STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

SSC Report: Protected Disclosures Act 2000

Date:	06 December 2017	**Report No:**	SSC2017/680
Contact:	Catherine Williams	**Telephone:**	9(2)(a) privacy

	Action Sought	Deadline
Minister of State Services (Hon Chris Hipkins)	1 **agree** to undertake a legislative review of the Protected Disclosures Act 2000 2 **agree** to submitting a bid for the 2018 legislation programme (Category 6 - drafting instructions to PCO in 2018) 3 **agree** to officials undertaking a targeted consultation with selected stakeholders 4 **refer** this report to Minister Curran because of overlaps with the Open Government portfolio 5 **note** that we will report back to you in April 2018 on the outcome of the targeted consultation, with proposals for the next phase of consultation 6 **note** that we envisage preparing a Cabinet Paper for submission in May 2018 seeking approval on the content and process for a public discussion document	Meeting on 11 December 2017

Enclosure: Yes – The Annex includes an indicative timeline for key deliverables

Executive Summary

7 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 who report concerns.

8 However, recent academic evaluations, anecdotal evidence and several misconduct cases suggest that New Zealand's legislation is not working effectively and lags behind international practice in a number of key areas.

9 We have looked at similar practice in other jurisdictions to determine the amendments to New Zealand's legislation that are required to address key weaknesses, bring it into line with international best practice and enhance our standing on the international stage with respect to transparency, integrity and good governance.

10 In particular, the following four areas needs strengthening in the legislation:

10.1 Standards for organisational procedures.

10.2 External reporting channels.

10.3 Protection against retaliatory action.

10.4 Enhanced compensation arrangements.

11 Different jurisdictions have taken very different stances on these issues because there are a number of trade-offs to manage.

12 As a first step, we recommend a targeted consultation with approximately 20 selected stakeholders before seeking Cabinet approval on the content of a public discussion document for wider consultation.

13 The aim of this initial consultation would be to address gaps in information, identify the potential benefits and risks of different choices and gauge public interest in this area before developing a more detailed plan for the next phase of public consultation.

Recommended Action

We recommend that you:

a **agree** to undertake a legislative review of the Protected Disclosures Act 2000

Agree/disagree.

b **agree** to submitting a bid for the 2018 legislation programme (Category 6 - drafting instructions to PCO in 2018)

Agree/disagree.

c **agree** to officials undertaking a targeted consultation with selected stakeholders prior to Cabinet approval for a wider consultation

Agree/disagree.

d **refer** this report to Minister Curran because of overlaps with the Open Government portfolio

Refer/not referred.

e **note** that we will report back to you in April 2018 on the outcome of the targeted consultation, with proposals for the next phase of consultation

Noted/not noted.

f **note** that we envisage preparing a Cabinet Paper for submission in May 2018 seeking approval on the content and process for a public discussion document

Noted/not noted.

Hon Chris Hipkins
Minister of State Services

SSC Report: Protected Disclosures Act 2000

Purpose of Report

14 This report outlines our advice on strengthening the Protected Disclosures Act 2000 (the Act). We seek agreement to undertake a comprehensive legislative review and run a public consultation process to develop more detailed options for reform.

Background

15 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 who report concerns.

16 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.

17 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.[1]

18 However, recent academic evaluations, anecdotal evidence and several misconduct cases suggest that New Zealand's legislation is not working effectively and lags behind international practice in a number of key areas.

19 These factors, combined with Sandie Beatie's investigation into the treatment of whistleblowers at the Ministry of Transport (July 2017), prompted the State Services Commissioner to seek approval to provide advice to Ministers on the operation of the Act and how it could be strengthened to provide for a more comprehensive regime in New Zealand.

20 In September 2017, the Australian Federal Joint Parliamentary Committee report on whistleblower protections recommended wide-ranging reforms set to overhaul Australia's public interest disclosures regime. The report identifies a number of challenges relevant to the New Zealand context.

The Act

21 The Act's statutory objective is to encourage people to report serious wrongdoing in their workplace by providing protection for employees who want to 'blow the whistle'. This applies to both the public and private sector.

22 "Serious wrongdoing" includes 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.

23 Current employees, former employees, homeworkers, contractors, secondees and volunteers can all report wrongdoing in their organisation.

24 Disclosures are protected if the information is about serious wrongdoing and the individual believes on reasonable grounds that the information is true or likely to be true.

[1] 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.

25 Disclosures must be made in accordance with an organisation's internal procedures. Public sector organisations are required to have these internal procedures (it is discretionary for the private sector).

26 The Act lists a number of "appropriate authorities" to whom a disclosure can be made in certain circumstances (including the Ombudsman, Controller and Auditor-General and State Services Commissioner).

27 The protections offered to employees include: confidentiality, immunity from civil and criminal proceedings and personal grievance against retaliation under the Employment Relations Act and remedies for victimisation under the Human Rights Act.

28 These protections don't apply if employees know the allegations to be false or act in "bad faith".

29 The Ombudsman can provide information to an employee on making a protected disclosure and, in some cases, take over an investigation in a public sector organisation.

Potential weaknesses and gaps in the legislation

30 In developing our advice, we have conducted an initial review of the Act, a scan of international best practice and spoken to selected subject matter experts.

31 Our view is that the aims of the Act remain sound, but the legislation is currently weak or silent in the following areas:

31.1 There are no specific requirements for organisations to:

31.1.1 Follow up on disclosures and investigate alleged wrongdoing in a timely manner.

31.1.2 Establish procedures to assess the risk of reprisals against individuals who disclose information about wrongdoing.

31.1.3 Provide dedicated redress, support or compensation for individuals who suffer retaliation or detriment.

31.1.4 Establish a system to record and track incidents of wrongdoing as well as periodically review how incidents are being handled.

31.2 There are also no penalties for those who breach protections for whistleblowers (e.g. revealing their identity) or undertake reprisals against whistleblowers.

31.3 The number of "appropriate authorities" to whom a disclosure can be made is confusing to navigate and can leave employees unsure about who to report to, especially if concerns are not dealt with satisfactorily inside their workplace.

31.4 There are no obligations on whistleblowers to cooperate during the course of the investigation.

32 The gaps we have identified potentially underpin the anecdotal and academic evidence which suggests that:

32.1 **People don't feel safe raising concerns.** Griffith University research (2017) found that nearly 30% of employees across Australian and New Zealand workplaces did not know what support their organisation provides to those who report wrongdoing.

32.2 **People are unclear about how to make a disclosure and what it means.** Griffith University research (2016) found that the New Zealand government ranks below most Australian jurisdictions in relation to the strength of

organisational processes for dealing with disclosures internally (based on self-assessments).

32.3 **People don't have confidence that their organisations will act on their concerns.** Transparency International's *National Integrity System Report on New Zealand* (2013) concluded that a significant number of whistleblowers encounter inaction, which perpetuates the belief amongst employees that there is no point in flagging concerns.

33 Most of the available evidence relates to the public sector and little is known about how disclosures are handled in the private sector.

34 Data including the number of reports organisations receive on an annual basis, the proportion that are dismissed, investigated and validated and the experiences of the different parties involved is needed to understand the size and nature of the issues across the public and private sector.

Comment

35 The Act is 17 years old and no longer reflects advances internationally. For example, the recent Australian Parliamentary Joint Committee's report and recommendations into whistleblower protections are set to overhaul Australia's law on public interest disclosures and provide a far more comprehensive regime. Key developments include:

35.1 The establishment of a new 'Whistleblower Protection Authority' with broad powers to provide direct support to whistleblowers

35.2 Enhancing the protections available to whistleblowers (e.g. protecting anonymous disclosures and making uncapped compensation available through a tribunal system)

35.3 Establishing a rewards system by which whistleblowers receive a proportion of any penalty imposed for the wrongdoing they reveal.

36 Our view is that amendment to New Zealand's legislation is required to address key weaknesses, bring it into line with international best practice and enhance our standing on the international stage with respect to transparency, integrity and good governance.

37 In particular, the following four areas needs strengthening:

37.1 **Standards for organisational procedures**. Clear principles for dealing with disclosures internally – such as reporting channels, investigation procedures, timeliness and protections for whistleblowers – need to be set out in the legislation to ensure that organisations understand what is expected of them (like in Canada and the Australian Commonwealth).

37.2 **External reporting channels.** The legislation needs to provide a clear explanation about the roles of different external "appropriate authorities" and when/how to use them to make it easier for employees to navigate.

37.3 **Protection against retaliatory action.** The legislation should list and define forms of retaliation (e.g. dismissal, demotion and harassment) and make it a statutory duty for organisations to assess the risk of retaliation occurring and take reasonable steps to protect employees from this (like the Australian Commonwealth does).

37.4 **Enhanced compensation arrangements.** There needs to be a clearly defined path to compensation within the Act itself which clarifies the civil and/or employment remedies that are available (e.g. right to obtain an apology, an

injunction or a reinstatement order) and how to launch a compensation claim (like in the UK and Canada).

38 To strengthen the Act even further and reflect advances internationally, we recommend consulting on the following:

38.1 Whether protections should be extended to a wider range of people with "inside information" (e.g. stakeholders, clients and members of the public)

38.2 Whether the confidentiality provisions in the Act need to be strengthened and how to balance this against the need to ensure effective follow-up and investigation

38.3 Whether the "serious threshold" test for reporting wrongdoing should be lowered to encompass a wider range of activity (e.g. like in the Australian Commonwealth)

38.4 Whether there should be penalties for retaliatory action (e.g. in the Australian Commonwealth, reprisals carry a maximum of two years' imprisonment)

38.5 Whether a single whistleblowing oversight body is required, either by powering up an existing organisation or creating a new one, and which functions it should perform – e.g. setting standards and regulating implementation, processing complaints from employees or taking over investigations.

38.6 Whether public service agencies should be required to establish an internal reporting system to monitor disclosures of wrongdoing, and provide annual reports to an oversight body (as the Public Service Integrity Commissioner requires in Canada)

39 Different jurisdictions have taken very different stances on these issues because there are a number of trade-offs to manage. In particular, a balance needs to be struck between encouraging and protecting whistleblowers while putting in place appropriate safeguards to minimise vexatious allegations and an onerous compliance burden for organisations. We recommend consulting broadly on the potential benefits and risks of different choices before developing a firmer view on the details of reform.

Controversial areas for discussion

40 In addition to the above, there are a range of controversial areas which we are not recommending at this stage, but are likely to be raised during the consultation period. These include:

40.1 Facilitating anonymous disclosures via web platforms and hotlines to provide a safer route for people to come forward, which a number of jurisdictions allow.

40.2 Allowing for disclosures to the media in certain circumstances, which the UK and Australian commonwealth do.

40.3 Removing the reporting in "bad faith" clause to reduce the impediments to employees disclosing information, as the UK, Portugal and Ireland have done.

40.4 Offering rewards and incentives to encourage people to come forward, as several US anti-fraud laws aim to do and the recent Australian Parliamentary Joint Committee into whistleblower protections recommends.

Consultation and legislative timelines

41 Whistleblowing laws have attracted a significant amount of international and media attention due to recent high profile investigations. In particular, there are a number of academics, researchers and public interest bodies who have a strong interest in the steps New Zealand is taking to strengthen the Act.

42 We recommend a broad consultation process that allows a wide range of stakeholders to have their say on how to achieve an effective protected disclosures regime for two key reasons:

42.1 This is a controversial and highly complex area of legislation where there are no easy answers. The consultation process will help us address gaps in information and refine our thinking before developing a firmer view on the details of reform.

42.2 Amendments to the Act could have a significant impact on every public and private sector employer in the country. We recommend giving a wide range of stakeholders, including civil society, the opportunity to digest, understand and feedback on proposals, bring them on board and address any concerns that could undermine successful implementation.

43 As a first step, we recommend a targeted consultation with approximately 20 selected stakeholders before seeking Cabinet approval on the content of a public discussion document for wider consultation.

44 The aim of this initial consultation would be to address gaps in information, identify the potential benefits and risks of different choices and gauge public interest in this area before developing a more detailed plan for the next phase of public consultation, including how far and wide we would want to consult on the details of legislative reform.

45 We propose engaging the following four groups during the targeted consultation:

45.1 Relevant government agencies (e.g. Ministry for Justice; Crown Law) and appropriate bodies (e.g. Office of the Ombudsman; Privacy Commissioner)

45.2 Unions (e.g. Public Services Association and NZ Council of Trade Unions)

45.3 Representative organisations (e.g. Business NZ)

45.4 Subject matter experts (e.g. academics; employment law practitioners)

46 This consultation would run from February to Mid-March and involve workshops with approximately 20 stakeholders from the four groups, including the option of some 1:1 interviews. We would prepare a succinct issues paper as the basis for this consultation.

47 We would report back to you in April 2018 on the outcome of the targeted consultation, with proposals for the next phase of consultation, including the cost and time implications of the choices you have around scale and depth. We would envisage preparing a Cabinet paper for submission in May 2018 seeking approval on the content and process for a public discussion document. The Annex provides details on timelines and key deliverables.

Relationship to other related work underway

48 Amendments to the legislation will be accompanied by a range of non-legislative levers for communicating and embedding change including guidance and templates for organisational policies.

48.1 The State Services Commission has already issued ‘Speaking Up’ guidance outlining the model standards expected of all public service agencies in July

2017. We are working with agencies to embed these standards to improve how protected disclosures are dealt with in the public sector.

48.2 The *Whistling While They Work* research consortium is currently exploring what effective organisations standards and procedures for dealing with disclosures look like. Findings will be released in 2018.

49 We are aware of other work underway such as updates to the conflicts of interest disclosures guidance and the Inspector-General's advice to agency chief executives about changes to the Protected Disclosures regime following the Intelligence and Security Act 2017 (I & S Act). We will work with relevant officials to ensure any final proposals for legislative reform are appropriately aligned and relevant responsibilities delineated.

Risks

50 The risk of not amending the Act is that New Zealand's legislation and practice, particularly around protection for whistleblowers, falls behind other jurisdictions and results in low levels of reporting by international standards. This would undermine the core objective of maintaining the high integrity of government and business in New Zealand and potentially negatively impact on our reputation on the international stage.

51 The risk of undertaking targeted consultation at this point is that it creates expectations which may not be met. For example, decisions about the nature and extent of public consultation will impact on timeframes for legislation. This needs to be managed through the engagement.

Next steps

52 Subject to your agreement, we will plan the targeted consultation and undertake this in February 2018.

53 You may wish to discuss this report with Minister Curran because of overlaps with the Open Government portfolio.

Annex: Indicative Timelines

These are indicative timeframes, which we can flex depending on your decision around the scale and depth of the public consultation period, and whether we build in time for an exposure draft.

Date	Deliverable
December 2017	Follow-up briefing to the Minister of State Services to inform a decision about the preferred approach to consultation
December 2017 - January 2018	Bid for 2018 legislation programme (Category 6 - drafting instructions to PCO in 2018)
February – End-March 2018	Phase 1 Targeted Consultation (approx. 20 stakeholders)
April 2018	Report back to MoSS on the outcome of the targeted consultation, draft issues paper, draft cabinet paper and proposals for the next phase of public consultation
May 2018	Cabinet paper seeking approval on the content of a public discussion document for consultation
July – September 2018	Phase 2 Public Consultation (scale and depth TBD)
October 2018	Report back to Cabinet on the outcome of the consultation
November 2018	Cabinet paper seeking approval for final policy decisions and drafting instructions
December 2018	Issue drafting instructions to PCO
August 2019	Introduction and First Reading in the House
February 2020	Report from Select Committee
End May 2020	Date of enactment
July 2020	Date of commencement