



# AIDE-MEMOIRE

[IN-CONFIDENCE]

## Protected Disclosures Act – updated draft paper for Ministerial consultation

**Date:** 2 September 2019

**For:** Hon Chris Hipkins, Minister of State Services

**Report No:** SSC2019/0289

### Protected Disclosures Act – updated draft paper for Ministerial consultation

<b>Purpose</b>	Further to our briefing of 25 July (SSC2019/0240), we attach a draft of the Cabinet paper, updated to reflect feedback from consultation with departments and appropriate authorities. The table below summarises what we have changed from the previous draft in response to feedback. A draft Regulatory Impact Assessment is also attached.
<b>Date of meeting</b>	The next available GOV meeting is 19 September 2019. The paper would need to be lodged on 12 September.
<b>Consultation</b>	<p>Since our previous briefing, we have consulted on the Cabinet paper with all government departments, the Ombudsman and the Inspector-General of Intelligence and Security and briefed many of the other appropriate authorities face to face.</p> <p>While largely supportive of the proposals, the consultation helped to highlight potential unintended consequences of some proposals and the need for the drafting to consider some further clarifications for the proposed Bill. It also generated further questions that need to be looked at in phase 2 – for example whether some types of disclosure should be protected irrespective of whether the term “protected disclosure” is used, and how that would fit with other laws governing the workplace.</p> <p>Some consultees, notably the Chief Ombudsman, also considered that we should be moving faster on the ‘one stop shop’ concept. A fuller explanation of why this concept requires further work has been inserted in the paper. The State Services Commissioner will be meeting the Chief Ombudsman on 6 September and will take him through how we have addressed his extensive feedback. Following that meeting, we may need to add to the current comments in the Consultation section of the paper.</p> <p>Treasury has confirmed its view that a summary form Regulatory Impact Analysis is required. A draft is attached, still subject to feedback from departments and a quality assessment, which we have asked to be completed before the paper is lodged. The timing is tight but not impossible.</p>
<b>Our advice</b>	Most of the proposals in the previous draft remain substantially the same, but we have redrafted some sections of the paper to reflect departmental and appropriate authority feedback. The changes are summarised in the attached

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table.

One proposal that drew criticism from most responders was the idea of clarifying the position for bullying and harassment, which is better covered by other legislation. We have not found evidence to support the issue raised in last year's consultation of people using protected disclosure rather than personal grievance processes. We have therefore reshaped our proposal to focus on the other part of the problem – to give appropriate authorities the powers to decline to investigate or refer back to the employer to resolve the disclosure. On the advice of Ministry of Justice that the proposal created more problems than it would solve, we have also removed the proposal to specifically clarify the duties of public sector media organisations.

We will be working with PCO on how best to draft the changes, including some of the new points of clarification that have been raised. We have put a general comment on these in the Cabinet paper, but see these as largely minor and technical matters that would not require detailed Cabinet approvals at the policy stage.

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We recommend

- that you release this aide-memoire in full once the attached paper has been considered by Cabinet
- Agree/disagree.

#### **Proactive Release**

Hon Chris Hipkins  
Minister of State Services

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## Summary of consultation feedback and resulting changes

Proposal	Feedback	What change made
<b>General</b>		
Legislative change	Mostly supported but DPMC queried necessity and how much could be done through guidance	None
<b>Key policy changes</b>		
Lower threshold from 'believe' to 'suspect'	Widely supported. Queries related to whether the overall test for protection (reason to suspect serious wrongdoing) was still sufficient	None (we will be looking at how to make overall test clearer in the legislation)
Ability to report direct to an external authority at any time	Supported, but queries on how this would work in practice – especially risk of discloser going to multiple agencies.	Unchanged, but clarify that agencies should ask whether discloser has made/is making same disclosure elsewhere
Clarifying whether bullying and harassment falls in definition of serious wrongdoing or would be better dealt with under other legislation	Most respondents considered that bullying and harassment should not be singled out as they are often symptoms of wider wrongdoing. The issue previously raised about people inappropriately using protected disclosure provisions for personal grievance does not seem borne out by low numbers of protected disclosures identified during consultation.	<b>Change proposal</b> to focus on recipients' ability to decline to investigate the disclosure (including if there is a more appropriate mechanism to deal with it)
Serious wrongdoing regarding use of funds or resources extended to private organisations using public funds or resources	Supported, with queries about whether this proposal placed new requirements on private organisations and whether there would be a scale threshold.  (This proposal would not require private organisations to implement public sector type internal procedures.)	No change
Serious wrongdoing by 'public official' extended to private organisations exercising statutory	Supported	No change

authority or delivering public services		
<b>Process support and clarification</b>		
Outlining the steps those receiving disclosures should take	Queries included whether protected disclosure status should be assumed at outset, ability to tailor procedures to own organisation and whether the steps would differ between internal and external disclosures.	Rewording some of the Cabinet paper discussion
Public sector organisations to provide support for disclosers	General support for the concept but a lot of questions about what this might look like, whether it would create legal risk, whether agencies could tailor the support to suit operational needs and how this would apply to external authorities, including those in the private sector	Redrafted to emphasise that this will be a required component of <b>internal</b> procedures
More explicit reference to forms adverse conduct towards a discloser could take	Some questions about whether the Health and Safety at Work Act list of adverse conduct was the best vehicle; also how PDA interacts with the Intelligence and Security Act 2017 (ISA)	Broader wording to enable decision on best approach to be taken during drafting
Choice of appropriate authorities - schedule	Queries focused on whether guidance would suffice instead, ensuring that sections 12 and 13 re matters to be referred to IGIS and DPMC respectively were not affected, and choosing authorities based on their authority to investigate and/or take disciplinary action.	Tweak drafting, no substantive change
Head of any public sector organisation – media organisations	Justice responded that duties under PDA are clear and that singling out public sector media organisations could instead create privacy, Bill of Rights Act etc issues	Delete proposed clarification
<b>Further work</b>		
Stage 2 of work	Some feedback that the paper did not explain why the one stop shop concept was not part of stage 1.  MBIE has been asked to prepare an Issues Paper on bullying and harassment, which will support the work on adequacy of redress mechanisms.	More priority for one stop shop in stage 2 work, with explanation of the work involved  Paper updated

In Confidence

Office of the Minister of State Services

Chair, Cabinet Government Administration and Expenditure Committee

## **Review of the Protected Disclosures Act 2000**

### **Proposal**

1. This paper seeks agreement to strengthen the Protected Disclosures Act 2000 as it relates to the public sector and to clarify and in some respects extend its application to the private sector.
2. The Protected Disclosures Amendment Bill holds a Category 4 on the 2019 Legislative Programme (to be referred to Select Committee in 2019).
3. I have also asked the State Services Commission (SSC) to undertake a second tranche of work, with other agencies as required, to:
  - consult on further possible amendments to the Act with a view to reform beyond 2020
  - build on existing standards and guidance to improve awareness of the Act across the public and private sectors
  - test the feasibility and usefulness of establishing reporting and monitoring arrangements, starting with the core public services.

### **Executive Summary**

4. New Zealand was one of the first countries in the world to introduce dedicated whistle-blower protection legislation in 2000. The Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees and other workers who report concerns. The Act covers all workplaces, although some provisions only apply in the public sector. The Act focuses on the worker/employer relationship because while staff may have information or insights not available to the public, they also have obligations of confidentiality to their employers and risk losing their employment and damaging their reputations if these are breached.
5. SSC has been working to provide disclosers and agencies in the public sector with better guidance, including the SSC's 'Speaking Up' standards. The Ombudsman has also been developing guidance on the Act applying to public and private sectors. However in a 2017 investigation into the treatment of whistleblowers at the Ministry of Transport, and a subsequent review of the Act, SSC identified a number of areas where the current regime is unclear, confusing, and creates barriers to making disclosures that the Speaking Up standards and guidance cannot fully address without supporting changes to the underlying legislation.

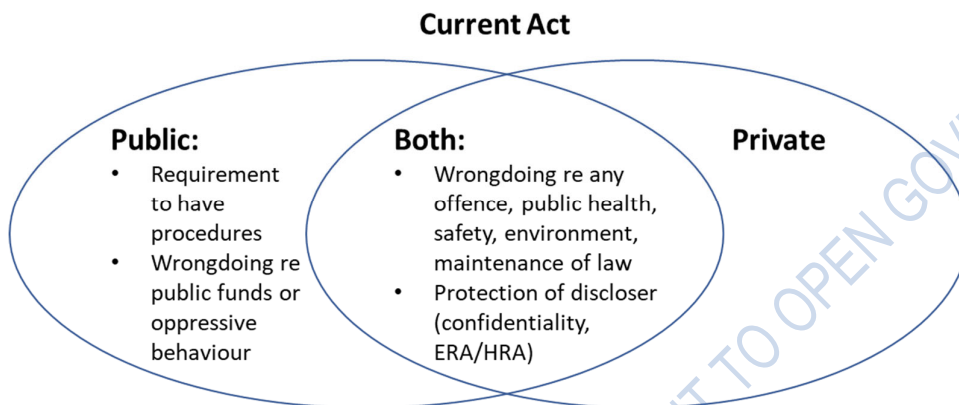
6. On 13 August 2018, Cabinet confirmed the decision to undertake a review and seek public feedback on five options for change (GOV-18-MIN-0051 refers). The five options consulted on, which are cumulative, were:
  - Foundational changes to clarify the existing legislation and improve protections
  - Allow people to report concerns externally at any time
  - Introduce dedicated system leadership
  - Introduce monitoring for the public sector
  - Introduce monitoring for the private sector.
7. Public consultation conducted in late 2018 supported many of the proposals and the summary of submissions is attached as Annex 3. This paper proposes taking forward most of the proposals in the first two options above through legislation in the first instance and progressing the other options in a second tranche of work. The main changes I propose to the Act are (Annex 1):
  - Lowering the threshold to protect a discloser if they 'suspect', rather than 'believe', serious wrongdoing
  - Requiring public sector organisations to provide support for disclosers
  - Allowing people to report directly to an appropriate authority at any time; conversely, making explicit the ability of that authority to decline a disclosure or refer it back to the discloser's organisation
  - Strengthening protection for disclosers by outlining what those receiving disclosures must do, and by being more explicit about the forms that adverse conduct might take
  - Extending the interpretation of some aspects of 'serious wrongdoing' in the Act to address the potential for private sector organisations to be involved in unlawful, corrupt, or irregular use of public funds or resources, and to engage in 'oppressive, improperly discriminatory, or grossly negligent' conduct when delivering services on behalf of government. Staff in private organisations should have the opportunity to make protected disclosures regarding such wrongdoing when it involves public funds or public services.
8. I expect these changes to have a significant impact on the main issues with the Act that have been identified, especially when combined with the non-legislative elements of the second tranche of work. The table in Annex 2 shows the proposals we consulted on that I intend to implement at this stage and the proposals that are subject to further work.
9. The changes should give those making and receiving disclosures much greater clarity regarding the scope of the Act and greater understanding of and confidence in the process. I therefore expect to see some increase in the number of protected disclosures.
10. I have also asked SSC to undertake a second tranche of work, with other agencies as required, to: consult on further possible amendments to the Act with a view to reform beyond 2020; build on existing standards and guidance to improve awareness of the Act across the public and private sectors; and test the feasibility

and usefulness of establishing reporting and monitoring arrangements, starting with the core public services.

## Background

### The Act

11. The Act currently covers the public and private sectors as shown:



12. The Act aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees (including former employees, contractors, secondees, board members and volunteers) who report concerns. Disclosures are protected if the information is about 'serious wrongdoing' and the discloser believes on reasonable grounds that the information is true or likely to be true. 'Serious wrongdoing' includes any serious offence; unlawful, corrupt or irregular use of public money or resources; conduct that poses a serious risk to public health and safety; or gross mismanagement by public officials. The protections offered to disclosers include best endeavours to preserve confidentiality and immunity from civil and criminal proceedings.
13. Effective organisational processes and legal protections for employees who 'blow the whistle' play a key role in uncovering serious misconduct, fraud and corruption in both public and private workplaces. This is critical to maintaining public confidence in the integrity of government and business in New Zealand. International research found that reporting by employees is the single most important method by which wrongdoing in, or by, an organisation is brought to light.<sup>1</sup>

### Problem definition

14. The aims of the Act remain sound, but there are four broad problems which guidance and standards, such as SSC's Speaking Up standards, can only partly mitigate:
- Both organisations and disclosers are confused about when to use the Act

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<sup>1</sup> Griffith University, *Whistling While They Work: Improving managerial responses to whistleblowing in public and private sector organisations*, September 2017. The findings are based on a survey of over 12,000 employees and managers in 38 Australian and New Zealand organisations.

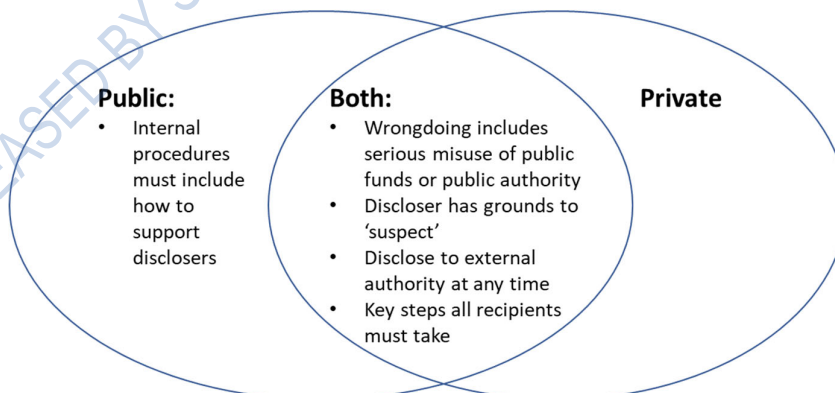


- Disclosers are unclear about how to make a disclosure internally, and some organisations are also unclear about how to respond
- It is hard for disclosers to navigate the system for reporting concerns externally
- Disclosers fear ‘speaking up’ because they lack confidence in the protections available to them.

## Proposals

15. In response to these four problems I have identified a package of proposals to amend the Act now, followed a second tranche of work. The overall objectives for this package are:
- Disclosers and organisations are familiar with the Act and know when to use it
  - Disclosers know who to report to and understand the support that is available to them
  - Organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively
  - Disclosers have confidence in the protections available to them and do not fear reprisal.
16. The legislative changes I propose at this stage build on work already being undertaken by SSC and the Ombudsman. SSC administers the Act and is responsible for providing leadership to the State services, including in the areas of integrity and conduct. SSC is undertaking considerable work developing model processes, procedures and guidance, including the Speaking Up standards and Positive Workplace Behaviour standards in the State services. The Ombudsman holds a statutory role under the Act which includes providing information and guidance to any employee on any matter concerning the Act.
17. The initial legislative package that I propose, set out in Annex 1, is based on measures that received a high level of support in public consultation.<sup>2</sup> The main effects on public and private sectors would be:

### Proposed changes to Act



<sup>2</sup> The summary of submissions is attached as Annex 3



18. The main changes that affect the private sector in this package will be:
- Changes to the definition of 'serious wrongdoing' to enable protected disclosures regarding serious wrongdoing by private organisations when it involves public funds or public services
  - Setting out the key steps all recipients of disclosures must take, including confirming whether disclosure is to be protected, confidentiality (subject to existing exceptions) and providing a response to the discloser
  - Ability for disclosers to go direct to an external organisation will affect private sector organisations both as employers and as 'appropriate authorities' (for example professional bodies).
19. Significant concerns were expressed in consultation about the time and costs involved in seeking remedies through the existing Human Rights Act and Employment Relations Act channels. Clarifying what recipients of disclosures need to do and improving awareness of those requirements should help to reduce the number of adverse consequences for those making protected disclosures. MBIE has been asked by Minister Lees-Galloway to prepare an Issues Paper on bullying and harassment at work. Drafting is underway and the Issues Paper is expected to be released in early 2020. I have also asked SSC to add the effectiveness of the remedies processes to the matters it will consider in the second tranche of work.
20. In addition to this package of legislative changes, I propose a second tranche of work, to be led by SSC working with other agencies as required, comprising:
- Further research and policy work regarding some of the more complex issues covered by the consultation that might merit inclusion in a future review of the Act
  - Promotion of guidance, processes and procedures
  - Testing the value and feasibility of reporting and monitoring arrangements (in the public service in the first instance)
  - Ongoing consideration of the potential for a 'one stop shop' lead for disclosures.
21. The second tranche of work will ensure that most of our original consultation proposals are considered. At this stage I have no plans to progress proposals that would fundamentally affect the scope and nature of the Act, such as expanding the definition of those who can make protected disclosures to cover people other than employees, such as victims of domestic abuse, immigrants, people who receive government benefits, auditors, or suppliers; protecting disclosures made direct to media; or providing financial rewards where a disclosure results in a successful prosecution.

## ***Changes in policy***

### *Lower the threshold for making a protected disclosure*

22. The Act currently confers protection to a discloser who believes on reasonable grounds the information they are disclosing is true, or likely to be true. Where the discloser's belief is mistaken, the discloser remains protected under the Act and from victimisation under section 66(1)(a) of the Human Rights Act, provided the discloser has not acted in bad faith.
23. Consultation highlighted that 'believe' may be too high a standard. It may deter disclosers who have difficulty obtaining sufficient evidence to turn their 'suspicion' into 'belief' from raising in good faith concerns of serious wrongdoing, contrary to the underlying purpose of the Act and the promotion of a 'speak up' culture.
24. I propose to lower the threshold for making a protected disclosure by requiring disclosers to have 'reasonable grounds to suspect' serious wrongdoing is being committed, rather than 'reasonable grounds to believe'. The disclosure will still need to be in good faith for the protections under the Act to apply.

### *Require public sector organisations to include how they will support disclosers in their internal procedures*

25. Currently there is no obligation in the Act for organisations to provide support to disclosers other than using best endeavours to maintain confidentiality of their identity.
26. The SSC Speaking Up standards already make express provision for keeping employees safe. Any process needs to reflect that support required will be dependent on the circumstances, which is why the standards refer to a support plan. In addition, I propose adding an explicit reference to public sector organisations providing support to disclosers. How an organisation will support a discloser could form part of the existing internal processes that organisations are required to put in place and publish. I am not proposing extending this duty to the private sector at this stage; it would also not apply when external authorities receive a disclosure.
27. I propose to leave the question of support for those who are the subject of a disclosure to the discretion of their employer.

### *Allow disclosers to report serious wrongdoing directly to an appropriate authority at any time*

28. The Act requires any discloser to report suspected serious wrongdoing internally within the organisation first, unless the discloser believes on reasonable grounds:
  - The head of the organisation is or may be involved in the serious wrongdoing
  - Immediate reference to an appropriate authority is justified by the urgency of the matter, or some other exceptional circumstances, or
  - There has been no action or recommended action within 20 working days.

29. Disclosers may not want to report concerns internally if they fear their identity will become known, particularly if the suspected serious wrongdoing has undermined their confidence in the organisation. Without access to an external reporting channel, serious wrongdoing is likely to go unreported.
30. Some consultees expressed concern that direct access to an external channel could result in unfair reputational damage and/or take the onus off organisations to create an internal speaking-up culture, maintain good internal procedures or investigate complaints. My view, however, is that well-managed organisations should be keen to ensure that their culture supports staff to raise serious issues internally. I therefore propose to enable disclosers to make a disclosure externally to an appropriate authority at any time.
31. Where an external authority considers it appropriate, the Act already provides that they may refer the matter to another appropriate authority for investigation. I expect external authorities to ask disclosers whether they have made the same disclosure elsewhere. I also propose to add explicit powers for authorities to refer a disclosure back to the employing organisation or disclosure a disclosure on grounds like those in section 17 of the Ombudsmen Act 1975 and section 71 of the Privacy Act 1993, such as triviality, delay, or the complaint being better dealt with through other mechanisms.

*Clarifying the definition of 'serious wrongdoing' and extending its application to cover public sector services and powers carried out by the private sector*

32. Clarity about what the Act does and does not cover is critical to ensuring the Act can be used for the right purposes and helps to expose serious threats to the public interest. Consultees observed that the complexity of the definition inhibits people from making disclosures because they are unsure whether the conduct they have seen fits within the definition of 'serious wrongdoing', and thus whether any disclosure would be protected. Although 'serious wrongdoing' will always be a matter of judgement, the Act does not remove protection from disclosers unless they act in bad faith or know their disclosure to be untrue.
33. I propose updating the definition of 'serious wrongdoing' to reflect that many public functions, including some involving the exercise of statutory powers, are carried out by private organisations. It needs to cover any 'unlawful, corrupt, or irregular use' of public funds or resources whether by a public or private organisation. Wrongdoing by a 'public official' also needs to cover 'an act, omission, or course of conduct by *any person delivering services on behalf of a public sector organisation* that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement'.

**Legislative clarifications**

*More clarity on appropriate authorities for receiving disclosures*

34. 'Appropriate authorities' are the external bodies to which a protected disclosure may be made. A discloser is only protected if they make the disclosure to those 'appropriate authorities'. The list in the Act includes some named officers and also:

- the head of every public sector organisation, whether or not specifically named
  - a private sector body which comprises members of a particular profession or calling and which has power to discipline its members.
35. Consultation confirmed that it is difficult for disclosers to determine which authority to disclose concerns to, as there is no clear alignment between the authorities and the categories of serious wrongdoing. I propose to use a new Schedule to the Act, to be updated through Order in Council, to name the most likely appropriate authorities and specify the nature of the disclosure/subject matter which relates to that authority's functions and investigative and disciplinary powers.
36. Although it is not clear when it would be appropriate to make a disclosure to any 'head of every public sector organisation', I have decided not to propose removal of this catch-all, as it would be invidious for a discloser to find that they were not protected solely because they made their initial disclosure to an agency not on the Schedule.

*Clarifying the Act to strengthen protections for disclosers*

37. The main protection disclosers have against retaliation is through the personal grievance provisions of the Employment Relations Act (which does not cover contractors), and the protection against victimisation in section 66 of the Human Rights Act.
38. People told us that despite protections, it can be very difficult to prevent retaliation from occurring in practice, especially given the difficulty of maintaining confidentiality, for example if the organisation needs to carry out a thorough investigation, if the community or organisation is small, or if the accused needs to be made aware of the disclosure for natural justice reasons.
39. As well as requiring public organisations' internal procedures to include protection and support for disclosers (paragraph 25-26 above), I propose to strengthen protection for disclosers by spelling out steps that all recipients of disclosures must take, and providing more detail on the forms of retaliation or adverse conduct that disclosers might face, whether by reference to other Acts or as a separate list. These steps should help to make organisations more aware of the need to manage the risks faced by disclosers and therefore reduce the number of instances where disclosers experience disadvantage.

*Outlining steps those receiving protected disclosures must take*

40. As well as the confidentiality requirement currently explicit in the Act, steps all those receiving disclosures (including external authorities and private organisations) must take would include establishing whether: the disclosure is intended as a protected disclosure; it prima facie meets the tests in the Act; it should be referred elsewhere for resolution. All of these are currently implied in the Act, but it was clear from consultation feedback that they are poorly understood.

*Clarifying the potential forms of adverse conduct disclosers may face*

41. The Act refers to recourse through personal grievance and victimisation provisions in the Employment Relations Act and Human Rights Act. These references focus largely on dismissal. I believe that providing or linking to a more comprehensive list of the forms of retaliation or adverse conduct that disclosers might face would encourage employers to think more carefully about how to protect disclosers. The Health and Safety at Work Act includes an extensive list of forms of disadvantage.

*Clarify the internal procedure requirements for public sector organisations*

42. The Act requires public sector organisations to have published internal procedures for receiving and handling information about alleged wrongdoing. The requirements for these are weak, leaving room for poor practice in how some organisations handle disclosures and uncertainty for those considering making disclosures. The SSC's Speaking Up standards address this problem in the State sector.
43. The Act provides that after 20 working days a discloser may go to an appropriate external authority. This implies that an organisation receiving a disclosure must respond to the discloser within 20 working days, but this is not explicit. Feedback in consultation highlighted that some disclosers encounter inaction after reporting concerns, which can perpetuate the belief that making a protected disclosure is futile.
44. I propose adding an explicit requirement that published internal procedures include investigating alleged wrongdoing and reporting back to the discloser on progress within 20 working days after the date the disclosure is made, and continuing to report until the investigation is complete.
45. As well as progress reporting and how the organisation will support disclosers, internal procedures should cover establishing whether the disclosure will be treated as a protected disclosure, how the discloser is to be protected and in what circumstances the disclosure should be referred direct to another authority.
46. This proposal will only address the situation relating to entities that have internal procedures, mainly public sector organisations. I am not proposing at this stage to extend the requirement for internal procedures to the private sector, although good private sector employers may well model their processes on what is required in the public sector.

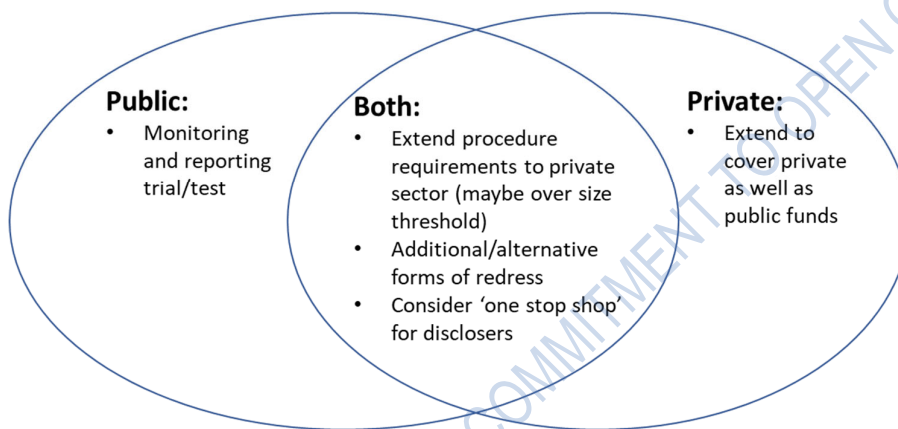
*General logic and coherence of the provisions of the Act*

47. Many of the points raised in consultation appear to arise from the disjointed way in which some of the Act's provisions are set out and expressed. I propose to invite Parliamentary Counsel to consider whether there are clearer ways to set out in the legislation, for example, the existing triple test for protected disclosure (that the person a) has reason to suspect wrongdoing, b) that the wrongdoing is serious and c) that the disclosure is not made in bad faith or known to be false). It may also be helpful to be explicit that the protections of the Act continue to apply if it is determined that the discloser was honestly mistaken.

## Second tranche of work

48. In addition to this basket of legislative changes, I propose a second tranche of work, to be led by SSC working with other agencies as required, comprising:
- Further research and policy work regarding some of the more complex issues covered by the consultation, to feed into a potential second round of legislative changes
  - Promotion of guidance, processes and procedures
  - Testing the value and feasibility of reporting and monitoring arrangements (in the public service in the first instance).

### Matters to consider in further work



### Further policy work

49. The policy issues not covered by the initial legislative package above are likely to require joint work with other agencies, especially MBIE, in light of their potential impact on the private sector.
50. A 'one stop shop' for protected disclosures: the Act divides system responsibilities between SSC (administering the Act and responsible for providing leadership to the State services) and the Ombudsman (investigative powers and providing advice and guidance to those using the Act). While there was strong support in consultation for a one stop shop, the diverse expectations expressed in the feedback and officials' analysis show more work needs to be undertaken on:
- what the functions of a 'one stop shop' would be
  - what powers it would require
  - what it would mean for the current range of appropriate authorities
  - where it would best sit
  - how it would add value
  - whether implementing it would require changes to legislation.



51. *Redress for disclosers:* As noted above, consultees were concerned about the costs and time delays involved in seeking redress for retaliatory action through the existing Employment Relations Act and Human Rights Act channels. I am hopeful that more clarity about the obligations on those receiving protected disclosures in the first place will limit the incidence of retaliatory action, but I wish to keep under review the timeliness and costs of the ERA and HRA processes in case there is merit in establishing another redress mechanism, for example through the courts. MBIE has been asked by Minister Lees-Galloway to prepare an Issues Paper on bullying and harassment at work. Drafting is underway and the Issues Paper is expected to be released in early 2020.
52. *Private sector wrongdoing:* The package above extends the definition of serious wrongdoing to cover corrupt or irregular use of **public** funds and resources by private firms. The question arises (for example in light of the recent ANZ scandal) as to whether there is a public interest in whistleblowing regarding misuse of **private** funds and resources, noting that anything that constitutes an 'offence' is already covered by the definition.
53. *Private sector procedure requirements:* Allowing disclosers to go direct to an external authority may reduce the potential benefit in requiring private organisations, possibly above a certain size, to have internal procedures for protected disclosures and to support disclosers. However it would be worth revisiting this issue once we have more information on the effectiveness of internal procedures in public organisations.
54. *Other issues emerging during consultation on the present proposals:* these include whether there are forms of serious impropriety that would not fall within the 'serious wrongdoing' definition; whether some forms of disclosure should be automatically covered by the Act irrespective of whether 'protected disclosure' status has been requested; whether any additional provisions are required in relation to anonymous disclosures; and whether further protections are needed for those who 'speak up' in non-confidential fora.

*Building on current work to raise awareness of the Act and encourage use of processes and guidance*

55. SSC is undertaking considerable work developing model processes, procedures and guidance, including promoting the existing Speaking Up standards and driving these through new Positive Workplace Behaviour standards. While there may be work required in the extended public sector, the main issues with awareness and lack of understanding of the Act reside in the private sector. The Ombudsman intends to continue development of guidance on the Protected Disclosures Act that can apply across all organisations in the public and private sectors.

*Monitoring and reporting within the Public Service*

56. Currently no single body collects and reports on the number of protected disclosures, so use of the Act is unclear. Consultation feedback supported better reporting for the public sector, ideally through existing mechanisms, such as MBIE's Mediation Services, agencies' annual reports, or the Office of the Ombudsmen's annual report.



57. The Ombudsman and SSC have already undertaken a programme of work to improve Official Information Act compliance in the State services. I propose to ask SSC to investigate requiring statistics on protected disclosures from Public Service departments and departmental agencies in the first instance, to test what, if any, monitoring and reporting arrangements might be practicable and useful in the wider public and private sectors.
58. I propose SSC continue to advance its programme of work including its Speaking Up standards and the work it is leading on positive workplace behaviours, and consulting the Ombudsman on guidance to agencies and organisations, including model procedures, responding to the areas of confusion highlighted during the consultation process, with a view to reconsidering the nature and potential of a 'one stop shop' as part of work on any future Bill.

### **Consultation**

59. The following departments and agencies have been consulted on this paper: Crown Law Office, Departments of Conservation, Corrections, Internal Affairs, Prime Minister and Cabinet, Inland Revenue, Education Review Office, Government Communications Security Bureau, Land Information NZ, Ministries of/for Culture and Heritage, Pacific Peoples, Primary Industries, Women, Environment, Business, Innovation and Employment, Defence, Education, Foreign Affairs and Trade, Health, Housing and Urban Development, Justice, Social Development, Transport, Oranga Tamariki, Te Puni Kōkiri, Customs Service, NZ Security and Intelligence Service, Serious Fraud Office, Statistics NZ, Pike River Recovery Agency, The Treasury, Parliamentary Counsel Office, Police, NZ Defence Force, Ombudsman.
60. During the development of this paper, officials also contacted representatives of the Ombudsman, Controller and Auditor-General, Inspector of Intelligence and Security, Human Rights Commission, Parliamentary Commissioner for the Environment, Independent Police Conduct Authority, Health and Disability Commissioner, Financial Markets Authority, Worksafe, Local Government NZ, NZ Society of Local Government Managers and Public Service Association to discuss the proposals.
61. Feedback from consultees was positive regarding most proposed changes, but some consultees, notably the Ombudsman, Ministry of Justice and the Serious Fraud Office, considered that this package of changes does not go far enough to promote the intent of the Act and were keen to see faster progress on establishing a one stop shop, improving redress, monitoring and reporting. For reasons outlined above these matters are currently proposed for the second tranche of work.
62. Following initial targeted consultation and the release of a Cabinet paper and discussion document, the public consultation process was undertaken between 29 October and 21 December 2018. We received 73 submissions in total and held four workshops with 54 attendees. A summary of submissions and the submissions themselves have been published on the SSC website.

### **Financial Implications**

63. None identified. Our consultation indicated that the present number of protected disclosures was too small for agencies to identify the related costs, and an increase

in the number of disclosures was not seen by most consultees as likely to result in significant additional costs. Some agencies noted that they have already experienced an increase in internal disclosures through the implementation of the Speaking Up standards, and may receive external disclosures as well under the proposals.

### **Legislative Implications**

64. Most of the proposals in this paper require legislation. A Bill to update the Protected Disclosure Act is on the 2019 legislative programme with a category 4 priority (introduce in 2019).
65. The Act binds the Crown (section 4) and I do not propose to change this.

### **Impact Analysis**

66. [Treasury assessment of summary RIA; the RIA to be attached as Annex 4]

### **Human Rights**

67. This paper has no negative implications for human rights and is not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A Bill of Rights Act vet will be undertaken once the Bill is drafted.

### **Gender Implications and disability perspective**

68. The small number of disclosures to date make it impossible to assess how and to what extent women, people with disabilities, non-binary and transgender and ethnic and religious minorities already make use of the Act and will benefit from these proposals. Bullying and harassment are known to disproportionately affect these groups and corruption is likely to exacerbate uneven power dynamics. The intention of the proposals is to produce better protection for disclosers and greater confidence in their ability to speak up.

### **Proactive Release and Publicity**

69. I intend to release this paper proactively in full and will issue a press release at that time.

### **Recommendations**

70. I recommend that the Committee:
  - 1) note that the Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees and other workers who report concerns
  - 2) note that the Act covers all workplaces, although some provisions only apply in the public sector
  - 3) note that four main problems have been identified with the Act as it stands:

- both organisations and disclosers are confused about when to use the Act
  - disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)
  - it is hard for disclosers to navigate the system for reporting concerns externally
  - disclosers fear 'speaking up' because they lack confidence in the protections available to them.
- 4) note that on 13 August 2018, Cabinet decided to undertake a review of the Act and seek public feedback on five cumulative options for change (GOV-18-MIN-0051 refers), namely:
- Foundational changes to clarify the existing legislation and improve protections
  - Allow people to report concerns externally at any time
  - Introduce dedicated system leadership
  - Introduce monitoring for the public sector
  - Introduce monitoring for the private sector.
- 5) note that the legislative recommendations in this paper cover most of the proposals in the first two options, while the other options will be addressed through a second tranche of work
- 6) note that an amendment Bill for the Protected Disclosures Act is on the 2019 legislative programme with a priority of 4 (refer to Select Committee in 2019 if possible)

### ***Policy changes***

- 7) agree to lower the threshold for protected disclosure from 'reason to believe' to 'reason to suspect' serious wrongdoing
- 8) note SSC Speaking Up Standards make express provision for support for employees
- 9) agree to require public sector organisations to state in their published internal procedures how support for disclosers will be provided
- 10) agree to allow people to report serious wrongdoing directly to an appropriate authority at any time
- 11) agree that where an appropriate authority considers it appropriate, they will be able to refer the matter back to the workplace organisation for investigation
- 12) agree that an appropriate authority should have the power to refuse a disclosure on grounds similar to the grounds for refusal in the Ombudsmen Act and Privacy Act

- 13) agree to amend the definition of 'serious wrongdoing' to ensure that unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation, is within the scope of serious wrongdoing
- 14) agree to extend the wording and interpretation of serious wrongdoing by a 'public official' to cover non-government organisation staff carrying out public functions

### **Legislative clarifications**

- 15) agree to create a new Schedule to the Act to name the most likely appropriate authorities for particular subject matter
- 16) note that I also intend to retain the appropriate authority status of the head of any public sector agency
- 17) agree to strengthen protections for disclosers by specifying what any organisation receiving protected disclosures must do
- 18) agree to include or refer to a list of the ways in which retaliation against a discloser may occur
- 19) agree to clarify what key aspects the internal procedures for public sector organisations need to cover
- 20) agree that Parliamentary Counsel examine how to reorganise and reword other provisions in the Act to make it clearer, for example bringing together the different elements (reason to suspect, serious wrongdoing and not in bad faith) required for a protected disclosure; and clarifying that protection still applies if the discloser is honestly mistaken

### **Second tranche of work**

- 21) note that I have asked the State Services Commission to continue to work on several other policy issues with a view to a second tranche of amendments to the Act, involving other agencies as appropriate:
  - Options for what a 'one stop shop' for protected disclosures could do, how it would interact with other appropriate authorities, how it could be implemented and what benefit it would provide
  - The adequacy of the current Employment Relations Act and Human Rights Act channels for redress where disclosers suffer retaliatory action
  - Whether corrupt or irregular use of private, as well as public, funds and resources needs to be covered in the definition of 'serious wrongdoing'
  - Whether there is value in requiring private organisations to have internal procedures for protected disclosures and to support disclosers
- 22) note that the State Services Commission is undertaking considerable work developing model processes, procedures and guidance, including the Speaking Up standards and positive workplace behaviour standards, and the

Ombudsman has also been developing guidance on the Act applying to public and private sectors

- 23) note that I have requested the State Services Commission to test the feasibility and usefulness of monitoring and reporting arrangements for core government departments
- 24) invite the Minister of State Services to issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft the Bill
- 25) authorise the Minister of State Services, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters required to finalise the Bill

Authorised for lodgement

Chris Hipkins

Minister of State Services

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## Annex 1: How the proposals in this legislative package address the problems and goals

Problem/goal	Current	Proposed	Why
<p><b>Problem:</b> both organisations and disclosers are confused about when to use the Act</p> <p><b>Goal:</b> all employees and organisations are familiar with the Act and know when to use it</p>	Disclosers need to ‘believe’ that there is serious wrongdoing	<b>Change</b> to ‘suspect’ that there is serious wrongdoing	Requirement to ‘believe’ may deter disclosure where discloser is uncertain
	Definition of ‘serious wrongdoing’ appears to have gaps	<b>Change:</b> extend the wording and interpretation of serious wrongdoing by a ‘public official’ to cover non-government organisation staff carrying out government functions	Means serious misconduct by private sector staff performing functions on behalf of government is also covered
		<b>Change</b> the definition of ‘serious wrongdoing’ to cover unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation	Currently reads as misuse only ‘within’ a public organisation
	Act unclear about ability for recipients of disclosures to refer or decline them except where passing to another appropriate authority	<b>Add</b> powers for those receiving disclosures to refer the disclosure back to the employing organisation or decline the disclosure for reasons like those in s17 of the Ombudsmen Act and section 71 of the Privacy Act	Addresses concerns that authorities may have to deal with disclosures that do not meet the tests in the Act
<p><b>Problem:</b> disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)</p> <p><b>Goal:</b> disclosers know who to report to and understand the support that is available to them</p> <p><b>Goal:</b> organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively</p>	Little clarity in the Act about when it applies and what recipients of disclosures need to do – for example whether the discloser needs to specifically claim protection under the PDA and at what point the confidentiality requirements start	<b>Change:</b> specifying what those receiving protected disclosures must do	Helps organisations to understand what is required of them, including confirming immediately whether this is intended as a protected disclosure
	Public sector organisations required to have internal procedures, but little clarity about what these need to cover	<b>Clarify</b> the internal procedure requirements for public sector organisations	More certainty for disclosers

<p><b>Problem:</b> it is hard for disclosers to navigate the system for reporting concerns externally</p> <p><b>Goal:</b> disclosers know who to report to and understand the support that is available to them</p> <p><b>Goal:</b> organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively</p>	<p>Must make disclosure internally and wait 20 working days unless certain exceptions apply (e.g. believing CE is involved in the wrongdoing)</p>	<p><b>Change:</b> allow people to report serious wrongdoing directly to an appropriate authority at any time</p>	<p>Enables disclosers to proceed if they have concerns about internal disclosure</p>
	<p>Very large number of potential external 'appropriate authorities' to receive disclosure</p>	<p><b>Create</b> a new Schedule to the Act, to be amended from time to time by Order in Council, to name the most likely appropriate authorities and specify the nature of disclosure/subject matter</p>	<p>Gives disclosers better information about where to take their disclosure (without removing 'head of any public organisation' option)</p>
<p><b>Problem:</b> disclosers fear 'speaking up' because they lack confidence in the protections available to them.</p> <p><b>Goal:</b> disclosers have confidence in the protections available to them and do not fear reprisal</p>	<p>Act requires public sector organisations to have and publish internal procedures for protected disclosures, but not clear what these must cover</p>	<p><b>Change:</b> require public sector organisations to state in their published internal procedures how they will support disclosers</p>	<p>Give disclosers in public organisations clarity on what they can expect</p>
	<p>Act vague on what those receiving disclosures need to do – 'confidentiality' section 19 is vaguely worded apart from the reasons why confidentiality may be overridden</p>	<p><b>Clarify</b> what all receiving protected disclosures (including appropriate authorities, public and private sector employers) must do</p>	<p>Both the discloser and the person receiving the disclosure are clear about what needs to happen</p>
	<p>Unclear what actions other than dismissal might be grounds for personal grievance or case to HRC</p>	<p><b>Clarify</b> the forms that retaliation could take, eg by reference to the Health and Safety at Work 'adverse conduct' provisions in the sections covering recourse</p>	<p>Makes it clear that forms of detriment other than dismissal can still be basis for grievance/HRC complaint</p>



## Annex 2: How the proposals in the consultation document are being progressed

Proposal consulted on	In this legislative package	Future or non-legislative work	Not progressed
<b>Option 1</b>			
SSC to provide information and guidance	n/a	Building on 'Speaking Up' guidance	
Improving definition of serious wrongdoing: <ul style="list-style-type: none"> <li>Concerns about corrupt or irregular use of funds/resources in private sector</li> <li>Excluding workplace bullying and harassment</li> </ul>	Partial - extend to cover misuse of <b>public</b> funds, resources or power whether by public or private sector Partial – power to decline to investigate where better covered by other legislation	Further work on whether corrupt/irregular use of <b>private</b> funds/resources needs to be covered (most should be covered under 'offence'?)	
Lower threshold to 'suspect' not 'believe' serious wrongdoing	Yes		
Obligations for all organisations: <ul style="list-style-type: none"> <li>To have procedures and what these cover</li> <li>To take action and investigate</li> </ul>	Partial – clarify what should be in public organisations' procedures	Further work on whether requiring procedures for private organisations adds value, especially as implementing option 2	Requirement to investigate – overtaken by option 2
Enhancing protections for disclosers and making path to potential compensation for victimisation clearer: <ul style="list-style-type: none"> <li>Clarify link to Human Rights Act</li> <li>List forms of retaliation</li> <li>Require organisations to provide support to disclosers</li> </ul>	Partial: clarify forms of retaliation, and require public sector organisations to indicate in their procedures how they will support disclosers	Further work on potential to require private sector organisations to support disclosers	
Clarify list of appropriate authorities	List key authorities in a Schedule to the Act, but keep backstop of head of any public sector organisation		
<b>Option 2</b> – enable reporting directly to an appropriate authority at any time	Yes		
<b>Option 3</b> – establish a single oversight body	No	Part of the further work to contribute to potential tranche 2 of legislation	
<b>Option 4</b> – introduce reporting obligations and monitoring for public sector	No	SSC to work with Public Service to test what reporting and monitoring would add	
<b>Option 5</b> – introduce monitoring for all organisations	No	Consider if Option 4 shows value	

**Annex 3: Summary of submissions**

[to attach]

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## Protected Disclosures reform

Advising agencies	State Services Commission Te Kawa Mataaho
Decision sought	This analysis has been prepared to inform key policy decisions to strengthen the Protected Disclosures Act 2000 as it relates to the public sector and to clarify and in some respects extend its application to the private sector.
Proposing Ministers	Minister of State Services

## Summary: Problem and Proposed Approach

### Problem Definition

**What problem or opportunity does this proposal seek to address? Why is Government intervention required?**

Uncovering serious wrongdoing is an important part of maintaining integrity. Research has found that reporting by employees is the single most important method by which illegal or corrupt activity in the workplace is brought to light. A clear and effective regime that encourages people to speak up about serious wrongdoing is therefore an essential element of a strong integrity framework.

New Zealand was one of the first countries in the world to introduce dedicated legislation to protect people who report concerns of serious wrongdoing – the Protected Disclosures Act 2000 (the Act). The Act's purpose is to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in public and private sector organisations, and to provide protection for employees who report concerns.

Unlike in many other jurisdictions, the Act applies to both the public and private sectors<sup>1</sup>. This is the key strength of New Zealand's system, as some jurisdictions have no protections for the private sector at all, and in other jurisdictions the regime is scattered across multiple pieces of legislation.

The aims of the Act remain sound, but there are four broad problems:

1. Both organisations and disclosers are confused about when to use the Act
2. Disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)
3. It is hard for disclosers to navigate the system for reporting concerns externally

<sup>1</sup> For the purposes of this paper, 'private sector' includes the not-for-profit, community, and voluntary sectors.  
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4. Disclosers fear 'speaking up' because they lack the confidence in the protections available to them.

The State Services Commission has issued model standards for the State sector which outline the minimum expectations on organisations to promote a 'speak up' culture, develop good processes, and keep people safe from reprisals or other punishment.

However, an approach that relies solely on better communications, guidance and support may not address the problems identified above. Therefore, Government intervention is required to clarify, strengthen, and promote the intent of the Act.

## Proposed Approach

### How will Government intervention work to bring about the desired change? How is this the best option?

In a public consultation paper issued in 2018 we proposed five different 'packages' as options for change. The five proposed 'packages' of options for change were:

1. Foundational changes to clarify the existing legislation and improve protections
2. Allow people to report concerns externally at any time
3. Introduce dedicated system leadership
4. Introduce monitoring for the public sector
5. Introduce monitoring for the public and private sectors.

All five packages included both legislative and non-legislative change. While non-legislative change, such as guidance and leadership, is critical for driving improvements, the regime's biggest weaknesses cannot be addressed without amending the Act.

Having considered feedback through public consultation, we propose the following:

- Lowering the threshold to protect a discloser if they 'suspect', rather than 'believe', serious wrongdoing
- Requiring public sector organisations to provide support for disclosers
- Allowing people to report directly to an appropriate authority at any time; conversely, making explicit the ability of that authority to decline a disclosure or refer it back to the discloser's organisation
- Strengthening protection for disclosers by outlining what those receiving disclosures must do, and by being more explicit about the forms that adverse conduct might take
- Extending the interpretation of some aspects of 'serious wrongdoing' in the Act to address the potential for private sector organisations to be involved in unlawful, corrupt, or irregular use of public funds or resources, and to engage in 'oppressive, improperly discriminatory, or grossly negligent' conduct when delivering services on behalf of government. Staff in private organisations should have the opportunity to make protected disclosures regarding such wrongdoing when it involves public funds or public services.

# Section B: Summary of Impacts

<b>Who are the main expected impacted parties and what is the nature of the expected impact?</b>
<p>The main expected impacted parties are:</p> <ul style="list-style-type: none"><li>• Disclosers will benefit from these changes as they would be better informed about who, when, and how they can report 'serious wrongdoing', and feel better supported.</li><li>• Public and Private sector organisations – these changes may impose a cost on these organisations as they may increase protected disclosures. However, the benefit of establishing an internal culture that encourages and supports disclosers and reporting of suspected serious wrongdoing outweigh the cost.</li><li>• Appropriate Authorities – these changes may increase the number of protected disclosures, but it will be from a low base.</li></ul>

<b>What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?</b>
<p>A larger than expected increase in the number of reported protected disclosures under the Act could be difficult for organisations to manage.</p>

<b>Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'</b>
<p>Not applicable.</p>

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# Section C: Evidence certainty and quality assurance

<b>Agency rating of evidence certainty?</b>
Not applicable.

To be completed by quality assurers:

<b>Quality Assurance Reviewing Agency:</b>
Ministry of Justice and the Treasury
<b>Quality Assurance Assessment:</b>
<b>Reviewer Comments and Recommendations:</b>

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# Impact Summary: Protected Disclosures Reform

## Section 1: General information

Purpose
<p>The State Services Commission (SSC) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing:</p> <ul style="list-style-type: none"><li>• policy decisions to be taken by or behalf of Cabinet, which will provide the contents of an amendment Bill to be presented to Parliament</li><li>• members of Parliament about the impact of the amendment Bill.</li></ul>

Key Limitations or Constraints on Analysis
<p>The main limitation and/or constraint on our analysis is the limited data on the number of protected disclosures made to organisations which makes it hard to calculate and estimate the impact these proposed changes will have, especially on the receiving organisations. As shown below, nine appropriate authorities reported a combined total range of between 10 and 50 protected disclosures (PD) in a year.</p>

Responsible Manager (signature and date):
<p>Hannah Cameron Deputy Commissioner Strategy and Policy State Services Commission</p>



## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

#### Policy Problem

The Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees (including former employees, contractors and volunteers) who report concerns. Disclosures are protected if the information is about 'serious wrongdoing' and the discloser believes on reasonable grounds that the information is true or likely to be true. 'Serious wrongdoing' includes any serious offence, unlawful, corrupt or irregular use of public money or resources; conduct that poses a serious risk to public health and safety; or gross mismanagement by public officials. The protections offered to disclosers include best endeavours to preserve confidentiality and immunity from civil and criminal proceedings.

Effective organisational processes and legal protections for employees who 'blow the whistle' play a key role in uncovering serious misconduct, fraud and corruption in both public and private workplaces. This is critical to maintaining public confidence in the integrity of government and business in New Zealand. International research has found that reporting by employees is the single most important method by which wrongdoing in, or by, and organisation is brought to light.<sup>2</sup>

However, after 18 years of operation, the Act has not been as effective as it should be. The Act requires more from public sector organisations because there is significant public interest in uncovering serious wrongdoing in government. But there is also public interest in ensuring that New Zealand businesses and not-for-profit organisations operate with high integrity. The Act is important to maintaining New Zealand's international reputation for low levels of corruption, which contributes to the country's strong relationships with other nations and stimulates investment in New Zealand's economy.

An investigation into the treatment of disclosers at the Ministry of Transport in 2017<sup>3</sup>, and a subsequent review of the Act by the State Services Commission, has identified several areas where needs strengthening.

The aims of the Act remain sound, but there are four broad problems which guidance and standards, such as 'Speaking Up'<sup>4</sup>, can only partly mitigate:

- Both organisations and disclosers are confused about when to use the Act
- Disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)
- It is hard for disclosers to navigate the system for reporting concerns externally
- Disclosers fear 'speaking up' because they lack the confidence in the protections available to them.

<sup>2</sup> Griffith University, *Whistling While They Work: Improving managerial responses to whistleblowing in public and private sector organizations*, September 2017. The findings are based on a survey of over 12,000 employees and managers in 38 Australian and New Zealand organizations.

<sup>3</sup> State Services Commission, *Media Statement: SSC investigation of whistle blower treatment within the Ministry of Transport*, May 2017. <http://www.ssc.govt.nz/resources/media-statement-ssc-investigation-whistle-blower-treatment-within-ministry-transport/>

<sup>4</sup> States Services Commission, *Speaking up in the State services*, April 2019. <http://www.ssc.govt.nz/resources/speaking-state-services/>

Furthermore, consultations with appropriate authorities showed that very few disclosures were made. Some of these authorities lacked a robust data collection for such disclosures.

## Policy Objectives

The objectives for this package are:

- All employees and organisations are familiar with the Act and know when to use it
- Disclosers know who to report to and understand the support that is available to them
- Organisations know what is expected of them and have the skills, competencies and ethos to handle disclosures effectively.
- Disclosers have confidence in the protections available to them and do not fear reprisal.

## 2.2 Who is affected and how?

These changes seek to change the behaviours of:

- Disclosers – encourage more people to step forward and report ‘serious wrongdoing’, raising public organisations’ transparency and integrity, which increases public confidence in government.
- Public and private organisations – enabling a culture change within these organisations in terms of encouraging, supporting and protecting disclosers. Encourage these organisations to produce internal processes that are clear and responsive. Changes to the definition of ‘serious wrongdoing’ to enable protected disclosures regarding serious wrongdoing by private organisations when it involves public funds or public services
- Appropriate authorities – allowing disclosers to report any ‘serious wrongdoing’ directly to an appropriate authority at any time will assist disclosers who may not want to report concerns internally if they fear their identity may become known, particularly if the ‘serious wrongdoing’ has undermined their confidence in the organisation. Not only that, but this change will encourage appropriate authorities to ensure that they have the capabilities to cater to these disclosures, especially if the rate of disclosures increase after as a direct result of these changes.

The table below illustrates the number of PDs received by some appropriate authorities. In addition, the Human Rights Commission reported 16 complaints of victimisation following protected disclosures since 2013.:

Appropriate authority	Number of received PDs
Serious Fraud Office (SFO)	Average 1 – 4 per year
WorkSafe NZ	Estimated 1 or 2 bullying notifications as a result of PD.
New Zealand Police	1 since 2018
Independent Police Conduct Authority (IPCA)	Estimated 6 PDs received over the past 5 years
Office of the Auditor-General (OAG)	2016 – 3 2017 – 3 2018 – 17 (7 related to one issue) 2019 – 4
Crown Law	Estimated 2 – 3 in the last 5 to 10 years.

Parliamentary Commissioner for the Environment	1 received to date
Inspector-General of Intelligence and Security	Low
The Ombudsman	Completed 7 requests for advice and guidance as in 2017/2018 annual report
Health and Disability Commissioner	Approximately 10 complaints which attempted to use the PDA over the 2018 – 2019 year.

### 2.3 Are there any constraints on the scope for decision making?

There are no known constraints on the scope.

There are connections to ongoing work by State Services Commission and the Office of the Ombudsman:

- SSC's Acting in the Spirit of Service – Speaking Up, Model Standards:* These model standards outline the State Services Commissioner's minimum expectations for organisations to support staff on speaking up in relation to wrongdoing concerns that could damage the integrity of the State services. They comprise all the key elements for promoting a 'speak up' culture, operating good processes including timely investigations, and keeping people safe from reprisals or other detrimental impacts. These standards are expected of all organisations within the State services.
- Office of the Ombudsman guidance:* The Office of the Ombudsman has published a new guide for agencies on whistleblowing and has issued guidance on making a protected disclosure.

# Section 3: Options identification

## 3.1 What options have been considered?

Non-legislative work to support the objectives is currently underway through the form of guidance provided by the Ombudsman and the standards (Speaking Up) produced by the SSC.

We held targeted consultation to discuss the problems of the Act itself.

In our Draft Discussions paper issued in 2018, we proposed five cumulative options for strengthening the Act as follows:

**Option One:** Foundational changes to clarify the existing legislation and improve protections

This option aims to build strong foundations by removing confusion and ensuring organisations have good procedures in place that encourage staff to speak up about potential failings or misconduct in their workplace.

**Option Two:** Allow people to report concerns externally at any time

This option goes beyond option 1 in making it easier for people to report concerns to an appropriate authority at any time.

**Option Three:** Introduce dedicated system leadership

This option would create a single port of call, a “one stop shop”, for advice on when, and how, to use the Act.

**Option Four:** Introduce monitoring for the public sector

This option would add new reporting obligations for public sector organisations to promote transparency and good practice.

**Option Five:** Introduce monitoring for the private as well as public sector

This option would add new reporting obligations for all organisations to promote transparency and good practice across the board.

### 3.2 Which of these options is the proposed approach?

The proposed approach to addressing the problem is to amend the Act on the basis of options one and two:

- Foundational changes to clarify the existing legislation and improve protections
- Allow people to report concerns externally at any time.

This package of proposed policy and legislative changes involves making the following changes:

Problem/goal	Current	Proposed	Why	Potential impact
<p><b>Problem:</b> both organisations and disclosers are confused about when to use the Act</p> <p><b>Goal:</b> all employees and organisations are familiar with the Act and know when to use it</p>	Disclosers need to 'believe' that there is serious wrongdoing	<b>Change</b> to 'suspect' that there is serious wrongdoing	Requirement to 'believe' may deter disclosure where discloser is uncertain	This could lead to an increase of protected disclosers received by organisations
	Definition of 'serious wrongdoing' appears to have gaps	<b>Change:</b> extend the wording and interpretation of serious wrongdoing by a 'public official' to cover non-government organisation staff carrying out government functions	Means serious misconduct by private sector staff performing functions on behalf of government is also covered	
	Act unclear about ability for recipients of disclosures to refer or decline them except where passing to another appropriate authority	<b>Change</b> the definition of 'serious wrongdoing' to cover unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation	Currently reads as misuse only 'within' a public organisation	
<p><b>Problem:</b> disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)</p> <p><b>Goal:</b> disclosers know who to report to and understand the support that is available to them</p> <p><b>Goal:</b> organisations know what is expected of them and have the skills, competencies and</p>	Little clarity in the Act about when it applies and what recipients of disclosures need to do – for example whether the discloser needs to specifically claim protection under the PDA and at what point the confidentiality requirements start	<b>Change:</b> specifying what those receiving protected disclosures must do	Helps organisations to understand what is required of them, including confirming immediately whether this is intended as a protected disclosure	In addition to a likely increase in PDs, this change will improve internal procedures and educate staff.
	Public sector organisations required to have internal procedures, but little clarity about what these need to cover	<b>Clarify</b> the internal procedure requirements for public sector organisations	More certainty for disclosers	

ethics to handle disclosures effectively				
<p><b>Problem:</b> it is hard for disclosers to navigate the system for reporting concerns externally</p> <p><b>Goal:</b> disclosers know who to report to and understand the support that is available to them</p> <p><b>Goal:</b> organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively</p>	<p>Must make disclosure internally and wait 20 working days unless certain exceptions apply (e.g. believing CE is involved in the wrongdoing)</p>	<p><b>Change:</b> allow people to report serious wrongdoing directly to an appropriate authority at any time</p>	<p>Enables disclosers to proceed if they have concerns about internal disclosure</p>	<p>Increase in PDs received by appropriate authorities</p>
	<p>Very large number of potential external 'appropriate authorities' to receive disclosure</p>	<p><b>Create</b> a new Schedule to the Act, to be amended from time to time by Order in Council, to name the most likely appropriate authorities and specify the nature of disclosure/subject matter</p>	<p>Gives disclosers better information about where to take their disclosure (without removing 'head of any public organisation' option)</p>	
<p><b>Problem:</b> disclosers fear 'speaking up' because they lack confidence in the protections available to them.</p> <p><b>Goal:</b> disclosers have confidence in the protections available to them and do not fear reprisal</p>	<p>Act requires public sector organisations to have and publish internal procedures for protected disclosures, but not clear what these must cover</p>	<p><b>Change:</b> require public sector organisations to state in their published internal procedures how they will support disclosers</p>	<p>Give disclosers in public organisations clarity on what they can expect</p>	<p>Increase in PDs may impact on costs regarding time and effort on receiving organisations</p>
	<p>Act vague on what those receiving disclosures need to do – 'confidentiality' section 19 is vaguely worded apart from the reasons why confidentiality may be overridden</p>	<p><b>Clarify</b> what all receiving protected disclosures (including appropriate authorities, public and private sector employers) must do</p>	<p>Both the discloser and the person receiving the disclosure are clear about what needs to happen</p>	
	<p>Unclear what actions other than dismissal might be grounds for personal grievance or case to HRC</p>	<p><b>Clarify</b> the forms that retaliation could take, e.g. by reference to the Health and Safety at Work 'adverse conduct' provisions in the sections covering recourse</p>	<p>Makes it clear that forms of detriment other than dismissal can still be basis for grievance/HRC complaint</p>	

In addition to these proposed legislative changes, the State Services Commission (SSC) will undertake further work, with other agencies as required, to:

- consult on a second tranche of amendments to the Act with a view to further reform beyond 2020, including what a 'one stop shop' could look like and improving redress for disclosers who are disadvantaged
- build on existing standards and guidance to improve awareness of the Act across the public and private sectors
- test the feasibility and usefulness of establishing reporting and monitoring arrangements, starting with the core public services. Monitoring and reporting do not seem well justified on current volumes of disclosures, but this may change as a result of the reforms in the current package.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

Affected parties	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i>
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#### Additional costs of proposed approach, compared to taking no action

All Public & Private organisations	Organisations may face some costs of implementing more explicit process requirements.	No basis on which to estimate due to the current low number of protected disclosures.
Appropriate Authorities	More costs for processing disclosures assuming that numbers increase.	
Disclosers		N/A
<b>Total Monetised Cost</b>		N/A
<b>Non-monetised costs</b>		Low

#### Expected benefits of proposed approach, compared to taking no action

All Public & Private organisations	Increase of public confidence in the government, government agencies, and NZ businesses. Requirements for both public sector internal processes and handling of protected disclosures by any organisation will be clearer.	
Disclosers	Disclosers are protected and feel confident and safe.	
<b>Total Monetised Benefit</b>		N/A
<b>Non-monetised benefits</b>		High

## 4.2 What other impacts is this approach likely to have?

### Main risks:

- There is the potential for an increase in vexatious, trivial, or 'bad faith' disclosures.
- Some organisations may have difficulty handling increased volumes of disclosures, reducing timeliness and effectiveness in how they are dealt with.

### Main benefits (in combination with non-legislative work on guidance and standards):

- All employees and organisations, both public and private, will be familiar with the Act and will know when to use it.
- Disclosers will know who to report to and understand the support that is available to them.
- Disclosers will have confidence in the protections available to them and will not fear reprisal.
- All organisations will understand what is expected of them and have the skills, competencies and ethics to handle disclosures effectively.
- Supporting a culture where 'speaking up' is embraced, supported and encouraged.

### Main Costs:

- Increase in cost (time and effort) for receiving organisations, including external appropriate authorities.



## Section 5: Stakeholder views

### 5.1 What do stakeholders think about the problem and the proposed solution?

Following initial targeted consultation and the release of a Cabinet paper and discussion document, the public consultation process was undertaken between 29 October and 21 December 2018. We received 73 submissions in total and held four workshops with 54 attendees. A summary of submissions and the submissions themselves were publicly released on 2 August 2019 at <http://ssc.govt.nz/resources/consultation-protected-disclosures-act-reform>

The following departments and agencies were consulted on the related Cabinet paper: Crown Law Office, Departments of Conservation, Corrections, Internal Affairs, Prime Minister and Cabinet, Inland Revenue, Education Review Office, Government Communications Security Bureau, Land Information NZ, Ministries of/for Culture and Heritage, Pacific Peoples, Primary Industries, Women, Environment, Business, Innovation and Employment, Defence, Education, Foreign Affairs and Trade, Health, Housing and Urban Development, Justice, Social Development, Transport, Oranga Tamariki, Te Puni Kōkiri, Customs Service, NZ Security and Intelligence Service, Serious Fraud Office, Statistics NZ, Pike River Recovery Agency, The Treasury, Parliamentary Counsel Office, Police, NZ Defence Force, Ombudsman.

During the development of this paper, officials also contacted representatives of the Ombudsman, Controller and Auditor-General, Inspector of Intelligence and Security, Human Rights Commission, Parliamentary Commissioner for the Environment, Independent Police Conduct Authority, Health and Disability Commissioner, Financial Markets Authority, Worksafe, Local Government NZ, NZ Society of Local Government Managers and Public Service Association to discuss the proposals.

Feedback from consultees was positive regarding most proposed changes, but some consultees, notably the Ombudsman, Ministry of Justice and the Serious Fraud Office, considered that this package of changes does not go far enough to promote the intent of the Act and were keen to see faster progress on establishing a one stop shop, improving redress, monitoring and reporting. For reasons outlined above these matters are currently proposed for the second phase of work.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

We propose amending the Protected Disclosures Act 2000 to give effect to the proposed approach.

SSC is responsible administering the Act. The State Services Commissioner's guidance will be updated to reflect amendments. The Office of the Ombudsman will also update their guidance to reflect the changes. Both organisations will also be working to promote awareness of the Act.

The new arrangements will come into effect following commencement of the amendment to the Act. Our timeline is to have an amendment Bill in Parliament by mid-2020.

As the additional requirements on organisations are expected to be modest, we cannot identify implementation risk at this stage.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

We will be exploring a pilot of gathering data from the public sector to inform our understanding on whether these new arrangements have met their objectives. We will also be continuing the work to promote the Speaking Up standards and will be seeking regular feedback from public sector organisations and other appropriate authorities on how the changes are operating.

### 7.2 When and how will the new arrangements be reviewed?

SSC will keep the arrangements under review on an ongoing basis.