SSC REPORT

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

Protected Disclosures Act 2000: Report back on the targeted consultation and next steps

Date: 16 April 2018

Report No: SSC2018/181

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	Action Sought	Deadline
Minister of State Services (Hon Chris Hipkins)	Provide feedback on the recommended scope of the review and approach to public consultation	At your meeting with SSC on Monday 23 April, 10am

Enclosure: Yes – three attachments:

- A3: Proposed areas for reform (material for meeting on 23 April 2018)
- Report: Draft consultation summary report
- A3: Background materials sent to stakeholders in advance of the consultation

Executive Summary

1 In December 2017, you asked the State Services Commission to review the Protected Disclosures Act 2000 (the Act) starting with a targeted consultation with stakeholders across the public and private sector [SSC2017/680 refers].

2 A targeted consultation with 38 organisations and individuals took place during February and March 2018 to gather perspectives on the strengths, issues and challenges with the Act and the benefits and risks of different reform choices.

3 This engagement highlighted a number of weaknesses with the current regime. In particular, there is a general confusion around what the Act does and how to use it; and, the processes for disclosing wrongdoing are frequently non-existent or overly complex.

4 This report seeks your feedback on a) the recommended scope of the review and b) the approach to public consultation. This will be used as the basis for discussion at your meeting with SSC on Monday 23 April.

5 Following this meeting and, subject to your feedback, our next steps will be to build a detailed set of reform options in the key areas identified to form the basis of a Cabinet Paper and discussion document to be released for wider public consultation.

Recommended Action

We recommend that you:

a **note** the contents of this paper

Noted/not noted.

b **discuss** this paper with officials and provide feedback on**:**

5.1.1 Recommended scope of the review

5.1.2 Approach to Cabinet and public consultation process

Agree/disagree.

c **note** that the outcome of the discussions at the agency meeting will be used to develop a Cabinet paper and discussion document

Noted/not noted.

d **note** that officials will circulate the final consultation summary report to those that participated in the targeted consultation

Noted/not noted.

SSC Report: Protected Disclosures Act 2000: Report back on the targeted consultation and next steps

Purpose of Report

6 This report provides our advice on the recommended scope of the review and the approach to public consultation. We would like to use this as the basis for discussion at your meeting with SSC on Monday 23 April.

Background

7 New Zealand is seen as a world leader in integrity, transparency and openness. It was ranked the least corrupt country in the world, according to Transparency International's 2017 Corruptions Perception Index released in 2018.[1]

8 In line with this this tradition of integrity, New Zealand was one of the first countries in the world to introduce dedicated whistleblower protection legislation in 2000.

9 Unlike many other jurisdictions, there is a single law that applies to the public and private sector and a broad range of "employees" are covered, including former employees, contractors and volunteers.

10 However, the legislation is now 18 years old and lags behind international practice in a number of areas.[2] It is crucial to address these to maintain our high standards of integrity, while not losing sight of the relevant strengths of our system.

11 In December 2017, you asked the State Services Commission to review the Protected Disclosures Act 2000 (the Act) starting with a targeted consultation with stakeholders across the public and private sector [SSC2017/680 refers].

12 The targeted consultation gathered perspectives on the objectives of the Protected Disclosures regime; the strengths, issues and challenges with current legislation and practice; and, the benefits and risks of different international approaches to reform (see A3: background materials sent to stakeholders in advance).

13 In total, we spoke to 38 organisations and individuals.[3] This included unions and professional bodies (e.g. PSA), appropriate authorities (e.g. Ombudsman), private and not-for-profit representative bodies (e.g. Business New Zealand, Social Services Providers Aotearoa), public service agencies and academics (Annex 1 provides a full list).

14 In addition, a number of interested individuals, including those with experience of using the Act, approached us to share their experiences and we benefited from the diverse perspectives they brought to the table.

Summary of consultation feedback

15 The attached report provides an account of the key themes that came out of our conversations. In summary, we heard that the objectives of the Protected Disclosures regime should be to:

15.1 Embed a positive culture around voicing concerns so that employees are able to "speak up", in any circumstance, freely and without fear.

[1] Corruptions Perceptions Index 2017 available at: https://www.transparency.org/news/feature/corruption_perceptions_index_2017
[2] Griffith University, Strength of Organisational Whistleblowing Processes – Analysis from Australia and New Zealand, 2017 and Transparency International, National Integrity System Assessment New Zealand 2013
[3] We held three workshops and had 16 individual conversations.

15.2 Have simple, clear and user-friendly processes for wrongdoing to be reported, detected and investigated.

15.3 Ensure consistency with other legislation so that employees and organisations know what channels to use in different circumstances (e.g. when a protected disclosure is made during an employment dispute and there is overlap with Employment Relations legislation).

15.4 Minimise inappropriate use of the Act, including for false or misleading allegations.

16 A number of weaknesses with the current system were highlighted around:

16.1 Coming forward with concerns (e.g. people are not familiar with the current Act and fear invoking "scary" legislation that could jeopardise their careers)

16.2 Procedures for handling disclosures (e.g. organisations vary significantly in their ability to handle disclosures and the number of external reporting channels are confusing to navigate).

16.3 Support, protections and compensation for those who disclose wrongdoing (e.g. few organisations provide dedicated "wrap-around" support to protect those who come forward from any adverse consequences).

Scope of the review

17 During the consultation, we sought perspectives on the benefits and risks of different international approaches to reform. We then conducted an analysis of how these reform priorities would work together to deliver the biggest improvements to the Protected Disclosures regime.

18 In our view, there is an opportunity to amend the legislation to provide a more comprehensive regime in New Zealand. We have identified seven key areas that could be strengthened:

1. **Make it clear when to use the law.** This would involve clarifying the relationship between the Act and related pieces of legislation (e.g. Health and Safety at Work Act 2015) to enable employees and organisations to know which Act to use in different circumstances. This may require changes to the "serious wrongdoing" definition in the Act,[4] potentially to broaden the range of reportable wrongdoing, while explicitly excluding purely personal and employment grievances that can be dealt with through other legal channels.

2. **Make it easy to "speak up" in organisations.** This would consider introducing a new statutory duty for all organisations to have a protected disclosures policy in place that provides information about how a disclosure can be made; the support and protections available; and the steps the organisation will take to investigate concerns. Feedback from the consultation suggested that the obligations may need to be differentiated across the public and private sector (i.e. prescriptive requirements through to high-level principles).

[4] Under the current Act, an employee may disclose information in accordance with the Act if the information is about "serious wrongdoing" in or by the organisation. This 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.

3. **Make it easy to report concerns externally.** This would focus on ensuring effective reporting channels to external agencies as a back up, or alternative, to reporting inside an organisation. This may require changes to the current set of "appropriate authorities" and the tiered reporting system (which requires individuals to report concerns internally first) to make it easier for people to know who to report to, and when.
4. **Protect those who come forward from reprisals.** This would explore strengthening the protections offered to those who report concerns – for example, considering listing and defining forms of retaliation in the legislation (e.g. dismissal, demotion and harassment) or making it a statutory duty for organisations to take reasonable steps from this occurring (e.g. by providing dedicated wrap-around support). Changes in this area will have implications for the obligations placed on organisations (see reform area 2).
5. **Make the path to compensation clearer.** This would explore the remedies available to individuals who suffer adverse consequences as a result of making a disclosure – such as offering interim relief, legal fees and compensation for any detriment suffered. This could involve clarifying or changing current compensation pathways (i.e. via the Employment Relations Act and the Human Rights Act) to make it easier to access and navigate in the context of a protected disclosure.
6. **Provide leadership and promote good conduct.** This would explore SSC's leadership role in raising awareness, supporting individuals to navigate the system and enabling organisations to fulfil obligations – e.g. through advice, guidance and training. There are choices around what the right mix of oversight functions would be, and where they could sit, to reinforce good practice across the public and private sector.
7. **Enforce standards and penalise non-compliance.** This would consider establishing an enforcement regime to scrutinise organisational practice and punish non-compliance. There are a number of different elements to this – e.g. monitoring compliance with the Act, responding to complaints about potential breaches and taking enforcement action (e.g. formal warnings, penalties and criminal prosecution).

19 There are choices around where we should focus our efforts to deliver desired improvements to the regime. The criteria that we consider relevant to the preferred scope of the reforms are:

19.1 The degree to which they will give effect to the **objectives** of the Protected Disclosures regime identified during the consultation process (see 15.1-15.4)

19.2 The degree to which the reforms are likely to introduce new **risks or unintended consequences** that could cause challenges in implementation

19.3 The **compliance cost on employers** across the public and private sector

19.4 The **cost of establishing the infrastructure** to support implementation of reforms

19.5 The amount of evidence and insights we have on **"what works"**

20 In our view, reforms in areas 1-6 would be a strong first step in getting the foundations right and driving improvements across the board:

20.1 It would bring our legislation in line with international practice in key areas – including requiring organisations to have clear and simple procedures in

place; ensuring effective "back up" channels for reporting concerns externally; and, improving the support and protections available to individuals who "speak up".

20.2 At the same time, it takes account of New Zealand's already high standards of integrity relative to other jurisdictions and therefore places emphasis on promoting and enabling good conduct rather than deterring and penalising non-compliance through a strong enforcement regime.

21 This approach may be challenged by some experts and parts of the public on whether it has enough "teeth" to drive improvements (i.e. reform area 7).

22 In our view, changes in this area are not desirable at this stage for the following reasons:

22.1 **Information and awareness raising is the preferred model for building buy-in and improving compliance.** In our view, the legislation should aim to promote good conduct and make it easy for organisations to do the right thing rather than encourage minimum compliance through deterrence and penalties. This is supported by the Legislation Design and Advisory Committee (LDAC), which recommends that the least coercive approach to improving voluntary compliance should be adopted.[5]

22.2 **We have limited knowledge about "what works" in relation to stronger enforcement mechanisms.** Although some jurisdictions have taken steps in this direction, the approach to legislation (i.e. whether there is a single law for the public and private sector) and enforcement varies significantly (e.g. from fines through to imprisonment)[6] and we do not have substantive evidence about which have proven most effective.

22.3 **Enforcement measures did not emerge as a major priority for reform during the targeted consultation**. The consensus was that enforcement measures were not as critical to driving improvements in New Zealand to the same degree as they are in countries with high levels of wrongdoing and crises of public confidence. In these countries, a strong regulatory regime acts as an important mechanism to compensate for ineffective processes and procedures for reporting concerns.

23 Given these considerations, we recommend that the State Services Commission monitor implementation of the reforms and evaluates the extent to which they are delivering desired improvements before initiating a process to assess the value of stronger interventions to ensure compliance.

Next steps

24 We would like your feedback on the proposed scope of the review, and whether there are any other reform areas you would like us to focus on.

25 After your feedback, our next step would be to develop detailed options for change under each reform area and consider how these would work together as a coherent package, recognising that changes in one area will have implications elsewhere in the regime. This will form the basis of a Cabinet Paper and public discussion document.

[5] See Legislation Design and Advisory Committee Guidelines: 2014 edition
[6] Wolfe, Worth, Dreyfus, Brown, "Whistleblower Protection Laws in G20 Countries: Priorities for Action", September 2014

Cabinet Paper

26 A Cabinet paper will be required to obtain agreement to undertake a public consultation on the preferred options. This would describe the options considered, seek in-principle agreement to the preferred approach and set out plans for consulting the public, including the draft discussion document.

27 The State Services Commission can provide you with a draft Cabinet paper and discussion document in June. After we have incorporated your feedback, indicative timelines are as follows:

27.1 Mid-June - Ministerial Consultation on the Cabinet Paper

27.2 July - Lodge the paper with the Cabinet Office and discuss at a Cabinet Committee (either at the Government Administration and Expenditure Review Committee or Economic Development Committee)

27.3 August-September – Public consultation (see next section)

Public consultation

28 We recommend that the next stage of public consultation invites feedback on the proposed options for change to improve the likelihood of successful implementation. This could involve:

28.1 Releasing a public discussion document setting out options for change and inviting submissions over a 6-8 week period.

28.2 Running workshops for specific groups during the submission period – for example, employers, unions and front-line implementers.

28.3 Using social media to reach groups who have strong views on how the regime could be improved.

28.4 Analysing submissions and finalising reform proposals before proceeding to final Cabinet policy approvals.

29 This consultation process would be broader than a legislative change process, which channels consultation towards the end of the process (i.e. during the exposure draft), and narrower than a fully co-produced reform process (i.e. partnering with the public early on to build a preferred solution).

30 In our view, this would be the most effective method for gathering meaningful public input into the proposed reforms for the following reasons:

30.1 It provides for broad engagement with specific groups who have an interest in how the reforms will work in practice and those who have had experience of using the legislation.

30.2 It would allow us to test the feasibility of different options for change, iron out potential implementation issues and increase the likelihood of successful implementation.

30.3 It is cost and time-effective and would allow the legislation to be amended within current timeframes (see Annex 2)

31 Once you have provided feedback on the approach to public consultation, we will develop a plan and include it in the draft Cabinet paper.

Communications

32 The targeted consultation summary report will be circulated to participants and made available to interested parties on the SSC website. You may also wish to share it with your cabinet colleagues.

Risks

33 **International research on whistleblower protections.** The SSC is a partner organisation on Whistling While They Work 2, a research programme led by Griffith University to identify best practice principles for organisational responses to managing disclosures across Australian and New Zealand workplaces. The research is at too early a stage for findings to be available. It is possible that some findings may support a different direction to what we have recommended in some areas. We are working with Griffith University to have preliminary New Zealand results reported in September, so they can be discussed as part of the consultation process. Griffith have indicated that previous research suggests that higher priority needs to be placed by organisations and regulators on a proactive obligation to support and compensate individuals. This is in contrast with regimes that rely primarily on punishing criminal reprisals which, while it may play a role, is more difficult and can only ever have limited effectiveness in achieving the intended outcomes. This is consistent with our recommended scope. However, it is important, in their view, to think about how to ensure that organisations have good policies, and implement them. This could be done through a range of approaches, of which penalties (which we are not recommending), could be one.

34 **Costs:** Changing the existing regime may require a budget bid – e.g. in relation to ensuring SSC has sufficient resources to provide leadership and promote good conduct. As we develop detailed policy proposals, we will provide cost information on the different reform options.

35 **Compliance burden.** New statutory obligations will introduce a compliance cost and could cut across existing regulations for organisations (e.g. health and safety). Smaller businesses and NGOs may require additional support in navigating obligations. We will work with other agencies and business to understand how new obligations will work alongside existing obligations and the appropriate level of support to make it easy for organisations to comply.

36 **Impact on legislation administered by other agencies.** Any amendments to the "serious wrongdoing" test and compensation arrangements in the Act will have implications for legislation administered by other agencies and may lead us to recommend changes in other areas. We will work closely with relevant agencies – particularly MBIE (on the Health and Safety at Work Act 2015 and Employment Relations Act 2000) to identify overlaps between different regimes and the changes that might be necessary.

37 **Long-term cultural change:** Changes to the Protected Disclosures Act are an important first step in encouraging a "speak up" culture. However, there are no quick fixes or solutions. Feedback from the consultation highlighted that legislative reform needs to be supported by non-regulatory approaches to raising awareness and shifting cultural attitudes over the long-term, (e.g. SSC's model standards, issued in July 2017, to set expectations in the public sector around speaking up).

Recommendations

38 It is recommended that you:

38.1 **note** the contents of this paper

38.2 **discuss** the paper with officials and provide feedback on:

(i) Recommended scope of the review

(ii) Approach to Cabinet and public consultation process

38.3 **note** that the outcome of the discussions at the agency meeting will be used to develop a Cabinet paper and discussion document

38.4 **note** that officials will circulate the final consultation summary report to those that participated in the targeted consultation

Yes/No

Annex 1: Targeted consultation participants

Who we spoke to	
Unions and professional bodies	Public Services Association
	Institute of Directors
	Institute of Internal Auditors
	New Zealand Nurses Organisation
Private sector	Business New Zealand
	KPMG
	Te take O Te Tangata - Health and Safety Legal Consultants
	New Zealand Shareholders Association
Voluntary and community sector	Social Services Provider Aotearoa
	Hui E!/Community Aotearoa
Oversight authorities	Health and Disability Commissioner
	Serious Fraud Office
	Privacy Commission
	The Ombudsman
	Office of the Controller and Auditor-General
	Inspector-General of Intelligence and Security
	Parliamentary Commissioner for Environment
	Independent Police Conduct Authority
Agencies and wider public sector	Ministry of Justice
	New Zealand Police
	Department of Corrections
	MBIE
	New Zealand Defence Force
	Crown Law
	Education Review Office
	Capital and Coast District Health Board
Academics and experts	Victoria University
	Griffith University
	RMIT University
	Transparency International
	Institute of Business Ethics
Individuals	5 Individuals with experience of making a disclosure

Annex 2: Indicative timelines

The table below provides indicative timelines for the review, which have been modified in some areas to allow more time for detailed policy development and consultation with relevant departments and key stakeholders, as this is a complex area of legislation with implications for all employers in New Zealand.

However, the overall timeframes remain unchanged. This is based on an assessment that the amended legislation will be a medium sized bill, of medium complexity.

Date	Deliverable
April – June 2018	Policy process - development of options for change, consultation with relevant Departments and key stakeholders and draft papers (Cabinet Paper and discussion document)
July	Papers at a Cabinet Committee to seek approval on the preferred options for change and approach to public consultation
August 2018 – September 2018	Formal public consultation process
October-November 2018	Analysis of consultation feedback and finalise proposals to put to Cabinet
December 2018	Final Cabinet approvals - Paper and Regulatory Impact Statement to Cabinet
January-March 2019	Final drafting instructions to PCO
September 2019	Introduction and First Reading
April 2020	Report from Select Committee
End May 2020	Date of enactment
July 2020	Date of commencement

Building public confidence in the integrity of government and business in New Zealand

Review of the Protected Disclosures Act 2000

Purpose of the consultation

- The Minister of State Services has asked the State Services Commission to undertake a review of the Protected Disclosures Act 2000.
- However, as you know well, questions have been raised as to whether New Zealand's legislation is working effectively and whether it lags behind international practice in a number of key areas. Getting this right is critical to maintaining public confidence in the integrity of government and business in New Zealand.
- As a first step, we would like to talk to you and a select group of stakeholders to understand your perspective and develop a view on the key issues before providing advice to Government for their consideration.

AIMS OF THE PROTECTED DISCLOSURES REGIME

The Purpose of the current Act is to promote the public interest by:

- **Facilitating the disclosure and investigation of serious wrongdoing in the workplace**
- **Protecting employees who report concerns**

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- In your view, what should be the key objectives of the Protected Disclosures regime?
- What would success look like in the short (2 years) and long-term (10 years)?
- What would future generations want?
- What are the key risks and unintended consequences we should be aware of?

KEY FEATURES AND ISSUES

HOW THE LEGISLATION CURRENTLY WORKS

- The Act applies to both the **public and private sector**.
- **"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.
- **Current employees, former employees, homeworkers, contractors, secondees and volunteers** can all report wrongdoing.
- 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**.
- 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).
- The Act lists a number of **"appropriate authorities"** to whom a disclosure can be made in certain circumstances (including the Ombudsman and State Services Commissioner).
- 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.
- These protections don't apply if employees know the allegations to be false or act in **"bad faith".**
- 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.

AREAS THAT ARE NOT COVERED IN THE LEGISLATION

There are no specific requirements on organisations to:

- ❑ **Follow up on disclosures and investigate** alleged wrongdoing in a timely manner.
- ❑ **Establish procedures to assess the risk of reprisals** occurring against whistleblowers.
- ❑ **Provide dedicated redress, support or compensation** to individuals who suffer retaliation or detriment
- ❑ **Establish a system to record and track reports** of wrongdoing.

- ❑ There are **no penalties for those who breach protections for whistleblowers** or undertake reprisals.
- ❑ There are **no obligations on whistleblowers to cooperate** during the course of the investigation.

Research suggests that:

1 **People are unclear about how to make a disclosure, what it means and the support that is available**

The New Zealand government ranks below most Australian public sector jurisdictions in relation to the strength of organisational processes for dealing with disclosures internally such as incident tracking, risk assessment, dedicated support and remediation (Griffith University, 2016).

2 **People do not have confidence that their organisations will act on their concerns.**

A number of whistleblowers encounter inaction, which perpetuates the belief amongst employees that there is no point in flagging concerns (Transparency International, 2013).

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- In your experience, how are disclosures handled in organisations? What works well? What works less well?
- How do people interact with the legislation? How does it influence practice?
- How are different parties treated in the process? I.e. the whistleblower, organisation and the individual named in a disclosure?
- In your view, what are the key issues and challenges we need to be aware of?

POTENTIAL AREAS FOR REFORM

There are a number of areas that could be reformed to provide for a more comprehensive regime in New Zealand. We are interested in your views on the benefits and risks of different international approaches to help us form a position on priorities and potential improvements.

WHO CAN MAKE A DISCLOSURE

Some countries take a broader view of the legislation and explicitly link it to the wider public interest of detecting wrongdoing in the first place (with some calling their legislation the "Public Interest Disclosures Act"). Anyone who witnesses wrongdoing is therefore encouraged to speak up whether or not they are on the payroll. E.g. in Canada, members of the public can also report alleged wrongdoing in the federal public sector.

Is there value in extending protections to a wider range of people? If so, who else should be covered?

SERIOUS THRESHOLD TEST

UK legislation strikes a balance between being overly prescriptive (which places the onus on the individual to determine whether an activity constitutes a "serious" violation) and overly relaxed, which may encourage unlimited disclosures (OECD, 2016).

Should the "serious threshold" test for reporting wrongdoing be re-considered? If so, what other activity should be covered?

CONFIDENTIALITY

In the Australian Commonwealth, the Act prohibits the release of any information by anyone to anyone (including to a court or tribunal) which might identify or disclose the identity of the whistleblower. There is a penalty of six months' imprisonment or a fine for revealing the identity of a whistleblower.

Is there a need to enhance the confidentiality provisions in the current Act? What trade-offs might we need to consider?

BAD FAITH CLAUSE

Greece, Portugal, Ireland and the UK have removed the "bad faith" clause on the basis that it could disincentivise employees coming forward.

What would be the benefits and risks of this approach in New Zealand?

ANONYMITY

Australia, the UK and Ireland allow for anonymous disclosures (in some cases, via hotlines and web platforms).

What would be the benefits and risks of protecting anonymous disclosures in New Zealand?

REWARDS

Several federal US laws provide whistleblowers with financial rewards when they submit information that helps the government recover funds from companies or individuals committing fraud.

What would be the benefits and risks of introducing rewards and incentives to encourage people to report wrongdoing?

STANDARDS FOR ORGANISATIONAL PROCEDURES

In Australia and Canada, the legislation requires federal public service agencies to have procedures in place to deal with disclosures and imposes some specific requirements around internal reporting channels, the manner in which investigations are undertaken and timeliness.

Should standards for dealing with disclosures internally be mandated for all organisations (public and private)? If so, what form could these take?

EXTERNAL REPORTING CHANNELS

The UK and Australia operate a tiered system in which employees must first exhaust internal channels before reporting to a designated external authority. In Canada, public sector employees can choose to report internally or directly to the Public Sector Integrity Commissioner at any time.

What would be the benefits and risks of these different approaches in New Zealand? When and how should different reporting channels be used?

REPORTING TO THE MEDIA

In the UK, Australia and Canada, employees can disclose directly to the media in certain circumstances (e.g. the risk is imminent, there is insufficient time to make a disclosure through other means or agencies fail to act).

What would be the benefits and risks of allowing disclosures to the media?

PROTECTIONS AGAINST RETALIATORY ACTION

The Australian Commonwealth legislation lists and defines different forms of retaliation and makes it a statutory duty for public sector organisations to assess the risk of retaliation occurring and to take reasonable steps to protect employees from this.

Should organisations be expected to establish support mechanisms that proactively minimise the risk of retaliation occurring? How could this be implemented across the public and private sector?

PENALTIES FOR RETALIATION

Twenty-two OECD countries have penalties in place for retaliation against whistleblowers which range from disciplinary actions to fines and imprisonment (E.g. in Australia, reprisals carry a penalty of a maximum of two years' imprisonment).

Should penalties for retaliatory action be explored? What form could these take?

COMPENSATION ARRANGEMENTS

Canada's legislation includes a comprehensive list of remedies overseen by a dedicated reprisals appeals body - the Public Servants Disclosure Protection Tribunal - which is responsible for investigating and processing retaliatory action taken against whistleblowers.

Is there a need to enhance compensation arrangements in the legislation? If so, what other remedies could be offered?

INTERNAL MONITORING

In Canada, the legislation requires public service chief executives to report annually to the Office of the Chief Human Resources Officer. The legislation also requires the Public Sector Integrity Commissioner to table a separate report to Parliament that highlights any systemic problems it has become aware of.

Should organisations be required to establish an internal reporting system and provide annual reports to an oversight body?

OVERSIGHT BODY

In Australia, the Federal Government has established an Expert Advisory Panel to consider options for a "one-stop shop" Whistleblower Protection Authority with broad powers to support whistleblowers, assess allegations, investigate reprisals and set standards for organisations.

What would be the benefits and risks of establishing a similar body in New Zealand? What functions could it perform?

- Are there any other dimensions you believe the State Services Commission should consider?
- What are the benefits and risks of different approaches?
- Which reforms would make the biggest difference in New Zealand?
- How can we ensure a coherent relationship between any changes made?

What will happen next?

- The work and outputs from these discussions will be promptly circulated.
- Feedback from this consultation process will shape our advice to the Government on the key issues for their consideration.

PROTECTED DISCLOSURES *RECOMMENDED AREAS FOR REFORM*

We would like to talk to you about the seven key areas that could be strengthened in the legislation. There are choices around where we should focus our efforts to deliver desired improvements to the regime. Based on your feedback, we will develop detailed options for change under each area to inform a draft Cabinet paper and public consultation document.

POSSIBLE AREAS FOR REFORM

CLARIFY WHEN TO USE THE LAW

We could explore:
- The definition of 'serious wrongdoing' in the Act
- The relationship between the Act and related legislation.

MAKE IT EASY TO SPEAK UP WITHIN ORGANISATIONS

We could consider:
- Introducing a statutory duty that all organisations must have a policy in place to provide information about the protected disclosures process.

MAKE IT EASY TO REPORT CONCERNS EXTERNALLY

We could consider:
- Changing the current reporting channels to "appropriate authorities" to make it easier for people to know who to report to, and when.

PROTECT THOSE WHO COME FORWARD

We could consider:
- Listing and defining forms of retaliation in the legislation.
- Requiring organisations to provide dedicated wrap-around support to people who report concerns

MAKE THE PATH TO COMPENSATION CLEARER

We could explore:
- Clarifying or changing current compensation pathways (i.e. via the Employment Relations Act and the Human Rights Act) to make it easier to access and navigate.

PROVIDE LEADERSHIP AND PROMOTE GOOD CONDUCT

We could explore:
- SSC's leadership role in raising awareness, supporting individuals to navigate the system and enabling organisations to fulfil obligations.

ENFORCE STANDARDS AND PENALISE NON-COMPLIANCE

We could consider whether to:
- Monitor compliance with the Act
- Impose penalties for breaches.

✓

RECOMMENDED FOCUS OF REFORMS

We consider that we should focus our reform efforts on these areas to:
- Reflect advances internationally
- provide better support for individuals to navigate the system, and for organisations to fulfil new obligations
- raise awareness, enhance public confidence in the system and embed a "speak up" culture over the longer term.

In our view, this approach would ensure we get the foundations right for the protected disclosures regime. It does not preclude introducing an enforcement regime at a later date, if it proves necessary.

✗

We consider the recommended approach will be sufficient, and will deliver the most significant improvements. In addition:
- Promoting good conduct and making it easy for organisations to do the right thing will be more effective than using deterrence and penalties
- We have limited information about what works in relation to stronger enforcement interventions. This may become clearer after the recommended approach has been implemented.

NEXT STEPS

APRIL – JULY 2018	*AUGUST - SEPTEMBER 2018*	*OCTOBER – DECEMBER 2018*	*JANUARY – AUGUST 2019*	*SEPTEMBER 2019 – APRIL 2020*	*MAY 2020*	*JULY 2020*
PHASE ONE Develop options for change (for Cabinet agreement and public consultation)	**PHASE TWO** Public consultation	**PHASE THREE** Finalise policy proposals (for Cabinet agreement)	**PHASE FOUR** Draft legislation	**PHASE FIVE** Passage of legislation	**ENACTMENT**	**COMMENCEMENT**

PROTECTED DISCLOSURES *WHERE REFORM COULD TAKE US*

This diagram shows how New Zealand's current legislation compares internationally in each of the seven possible areas of reform, and where legislative change could take us. This is an opportunity to strengthen New Zealand's already high standards of integrity, and bring it in line with international best practice. There are choices around how far we go in each area to encourage reporting of alleged wrongdoing, while managing some key trade-offs and risks (e.g. broadening the definition of "serious wrongdoing" in the Act will need to be balanced against the need to ensure it remains focused on substantive integrity issues with a public interest content).