timeframes, and protect people from retaliation.

Good communication and consultation with staff is needed

It is essential that a whistleblower policy is supported by senior management, and adequately promoted and clearly communicated so that it is accepted and well-known by all throughout the Civil Service. When designing and implementing the policy, employees, directors and other stakeholders should be properly consulted, briefed and trained. The achievements of whistleblowing mechanisms should be regularly communicated to civil servants and to the public, and staff should be consulted regularly in order to identify areas for improvement.

A shift in culture is essential

Whistleblowers are often perceived as disloyal, rather than as champions of the public interest. This must change. The importance of whistleblowing in the detection and prevention of wrongdoing is still generally under-valued. It is an inexpensive risk management tool – a tool to sound the alarm at early stages, potentially even before any damage has been caused.

Public support is needed to promote whistleblowing. To change this perception, whistleblowing needs to be promoted as an effective tool for stopping corruption and for serving the public interest. Government should lend its support to public information campaigns as well as initiatives to promote whistleblowing that are carried out by professional groups, Ombudsmen, industry, the media, and other civil society organisations. Whistleblowers should not only be protected by public authorities, but also actively supported.

In addition to the above, the OCC **recommends** (Recommendation 5) that an ideal whistleblowing policy document generally should include, but not be limited to, the following:

- a clear definition of individuals covered by the policy,
- the responsibility for reporting wrongdoing – linked, as regards to the public sector, to the Public Sector Values and Civil Service Code of Conduct,
- applicable areas of complaints and those responsible for addressing them,
- the prevention of retaliation against whistleblowers,
- the process of reporting violations,
- confidentiality,
- the overseeing officer's duties, and
- procedures for acknowledging reported violations.

Good Faith - All employees of an entity should be encouraged to report any action or omission or suspected action or omission taken within the entity that is illegal, fraudulent or otherwise not in accordance with good governance and administration, but this MUST be done in good faith. Any report made maliciously or any report that is believed to be false must be viewed as a serious disciplinary offence. The potential whistleblower must have reasonable grounds for believing that the information they are reporting indicates that a violation has occurred.

The entity needs to seriously consider how to properly word any provisions relating to deliberately wrongful, malicious or *mala fide* reporting in order to guard against creating the unwanted inhibiting effect it may have on a would be reporter's willingness to report a suspected wrongdoing.

Free From Retaliation - The policy must be clear that any person who, provided they acted in good faith and were of reasonable belief, reports some wrongdoing or cooperates in the investigation into some wrongdoing, shall not be subjected to harassment, adverse treatment regarding employment or any retaliatory consequences. Anyone guilty of retaliation should be subject to swift action and severe discipline, up to and including dismissal.

Third Party Reporting - Where *any* person believes that someone, who has made a report of a wrongdoing or who has cooperated in an investigation against an alleged wrongdoer, is suffering from retaliation or other adverse treatment, the policy should also include provision for how that person, or the whistleblower themselves, may report that *further* wrongdoing appropriately, modelling the existing Personnel Regulations and/or Grievance Procedures where appropriate. This is particularly important for persons at Head of Department level and above as this would invariably be the levels of the civil service to whom whistleblowers would report wrongdoing.

The Reporting Procedure

A whistleblower policy must include the procedure persons should follow for reporting wrongdoing. All staff must be duly informed of this procedure, and it should form part of any new employee package or orientation offered to new staff members. The policy should also be posted on the website of each government entity.

Government entities need to identify how and to whom a person may report. In most cases, the immediate line manager or supervisor of the person reporting is the person best suited to address a concern. However, if the whistleblower is not comfortable speaking with his or her supervisor or if he or she is not satisfied with the supervisor's response, they can speak directly to the next person in the chain of command. Ultimately, some individuals are reluctant to speak directly with their supervisors for fear of retaliation, especially where their concerns pertain to wrongdoing by the supervisors themselves. Therefore, the whistleblower policy should provide several options for employees to raise concerns, including an option of reporting a violation anonymously.

The policy should also address where, in certain limited cases, it would be more appropriate to report directly to an outside entity – for example, the RCIPS, Auditor-General, Anti-Corruption Commission, or Commission for Standards in Public Life.

Confidentiality

Protection of the confidentiality of whistleblowers is the bedrock of any whistleblower policy, particularly in a small jurisdiction such as Cayman. One way of doing this is anonymous reporting. Allowing persons to report anonymously may increase the possibility of reports actually being made; however, it is important to note that it may also increase the possibility of false claims being filed.

The policy should encourage anyone reporting wrongdoing to identify themselves when making a report in order to facilitate the investigation. However, the person should be given the opportunity to report wrongdoing anonymously if they prefer, and all reports, howsoever made, must be dealt with at the highest levels of confidentiality, consistent

with the need to conduct an adequate investigation, to comply with all applicable laws, and to cooperate with law enforcement authorities where necessary.

Handling reports of Wrongdoing - Expedited, effective enforcement is essential to the process. This will not only significantly reduce fraudulent activity but also sends a message to all stakeholders and those reliant on the entity that it exercises accountability and good governance. The policy will identify the person responsible for promptly investigating the reported wrongdoing and for causing appropriate corrective action to be taken if warranted. A process as to how the reporter of wrongdoing will be notified of actions taken should be included in the policy. This should state that the reporter will be notified about what actions will be taken, to the extent reasonably possible. If no further action or investigation is to follow, an explanation for the decision must be provided to the reporter.

Finally, the policy should include a mechanism for monitoring and auditing reports of wrongdoing. It would first identify an entity such as the Auditor General or the Anti-Corruption Commission to be responsible for conducting a review of closed reports to ensure due process.

GOVERNMENT 2008–2013

a) Work culture custom and practice

Bad workplace cultures are insidious and do not happen overnight. However, once embedded they are very hard to change, particularly in small jurisdictions. Anyone who is brave enough to speak out against wrongdoing can be ostracized, not only at work but also socially – for example, at social events or at church.

During the course of this investigation, civil servants of all ranks were interviewed. Whilst some were prepared to be named on the record, many others, however, were concerned about confidentiality for fear of such reprisals. As a means of protecting the identity of two of these civil servants who did not wish to be named, they will be referred to as CS-1 and CS-2.

CS-1

When interviewed, in the opinion of this civil servant, the general view held by many civil servants is if one of their number reports wrongdoing, there is a high likelihood of being penalized for doing so. CS-1 gave an account of a civil servant who reported financial irregularities by a co-worker, and received adverse treatment as a result. However, the person who allegedly committed the wrongdoing is still in post, and continuing the same practices unchecked.

Also according to CS-1, another civil servant had received many reports from various persons employed within government who wanted to report wrongdoing; however, once those persons become aware that there was no protection afforded to them, they were never heard from again.

As far as CS-1 is concerned, despite the whistleblowing section in the Freedom of Information Law 2007, if the wrongdoer is not punished or removed, the whistleblower would have to continue working with them, giving the wrongdoer ample opportunity to get back at them in some way.

CS-1 stated that one way of punishing whistleblowers was through their benefits such as leave and vacation entitlement: *"For example, there have been instances of civil servants having their vacation being taken away from them by them not able to get a specific time to take their leave and whenever they ask for that time off, it is never the right time, so what happens is that they have to take their leave in bits and pieces at a time"*. Further examples were given of some civil servants only being allowed to take their leave at the

rate of one day per month, as a form of punishment for reporting wrongdoing. Confidential and personal information has also been leaked by way of retaliation.

If the wrongdoer is the whistleblower's boss, there would definitely be adverse consequences for the whistleblower should they report their wrongdoing. Without protections, people will become disenchanted and not report on any potential wrongdoing, because in reality your boss could make your job very unpleasant – if you still had a job at all.

CS-1 believed that if civil servants knew that they had greater protection, more would come forward to report wrongdoing, thus preventing malpractice, waste, and possible corruption and saving money for government by, for example, preventing financial malpractice. In rare cases some civil servants have said that they could live with the consequences and have reported wrongdoing, but in most cases, others have said that they would have to live with it and not follow through with any reports of wrongdoing so that they could keep their jobs.

If an employee is hired on a fixed-term contract, it can be extremely easy to get rid of that person. In this case, all a vindictive employer would have to do is to simply not renew that employee's contract when it is up for renewal.

If the employee is Caymanian, they would be employed on an open-ended term and would not have to deal with that issue. However that Caymanian employee may have to deal with the issue of the employer making their working conditions miserable or unbearable, where that person would then be forced to leave. This demonstrates that any employee can be victimized, regardless of their status on island.

CS-2

This interviewee alleged that a number of employees in a unit within the civil service filed a complaint against a former employer and later felt that they were all penalized as a result of this - one of the complainants got demoted; another was ignored by management; three remained and (at the time of the OCC interview) were still awaiting the re-grading of their posts.

CS-2 also gave an example of a civil servant who 'blew the whistle' on an unfair recruitment process, and as a direct consequence of this an attempt was made to transfer that person to a different part of the civil service without consultation and with no notice.

The accounts given by CS-1 and CS-2 are clearly at variance with the Public Service Values and the Civil Service Code of Conduct. These are now contained in Part II of the Public Service Management Law (now 2013 Revision):

Public Service Values

S.4 (a)-(h) of the 2013 Law sets out the values to which the public service shall aspire and which shall govern its management and operation as follows:

(a) to serve diligently the government of the day, the Legislative Assembly and the public in an apolitical, impartial and courteous manner and to deliver high-quality policy advice and services;

(b) to uphold the proper administration of justice and the principles of natural justice, and to support public participation in the democratic process;

(c) to strive continually for efficiency, effectiveness and value for money in all government activities;

(d) to adhere to the highest ethical, moral and professional standards at all times;

(e) to encourage creativity and innovation, and recognise the achievement of results;

(f) to be an employer that cares, is non-discriminatory, makes employment decisions on the basis of merit and recognises the aims and aspirations of its employees, regardless of gender or physical disabilities;

(g) to be an employer that encourages workplace relations that value communication, consultation, co-operation and input from employees (either individually or collectively) on matters that affect their workplace and conditions of service; and

(h) to provide a safe and healthy working environment.

Public Servant's Code of Conduct

S.5 of the 2013 Law imposes on a public servant a duty to comply with the Public Servant's Code of Conduct in subsection (2) below, and failure to do so in a significant way shall be grounds for discipline or dismissal.

(2) The Public Servant's Code of Conduct is as follows -

(a) a public servant must behave honestly and conscientiously, and fulfil his duties with professionalism, integrity and care;

(b) a public servant must be courteous and respectful to the Governor, the Speaker and Deputy Speaker, Official Members, Ministers, Members of the Legislative Assembly, other public servants and members of the public, and treat everyone with impartiality and without harassment of any kind;

(c) a public servant must be politically neutral in his work and serve the government of the day in a way that ensures that he maintains the confidence of the government, while also ensuring that he is able to establish the same professional and impartial relationship with future governments;

(d) a public servant, as a member of the public, has the right to be politically informed but must ensure that his participation in political matters or public debate or discussions, does not conflict with his obligation as a public servant to be politically neutral;

(e) a public servant must not, at any time, engage in any activity that brings his ministry, portfolio, statutory authority, government company, the public service or the government into disrepute;

(f) a public servant must obey the law and comply with all lawful and reasonable directions, including work place rules established by his chief officer or a person with delegated authority from the chief officer;

(g) a public servant must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) with his duties as a public servant, and must not use his official position for personal or familial gain;
(h) a public servant shall not directly or indirectly disclose information which comes into his possession in his official capacity unless authorised or allowed to do so under this section, the Freedom of Information Law, 2007 or any other Law; and
(i) a public servant must not use official resources, including electronic or technological resources, offensively or for other than very limited private purposes.
(3) The Governor in Cabinet may establish policies and procedures for the release to the public of records that may or may not be divulged under the Freedom of Information Law, 2007 so long as those policies or procedures do not prevent the divulging of records that must be divulged under that or any other Law.
(4) The duty imposed by subsection (2) (h) continues after a public servant leaves the public service.

Sections 56 and 57 of the 2013 Law require Chief Officers to uphold, promote and encourage compliance with the Public Service Values and the Code of Conduct.

The Portfolio of the Civil Service believes that Part II of the 2013 Law would help whistleblowers by giving them a 'compass' to guide them through a situation where they are reporting wrongdoing. **However, the OCC has found that the absence of an effective and rigorously enforced whistleblowing policy undermines the ability of civil and public servants to fully comply with Part II of PSML.**

b) Potential avenues of redress.

Often when a Civil Servant reporter of wrongdoing, or whistleblower, has been victimized, their only formal avenue of redress is by way of the grievance procedure now under S.51 of the Personnel Regulations (2013 Revision). Under this section, a Chief Officer shall establish and publish procedures for addressing grievances of staff in his civil service entity, and those procedures shall be based on the following:

a) In the first instance the grievance should be communicated to the staff member's immediate supervisor, who shall then discuss the matter with the staff member and then address the issue in such manner as the supervisor considers appropriate;
b) If, after the process in sub-paragraph (a) has been completed, the staff member is not satisfied that the grievance has been satisfactorily resolved, the staff member may then communicate the grievance to his appointing officer (where the appointing officer is not also the staff member's immediate supervisor), who shall then discuss the matter in such a manner as the appointing officer considers appropriate.
c) If , after the process in sub-paragraph (b) has been completed, the staff member is still not satisfied that the grievance has been satisfactorily resolved, the staff member may then communicate the grievance to his Chief Officer, (where the Chief Officer is not also the staff member's appointing officer), who shall then discuss the matter with the staff member and then address the issue in such manner as the Chief Officer considers appropriate and the decision of the Chief Officer shall not be subject to appeal; and
d) If the grievance relates to the behavior of the staff member's –
    i) immediate supervisor, the grievance should be communicated in the first instance to the appointing officer;
    ii) appointing officer, the grievance should be communicated in the first instance to the Head of the Civil Service rather than following the procedures specified in subparagraphs (a) to (c), and the Head of the

Civil Service (or his delegate) shall then discuss the matter with the staff member and then address the issue in such a manner as he considers appropriate.

(2) For the purposes of this regulation, a grievance is-

(a) a matter of concern to a staff member which –

(i) relates to workplace conditions or safety, the behavior of another staff member in the workplace, or the compliance of other staff members with the Public Servant's Code of Conduct; and

(ii) the staff member wishes to be addressed through a formal grievance process rather than through normal informal interaction with his immediate supervisor; and

(b) not a matter which is the subject of the appeal process specified in sections 53 and 54 of the [Public Service Management] Law.

Appeals Procedure:

Sections 53 and 54 of the Public Service Management Law (2013 Revision) sets out the appeals processes to the Chief Officer and the Civil Service Appeals Commission (CSAC) respectively. For a discussion about CSAC, see below.

Any appeal under S.53 must be made within 30 days and the appellant civil servant or staff member shall provide evidence to the Chief Officer to show that the Head of Department or other manager in the civil service entity has acted in an unfair, biased or inconsistent manner. The Chief Officer must then render a decision within 30 days.

Under S.54, a staff member or civil servant may appeal to CSAC about the decision of any Chief Officer (other than that of delegation) within 30 days of being notified of that decision. As under S.53, the appellant shall provide evidence to the Commission to show that the chief officer acted in an unfair, biased or inconsistent manner. CSAC is then obliged to render a final decision on the appeal within 30 days, but, if the matter concerns

dismissal, can make interim orders including temporary reinstatement or suspension of the appellant.

The Civil Service Appeals Commission (CSAC):

The Civil Service Appeals Commission (CSAC) is a quasi-judicial body appointed under the Public Service Management Law (as amended from time to time – currently Pt. VIII of the 2013 Revision). Its sole purpose is to consider, and decide upon, appeals from civil servants about personnel-related decisions.

The Commission itself comprises of a chairperson and up to six others who, by Law, must be independent from both the civil service and political parties. A person cannot be a member of the Commission if he is a civil servant, or if he is, or has within the preceding three years, been a member of the Legislative Assembly, or held an office in a political party.

To reinforce the independence of CSAC, the Law also states that no person or authority may direct or control the Commission in the carrying out of its duties.

The CSAC is supported by the Commissions Secretariat which provides technical and administrative support to the Commission.

S.69(1) of the PSML 2013 sets out imprisonable offences concerning the Commission.

69. (1) A person who

(a) otherwise than in the course of his duty directly or indirectly by himself or by any other person in any manner influences or attempts to influence any decision of the Civil Service Appeals Commission;

(b) without reasonable excuse fails to appear before the Civil Service Appeals Commission when required to do so or who fails to

(i) comply with any request made by the Commission to produce any information that is in that person's possession or under that person's control; or

(ii) provide answers or explanations when required to do so by the Commission; or
(c) makes any statement or gives any information to the Civil Service Appeals Commission, knowing it to be false or misleading,

commits an offence and is liable to imprisonment for six months.

There have been three CSAC Chairs over the timeframe covered by this OCC investigation, two of whom (Chairman A and Chairman B) were interviewed for this Report.

Chairman A

In the opinion of this interviewee, a concern about confidentiality is the issue that would make it most difficult for employees – Caymanian or non-Caymanian - to blow the whistle on wrongdoing.

In the opinion of Chairman A, the whistleblowing recommendation in the Clifford Report could be expanded to deal with general maladministration in government, especially with regard to wasting government funds. There was an obligation for civil servants to follow the Public Service Code of Conduct, but confidentiality should not extend to maladministration or criminal activity; in fact it could be argued that both the Public Service Values and Civil Service Code of Conduct imposes a positive duty to report such wrongdoing.

This interviewee believed that if necessary the whistleblower should be able to report to an agency outside the core civil service, for example, the RCIPS, Anti-Corruption Commission or one of the oversight bodies promoting good governance. There should also be assistance or guidance given on what sort of things to 'blow the whistle on' – for example, underhanded activity leading to unmerited promotions, favoritism, or negative bias.

When asked how *bona fide* whistleblowing should be promoted across the civil and public service, Chairman A was of the view that it should be made clear across government that this is an available option, and that the genuine whistleblower will not have prejudicial action taken against them - in other words, that they are protected. For example, the Personnel Regulations could give guidance about appropriate channels of communication for whistleblowing. In the opinion of this interviewee, *"this is not difficult to do; it just needs to be done"*. However, there also needs to be some guidance on the responsibilities that goes along with having the right to blow the whistle: *"people have to know that they cannot blow the whistle on just everything"*.

In the opinion of Chairman A, there should be a section in the PSML highlighting and incorporating the whistleblowing provisions in S.50 of the FOI Law, and outlining the procedure by which wrongdoing could be reported, clearly stating that genuine whistleblowers would be protected. **However, whilst the OCC believes this is good as a short-term measure, it does not avoid the need for comprehensive standalone Whistleblowing legislation.**

In similar vein to CS-1, *ante*, and other interviewees, Chairman A stated that one of the problems in a very small society such as the Cayman Islands is that there are all sorts of ways of 'getting at' a person. If you are an expatriate on a contract with government and you are known to be a whistleblower, you are in grave danger of not getting a renewal of contract. If you are Caymanian you could be blacklisted; your salary might not be affected, but you could be passed over for promotion, for example. Because Cayman is a small jurisdiction, if you report wrongdoing and your name became known, there is the chance of being blacklisted and your prospect of employment may not be good – either in retaining your current position or in finding another position. This highlighted the need for the strictest confidentiality in this area.

In summary, Chairman A's concerns were as follows:

- The attitude of denial means that people are not open to having certain information released and that is why whistleblowing in Cayman has been very difficult up to now. *"If you were to blow the whistle you would have had to accept hell and damnation coming down on you".*

- Confidentiality - a big issue where whistleblowing is concerned. Potential whistleblowers would have to be confident that when they carry out and go through this mechanism that they are not going to be penalized. Concerns around confidentiality were the single biggest deterrent for employees, Caymanian and non-Caymanian alike, to blow the whistle.

- Whistleblowers are not going to come forward and report wrongdoing if there is no protection or anonymity for them.

- There must be an effective procedure put in place that would both protect the rights and interests of the whistleblower and also allow the person or government entity reported against the right to defend themselves.

Chairman B:

This interviewee was aware of instances of intimidation in the civil and public service and for that reason believed that no one would want to report any wrongdoing. As a consequence, this interviewee questioned how a whistleblower in the civil service would currently be protected.

Like Chairman A, Chairman B said that there should be guidelines and an education and information process in place to set out the process in relation to whistleblowing, and a legitimate way of bringing to light a wrong, observing that people may withhold information for a fear of being considered a tattletale, but an effective education process

would make people aware that it is appropriate to report wrongdoing. Assurances need to be given that a *bona fide* whistleblower will be protected.

According to this interviewee, many people would approach CSAC and would be advised of the appropriate steps to take – for example, going through their Chief Officer first; however, in some of those cases they would suspect intimidation was a factor because they would never hear from those persons again. *"Not everyone had the will to fight 'big government'."* This concurred with the view expressed by CS-1 earlier in this section of the Report.

Further, according to Chairman B, the law also does not automatically allow for the appellant to be legally represented when they appear before CSAC. Government on the other hand is always legally represented, which would put them at an advantage and the appellant at a disadvantage if they could not afford a lawyer. The employees would sometimes have the better case, but with having little or no money for lawyers, they would not proceed.

c) Senior Civil Servants

Chief Officers

A Chief Officer (CO) within the Cayman Islands civil service is responsible for the overall performance and management of their Ministry or Portfolio in order to achieve the outcomes for the country as established by Cabinet.

The Chief Officer is totally responsible for the delivery of outputs and the achievement of ownership performance in accordance with the funds allocated and performance specified by Cabinet as set out in the Appropriations Law, including the provision of high quality policy advice and support to the Minister or Official Member.

In addition, the Chief Officer is required to work with other Chief Officers and equivalents to provide coordinated and integrated policy advice to the Deputy Governor and Cabinet.

The current Chief Officer for the Portfolio of the Civil Service (POCS) is Gloria McField-Nixon who was interviewed for this Report. She has been in post since 2009. As Chief Officer for the Portfolio, she

- reports to the Deputy Governor;
- has responsibility for dealing with grievances within the civil service;
- promotes the Public Service Code of Conduct; and
- allows grievances to be heard at all levels of seniority right up to C.O level, with that being taken to the Deputy Governor.

According to Mrs. Mcfield-Nixon there were surprisingly no instances of reprisals or victimization for whistleblowing that she was aware of. Present and former Heads of the Civil Service broadly agreed with this view. **However, this is in direct contrast both to those persons interviewed in this section of this Report *ante* and those interviewed who claim to have been victimized for reporting wrongdoing in section 11 of this report, *post*.**

In interview, Mrs. McField-Nixon stated that whistleblowing could be looked at from two perspectives – firstly, whether there is a mechanism in place that encourages people to come forward if they know of something that is wrong; and secondly, if someone does come forward and report wrongdoing, whether there was anything in place to protect them from victimization or retribution. In her opinion, without there being clear or specific mention of whistleblowing in the Public Service Management Law (PSML) - the key legislation governing public service conduct - what remains is the Public Service Values and Public Servant's Code of Conduct, which sets out the standards for how all public servants are expected to conduct themselves as set out in Part II of the Law (2013 Revision).

Where someone's conduct is in question, there is the Grievance Procedure in section 51 of the Personnel Regulations (2011 Revision), which potentially can be used by a whistleblower if they have been victimized for reporting wrongdoing. Where that retribution has taken the form of unfair discipline or dismissal there is the right of appeal which can then be done through the CO or ultimately CSAC.

Sections 22 and 23 of the PSML (2013 Revision) deal with political pressures from Ministers, Official Members and Members of the Legislative Assembly, and the role of the Deputy Governor, as Head of the Civil Service, in interceding in order to get the particular person concerned to desist, including the steps he can and should take to do so.

Mrs. McField-Nixon was of the view that laws (new or existing) can be improved or strengthened by making sure proper consideration is given to safeguarding the person who would be the possible whistleblower, with the clear understanding that if someone abuses the right or ability to draw attention to improper behavior by making up false allegations, there will be severe consequences. *"It may very much be time for the government to start to look at having dedicated legislation".*

The role of the Deputy Governor

Formerly known as the Chief Secretary, the Deputy Governor has a two-fold role – assisting the Governor and, more importantly for the purposes of this Report, as Head of the Civil Service.

In this latter role, the Deputy Governor

- gives strategic policy advice to the Governor and Cabinet, including on civil service matters and public sector reform initiatives; and
- oversees civil service matters generally, including the activities of the Portfolio of Internal and External Affairs and the Portfolio of the Civil Service

The Deputy Governor oversees all matters relating to the operation of the Cayman Islands Civil Service in accordance with the Public Service Management Law and Personnel Regulations. This includes:

- Developing, promoting, reviewing and evaluating human resource policies and practices for the civil service;
- Taking action (if necessary) to prevent inappropriate political influence; and
- Ensuring a stable and effective civil service.

Consequently, it stands to reason that the Deputy Governor would ultimately be responsible for encouraging and promoting adherence to the Public Service Values and the Public Servant's Code of Conduct in accordance with Part II of the PSML 2013. Should a comprehensive whistleblowing policy be drafted, the Deputy Governor as Head of the Civil Service would ultimately be responsible for ensuring it is complied with.

Since 2008 there have been three Heads of the Civil Service – George McCarthy, Donovan Ebanks and Franz Manderson.

George McCarthy:

Mr. McCarthy became Chief Secretary and Head of the Civil Service in late 2004, after Hurricane Ivan, and remained in post until April – June 2009. He was the Cayman Island's most senior civil servant at both during the Clifford Enquiry and the publication of the resulting Report.

Mr. McCarthy is a trained accountant, who joined the Civil Service in 1974. Apart from his two years in the private sector from 1989-91, he has spent his career in the Civil Service.

Before he became Chief Secretary, he was Financial Secretary (1992-2004) then Deputy Financial Secretary (1985-92). He has therefore held 3 senior Civil Service posts over 24 years. Whilst he was in those senior roles he said he was never made aware of any whistleblowing cases that could be corroborated, either by his staff or by reporters of wrongdoing themselves.

The Cayman Islands Civil Service Association (CISCA) as an organization was in place before he joined the Civil Service. His working relationship with them was good. He had been approached by CISCA Management Council regarding the PSML reforms, but was never approached by them directly regarding whistleblowing as far as he could recall.

When asked whether he was part of a whistleblowing appeal system, to whom someone could ultimately complain if they have been dismissed or adversely treated for reporting wrongdoing, Mr. McCarthy responded that if a civil servant had a complaint against their Head of Department, they could complain to the next level up. If there was collusion with more senior people, you could go to the level above where the collusion ends. Ultimately they could come to him as Head of the Civil Service.

When interviewed, Mr. McCarthy, Mr. Ebanks and Mr. Manderson were all asked whether, during their respective tenures as Heads of the Civil Service, they had presided over a culture that did not support whistleblowing, and consequently could be viewed as part of the problem. In response to this question, Mr. McCarthy denied wilful blindness on his part. If he had knowledge that someone wanted to report whistleblowing but did not feel supported in doing so, he accepted that, as Head of the Civil Service, this would have been his responsibility to support that person and to do something about it.

With regard to existing policies and laws during his time in the Civil Service that could be used to protect whistleblowers, Mr. McCarthy was only aware of the PSML which dealt with the standard of behavior expected of a civil servant, now currently in Part II of the PSML 2013 (the Public Service Values and Public Servant's Code of Conduct). These are the values to which the public service should aspire. In his opinion there are some sections of the Code of Conduct that would support whistleblowers.

Donovan Ebanks

Mr. Ebanks was appointed Chief Secretary in July 2009. The title of this role became Deputy Governor on 6 November 2009. He spent his entire career in the Civil Service and initially joined the Public Works Department as an engineer in 1975; when he left in 1994 he was Chief Engineer. He was Deputy Chief Secretary from 1994-2009 and Chief Secretary from July – November 2009, when the role became Deputy Governor. He remained Deputy Governor until his retirement in January 2012.

Save for one person who he urged to come forward but who declined to do so, as far as he could recall Mr. Ebanks was not made aware of any whistleblowing cases during his time as Chief Secretary and Deputy Governor, either personally, via staff, or through CICSA. **This contrasts with accounts from other civil servants (both current and former) interviewed for this Report.**

He had a cordial relationship with CICSA and had considerable dealings with them with regards to the policy on signing petitions. If CICSA had any concerns with regards to whistleblowing, either generally or with any particular individual, the organization could come to him and he in turn would listen.

When asked whether, in the light of allegations of intimidation and victimization of actual or potential whistleblowers, as Head of the Civil Service he had been part of the problem, Mr. Ebanks said he could not be objective on that point and that it was for others to judge. He accepted that it is possible that people might have felt scared of him and believed they would not be supported if they "blew the whistle".

During his time as Chief Secretary and Deputy Governor there were no whistleblowing policies in place. He thinks there should have been. With regard to laws, apart from the provisions in the Freedom of Information Law 2007 there were none in place specifically dealing with whistleblowing.

With regard to the Public Servant's Code of Conduct, its values impose an obligation to report anything that constitutes wrongdoing. However, it does not set out any policies or protocols to be followed.

Generally however, Mr. Ebanks was of the opinion that there is a place for whistleblower protection, believing that whistleblowing provisions are healthy and appropriate in a good governance structure, and that he supported appropriate whistleblowing measures.

Franz Manderson

The current Deputy Governor and Head of the Civil Service is Mr. Franz Manderson, who took up this post in February 2012. His last two senior civil service roles prior to this were as Chief Officer, Portfolio of Internal and External Affairs, and then before that as Chief Immigration Officer.

In his role as Deputy Governor, Mr. Manderson claims to have personally been made aware of instances where public servants have:

- Used government vehicles for personal use;
- Abused sick leave (saying they are sick but are not)
- Were discourteous to customers

He knows of people who have been spoken to and given written warnings, but of no dismissals.

With regard to his relationship with the Cayman Islands Civil Service Association (CICSA), the Association has always had someone who meets with them on a regular basis. The current Chief Officer of PoCS, Gloria McField-Nixon, meets with the Association at least quarterly, and within the last month (before this interview) Mr. Manderson had recently agreed to meet with CICSA himself. Despite this, he has not been made aware of any whistleblowing cases through CICSA in his capacity as Head of the Civil Service.

Mr. Manderson meets with Mrs. McField-Nixon almost daily - more than any other Chief Officer, as she is the lead in HR matters for the Civil Service.

As with Mr. McCarthy and Mr. Ebanks, Mr. Manderson was asked whether, as Head of the Civil Service, he was part of the problem, in light of the credible allegations of intimidation and victimization of persons who report wrongdoing, or persons being afraid to so act for fear of such reprisals. He denied this, stating that if he had victimized a whistleblower; was not confidential; actively supported victimization; or passively supported victimization, then he would arguably be part of the problem. However, he has not done, and does not do, any of those things.

He thinks the number of whistleblowing incidents have remained the same.

In regards to Whistleblowers on government contracts, when he was C.O. in 2009-10, he heard of instances where people had intimated that their contracts were not renewed because they reported wrongdoing. However, he did not believe this to be true as he saw documented issues of poor performance justifying non-renewal.

Speaking on the subject of existing laws and policies on whistleblowing (dealt with in Section 8 of this Report), to his knowledge there are currently none except S.50 of the Freedom of Information Law 2007. He is also not aware of any policies that deal with whistleblowing; **this is supported by OCC research which has shown that, as at the date of this Report, none currently exist.**

When asked to discuss the Clifford Inquiry and Report, he felt that the Recommendations were sound. He would support implementation and as Head of the Civil Service he would get behind the Recommendations, especially on whistleblowing.

As Deputy Governor and Head of the Civil Service, Mr. Manderson wants to see comprehensive legislation and policy on whistleblowing including:

- Who to report to
- How both the matter reported on and the whistleblowers are dealt with;
- Clear guidance to the Civil Service as to how to deal with said matters
- How the law should be applied.

In his view, civil servants are aware that S.5(2) (e) and (f) of the Public Servant's Code of Conduct can be used to protect whistleblowers (how he knows this is unclear), but there is currently no legislation in force to do this apart from the whistleblowing provision under S.50 of the Freedom of Information Law 2007. He does not know of a specific case where those parts of the Code of Conduct have been used. He is also not aware of anyone coming to him and expressly stating that they 'blew the whistle' and was punished as a result.

d) The Cayman Islands Civil Service Association (CICSA)

The Cayman Islands Civil Service Association is the only body in the Cayman Islands charged with representing the interest of persons employed by Government.

CICSA is recognized in S. 68 the Public Service Management Law 2013, which states that "The Cayman Islands Government recognises the Cayman Islands Civil Service Association as the duly appointed representative of the civil service and the Head of the Civil Service, the Portfolio of the Civil Service and chief officers are similarly to recognise the Association and liaise with it as appropriate over human resource issues for which they are responsible."

The role of CICSA is primarily to foster good relationships between employer and employees. The law recognizes CICSA as the duly constituted body to liaise between employer and employee.

CICSA represents all levels of civil servants. The only requirement for membership is that an individual either be currently employed by the government or a retired civil servant.

For the past 45 years CICSA has assisted civil servants. In the future, its hope is to continue to increase the quality and quantity of services that it provides.

With regard to whistleblowing, CISCA feels that there is a need for proper protections to be put in place, backed by robust action being taken to hold wrongdoers accountable. As part of this there needs to be a proper reporting system set up to receive complaints and information. Included in this should be an obligation imposed on a civil servant not to arbitrarily release information to the media.

There is a reluctance to come forward for fear of victimization. This is regrettable but, as things stand, understandable. Even CICSA, although they co-operated with the investigation, were surprisingly reluctant bearing in mind their mandate to represent civil service members. The reasons for this are best known to them, but from OCC research and interviews it is not due to any lack of civil servants actually victimized, or fearful of being victimized, for reporting wrongdoing, and making this known to them.

THE VICTIMS: REPORTERS OF WRONGDOING

The OCC is aware that the overwhelming majority of whistleblowers come forward, despite the very real potential risks, because it is the right thing to do and the only way to work with integrity. However, there are rare exceptions when the motives of the person coming forward ostensibly to report wrongdoing are less than pure. Any such examples have not been used in this Report as they would damage the good examples by association.

This section was the most difficult part of the Report to write because, as Commissioner, I was aware that to do so in even the vaguest of terms risked identifying the victims, as some of their accounts will be known by other civil servants, often senior.

All those who came forward would only speak to me personally as Commissioner, even though the OCC's reputation for confidentiality and integrity is both proven and well known. Despite guarantees of anonymity, some who were prepared to give me a verbal account of their experiences would not consent for it to be used in the Report under any circumstances as they were so afraid of reprisals, both professionally and personally. When a written interview was conducted, the accounts were anonymised and identifying details removed.

Of those interviewed who consented for their accounts to be used in this Report:

- 40% reported financial mismanagement;
- 40% reported favouritism and unjustified preferential treatment of some members of staff over others, in particular with regard to promotions and training;
- 80% had reported their concerns to the most senior levels of the civil and public service;

All felt victimized as a direct consequence of reporting wrongdoing:

- 80% had their employment terminated either by being forced to resign, constructively dismissed or by their contract not being renewed when they had been given every expectation that it would be.
- 20% were transferred out of the department.
- 20% were demoted;
- 20% were not promoted.

THE CAYMAN PRIVATE SECTOR EXPERIENCE

Contrary to the belief that this issue, focusing as it does on the treatment of government reporters of wrongdoing, does not concern the private sector, many of the whistleblowers interviewed by the OCC reported financial irregularities as being mainly or entirely the reason they felt compelled to report wrongdoing.

Although we have concentrated on whistleblowing in the public sector in this Report, from our research there would appear to be nothing comprehensive – and no examples of best practice - within the private sector. The hope and aim of this Report is that the OCC Recommendations, much as is the assumed intent behind the SIPL Bill, will also benefit the private sector business community and the Cayman Islands as a whole.

As stated in the Introduction, **effective whistleblowing protection for both the public and private sector makes good business sense.** For example, in November 2012 Forbes magazine ranked New Zealand first on its most recent list of the Best Countries for Business thanks to a transparent and stable business climate. New Zealand's high trust society is considered both a national treasure and an economic asset, and according to Phil O'Reilly Chief Executive of Business New Zealand, it is *"…… its greatest competitive advantage."*

EXAMPLES OF BEST PRACTICE: OTHER JURISDICTIONS

The OCC recognizes that the Cayman Islands is a unique jurisdiction, not least because of its tax status. It also believes strongly that effective whistleblowing regulation and protection has to be one that is particularly crafted to suit the needs of these Islands, to ensure maximum "buy-in" from all stakeholders.

That said, there are aspects of whistleblowing legislation and protection in the following jurisdictions that could and should be examined and possibly applied here. These have been highlighted in **bold.**

Whistleblowing is a current topic in many jurisdictions and across a wide variety of sectors both within and outside of government. Many countries across the world, including South Africa, Bermuda, and the United Kingdom already have stand-alone legislation dealing solely with this subject.

In the United Kingdom, the Public Interest Disclosure Act 1998, having received Royal Assent in 1998, has been in force since July 1999. According to the Preamble, this is "An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes."

In the United States, in certain circumstances, whistleblowers are paid for reporting wrongdoing, though because there are drawbacks to this approach this is not an OCC recommendation.

In 2013 alone, countries as disparate geographically and politically as Hungary and Australia have both brought whistleblowing legislation before their respective parliaments. In Hungary, the new draft whistleblowing legislation is to be laid before and accepted by Parliament in the autumn of 2013, with the effective date of the new legislation being 1 January 2014.

In Australia, the Public Interest Disclosure Bill was passed into law on 26 June 2013. This establishes the first stand-alone whistleblower protection scheme for federal public servants, contractors and employees of contractors who report wrongdoing within the Commonwealth (of Australia) public sector.

This Bill (now Law) confers a number of roles and powers on the Commonwealth Ombudsman to ensure the legislation meets its objectives. The Ombudsman's office will assist both agencies and those reporting wrongdoing (whistleblowers) to interpret, understand and comply with the legislation. The Commonwealth Ombudsman will also have oversight of agency decisions and will report annually to Parliament on the scheme, providing transparency and accountability for its operation.

The Commonwealth Ombudsman, Colin Neave, said the Public Interest Disclosure Bill would help to ensure the efficient, effective and ethical delivery of government services and ultimately help reduce risks to the environment and the health and safety of the community, adding: *'It will provide indirect benefits to all Australians and contribute to building further confidence in the Commonwealth public sector.'*

The former Minister for the Public Service and Integrity, Mark Dreyfus QC, in announcing the passage of the Bill, said the legislation would encourage a pro-disclosure culture across the public sector by facilitating disclosure and investigation of wrongdoing and maladministration in the federal public sector, stating: *"It provides a clear set of rules for government agencies to respond to allegations of wrongdoing made by current and former public officials, and strengthens protections against victimisation and discrimination for those speaking out."*

RECOMMENDATION – consideration should be given to a government Minister holding the portfolio for the Public Service and Integrity, in much the same way as Australia (Recommendation 10 of this Report).

It is important to note that this piece of legislation also includes a statutory review of its operations two years after commencement.

A Whistleblowing world leader - New Zealand

New Zealand is an excellent example of good practice in this area, especially as it has topped the Transparency International (TI) Corruption Perceptions Index for 7 years running (2006-12) as the world's least corrupt nation, and has an established reputation for clean government. As already stated in section 12 of this Report, New Zealand's high trust society is both a national treasure and an economic asset.

Both Dame Beverley Wakem, Chief Ombudsman of New Zealand and President of the International Ombudsman's Institute (IOI), the global body for ombudsmen, and John Pohl, General Counsel for the Office of the Ombudsman, New Zealand, were interviewed as part of this investigation.

The legislation protecting whistleblowers is the Protected Disclosures Act 2000 (referred to here as PDA NZ, to distinguish it from the Jamaican legislation of the same name and acronym – see *post*). According to both Dame Beverley and Mr. Pohl, the impetus for the Act was the public disclosure of the poor treatment of patients at the Lake Alice Facility for the Mentally Ill. A male nurse had warned his employers about the danger of releasing a mentally ill patient (a mentally ill person did in fact kill someone on release). When nothing was done, he went public; as a result of his actions he was dismissed and otherwise victimized.

According to John Pohl, the purpose of the Act is to make it easier to disclose and investigate "serious wrongdoing" in or by an organisation (public or private sector) and to protect employees who make such disclosures from any retaliatory action, whether by their employer or otherwise. "Serious wrongdoing" is defined in S.3 of the Act and includes:

a) The wrongful use of public funds or resources of a public sector organization;
b) Putting public health, safety or the environment at serious risk;
c) Creating a serious risk to the maintenance of the law;
d) The commission of offences; and
e) Oppressive, improperly discriminatory, or grossly negligent conduct, or gross mismanagement, by a public official

In essence, the Protected Disclosures Act permits the disclosing of a serious wrongdoing by an employee of an organisation without fear of retaliation provided that it is made in accordance with the requirements of that Act. However, the Act requires that disclosures follow the internal procedures of the relevant organisation (which public sector agencies are required to have). While private sector organisations are not required to have internal procedures for making disclosures, it is only if no internal procedures exist, or the internal procedures are considered by the 'whistleblower' not to have dealt with the matter adequately that it can go beyond the agency or organisation concerned. In this regard, while Ombudsmen are an "appropriate authority" for this purpose and also have the function of providing advice and guidance about the PDA, they have no jurisdiction with respect to private sector organisations.

According to Mr. Pohl, the only issues that would come to the New Zealand Ombudsman's Office would be if and when the whistleblower feels nothing has been done, or that the matter is taking too long to be resolved, in which case the whistleblower can come to the Ombudsman.

The definition of employee under the Act is very wide, and includes volunteers (S.19A of the Act). **The OCC recommends that any Cayman legislation should include this (Recommendation 1 of this Report).**

If the whistleblower goes straight to the media instead of going through the internal procedure first, the whistleblower is not protected by the Act. Although there is a New

Zealand common-law defence of "Exposure of an Iniquity" if the media route is taken, this would be the only possible protection and it would be inadvisable to rely on this.

With regard to the operation of the protections under the Act, S.17 and S.18 provide protections for the complainant. S.19 is the confidentiality provision, and S.19 (A) extends this to include volunteers. Employees who claim to suffer retaliatory action from their employer may bring a personal grievance under employment legislation.

The whistleblower is also immune from civil or criminal proceedings in relation to the disclosure and has the right to have their identity kept confidential. However, under S.20 of the Act no protections apply to disclosures known to be false or otherwise made in bad faith.

If someone intends to report wrongdoing, consideration has to be given as to the best organization to receive this information – for example, if it is potentially a criminal matter, they should go to the police. If someone wishes to make such a disclosure to the New Zealand Ombudsman's Office, the following points are considered:

- Is it about an employee?
- Is that employee in the private or public sector?
- Has the whistleblower gone through any existing internal process?
- Is the disclosure about serious wrongdoing?

There is a provision in the PDA NZ which allows the whistleblower to go directly to the Chief Executive (equivalent of a Chief Officer rank in the Cayman Islands Government) if he or she believes the wrongdoers include people involved in the internal process. If the alleged wrongdoer is the Chief Executive, the whistleblower can go to the appropriate authority as defined in S.3 (1) of the Act.

The Caribbean experience - Jamaica

Jamaica has stand-alone legislation dealing with whistleblowing – the Protected Disclosures Act 2011.

This country is Cayman's nearest English-speaking Caribbean neighbour, and culturally very similar. Professor Trevor Munroe is well known to the Cayman Islands, having lectured and made presentations here in recent years. He is currently Executive Director of National Integrity Action, a non-profit organization aimed at combating corruption in Jamaica. When interviewed for this Report in July 2013, he was firmly of the view that not only is confidentiality very critical, but that the protection of the whistleblower from victimization will depend on the robustness of the body to which he or she is reporting.

Professor Munroe stated that in Jamaica there is a designated body for whistleblowers to go to – the Commission for the Prevention of Corruption (CPC), which particularly relates to public servants – but this has only recently been so designated, even though this body was established in 2002 to give effect to the Corruption Prevention Act 2001.

The inaugural Commission members were Justice Chester Orr (Chairman); educator Rosemarie Vernon; lawyer William Chin-See; Canon Weeville Gordon and Auditor-General Adrian Strachan.

According to Professor Munroe, the 3 bodies that could (potentially) deal with issues of corruption and whistleblowing – the Office of the Contractor-General, the CPC, and the Parliamentary Integrity of Members Commission (the latter being the oldest of the three, established in the 1970's) – are to be merged into a single anti-corruption body sometime (optimistically) in 2014.

The Offshore experience – Bermuda

Bermuda has many similarities to the Cayman Islands. Like these Islands, it is also a British Overseas Territory – an offshore jurisdiction, of similar size and population, and similar population diversity with a number of different nationalities present. It is also culturally, if not geographically, Caribbean.

The Good Governance Acts of 2011 and 2012 both deal with whistleblower protection. Although not one discrete stand-alone piece of legislation, both Acts deal with good governance, were passed in successive years and, in relation to whistleblowing, can be considered together.

S.7 of the 2011 Act amends the (Bermuda) Employment Act 2000 by inserting a new S.29 (A) to protect whistleblowers from unfair dismissal and disciplinary action.

The 2012 Act creates criminal offences so as to make further provision for the protection of whistleblowers and transparency in the awarding of government contracts. **S.3 of the 2012 Act makes it a criminal offence to terminate a contract with, or withhold payment from, certain whistleblowers. A person committing such an offence can be fined up to $10,000, or receive up to 12 months imprisonment, or both.**

FINDINGS

1. FINDING – Civil and Public Servants, whether Caymanian or non-Caymanian, are extremely reluctant to report wrongdoing both for fear of reprisal, either direct or indirect (i.e., fear of repercussions on family members) and because of a strongly held belief that the wrongdoer will not be punished.

2. FINDING – Whilst Civil Servants, past and present, who were interviewed for this Report recounted many instances of intimidation, victimization or reprisal against whistleblowers, civil servants at Chief Officer level and above largely claimed to be unaware of any such issues.

3. FINDING - There is no effective and rigorously enforced whistleblowing policy within the Cayman Islands Government. The absence of same undermines the ability of civil and public servants to fully comply with Part II of the Public Service Management Law (currently 2013 Revision).

4. FINDING - The proper treatment of whistleblowers is a "good governance" issue, as well as a human rights issue. This also has an impact on private sector business as well.

5. FINDING - The protection from victimization will depend on the robustness of the body to which the whistleblower is reporting.

RECOMMENDATIONS

Law

1. RECOMMENDATION - Enact stand-alone legislation to deal with whistleblowing as in Jamaica, Australia, New Zealand and elsewhere (see Section 13 of this Report). Although, according to senior lawyers employed within the Government Legal Service, there are a few sections in individual laws that could be relied upon by whistleblowers, the OCC is firmly of the view that people should not have to trawl through legislation to cherry-pick sections of applicable legislation, which is especially

difficult for ordinary members of the public, and does not assist transparency. The protection should extend to volunteers as well as to employees and others receiving payment for their services.

2. RECOMMENDATION - There should be a Positive Duty to Report as *per* the Money Laundering and Anti-Corruption Laws.

Civil Service Policy and Practice

3. RECOMMENDATION - Change the culture of the Civil Service to encourage whistleblowing and support whistleblowers – to see whistleblowers properly as Reporters of Wrongdoing.

4. RECOMMENDATION and FINDING - Hand in hand with 3 above is accountability for the perpetrators of wrongdoing. If they are not appropriately punished no-one will come forward.

5. RECOMMENDATION – Government should draft a Whistleblowing Policy document containing the points raised in Section 8(b) of this Report.

6. RECOMMENDATION - Keep the Public Service Values and Public Servant's Code of Conduct front and centre for all who work in any government entity or carry out government business, even if not directly employed by government.

7. RECOMMENDATION – Establish a confidential hotline or tip-line for whistleblowers, properly funded and resourced on an ongoing basis.

8. RECOMMENDATION - Confidentiality for whistleblowers must be ensured.

Public Education and Outreach

9. RECOMMENDATION – Establish a programme of public education to advise people on what amounts to whistleblowing, and as to what legislation and protections are currently, or will imminently be, in place.

Other

10. RECOMMENDATION – consideration should be given to a Government Minister holding the portfolio for the Public Service and Integrity, in much the same way as Australia.

GLOSSARY

CICSA – Cayman Islands Civil Service Association.

CCL 2006 – Complaints Commissioner Law 2006

CO – Chief Officer

CPC - Commission for the Prevention of Corruption

CSAC – Civil Service Appeals Commission.

DG – Deputy Governor

FOI – Freedom of Information Law 2007

HR – Human Resources

PoCS – Portfolio of the Civil Service

PSML – Public Service Management Law.

PDA NZ – Protected Disclosures Act (New Zealand legislation)

PDA JA - Protected Disclosures Act (Jamaica legislation)

SIPL – Standards in Public Life Bill 2013