



[IN-CONFIDENCE]

Review of Protected Disclosures Act – Outcome of public consultation and next steps

Date: 24 May 2019
Report No: SSC2019/0161
Contact: Catherine Williams, Deputy Commissioner, Integrity, Ethics and Standards
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	Action Sought	Deadline
Hon Chris Hipkins Minister of State Services	Note the contents of this report and agree next steps	

Enclosure: Yes (attached)

- Submissions Summary Report
- Choices resulting from public engagement on the Protected Disclosures Act Review A3

Executive Summary

- 1 This report briefs you on the results of public consultation on the review of the Protected Disclosures Act 2000, identifies policy options and makes recommendations for proceeding with the review.
- 2 Following agreement of your preferred option, we will provide you with further advice including next steps.
- 3 We seek your agreement to the publication of the Submissions Summary Report, and publication of the submissions (except where redactions are necessary) when a further review has been completed.
- 4 We also seek your agreement to proactively release this report once policy proposals have been agreed and announced by Cabinet.

Minister's Office Comments

Comments:

Date returned to SSC:

Recommended Action

We recommend that you:

- a **agree** to the publication of the Submissions Summary Report and indicate a time when publication will be appropriate
Agree/disagree.
- b **agree** to the publication of submissions (except where redactions are necessary) when a further review has been completed
Agree/disagree.
- c **note** there are three proposed options to proceed with reform of the Protected Disclosures Act
- d **note** that these options will have implications for resourcing
- e **agree** which option you would prefer to proceed with:
 - a. Option A (retaining focus on the public sector)
Agree/disagree.
 - b. Option B (adding to Option A extending coverage to the private sector)
Agree/disagree.
 - c. Option C (adding to Options A and B establishing an oversight function)
Agree/disagree.
- f **note** we will provide further advice to you on your preferred option including next steps
Agree/disagree.
- g **agree** to proactively release this report once policy proposals have been agreed and announced by Cabinet.
Agree/disagree.

Hon Chris Hipkins
Minister of State Services

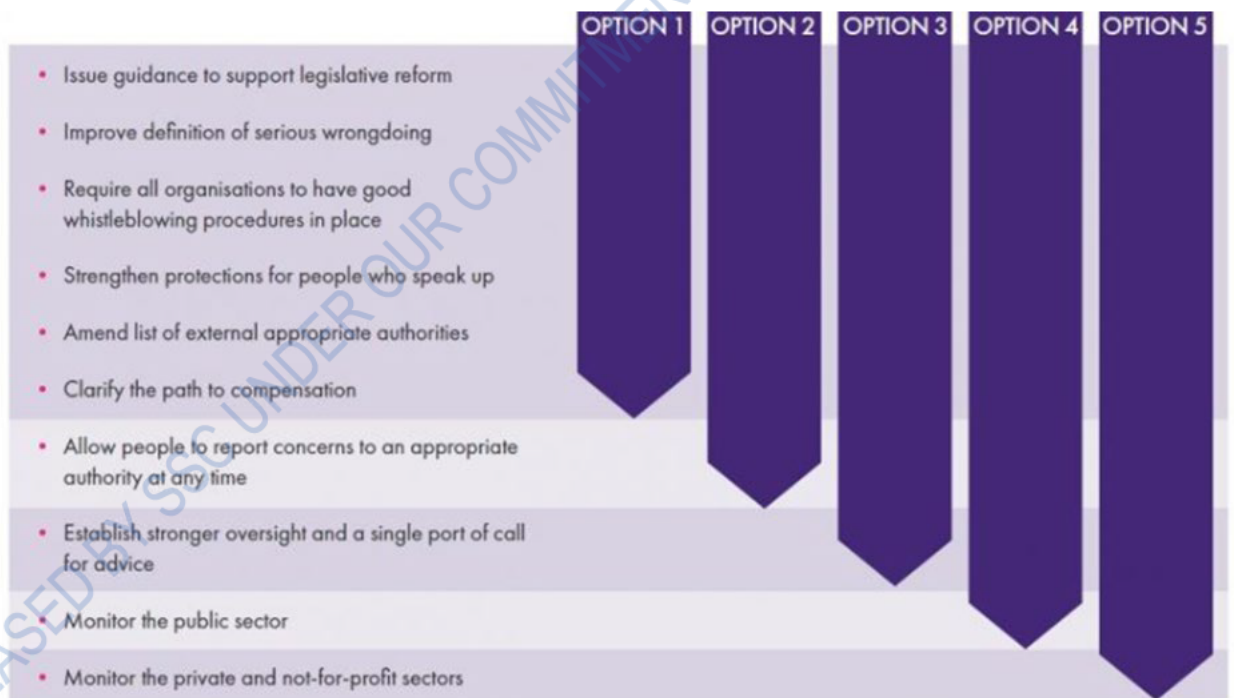
SSC Report: Review of Protected Disclosures Act – Outcome of public consultation and next steps

Purpose of Report

- 5 This report briefs you on the results of public consultation on the review of the Protected Disclosures Act 2000, identifies policy options and makes recommendations for proceeding with the review.

Background

- 6 In August 2018 following a targeted consultation process, Cabinet agreed to a review of the Protected Disclosures Act 2000 (the Act) and to a public consultation process.
- 7 The purpose of the review was to ensure the Act:
- helps expose serious threats to the public interest
 - encourages open organisational cultures
 - is easy to use and understand
 - promotes fairness for everyone.
- 8 The review invited comment on five possible options that aim to improve the current regime.



- 9 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.

Problems under the current regime

- 10 The attached Submissions Summary Report sets out the consultation process and comments received. Five key issues were identified:
 - People lack confidence that making a disclosure will have any effect on serious wrongdoing (34 comments)
 - People don't trust that the Act will protect them (32 comments)
 - The Act is unclear, and people don't know how to use it (32 comments)
 - The scope of the Act is too narrow (11 comments)
 - There's a lack of oversight of the regime (5 comments)
- 11 Some submitters expressed concerns about broader integrity issues such as threats to our high international ranking in integrity measures, poor behaviour in the employment space and lack of openness (15 comments).
- 12 Alternately, some submitters said the need for change was not urgent because New Zealand is one of the least corrupt countries in the world.

The changes people wanted to see

- 13 The attached A3, 'Choices resulting from public engagement on the Protected Disclosures Act review' (the Choices A3) summarises the policy proposals favoured by submitters.
- 14 The vast majority of submitters supported non-legislative solutions including promoting awareness and understanding of the Act. There was also a high level of support for establishing an effective oversight function through a one-stop-shop.
- 15 There was significant support for changes which would:
 - Clarify the definition of serious wrongdoing and remove differences between the private and public sectors
 - Lower the threshold for making a protected disclosure from 'reasonable grounds to believe' to 'reasonable grounds to suspect'
 - Require organisations to have whistle blowing procedures in place – including requirements to investigate, report on investigation outcomes and provide greater support for whistle blowers
 - Allow external reporting of serious wrongdoing at any time
 - Introduce monitoring and reporting for the public sector
 - Assist organisations to put good procedures in place.

Policy Options

- 16 We have identified three options consistent with the consultation proposals and weight of submissions received. The details of these and our analysis are set out in the Choices A3.

Option A (enhanced status quo: retaining focus on the public sector)

- 17 The key features of this option are retaining the focus on the public sector and undertaking more work on the improvements as outlined in the Choices A3.
- 18 The advantage of this option is its relative ease of implementation. Consideration can be given to introducing mandatory reporting.
- 19 The disadvantage of this option is that by retaining focus on the public sector, the amendment to the Act would not address the significant feedback received in consultation. It would also not address concerns raised in recent research conducted by the Ombudsman.
- 20 We could work towards the objective of introducing a Bill containing these amendments by mid-2020. A programme of work will be required to implement the Bill when enacted, and will be subject to your other State Services priorities. This programme could include updating our guidance, informing appropriate authorities of their roles and responsibilities, introducing monitoring and reporting for the public sector, and working with the Ombudsman.
- 21 In addition, SSC will continue to lead promotion of a speak-up culture in the public service.

Option B (adding to Option A extending coverage to the private sector)

- 22 Option B includes all the improvements described under Option A, and extending coverage to the private sector by applying the same definition of serious wrongdoing to both the public and private sectors (including not-for-profit and voluntary) and requiring all organisations to have whistle blowing procedures in place.
- 23 The advantages of this option are that it will respond to the significant support for removing differences between the private and public sectors, clarify the definition of serious wrong doing and make other improvements to whistle blowing protection.
- 24 The disadvantage of this option is the potential compliance costs on business and the voluntary sector. We would need to explore what options might exist to mitigate these costs as part of implementation planning.
- 25 This option will overlap with existing employment related legislation. Developing the Bill will be dependent on significant input and support by the Ministry of Business, Innovation & Employment to consider this overlap and explore ways to minimise compliance costs on businesses. Assuming that this support was available, we could work towards the objective of introducing a Bill containing these amendments by mid-2020.
- 26 In addition to the implementation outlined in Option A, planning would need to consider how best to promote awareness in the private sector (including the voluntary sector), on the impact of the changes on them and support them with the transition.

Option C (adding to Options A and B establishing an effective oversight function)

- 27 This option builds on the improvements of the previous options and proposes establishing an oversight function for the private and public sectors to be located in an existing or new body. The functions could include providing advice and resources to individuals with concerns about wrongdoing and reviewing and investigating protected disclosures.
- 28 Currently both the SSC and the Office of the Ombudsman provide 'speaking up' support guidance. This is amplified by agencies such as the Financial Markets Authority (some of the legislation it administers includes speaking up provisions), the Serious Fraud Office and the Institute of Directors. The Ombudsman has a statutory role under the Protected Disclosures Act including powers to escalate disclosures to an appropriate authority and the power to investigate if the disclosure relates to a public sector organisation.
- 29 Consideration of the issues involved in establishing an effective oversight function is likely to be complex given coverage of both public and private sector organisations. It is highly unlikely that a Bill containing these amendments could be ready to be introduced before the end of 2020.
- 30 Establishing or appointing an oversight body would take some time, however when established, depending on its responsibilities, an oversight body could be responsible for much of the legislative and non-legislative programmes of work.

Next Steps

- 31 A critical factor in our being able to successfully deliver each of these options will be having the support and contribution of key stakeholders, particularly the Ministry of Business, Innovation & Employment.
- 32 Following your indication of your preferred option, we will provide you with further scoping of your preferred option, timings and a paper for provision to the Minister of Workplace Relations and Safety.

Publication

- 33 We propose publishing the Submissions Summary Report on the SSC website (if you agree) at a time you consider appropriate.
- 34 We will need to carefully consider all submissions before making them public. At the time of consultation submitters were advised that their written submissions would be published on the SSC website unless they indicated otherwise.
- 35 We propose to release the submissions, except where redactions have been sought by the submitter or are necessary to protect other interests referred to in the Official Information Act.

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REVIEW OF THE PROTECTED DISCLOSURES ACT 2000

Submissions Summary Report

April 2019

STATE SERVICES COMMISSION
TE KAWA MATAAHO





SECTION 1: INTRODUCTION

New Zealand started strong, but almost 20 years on there are challenges we need to address

New Zealand was one of the first countries in the world to introduce a dedicated law to protect 'whistleblowers' – the Protected Disclosures Act 2000 (the Act). This law exists to support people in the public and private sectors to expose criminal, fraudulent or other serious misconduct in their workplace by protecting them from unfair dismissal or treatment.

However, the law is now 18 years old and it's not working as well as it should. People don't always know how to use the Act – or feel safe using it.

This needs to change. If we want to maintain our high integrity standards, we must continue to work hard to tackle serious misconduct in New Zealand.

It is vital we get this right. When something is wrong, people need to be able to raise issues safely without fear of punishment or reprisal.

The Government is committed to protecting New Zealanders who 'speak up' about serious wrongdoing in the workplace

In August 2018, the Government decided to review the Act and engage with the public on options for change.

The purpose of the review is to ensure the Act:



helps expose serious threats to the public interest

by clearly focusing on conduct in the workplace that poses the biggest threat to the public interest – for example, criminal activity of any kind, or a danger to public health and safety.



encourages open organisational cultures

by requiring all organisations to have good procedures in place that make it easy for people to speak up freely and without fear.



is easy to use and understand by setting out clear definitions and rules that make it easy for people to know what the Act does and when, and how to use it.

promotes fairness for everyone by ensuring everyone is treated with respect throughout the process.



New Zealanders told us what matters most to them

From 29 October to 21 December 2018, we invited public feedback on five possible options that aim to improve the current regime. We used Have My Say, an online engagement platform, and also accepted written submissions and comments made in workshops. We received 73 submissions in total and held four workshops with 54 attendees.

This submissions summary report sets out what the public told us about the problems under the current regime, as well as the changes they want to see.

We refer to 'comments' rather than 'submissions' throughout this report because we have considered each observation, statement, or question in the online and written submissions, as well as the four workshops.

SECTION 2: PROBLEMS UNDER THE CURRENT REGIME

Public engagement allowed us to get a better understanding of the problems under New Zealand's current whistleblowing regime.

People told us that there are five key issues:

1. People lack confidence that making a disclosure will have any effect on serious wrongdoing (34 comments)
2. People don't trust that the Act will protect them (32 comments)
3. The Act is unclear, and people don't know how to use it (32 comments)
4. The scope of the Act is too narrow (11 comments)
5. There's a lack of oversight of the regime (5 comments)

There were also some submitters who outlined their concerns about broader integrity issues in New Zealand, which may relate to our whistleblowing regime (15 comments). Matters raised by some submitters included:

- Threats to New Zealand's high international ranking in integrity measures
- Poor behaviour in the employment space

On the other hand, there were some people who said that the need for change was not sufficiently urgent because New Zealand is one of the least corrupt countries in the world.

Problem 1: People lack confidence that making a disclosure will have any effect on serious wrongdoing

The problem raised most frequently by submitters was that people lack confidence that making a disclosure will have any effect on serious wrongdoing. For many people, this undermines the purpose of the regime. If people don't think anything will be done about a concern they raise, they will be less likely to blow the whistle in the first place, and serious wrongdoing is more likely to go unreported.

Why people feel this is a problem

Some people told us that organisations don't deal with internal disclosures well. We heard that:

- Organisations don't investigate a disclosure after it has been made, or they take too long to investigate
- There is a lack of communication by the person who has received the disclosure, and whistleblowers don't have a clear idea about what will happen next, or when
- Organisations don't have the training or resources to deal with disclosures when they're made
- People lack confidence that the agency that is the subject of the disclosure will be able to investigate independently or effectively
- Organisations don't take concerns about senior people seriously enough

Some people told us that they lack confidence in the Act's appropriate authorities. We heard that:

- Appropriate authorities sometimes pass protected disclosures on to each other, rather than investigate them
- Some people lack confidence that the Ombudsman will be able to help
- Protected disclosures that contain multiple concerns are often split up and dealt with by different appropriate authorities. This can obscure the overall issue.

Problem 2: People don't trust that the Act will protect them

Another significant problem raised by submitters is that people don't trust the Act will protect them. The purpose of the Act is to protect people who raise concerns about serious wrongdoing in the workplace. If these protections are failing, or seen to be failing, the Act is not fulfilling its purpose.

Why people feel this is a problem

Some submitters told us that people are too scared about the consequences of reporting wrongdoing to speak up. We heard that:

- Blowing the whistle can be career-ending, and it's a significant risk that whistleblowers take
- Whistleblowers are afraid of ongoing reputational damage
- People can experience significant stress and mental health issues after making a protected disclosure
- Whistleblowers may be mistreated by those who are responsible for the bad behaviour, or by the organisation
- People who witness wrongdoing may face threats of unemployment
- People are worried that they may be mistaken, so they don't speak up

Some people told us that it's too difficult to protect confidentiality in practice because of New Zealand's size, or the size of their organisation or sector. We heard that this is particularly difficult in small rural communities.

Some submitters told us that there are particularly vulnerable groups of people who are too scared to blow the whistle – even if they have seen wrongdoing take place. We heard that:

- Whistleblowers who report directly to the person that is the subject of the concern are particularly vulnerable
- There are several groups of people who may be vulnerable to job loss and are less likely to speak up if they see wrongdoing in the workplace. Some examples of the groups submitters told us about included new or temporary migrants, Māori, women, young people, contractors, and casual workers
- Māori are treated particularly badly when they blow the whistle

Some submitters told us that there is very little practical support for people who have blown the whistle. We heard that:

- Organisations don't provide support for whistleblowers
- There's no external support or advocacy for whistleblowers, and it's often too expensive to get legal advice

Some people told us that organisations don't support speaking up about wrongdoing. We heard that:

- There are power imbalances in hierarchical organisations that stop people from speaking up
- There's a cultural issue around whistleblowers not being taken seriously

Problem 3: The Act is unclear, and people don't know how to use it

The Act's lack of clarity, and the fact that people don't know how to use it, was raised by a large group of submitters. This is a problem because if people don't understand whether the Act applies to their circumstances, or how to use it if it does, they are less likely to feel safe or confident. The result may be that more serious wrongdoing goes unreported.

Why people feel this is a problem

Some people told us that there's a lack of awareness about the Protected Disclosures Act. We heard that:

- People don't know that the Act exists
- People don't understand which circumstances the Act applies to – or when it doesn't apply
- People don't realise that the Act applies to the private sector
- Organisations don't understand what the Act requires them to do when a disclosure is made
- There is very little guidance or training available for organisations

Some people told us that the Act is worded in a confusing way. We heard that:

- The Act allows for very different interpretations of important terms, such as 'serious wrongdoing'
- The overlaps between this Act and other legislation is complicated and confusing
- People don't understand which appropriate authority to go to because the list is so extensive
- People told us that protected disclosures are inherently complicated issues. There are so many different things that can happen – but the Act isn't clear about what the whistleblower or the organisation should do

Problem 4: The scope of the Act is too narrow

Some submitters told us that the scope of the Act is too narrow, and that it should apply to a broader group of people or extend beyond the workplace. It could be problematic if the Act is too restrictive to allow serious wrongdoing from being reported – although a balance needs to be struck to ensure it has enough focus and clarity to meet its purpose.

Why people feel this is a problem

Some submitters told us that not enough people are protected under the Act if they make a disclosure. We heard that:

- Ordinary citizens, not just employees, should be able to make a protected disclosure, because they are often in a position to see wrongdoing, and because they are the users of the products and services
- Particularly vulnerable groups of people should be protected – for example victims of domestic abuse, new or temporary migrants, and people who receive government benefits
- External auditors should be protected because they are in a position to see wrongdoing happening

Some people told us that the definition of 'serious wrongdoing' is too restrictive, and the threshold should be lowered. We heard that:

- People should be able to make protected disclosures about 'wrongdoing', rather than 'serious wrongdoing' - for example, failure to comply with organisational policies
- The definition should include 'seriously unethical' behaviour – such as collusive bidding, defective pricing, product substitution, false statements and claims, and unjustified sole sourcing
- People should be able to report harm they become aware of within the workplace that may be taking place outside, such as domestic violence

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Problem 5: There's a lack of oversight of the regime

A few submitters told us that there is a lack of leadership and accountability across the whistleblower protection regime. Without oversight, organisations may lack the leadership necessary to drive better practices – and a lack of accountability may undermine people's trust in the regime.

Why people feel this is a problem

We heard that:

- There's a lack of leadership of good practice as well as accountability for non-compliance
- The regime is fragmented and lacks cohesion and consistency
- The lack of information about whistleblowing in New Zealand is problematic because we don't understand the big picture. In particular, we need more information about whistleblowing in the private and not-for-profit sectors

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SECTION 3: THE CHANGES PEOPLE WANT TO SEE

Overview

We invited public feedback on five possible options that aim to improve the current regime. Under these broad options, we made specific proposals on actions that could be taken.

As shown in the diagram, the five options build on one another so that the proposals in the first carry through to the fifth. The options range from the minimum changes required to make the Act fit-for-purpose through to more significant changes that increase the level of oversight to support people to use and understand the law.

The five options are shown in the diagram below.



All five options include a combination of guidance and targeted improvements to the law that aim to:

- ensure a clear focus on the issues that pose the biggest threats to the public interest
- build strong foundations and encourage open organisational cultures
- set out clear definitions and rules to make the law easy to use and understand
- promote fairness by ensuring everyone is treated with respect throughout the process

Importantly, while we sought feedback on which, if any, of the five options are preferred, we emphasised that none were set in stone. The options were intended as a basis for discussion about the pros and cons of each and what may or may not work in practice.

Feedback on Option 1: Build strong foundations

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.

Our proposal: providing information and guidance

We received 60 comments in favour of non-legislative solutions, including providing more information and guidance about the Act. Most of these comments discussed the need for:

- promotion of a speak-up culture
- guidance and support for individuals who may wish to speak up about serious wrongdoing, as well as organisations that need to implement the Act
- resources, such as templates and case studies of best practice
- training for organisations
- better leadership on speaking up

Our proposal: improve the definition of serious wrongdoing

We received 48 comments on improving the definition of serious wrongdoing. Overall, there was agreement that the definition should be clearer and easier to understand.

There was broad support for our proposal to include concerns about corrupt or irregular use of money or resources in the private and not-for-profit sector. Some people told us that the Act should apply equally to both the public and private sectors.

There were similar numbers of submitters who were for and against the proposal to remove bullying and harassment from the definition of serious wrongdoing. However, several submitters told us that bullying and harassment is often indicative of other wrongdoing.

There was also support for our proposal to lower the threshold for making a protected disclosure by requiring people to have 'reasonable grounds to suspect' serious wrongdoing is being committed, rather than 'reasonable grounds to believe'.

Our proposal: strengthen obligations for organisations

We received 65 comments that discussed our proposal to strengthen obligations for organisations – for example, by requiring them to have procedures in place for receiving and handling information about alleged wrongdoing. We also proposed that organisations could be legally required to take action and investigate information about alleged wrongdoing and report back to the whistleblower on the outcome.

There were 25 comments expressly supporting the proposal, 2 opposing it, 9 stating that small to medium enterprises should be exempt, and 3 that discussed why voluntary organisations should be exempt. A submitter told us that clarifying the protected disclosures process, both internally and externally, would enhance accessibility and transparency, and create a safer and more trusting environment.

People also told us that:

- Organisations should be required to formally acknowledge and respond after an individual has made a protected disclosure
- Organisations should allocate clear responsibility for whistleblowing issues, and there should be a clear reporting line to the chief executive on these matters
- Organisations should be provided with template policies and processes to assist with implementation

We received 27 comments stating the need for organisations to provide better wraparound support for individuals who have made a protected disclosure, and about 10 comments about better support for people accused of wrongdoing.

Our proposal: enhancing protections for people who 'speak up'

There was support for our proposal to list forms of retaliatory action in the Act. We heard that:

- The Health and Safety at Work Act could be used to inform a list of retaliatory action
- Oppressive behaviour should be included in the list of retaliatory action – it shouldn't be limited to tangible impacts like dismissal

People still told us that it can be very difficult to prevent retaliation from occurring in practice.

More broadly, a high number of comments discussed the need to strengthen protections for people who speak up (68 comments). Although there were few ideas about how to do it, people told us that:

- Protecting confidentiality is paramount
- Protecting the individual's job is also critical
- Protection of individuals' safety outside the workplace should be covered by the Act
- The onus should be on the organisation to protect the individual – not the other way around
- Protections for the individual should take effect immediately after the disclosure is made

However, people also told us that it can be very difficult to maintain confidentiality in practice – 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.

Feedback on Option 2: Allow people to report concerns to an appropriate authority at any time

This option would include all the improvements described under Option 1, but go one step further in making it easier for people to report concerns to an appropriate authority at any time.

Our proposal: reporting directly to an appropriate authority

We received 43 comments that discussed our proposal to allow people to report serious wrongdoing directly to an appropriate authority at any time. There were 23 comments that expressed explicit support for the proposal and 4 that were opposed.

In general, people told us that this would provide greater objectivity and independence, protect confidentiality, and guard against conflicts of interest. We heard that it may also assist organisations that are poorly equipped to deal with protected disclosures.

However, people also told us that the proposal could deter organisations from creating speak-up cultures internally or from investigating complaints – because they know that another organisation will. We also heard that the reputation of the organisation could be unfairly damaged if it hasn't had an opportunity to deal with the concern first.

Our proposal: clarifying the list of appropriate authorities people can report to

We received 20 comments about our proposal to remove 'the head of every public sector organisation' as an appropriate authority under the Act. There were about 6 comments in support, and there was broad consensus that the current provision is too confusing for people who want to raise concerns about serious wrongdoing. There were about 2 comments in opposition.

People also told us that if the catch-all term 'head of every public sector agency' is removed, then the list of named authorities should be reconsidered and expanded. For example, the Ministry for Primary Industries could be retained for animal cruelty issues and the Financial Markets Authority could be retained for corrupt or irregular use of money or resources.

Our proposal: clarifying the path to compensation in the event of retaliation

We received very little feedback about our proposal to clarify the path to compensation in the event of retaliation. However, we received 6 comments stating that the compensation provisions themselves should be stronger – rather than just making the path to compensation clearer.

People also told us that the Ombudsman should be able to award compensation, and that individuals should be compensated if their employer fails to protect them after they have made a protected disclosure.

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Feedback on Option 3: Establish stronger oversight through a 'one-stop-shop'

This option would include all the improvements described under Option 2 and create a single port of call for advice on when, and how, to use the Act.

Our proposal: Establish stronger oversight

We received 81 comments about the proposal to establish stronger oversight through a 'one-stop-shop'. The vast majority were in favour of the proposal – about 50 comments compared to 3 against.

People told us about the functions they would like the body to carry out. Some of the commonly discussed functions included:

- Review and investigate protected disclosures
- Provide advice to individuals with concerns about wrongdoing
- Collect and publicly report information about protected disclosures
- Intervene or impose sanctions where organisations fail to comply with the Act
- Direct whistleblowers to the suitable appropriate authority
- Provide resources for organisations and individuals
- Assist organisations to put good procedures in place

People also said that the organisation best suited to perform these functions would be:

- The Ombudsman, after receiving additional funding to take on these new functions
- A new organisation specifically for whistleblowing
- Different organisations for the public and private sectors

We heard that the body should be independent, accessible, and resourced with well-trained staff. People also told us that the legislation should be very clear on its function and mandate, particularly in relation to other bodies.

Although there was significant support for this proposal, people also highlighted the risk that an external body could undermine efforts by organisations to create speak-up cultures.

Feedback on Option 4: Introduce monitoring and reporting for the public sector

This option would include all the improvements described under Option 3 and introduce new reporting obligations for all public sector organisations to promote transparency and good practice.

Our proposal: Introduce monitoring and reporting requirements for public sector organisations

We received 32 comments that discussed reporting requirements for the public sector. Of these, 12 expressed explicit support and 2 were in opposition.

We heard that:

- Monitoring data should be high-level, rather than detailed
- The data should be collected and reported through existing mechanisms, such as MBIE's Mediation Services and agencies' annual reports
- The data collected be collected by the Ombudsman, SSC, the new oversight body, or an appropriate authority

Feedback on Option 5: Introduce monitoring and reporting for the private and not-for-profit sectors

This option would include all the improvements described under Option 4 and introduce new reporting obligations for all organisations to promote transparency and good practice across the board.

Our proposal: Introduce monitoring and reporting requirements for all organisations

We received 36 comments that discussed our proposal to introduce monitoring and reporting requirements for all organisations – including the private and not-for-profit sectors. Of these, 11 expressed explicit support and 2 were in opposition. There were 4 comments that opposed the inclusion of small to medium enterprises in this requirement.

We heard that:

- Monitoring data should be high-level, rather than detailed
- The data should be collected and reported through existing mechanisms, such as MBIE's Mediation Services and agencies' annual reports
- The findings should be published every 6 months

New ideas we heard about during public engagement

Some submissions raised new ideas that weren't part of our discussion document.

Expanding the definition of 'serious wrongdoing'

People told us that the definition could be expanded to include a number of additional situations, such as conflicts of interest, receipt of gifts or favours by contractors, non-compliance with a company's own policies, negatively impacting Treaty of Waitangi partnerships, exploitation of new or temporary migrants, serious contraventions of financial markets regulations, and serious statutory breaches not already covered by the definition.

Expanding the scope of the Act beyond employees

We received 18 comments about the need to expand the definition of who can make a protected disclosure. We heard that:

- The Act should not only protect employees, but also other vulnerable groups of people. Some of the groups mentioned were victims of domestic abuse, new or temporary migrants, and people who receive government benefits
- The Act should cover any individuals with information

However, people also told us that the risk of expanding the definition too broadly could be to unintentionally create an avenue for raising any kind of complaint.

It is also important to note that this would change the purpose of the Act, which is to protect employees who come forward to report serious wrongdoing in the workplace.

Other ideas

We also heard that:

- Our protected disclosures regime is spread between different pieces of legislation, including the substantive Act, the Human Rights Act and the Employment Relations Act. One submitter told us that it may assist effectiveness and uptake to bring all the relevant provisions together under one law
- Rewards should be introduced for whistleblowers who are proven correct
- We received an even balance of comments about requiring disclosures to be made in good faith, and about removing that requirement

People also gave us ideas about how to implement any changes to the Act. We heard that:

- Any changes need to be consistent with the principles of Te Tiriti o Waitangi
- Any changes should be workable with other legislation – consider other new regulatory and compliance requirements coming into effect and ensure consistency with these
- There should be a transitional period of at least two years to ensure organisations have sufficient time to comply

Feedback on the changes we aren't proposing to introduce

We began testing the benefits and risks of different reform choices in early 2018 with stakeholders across the public, private and not-for-profit sectors, which informed our decision to not include the following changes in the five options for change:

- Extending the protections of the Act to people who report directly to the media
- Extending the protections of the Act to people who report concerns anonymously
- Introducing penalties for employers who breach their obligations

We set out our rationale in our discussion document and invited feedback.

Extending the protections of the Act to people who report directly to the media

We received 17 comments about extending the Act's protections to people who report directly to the media.

There was an even balance of people who supported and opposed this idea. Those in favour of extending the Act said that it's the best way of bringing wrongdoing to light, but those who opposed it said it may encourage vexatious complaints. We also heard that we don't know enough about the problem in New Zealand to warrant this change, and that there would be no benefit because the media's confidentiality provisions are already stronger than the Act's.

Extending the protections of the Act to people who report concerns anonymously

We received 8 comments about extending the Act's protections to people who report concerns anonymously.

The majority of submitters who commented on this idea told us that the Act should have a provision for anonymous disclosures – although it was not always clear whether the submitters thought the protections should apply, or how to do it when the identity of the discloser is unknown.

Introducing penalties for employers who breach their obligations

We received 19 comments about whether to introduce penalties for employers who breach their obligations.

The majority of submitters who commented on this idea told us that penalties should apply to employers who breach their obligations under the Act.

There was a general sentiment that this would lead to greater accountability for employers. Submitters also told us that this would ensure consistency with other schemes in New Zealand and bring New Zealand into line with other jurisdictions. However, there were also some submitters that opposed the idea and others who considered it should be introduced as a second phase of reform.

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SECTION 4: NEXT STEPS

We will now use your feedback and other evidence to advise the Minister of State Services on final options for change.

The Minister may then seek Cabinet's agreement to his preferred options. If Cabinet agrees, a Bill will be drafted. If this happens, then the Bill would be expected to be introduced to Parliament in 2020.

You will then have an opportunity to comment on the draft legislation when it is considered by a Select Committee.

KEEP UPDATED



WEB

Go online to www.havemysay.govt.nz to read more about the review.



EMAIL

Got a question? Email us at info@HaveMySay.govt.nz.



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CHOICES RESULTING FROM PUBLIC ENGAGEMENT ON THE PROTECTED DISCLOSURES ACT

This A3 assists you to determine which policy proposals to take forward as part of the review of the Protected Disclosures Act. Our recommendations are based on what submitters told us, the extent to which each proposal meets the objectives of the review set by Cabinet, how well each proposal addresses the major problems submitters told us about, and ease of implementation.

Option	Policy proposal	What submitters told us	Meets objectives of the review	Addresses challenges submitters told us about	Implementation ease	Recommend?
OPTION A: Public Sector	Non-legislative solutions to promote awareness and understanding of the Act i.e. promotion of a speak-up culture; templates, good practice case studies and training	Vast majority of submitters in favour	HIGH	MEDIUM	MEDIUM	YES
	Remove 'the head of every public sector organisation' as an appropriate authority under the Act - if the catch-all term is removed then the list of named authorities could be reconsidered and expanded	Some submitters in favour	MEDIUM	MEDIUM	HIGH	YES
	Clarify the definition of serious wrongdoing in the Act so that it's easier to understand	Most submitters in favour	MEDIUM	MEDIUM	HIGH	YES
	Remove bullying and harassment from the definition of serious wrongdoing an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement	Balance of submitters for and against	MEDIUM	MEDIUM	MEDIUM	MAYBE
	Lower the threshold for making a protected disclosure by requiring people to have 'reasonable grounds to suspect' serious wrongdoing is being committed, rather than 'reasonable grounds to believe'	Most submitters in favour	MEDIUM	LOW	MEDIUM	MAYBE
	Require organisations to have procedures in place for receiving and handling information about alleged wrongdoing. Require organisations to investigate alleged wrongdoing and report back to the whistleblower on the outcome	Most submitters in favour	HIGH	HIGH	LOW	YES
	Require organisations to provide support for individuals who have made a protected disclosure – for example, by imposing a duty in the Act	Most submitters in favour	MEDIUM	LOW	MEDIUM	MAYBE
	List forms of prohibited retaliatory action in the Act i.e. dismissal, demotion, suspension, failure to promote, ostracism, blocking access to resources, disciplinary sanction, bullying or harassment, victimization	Most submitters in favour	MEDIUM	LOW	HIGH	YES
	Clarify the path to compensation in the Act in the event of retaliation	Few submitters commented	MEDIUM	LOW	HIGH	YES
	Allow people to report serious wrongdoing directly to an appropriate authority at any time	Most submitters in favour	MEDIUM	MEDIUM	MEDIUM	MAYBE
	Introduce monitoring and reporting for the public sector	Most submitters in favour	LOW	LOW	MEDIUM	MAYBE
	Expand all parts of the definition of serious wrongdoing to cover the private sector an unlawful, corrupt, or irregular use of funds or resources of a public sector organisation	Most submitters in favour	HIGH	HIGH	LOW	YES
	Introduce monitoring and reporting for the public and private sectors	Some submitters in favour	LOW	MEDIUM	LOW	NO
	Establish stronger oversight through a 'one-stop-shop' . To investigate protected disclosures, advise individuals and organisations, or carry out public reporting. It could be a new organisation(s) or an organisation(s) that already exists	Vast majority of submitters in favour	HIGH	HIGH	LOW	YES
OPTION B: Public Sector + Private Sector	Expand the definition of 'serious wrongdoing' to include additional situations i.e. conflicts of interest, receipt of gifts or benefits, non-compliance with a company's own policies, negatively impacting Treaty of Waitangi partnerships, and exploitation of immigrants	Some submitters in favour	MEDIUM	MEDIUM	LOW	NO
	Expand the definition of who can make a protected disclosure so that it doesn't only cover employees. It could cover victims of domestic abuse, immigrants, people who receive government benefits, auditors, or suppliers	Some submitters in favour	LOW	LOW	LOW	NO
	Compensation provisions themselves should be stronger – rather than just making the path to compensation clearer	Some submitters in favour	MEDIUM	LOW	LOW	NO
	Bring all aspects of the protected disclosures regime under one Act	Few submitters commented	LOW	LOW	MEDIUM	NO
	Introduce rewards for whistleblowers who are proven correct	Few submitters commented	LOW	LOW	LOW	NO
	Remove the requirement that protected disclosures are made in good faith	Balance of submitters for and against	LOW	LOW	MEDIUM	NO
	NEW IDEAS FROM PUBLIC CONSULTATION					
OPTION C: Public Sector + Private Sector + Oversight Entity	Expand the definition of 'serious wrongdoing' to include additional situations i.e. conflicts of interest, receipt of gifts or benefits, non-compliance with a company's own policies, negatively impacting Treaty of Waitangi partnerships, and exploitation of immigrants	Some submitters in favour	MEDIUM	MEDIUM	LOW	NO
	Expand the definition of who can make a protected disclosure so that it doesn't only cover employees. It could cover victims of domestic abuse, immigrants, people who receive government benefits, auditors, or suppliers	Some submitters in favour	LOW	LOW	LOW	NO
	Compensation provisions themselves should be stronger – rather than just making the path to compensation clearer	Some submitters in favour	MEDIUM	LOW	LOW	NO
	Bring all aspects of the protected disclosures regime under one Act	Few submitters commented	LOW	LOW	MEDIUM	NO
	Introduce rewards for whistleblowers who are proven correct	Few submitters commented	LOW	LOW	LOW	NO
	Remove the requirement that protected disclosures are made in good faith	Balance of submitters for and against	LOW	LOW	MEDIUM	NO