- Barriers to disclosure;
- Obligations on an organisation that receives a disclosure;
- Adequacy of internal procedures and policies;
- Confidentiality;
- Risk of reprisal conduct;
- Reporting and oversight.

42. Improvements in each of these areas will be required in order to address the three key reasons that wrongdoing is not reported: employees do not think anything will be done, they do not feel they will be protected, and they do not think their identity will be kept secret.[10]

Definition of 'serious wrongdoing'

43. The Discussion Document recommends that bullying and harassment fall outside of the protections of the PDA, being '*not in the public interest*':

> *… when concerns are valid, **but not in the public interest** – for example, about being bullied or harassed by their manager or co-workers, they are referred to other sources of support and advice that are better suited to helping them. (emphasis added).*

44. While I agree that matters solely relating to an individual employment grievance may generally be properly excluded from the ambit of the PDA, serious or systemic workplace bullying, harassment, and/or discrimination are more than simply an individual employment issue, and are in fact a matter of significant and increasing public interest.

45. This type of conduct is particularly oppressive in terms of its effect on employees who may wish to speak up. They are uniquely vulnerable to retaliation and reprisal, and in my experience there is currently no clear and safe pathway for these employees to raise such matters.

46. It simply is not possible to avoid the fact that, sometimes, a protected disclosure will intersect with employment obligations and remedies. Indeed, one of the remedies under the PDA is itself a part of the employment relations regime – a personal grievance. Where an employee wishes to disclose information in circumstances of mixed wrongdoing and employment grievance, they are at particular risk of reprisal or retaliation. Reprisal conduct can be 'dressed up' as a legitimate response to the employment grievance.

47. Employers have various duties under the *Health and Safety at Work Act 2015*, including ensuring the physical *and* mental health of employees.[11] Failure to do so is an offence.[12]

[10] *Ibid*, page 58.

[11] Section 36(1) *Health and Safety at Work Act 2015*.

[12] *Ibid*, Section 49(1).

Not only does this indicate the seriousness with which this type of conduct must be viewed, and the risk to employees, it constitutes another aspect of the current definition of serious wrongdoing, being an *'act, omission or course of conduct that constitutes an offence'*. Serious or systemic bullying and harassment and – perhaps most importantly – an organisation's failure to address it, fall squarely within the type of conduct that a protected disclosures regime should bring to light.

48. Often when such issues are raised in the form of a protected disclosure, they are more than simply an individual employment grievance. Rather, they are a significant or ongoing issue affecting multiple staff members, often with wider consequences for the organisation's performance and implications for members of the public who interact with that agency. By way of example, consider the potential effect of this type of conduct within a health care environment, and the risk that this could pose to health care recipients.

49. Rather than addressing these complexities by excluding these matters from the PDA, I suggest that the PDA includes a separate category and procedures for disclosing workplace harassment or bullying. These could link to the Health and Safety at Work Act, and have, for example, more targeted natural justice exclusions from confidentiality obligations.

50. This would ensure the protections that are being proposed to augment the Act such as wrap around welfare procedures would be extended to the most vulnerable disclosers, and the Act would be in step with the current environment in which workplace bullying and harassment (and corollary mental health issues) are of increasing public interest.

51. I urge you to reconsider this approach, keeping in mind the WWWK2 results, indicating a higher prevalence of bullying within New Zealand organisations, reported as occurring by over 50 percent of respondents.

Recommendation Two: reporting of serious or systemic bullying and harassment should be included in the type of information that may form a protected disclosure.

52. In addition to this, I would support the extension of the definition to cover the misuse of funds in the private and not-for-profit sector, as well as the redrafting of the definition to be more accessible to those consulting the legislation. Subsection (e) of the definition, in particular, is one that causes some difficulty amongst potential reporters, and it is frequently complex to determine whether the conduct alleged would fall within this provision. It is more subjective and less defined than the other definitions of serious wrongdoing, and is enquiries made to my office often relate to what is meant by 'oppressive' or 'gross mismanagement' in a PDA context. Anecdotally, it seems that individuals often see this as a 'catch-all' provision, an approach that could put them at risk when raising their concerns.

Barriers to disclosure

53. The NSW Ombudsman has reported that one of its most frequent recommendations arising from audits of public sector agencies protected disclosures procedures, is to increase the number of nominated individuals to whom a protected disclosure may be

made. Employees typically prefer to make a report of wrongdoing to an immediate manager or someone within the organisation that they know – however, the current legislation requires that the individual make their report to the nominated individual within an organisation.

54. This could be seen as a barrier to reporting. It is understandable that an employee would seek out a colleague they are familiar with, and this should not necessarily prevent them from relying on the protections available under the PDA.

55. Currently, section 6A of the PDA provides that a technical failure to observe the Act's process does not prevent a disclosure from being protected. However, individuals who come to the Ombudsman are frequently unaware of this provision and at times report having been told by public sector agencies that their failure to report to the correct individual means that their disclosure will not be treated as protected.

56. It is my view that, in addition to retaining the provision regarding technical failure to observe the Act's procedural requirements, consideration should be given to whether it is appropriate to allow for an employee to initially report to their manager or another colleague, without risking the loss of protection.

57. I acknowledge that organisations may take this as requiring that all managers receive a significant level of training and support around protected disclosures, and could lead to relatively junior staff members receiving information about serious wrongdoing. This is not what I suggest.

58. However, I do consider that all public sector managers should be aware of the PDA, and aware of where within an organisation disclosures are to be directed. Their function, rather than providing technical advice on protected disclosures, could simply be as a 'first port of call' and referral system for employees. The express legislative statement that this does not cause a disclosure of information to cease to be protected would be useful, I consider, for both employees and organisations.

Recommendation Three: any new legislation retains current section 6A protection for a technical failure to follow the process, and considers allowing for information about serious wrongdoing to be disclosed to an employee's immediate manager.

59. In addition to this, a further barrier to disclosure may be the inability of employees to report directly to an appropriate authority. Currently, they may only do so in limited circumstances.

60. Research has consistently shown that employees prefer to raise disclosures internally in the first instance.[13] Research has also shown that external reporting of a protected disclosure is associated with a higher risk of reprisal or repercussion.[14]

61. At the same time, where a disclosure is particularly serious or reprisal conduct has already occurred, some employees would feel significantly safer reporting outside of

[13] Above, n 9, page 25.

[14] *Ibid.*

their organisation. Where this is the case, the requirement to first report internally could prevent that serious wrongdoing from ever becoming known. I note in particular the increased risk associated with seeking to report serious, widespread wrongdoing at the top of an organisation, or being required to pursue a disclosure internally when already being subjected to retaliation.

62. These competing interests must both be provided for. It may be that the existing provision can be amended to allow for initial disclosure directly to a smaller selection of appropriate authorities, or in a particular set of circumstances. Those appropriate authorities, or the oversight body as suggested in the Discussion Document, could then undertake a triage function, determining whether to: refer the disclosure to the organisation itself; refer the disclosure to an appropriate authority; or investigate the disclosure itself.

Recommendation Four: Consideration is given to the circumstances in which a protected disclosure should be made directly to an appropriate authority, instead of internally within the organisation. Rather than allowing direct reporting to all appropriate authorities, disclosures could be made directly to specified appropriate authorities, who undertake a triage function before deciding whether the disclosure can in fact be handled internally by the organisation.

Handling of disclosures

63. Currently, the PDA is silent on what is to occur once a disclosure has been made to an organisation. There are no handling or communication requirements imposed on organisations, and there is no obligation on an organisation or appropriate authority to even inquire into the circumstances raised by the disclosure.

64. I agree with the proposal that organisations be required by law to take action and investigate all concerns about serious wrongdoing, however with the caveat that a base threshold for investigation (e.g. prima facie evidence has been provided/there is no reasonable basis to disbelieve the complainant) must be met before that obligation is imposed. This would go some way to mitigating the risk of baseless or bad-faith accusations, whilst minimising the burden on organisations.

65. The need to observe best practice complaints handling procedures is manifest in the context of whistleblowing given the unique risks posed to the discloser. It has been identified that approximately 40 percent of individuals who reported wrongdoing either were unaware of whether the report was investigated, or believed that the report had not been investigated.[15] This contributes to a poor understanding of whistleblowing and its value, as well as a negative perception of how a particular organisation handles and responds to disclosures.

Recommendation Five: the legislation require that organisations that receive a disclosure:

[15] Above, n 9, page 33.

- ***Acknowledge receipt of the report within a specified timeframe (for example, 5 working days);***
- ***Where a base threshold is met, investigate the report;***
- ***Advise the reporter within 10 working days whether or not the report will be investigated, noting where the reporter can go for further assistance; and***
- ***Where practicable and to the extent consistent with privacy and natural justice, the organisation advise the reporter of the outcome of their disclosure, including any organisational reform that occurs as a result.***

Internal policies and procedures

66. As noted above, research demonstrates that employees prefer to make disclosures within their organisation, and, if handled well, that internal report is less likely to have negative repercussions.[16] When talking to Ministry of Transport staff during the SSC's inquiry into the treatment of whistleblowers throughout the Joanne Harrison affair, Sandi Beatie QSO[17] noted that staff saw it as significantly more serious, and a '*giant step'*, to go outside of the Ministry to an Ombudsman or Minister.

67. That same report noted that staff had a lack of clarity around how concerns would be treated if raised, and what in fact the PDA provided for. Understanding of whistleblowing was varied, and it was described by some as the '*nuclear'* option. This is consistent with research findings that New Zealand employees have a lower level of awareness and confidence in how and to whom to make a report, and the support available.[18]

68. Under the current legislation, only public sector organisations are required to establish and publish internal procedures for receiving and dealing with information about serious wrongdoing.[19] Other than identification of the person to whom a disclosure may be made, reference to sections 8 to 10 of the PDA, and compliance with principles of natural justice, there are no substantive requirements as to what those procedures should cover and how they are to be implemented.

69. As noted above, I am currently in the process of considering the internal procedures of all 31 government departments, and am not yet in a position to comment on what those procedures currently look like. However, there are a number of common-sense requirements that ought to be incorporated for both the public and private sector.

70. The legislation should be amended to require both public and private sector organisations to have procedures for making and handling a protected disclosure, with minimum requirements being:

[16] Above, n 9, page 25.

[17] Beatie, Sandi, *Report of investigation into whistle blower treatment within the Ministry of Transport* (13 July 2017), State Services Commission, at page 11.

[18] Above, n 9, page 62.

[19] Section 11 PDA.

- Basic explanation of a protected disclosure and how these are received and assessed by the organisation;
- Who a disclosure may be made to within the organisation;
- When and how the disclosure can be escalated if necessary;
- Details on how the discloser will be protected;
- Where further information and guidance can be obtained.

71. These elements are reflective of the inquiries that Ombudsmen receive, and the key areas where things can go wrong. Although I appreciate that it will be a new requirement for the private and not-for-profit sector, the Ombudsman could be tasked with producing appropriate tailored guidance, and there could be an appropriate lead-in time included.

72. Unless they contain classified information, those procedures should be available on the website of the organisation, and so freely accessible to staff (who may be worried about requesting or accessing a copy within their organisation), and also to former employees and contractors.

Recommendation Six: the legislation set minimum requirements for the content of internal procedures by both public and private sector organisations for receiving and dealing with protected disclosures. Those requirements should include:

- ***An explanation of the PDA and the protections it provides;***
- ***Identification of who within the organisation the disclosure can be made to, and when (and how) it can be made directly to the CE;***
- ***The process that will be followed by the organisation to assess the disclosure and report back to the employee;***
- ***What the employee can do if no action is taken or they are unable to report to the specified individual;***
- ***Where external information and guidance can be sought;***
- ***How confidentiality will be maintained, and what will happen in the event that it is breached or overridden by natural justice requirements;***
- ***Processes for risk assessment and support;***
- ***Publication of the internal procedures.***

Confidentiality

73. Anecdotally, from my Office's handling of PDA inquiries, it appears that the threshold of 'best endeavours' for the protection of confidentiality is not well understood, and it is assumed by some officials that natural justice will always require the discloser's name to be provided to the alleged wrongdoer.

74. This is not the case, and to the extent that this misunderstanding is reflected in procedures or practice would doubtless act as a disincentive to reporting. In many circumstances of criminal offence or financial wrongdoing, there will be independent corroborative evidence available, and the source of the initial 'tip-off' will be immaterial. The 2003 review of the PDA by Mary Scholtens QC expressly considered this, and is worth revisiting.[20]

75. In other jurisdictions, the restriction on disclosing identifying information is termed in more definite or prohibitive terms, and some expressly allow for anonymity.[21] No reason has been offered as to why this should differ in New Zealand, and it may be that a tightening of the confidentiality requirement is warranted.

76. The PDA currently allows for anonymous disclosures in certain circumstances (section 19(3)(a) refers), and I consider that this ought to be retained. If an anonymous disclosure is made but does not provide sufficient *prima facie* credible information to warrant further inquiry, then that will simply be the end of the matter (this would be a further benefit of including a threshold in the obligation on an organisation to investigate reports).

77. The mere fact that a tip-off is anonymous does not mean that it is not useful, or cannot initiate a successful investigation. There will inevitably be circumstances where an anonymous disclosure is appropriate and/or necessary, and it should not be excluded from the potential protection of the PDA.

78. As I have identified in previous comments to you, clarification of the confidentiality provisions and anonymity could be useful. Consideration could be given to emphasising the existing role of the Ombudsman in providing advice on these matters.

79. I also consider it to be best practice, and a potentially valuable inclusion in the legislation, for organisations to advise disclosers in advance if natural justice requires them to disclose identifying information. An individual is at greatest risk of retaliation once their identity is disclosed. In the event that this occurs, the organisation should appoint a 'welfare officer', designated with the task of monitoring the welfare of the discloser.

Recommendation Seven: strengthen confidentiality provisions to include a clear prohibition on disclosure of identifying information except in certain circumstances, with corresponding obligations of communication where confidentiality is breached or overridden by natural justice obligations.

Recommendation Eight: retain the ability to make anonymous disclosures, and the Ombudsman's role to provide guidance to organisations where this occurs.

[20] Above, n 6.

[21] See for example: *Public Interest Disclosures Act 1994 (NSW)*, section 22; *Whistleblowers Protection Act 2001 (Vic)*, section 22; *Public Interest Disclosure Act 2010 (Qld)*, sections 17 (anonymity) and 65.

Risk of reprisal conduct

80. The most recent WWWK2 research[22] has identified the importance of organisations taking a proactive approach to the risk of reprisal. In particular, it notes that:

> *For decades, whistleblowing policy and legislation have focused on achieving 'protection' by proscribing reprisal action, and extending legal remedies to whistleblowers who suffer such consequences. Rarely, however, do these mechanisms result in satisfactory outcomes for a reporter, not least because the damage has already been done…*

81. The research establishes that where a risk assessment occurs as soon as a report is made, there is more likely to be proactive management of the risk of reprisal, less likely to be reprisal and repercussions, and more likely that reporters have a positive perception of how they have been treated.[23] The research has also identified a number of certain risk factors, that can assist organisations in assessing the likelihood of negative repercussions for a reporter.[24]

82. The assessment of risk to a reporter is an important step in ensuring the reprisal is prevented or, if it does occur, is minimised and responded to. The research suggests that it correlates highly to a perception of more positive outcome on the behalf of the reporter, and in that respect alone it should be seen as valuable to organisations. I consider it should be a statutory obligation to undertake this assessment, as a part of a wider duty to take reasonable steps to prevent reprisal and negative repercussions. This could be similar to provisions in some of the Australian state jurisdictions:

- Section 59, *Public Interest Disclosure Act 2013* (Australian Commonwealth)
- Section 58(5), *Protected Disclosures Act 2002* (Victoria)
- Section 28, *Public Interest Disclosure Act 2010* (Queensland).

83. The NSW Ombudsman has recommended a similar requirement for the NSW legislation.[25]

84. This ties in with a need to do more than provide redress avenues in the event that something does go wrong. By this time, regardless of any available compensation, the employee has likely suffered both personal and professional harm. The legislation should impose a duty on the heads of organisations to take steps to ensure that a reporter does not suffer reprisal conduct or other negative repercussions because of their disclosure.

Recommendation Nine: The new regime impose a duty on organisations to take reasonable steps to ensure that employees who make a protected disclosure do not suffer reprisal or negative repercussions. This should include a requirement that internal procedures contain

[22] Above, n 9, page 89.

[23] *Ibid*, pp 100 – 103.

[24] For example, *Ibid*, pp 93 – 94.

[25] Above, n 7.

risk assessment provisions, and that risks are assessed and mitigating measures put in place at the time of the disclosure.

85. In addition to this, it needs to be appreciated that reprisal conduct does not simply mean that an individual has been dismissed from their employment or forced to resign. The current focus of the remedies available under the PDA means that too often organisations think of repercussions in terms of only deliberate reprisal conduct.

86. As is noted in the Discussion Document, it would be useful to include in the legislation *examples* of reprisal conduct and unacceptable repercussions, including:

- Dismissal;
- Demotion;
- Suspension;
- Unwarranted alteration to ordinary working arrangements;
- Failure to promote;
- Ostracism;
- Blocking access to work resources;
- Disciplinary sanction;
- Bullying or harassment – by both management staff and colleagues;
- Victimisation;
- Failure to provide support to the reporter;
- Wage deductions or inconsistencies;
- 'Blacklisting'.
- Redundancy.

87. In addition to clarifying the pathway to compensation in the event that retaliation does occur, it may also be worthwhile reconsidering the range of remedies available. In particular, are there other remedies that could be provided in order to allow more timely correction of reprisal conduct? An example of this is injunctive relief, which has been used in other jurisdictions to some success.

Recommendation Ten: Consideration be given to including a wider range of statutory remedies in the event that retaliation occurs.

Reporting and oversight

88. There are existing mechanisms in the PDA that would allow for effective oversight of PDA performance, *if* additional requirements and powers were included, with corollary resourcing. In this regard, I refer to sections 15A to 15C of the PDA, which allow for an Ombudsman to review, guide and take over investigations. These provisions have been

used rarely by Ombudsmen since inserted in 2009, because they rely on either the organisation advising the Ombudsman of receipt of a disclosure or ongoing investigation, or the reporter of the wrongdoing being aware that the Ombudsman can take such action and then bringing this to the Ombudsman's attention.

89. These mechanisms could remain in the PDA regime, with an added requirement that agencies report to the Ombudsman when a protected disclosure is received and when commencing a full investigation into a protected disclosure. The empowering legislative provision could be reviewed within a specified timeframe in order to consider its ongoing usefulness and any compliance costs.

90. In addition to this, New Zealand organisations, and the Ombudsman as the oversight authority, are currently operating without any real visibility of how the PDA regime is operating, and the numbers of disclosures being made and acted upon. This may be contributing to the general level of uncertainty amongst employees. Information of this type is necessary for effective oversight, together with targeted action to facilitate disclosures and better support organisations and employees.

91. Ideally, reporting would include:

- The number of disclosures received;
- The type of disclosure (i.e. which limb of the definition of 'serious wrongdoing');
- The number of investigations undertaken or ongoing by the organisation;
- The outcome of the investigation;
- The outcome of any disclosures that were not investigated;
- Whether the disclosure was referred and/or escalated to an appropriate authority;
- The current work status of the reporter;
- Whether the reporter made a complaint about retaliatory action (personal grievance or victimisation);
    - If so, whether that complaint was upheld.

92. This level of reporting is consistent with the examples of other jurisdictions, for example under the NSW's *Public Interest Disclosures Act 1994*. Reporting also assists in the periodic 'auditing' of public sector agencies by the NSW Ombudsman.

93. In addition to strongly disincentivising reprisal conduct, the Ombudsman would be able to compare this data to the types of inquiries, complaints, and disclosures s/he has received. That comparison alone would be valuable for understanding how organisations perceive the disclosures they are receiving, and would also assist in the targeted use of resources for developing guidance, training, or review functions.

94. There could be concern about the administrative burden that this could create for public sector organisations (and private sector, if it is to cover them too). However, my anecdotal observation would be that there are a limited number of protected

disclosures, such that even if these were to increase under a more open regime, organisations would still not be receiving and reporting on a great volume of disclosures. Indeed, when the NSW Ombudsman made recommendations in 2016, it was noted that some 80% of public authorities did not receive any protected disclosures in any given period.[26]

Recommendation Eleven: Public sector organisations are required by legislation to report to the Ombudsman when they receive a protected disclosure, and also upon commencing an investigation into it. The Ombudsman should also have the statutory power to require this type of information at any other time, and legislation should retain the current section 6C ability to require from public sector organisations a copy of their internal procedures.

In addition to this, public sector organisations should have a legislative obligation to report to the Ombudsman annually on:

- ***The number and type of disclosures received;***
- ***The number of investigations undertaken or ongoing by the organisation;***
- ***The outcome of the investigation;***
- ***The outcome of disclosures that were not investigated;***
- ***Whether the disclosure was referred and/or escalated to an appropriate authority;***
- ***The current work status of the reporter;***
- ***Whether the reporter made a complaint about retaliatory action (personal grievance or victimisation);***
    - ***If so, whether that complaint was upheld.***

This reporting obligation could be extended to the private and not-for-profit sector in due course, depending upon the outcome of SSC's review and likely numbers.

Part Two: Submission on the Discussion Document

In this part of my submission, I have commented on the objectives and risks outlined in the Discussion Document, before moving on to provide brief comment on each of the options presented (referring, as necessary, to Part One).

Objectives and risks

95. I agree that the legislation should seek to support employees in exposing serious threats to the public interest. It should also support (though cannot itself create) open organisational cultures in which speaking up is encouraged, and occurs freely and without fear.

[26] Above, n 7.

96. As outlined above, it is critical that the legislation and supporting resources are easy to both understand and use. It must be accessible to those who need it, keeping in mind that both potential reporters and the recipients of those reports may receive them infrequently, and be under personal or professional pressure/stress owing to that report. It must be clear from the legislation:

- Who can make a disclosure;
- What a disclosure can be about;
- How to make a disclosure;
- Obligations that organisations must meet;
- Options in the event that something goes wrong; and
- Where to seek advice on any of the above.

97. It goes without saying that the legislation must facilitate a process in which everyone is treated fairly. Procedural and interpersonal justice are essential to the handling of protected disclosures, and the perception of a positive outcome. It can therefore be seen as equally essential to the overall aim of fostering a culture in which employees are willing to speak up.

98. In respect of the identified risks, I note that the PDA currently provides continuing protection to employees who make a genuine report of suspected wrongdoing, where they either fail to comply technically with the Act, or are mistaken as to the wrongdoing. Similar provisions should be carried across into any prospective legislation.

99. Finally, I want note that any prospective 'floodgates' argument in respect of extending the regime would not be based on realistic prospect. Numbers are very small currently, and remain small even in jurisdictions that have undertaken work to promote more disclosures (as noted above, 80% of NSW public authorities receive no disclosures). Even then, an increase in legitimate concerns being raised should be encouraged. Irrespective of whether concerns reach the level of 'serious wrongdoing', employees should feel safe to raise them. This is a matter of good administration, and good employment practice.

100. Insofar as the concern relates to encouraging misuse of the PDA or unfounded accusations, that also should not be a deciding factor in how to progress reform. Those who do not act in good faith simply do not attract the protections of the PDA.

Option 1

101. Option One relates to building strong foundations, and is aimed at making changes to the PDA which will reduce confusion, and ensuring that organisations have good internal procedures for receiving and handling protected disclosures.

Providing information and guidance

102. Option One proposes that SSC issues guidance to whistleblowers. I agree that there should be a statutory responsibility to produce guidance.

103. I consider that the Ombudsman will continue to be an appropriate source of guidance in this area, as:

    a. I am independent and impartial with existing knowledge and experience of dealing with whistleblowers;

    b. I am currently tasked with oversight across both central and local government; and

    c. I also have an existing a role to provide guidance in respect of protected disclosures in the private sector.

104. My guidance can assist organisations to fulfil their obligations under the protected disclosures regime. In particular, guidance regarding best practice internal procedures, and requirements for confidentiality, investigations and natural justice.

105. The focus of guidance by the SSC should be in fostering and 'embedding' a reporting culture, and achieving system-wide organisational reform.

Improving the definition of serious wrongdoing

106. Option One also proposes amendments to the definition of serious wrongdoing. In particular, including the misuse of private sector funds, while excluding workplace bullying and harassment.

107. I agree that the current subsection (e) of the definition of 'serious wrongdoing' is insufficiently clear for employees and organisations, and I would support amendment of this. It is more subjective and less defined than the other definitions of serious wrongdoing, and enquiries made to my office often relate to what is meant by 'oppressive' or 'gross mismanagement' in a PDA context.

108. I also strongly support amendment of the definition of 'serious wrongdoing' so that corruption or irregular use of resources in the private and not-for-profit sectors is expressly included.

109. However, I strongly disagree that all reports of bullying and harassment ought to be excluded from the PDA's coverage. These are issues of significant and increasing public interest. This type of conduct is particularly oppressive in terms of its effect on employees who may wish to speak up. They are uniquely vulnerable to retaliation and reprisal, and in my experience there is currently no clear and safe pathway for these employees to raise such matters. Individuals who make disclosures of mixed wrongdoing and employment grievance are at particular risk of reprisal and retaliation – reprisal conduct can be 'dressed up' as a legitimate response to the employment grievance. This will only be exacerbated by amending the definition in this way.

110. Serious or systemic bullying and harassment fit properly within the regime, and to remove them would be an unjustified watering-down of employer obligations. Employers have various duties under the *Health and Safety at Work Act 2015*, including ensuring the

physical *and* mental health of employees.[27] Failure to do so is an offence.[28] Not only does this indicate the seriousness with which this type of conduct must be viewed, and the risk to employees, it constitutes another aspect of the current definition of serious wrongdoing, being an *'act, omission or course of conduct that constitutes an offence'*.

111. Rather than addressing these complexities by excluding these matters from the PDA, I suggest that the PDA includes a separate category and procedures for disclosing workplace harassment or bullying. These could link to the Health and Safety at Work Act, and have, for example, more targeted natural justice exclusions from confidentiality obligations.

112. This would ensure the protections that are being proposed to augment the Act such as wrap around welfare procedures would be extended to the most vulnerable disclosers, and the Act would be in step with the current environment in which workplace bullying and harassment (and corollary mental health issues) are of increasing public interest.

Strengthening obligations for organisations

113. Option One proposes strengthening the requirement for internal procedures across the public, private and not-for-profit sectors. In addition, it is proposed that all organisations could be required to take action and investigate information about alleged wrongdoing.

114. I strongly support these proposals, with some amendment.

115. The PDA is silent on what is to occur once a disclosure has been made to an organisation. There are no handling or communication requirements imposed on organisations, and there is no obligation on an organisation or appropriate authority to even inquire into the circumstances raised by the disclosure.

116. I agree with the proposal that organisations be required by law to take action and investigate all concerns about serious wrongdoing, however with the caveat that a base threshold for investigation (e.g. prima facie evidence has been provided/there is no reasonable basis to disbelieve the complainant) must be met before that obligation is imposed. This would go some way to mitigating the risk of baseless or bad-faith accusations, whilst minimising the burden on organisations.

117. In respect of internal procedures, only public sector organisations are currently required to establish and publish internal procedures for receiving and dealing with information about serious wrongdoing.[29] Other than identification of the person to whom a disclosure may be made, reference to sections 8 to 10 of the PDA, and compliance with principles of natural justice, there are no substantive requirements as to what those procedures should cover and how they are to be implemented.

[27] Section 36(1) *Health and Safety at Work Act 2015*.

[28] *Ibid*, Section 49(1).

[29] Section 11 PDA.

118. The legislation should be amended to require both public and private sector organisations to have procedures for making and handling a protected disclosure, with minimum requirements being:

- Basic explanation of a protected disclosure and how these are received and assessed by the organisation;
- Who a disclosure may be made to within the organisation;
- When and how the disclosure can be escalated if necessary;
- Details on how the discloser will be protected;
- Where further information and guidance can be obtained.

119. Unless they contain classified information, those procedures should be available on the website of the organisation, and so freely accessible to staff (who may be worried about requesting or accessing a copy within their organisation), and also to former employees and contractors.

Enhancing protections for people who 'speak up'

120. Option One proposes to define more clearly what is meant by retaliation, and to more clearly link the PDA to the remedies under the Human Rights Act. I support this proposal.

121. It would be very useful to include in the legislation *examples* of reprisal conduct and unacceptable repercussions, including:

- Dismissal;
- Demotion;
- Suspension;
- Unwarranted alteration to ordinary working arrangements;
- Failure to promote;
- Ostracism;
- Blocking access to work resources;
- Disciplinary sanction;
- Bullying or harassment – by both management staff and colleagues;
- Victimisation;
- Failure to provide support to the reporter;
- Wage deductions or inconsistencies;
- 'Blacklisting'.
- Redundancy.

122. I also consider that the legislation should impose a duty on the heads of organisations to take steps to ensure that a reporter does not suffer reprisal conduct or other negative repercussions because of their disclosure. The importance of risk assessment cannot be underestimated and should be a requirement of all internal procedures. Research has demonstrated that assessing possible risk at the time of disclosure result in more proactive action to minimise reprisal conduct and ancillary negative repercussions.

123. Finally, it is important to give consideration to the issue of confidentiality. Where confidentiality is breached, the discloser is at greater risk of retaliation. I also consider it to be best practice, and a potentially valuable inclusion in the legislation, for organisations to advise disclosers in advance if natural justice requires them to disclose identifying information. An individual is at greatest risk of retaliation once their identity is disclosed. In the event that this occurs, the organisation should be required to appoint a 'welfare officer', designated with the task of monitoring the welfare of the discloser.

Clarifying the list of appropriate authorities people can report to

124. Option One proposes that the number of appropriate authorities under the PDA be restricted, so that reference to 'the head of every public sector agency' be removed.

125. I do not agree that the list of appropriate authorities should be rationalised in the manner suggested. A number of public sector CEOs provide an avenue through which private sector agencies can escalate disclosures that might not otherwise have a suitable appropriate authority (for example, WorkSafe within MBIE).

126. I have received a number of inquiries from private and not-for-profit sector employees in the past and, anecdotally, one of the key issues has been identifying an appropriate authority with the relevant functions and *authority* to act on the matter. Restricting the designated appropriate authorities would only compound this difficulty, particularly as the suggestion in its current form would remove a number of authorities with regulatory functions. Consider, for example, WorkSafe, the Ministry of Primary Industries, Department of Conservation, and the many other departments that have some legal authority over certain matters. It would be possible to carve out RNZ and TVNZ if this was considered necessary to avoid attempts at using them as a vehicle for disclosures direct to the media

Clarifying the path to compensation in the event of retaliation

127. Finally, Option One proposes to clarify existing arrangements for compensation within the legislation. While I support this, there does not appear to be any suggestion of considering whether additional remedies are required.

128. The current focus of the remedies available under the PDA means that too often organisations think of repercussions in terms of only deliberate reprisal conduct. It may be worthwhile reconsidering the range of remedies available. In particular, are there other remedies that could be provided in order to allow more timely correction of reprisal conduct? An example of this is injunctive relief, which has been used in other jurisdictions to some success.

Option 2

Reporting directly to an appropriate authority

129. Option Two proposes all of the improvements under Option One, with the additional change so that employees may report directly to an appropriate authority.

130. I support this proposal operating in conjunction with the triage role referred to under Option Three. Although it will often be important that organisations have a first opportunity to respond to issues, and internal reporting is often the preference of employees, it is important to acknowledge that there can be many circumstances in which this simply is not possible.

131. For example, where a disclosure is particularly serious or reprisal conduct has already occurred, some employees would feel significantly safer reporting outside of their organisation. Where this is the case, the requirement to first report internally could prevent that serious wrongdoing from ever becoming known. I note in particular the increased risk associated with seeking to report serious, widespread wrongdoing at the top of an organisation, or being required to pursue a disclosure internally when already receiving retaliation.

132. It may be that the existing provision can be amended to allow for disclosure directly to a smaller selection of appropriate authorities, or in a particular set of circumstances. Those appropriate authorities, or the oversight body as suggested in the Discussion Document, could then undertake a triage function, determining whether to: refer the disclosure to the organisation itself; refer the disclosure to an appropriate authority; or investigate the disclosure itself.

Option 3

Establish stronger oversight

133. Option Three proposes the establishment of an oversight agency for protected disclosures (in addition to the proposals included in options one and two).

134. I strongly agree that there should be a single port-of-call for employees to go to for advice on raising concerns. It may also be useful for that oversight body to receive reports directly, and refer them to appropriate authorities or internally within the relevant organisation (the 'triage' role suggested in the Discussion Document).

135. This role would appropriately be built on the existing functions of the Ombudsmen under the Act, and should remain with the Ombudsmen. This would limit additional cost, and vest oversight with a fully independent body, answerable directly to Parliament and not the Government of the day. It would also allow the PDA role to be leveraged off the Ombudsman's current jurisdiction and capacity.

136. In particular:

    a. I am independent and impartial with existing knowledge and experience of dealing with whistleblowers;

b. I am currently tasked with oversight of administrative practices across both central and local government; and

c. I also have an existing a role to provide guidance in respect of protected disclosures in the private sector.

137. I already both formally and informally direct disclosures to the correct authorities, and assist employees in identifying the correct pathway for internal reporting. This could be a relatively simply legislative change that together with appropriate resourcing, could be operationalised by me without the delays and additional complexities that would be inherent in tasking another agency with these functions.

138. Any additional functions would fit comfortably within the Ombudsman's role. Indeed, it would be a natural extension of my role, given that I am already tasked by Parliament to provide advice, guidance, resources, training and systemic monitoring and investigation in other areas of my jurisdiction, such as good decision-making, effective complaint handling and the official information legislation.

139. Additional statutory functions and powers would complement my current activities. I will shortly be producing further guidance in the area of protected disclosures and, depending on the outcome of this review, additional work such as review of organisation's protected disclosures procedures may be possible (in much the same way that I now have a team dedicated to reviewing agencies' official information practices). My Office has some years of PDA experience, data, and resource that can be developed, as well as established processes for triaging and resolving complaints, and providing guidance and systemic monitoring and investigation to lift administrative practice across the public sector. This means the additional costs imposed by establishing a new body, and the risk of added complexity, can be avoided almost in their entirety.

140. Just as importantly, Ombudsmen have particular experience in dealing with whistleblowers, and are entirely independent of government, being an Officer of Parliament. Ombudsmen have a long-standing reputation of independence, integrity and impartiality, and well-established and trusted mechanisms for maintaining the secrecy and confidentiality requirements already imposed under the Ombudsmen Act.

141. There are a number of additional benefits to placing oversight responsibility with an Ombudsman. This has been recognised in some Australian state jurisdictions, too. The NSW Ombudsman has been able to use these protected disclosures functions to bolster oversight efficiently, and in a number of ways:

a. Information relating to protected disclosures, and disclosures reviewed as a part of the audit programme, have provided insight into areas in which improvements to practices overall can be made.

b. Along with the inquiries and requests received from both organisations and reporters, protected disclosures information has identified areas that need to be flagged for legislative amendment, development of new resources, or revision of existing resources.

c. Audit results have identified organisations which require training, resources, or other assistance.

d. Reports that were made, but which did not qualify as a protected disclosure, could nonetheless be considered by the Ombudsman under their general powers to investigate administrative conduct, and wider systemic or auditing action taken as a result.

142. I consider that similar efficacies in oversight could be achieved in New Zealand by placing enhanced oversight responsibility with the Ombudsman. In particular, the wider jurisdiction and functions of the Ombudsman would both complement and supplement the PDA jurisdiction. In particular, administrative shortcomings or systemic issues not reaching the threshold of a public interest disclosure can still be addressed or monitored in order to ensure that wrongdoing does not escalate to this level.

143. Recent developments within my Office have also resulted in the establishment of two teams dedicated to monitoring, resolving, and (where necessary) investigating systemic issues.

144. In addition to this, all staff are well-versed in their obligation to maintain secrecy and respect the confidentiality of all parties. As I will note below, the addition of further statutory functions and corresponding obligations on organisations, will further improve the functioning of the protected disclosures regime.

Option 4

Introduce reporting requirements

145. Option Four proposes to introduce reporting requirements for the public sector, along with all proposals in Options One to Three. This particular proposal is one that I strongly support, and one which has been underway in Australian jurisdictions for some time now.

146. There are existing mechanisms in the PDA that would allow for effective oversight of PDA performance, *if* additional requirements and powers were included, with corollary resourcing. In this regard, I refer to sections 15A to 15C of the PDA, which allow an Ombudsman to review, guide and take over investigations. These provisions have been used rarely by Ombudsmen since inserted in 2009, because they rely on either the organisation advising the Ombudsman of receipt of a disclosure or ongoing investigation, or the reporter of the wrongdoing being aware that the Ombudsman can take such action and then bringing this to the Ombudsman's attention.

147. New Zealand organisations, and the Ombudsman as the oversight authority, are currently operating without any real visibility of how the PDA regime is operating, and the numbers of disclosures being made and acted upon. This may be contributing to the general level of uncertainty amongst employees. Information of this type is necessary for effective oversight, together with targeted action to facilitate disclosures and better support organisations and employees.

148. Ideally, reporting would include:

- The number of disclosures received;
- The type of disclosure (i.e. which limb of the definition of 'serious wrongdoing');
- The number of investigations undertaken or ongoing by the organisation;
- The outcome of the investigation;
- The outcome of any disclosures that were not investigated;
- Whether the disclosure was referred and/or escalated to an appropriate authority;
- The current work status of the reporter;
- Whether the reporter made a complaint about retaliatory action (personal grievance or victimisation);
    - If so, whether that complaint was upheld.

149. This level of reporting is consistent with the examples of other jurisdictions, for example under the NSW's *Public Interest Disclosures Act 1994*. Reporting also assists in the periodic 'auditing' of public sector agencies by the NSW Ombudsman.

150. In addition to strongly disincentivising reprisal conduct, the Ombudsman would be able to compare this data to the types of inquiries, complaints, and disclosures s/he has received. That comparison alone would be valuable for understanding how organisations perceive the disclosures they are receiving, and would also assist in the targeted use of resources for developing guidance, training, or review functions.

151. There could be concern about the administrative burden that this could create for public sector organisations (and private sector, if it is to cover them too). However, my anecdotal observation would be that there are a limited number of protected disclosures, such that even if these were to increase under a more open regime, organisations would still not be receiving and reporting on a great volume of disclosures. Indeed, when the NSW Ombudsman made recommendations in 2016, it was noted that some 80% of public authorities did not receive any protected disclosures in any given period.

152. I would not expect costs to be too great. As identified, numbers are small and continue to be so even in jurisdictions where reporting has been encouraged with a renewed vigour. Smaller agencies and organisations are likely to receive fewer numbers of disclosures in any event, and the type of information sought should be held in any event for the protection of the reporter and the internal organisational response to that report. Public sector organisations are familiar with various reporting requirements, and it would eventually become 'business as usual'. The empowering legislative provision could be reviewed within a specified timeframe in order to consider its ongoing usefulness and any compliance costs.

Option 5

Extend reporting requirements to private and not-for-profit organisations

153. Option Five proposes to extend reporting obligations to *all organisations.*

154. Similar to my comments on Option Four, I would expect that most businesses would receive low numbers of protected disclosures. Given the different context of the private and not-for-profit sectors, it could be that the level of required reporting can be scaled appropriately. Those familiar with these sectors will, I am sure, be able to offer more insightful comment on necessary lead-in times and the like.

155. However, I do not agree that there should be an exclusion for community, voluntary and not-for-profit organisations. I cannot see a principled basis for such an exclusion. These organisations can, in some cases, have very important community roles and impacts. They are also organisations that I have received PDA inquiries about in the past, relating to what could be serious allegations with significant impact on some members of the public.

Changes that are not proposed

156. The Discussion Document has specifically excluded changes such as:

    a. Extending protections to people who report to media;

    b. Extending protections to people who report anonymously; and

    c. Introducing penalties for employers who breach the Act.

157. I have no further substantial comment on the changes that have not been proposed in the Discussion Document.

158. However I do wish to note that the PDA currently allows for anonymous disclosures in certain circumstances (section 19(3)(a) refers), and I consider that this ought to be retained. If an anonymous disclosure is made but does not provide sufficient *prima facie* credible information to warrant further inquiry, then that will simply be the end of the matter (this would be a further benefit of including a threshold in the obligation on an organisation to investigate reports).

159. The mere fact that a tip-off is anonymous does not mean that it is not useful, or cannot initiate a successful investigation. There will inevitably be circumstances where an anonymous disclosure is appropriate and/or necessary, and it should not be excluded from the potential protection of the PDA.

160. In respect of direct reporting to media, I agree that the intended focus of a PDA regime must be to facilitate reporting of wrongdoing, internally and to authorities who have the capacity and authority to investigate appropriately, and remedy identified issues. There is a balance to be struck between observing fairness and procedural justice, and protecting the employee who makes the disclosure. I do not believe that direct reporting to media is appropriate in that context.

161. Finally, I note the suggestion that penalties for non-compliance with the PDA could be considered at a later stage. I encourage the approach of taking time to review performance sometime after implementation of changes to the regime, in order to assess how well new procedures have been embedded, and whether there has been a measurable change in organisational culture.

Appendix 1. Summary of recommendations

#	Recommendation
1	The oversight function remains with the Ombudsman, with necessary enhancements to statutory functions and powers under new or amended legislation.
2	Reporting of serious or systemic bullying and harassment should not be excluded from the type of information that may form a protected disclosure.
3	Any new legislation retains current section 6A, and considers allowing for information about serious wrongdoing to be disclosed to an employee's immediate manager, without ceasing to be a protected disclosure of information.
4	Consideration is given to the circumstances in which a protected disclosure should be made directly to an appropriate authority, instead of internally within the organisation. Rather than allowing direct reporting to all appropriate authorities, disclosures could be made directly to specified appropriate authorities, who undertake a triage function before deciding whether the disclosure can in fact be handled internally by the organisation.
5	The legislation require that organisations that receive a disclosure: • Acknowledge receipt of the report within a specified timeframe (for example, 5 working days); • Where a specified threshold is met, investigate the report; • Advise the reporter within 20 working days whether or not the report will be investigated (this is consistent with the current timeframe before escalation to an appropriate authority is permitted), noting where the reporter can go for further assistance; and • Where practicable and to the extent consistent with privacy and natural justice, the organisation advise the reporter of the outcome of their disclosure, including any organisational reform that occurs as a result.
6	The legislation set minimum requirements for the content of internal procedures for receiving and dealing with protected disclosures. Those requirements should include: • An explanation of the PDA and the protections it provides; • Identification of who within the organisation the disclosure can be made to, and when (and how) it can be made directly to the CE; • The process that will be followed by the organisation to assess the disclosure and report back to the employee; • What the employee can do if no action is taken or they are unable to report to the specified individual;

#	Recommendation
	• Where external information and guidance can be sought; • How confidentiality will be maintained, and what will happen in the event that it is breached or overridden by natural justice requirements; • Processes for risk assessment and support; • Publication of the internal procedures.
7	Confidentiality provisions be strengthened by including a clear prohibition on disclosure of identifying information except in certain circumstances, with corresponding obligations of communication where confidentiality is breached or needs to be overridden by natural justice requirements.
8	The legislation retain the ability to make anonymous disclosures, and the Ombudsman's role to provide guidance to organisations where this occurs.
9	The new regime impose a duty on organisations to take reasonable steps to ensure that employees who make a protected disclosure do not suffer reprisal or negative repercussions. This should include a requirement that internal procedures contain risk assessment provisions, and that risks are assessed and mitigating measures put in place at the time of the disclosure.
10	Consideration be given to including a wider range of statutory remedies in the event that retaliation occurs.
11	Public sector organisations are required by legislation to report to the Ombudsman when they are commencing an investigation into a protected disclosure. Consideration be given to including a wider range of statutory remedies in the event that retaliation occurs. In addition to this, public sector organisations should have a legislative obligation to report to the Ombudsman annually on: • The number and type of disclosures received; • The number of investigations undertaken or ongoing by the organisation; • The outcome of the investigation; • The outcome of disclosures that are not investigated; • Whether the disclosure was referred and/or escalated to an appropriate authority; • The current work status of the reporter; • Whether the reporter made a complaint about retaliatory action (personal grievance or victimisation); - If so, whether that complaint was upheld.

SUBMISSION TO THE STATE SERVICES COMMISSION

PROTECTED DISCLOSURE ACT REFORM CONSULTATION

To: Protected Disclosure Act Reform Consultation
State Services Commission
PO Box 329
Wellington 6140

By email: submissions@havemysay.govt.nz

This submission is made on behalf of Television New Zealand Limited, in response to the State Services Commission's consultation document relating to the review of the Protected Disclosures Act 2000. TVNZ is comfortable for this submission to be made publicly available.

Contact Details:

Brent McAnulty
General Counsel & Corporate Affairs Director
Television New Zealand Limited

9(2)(a)(i) [redacted]

INTRODUCTION

1. Television New Zealand Limited (**TVNZ**) is the country's leading free to air broadcaster. It reaches approximately 2.2 million New Zealanders every day, predominantly through its broadcast channels, TVNZ 1, TVNZ 2 and TVNZ DUKE, as well as its TVNZ OnDemand and 1 News Now online services. TVNZ is owned by the Crown but operates as a self-sufficient, commercial entity by virtue of the Television New Zealand Act 2003, and is supported by advertising revenue.

2. TVNZ thanks the State Services Commission (**the Commission**) for the opportunity to make a submission in respect of the Commission's review of the Protected Disclosures Act 2000 (**the Act**). TVNZ would welcome the opportunity to discuss these submissions with the Commission, if the Commission pleases.

3. TVNZ understands the Commission has already undertaken some targeted consultation on proposed reform choices with stakeholders from the public, private and not-for-profit sectors. As a result of that consultation, it appears that the Commission is no longer proposing to extend the protections of the Act to people who report directly to media. The limited discussion on the reasons for this is summarised in the discussion document entitled *"Help Shape Improvements to the Protected Disclosures Act to Maintain New Zealand's High Standards of Integrity"* as follows:

> **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 to the media could help expose serious threats to the public interest and incentivise organisations to take action. But it's complicated. People could simply get it wrong, or worse, deliberately make a false claim, which could cause unfair reputational damage to the people involved in the public domain. We think this would undermine the aim of promoting fairness for everyone.

4. While TVNZ agrees with the general intent of the proposed reforms – and the objectives of the protected disclosures regime, it submits the Commission ought to reconsider extending the protections of the Act to people who report directly to media for the following reasons:

   4.1. The belief that the risks of extending protections outweigh the related benefits is a fallacy based on a misunderstanding of (i) the way in which the media operates in New Zealand, and (ii) the existing legal and regulatory framework that mitigates against the likelihood of those risks eventuating; and

   4.2. Extending protections directly aligns with the regime's stated objectives of (i) helping expose serious threats to the public interest; and (ii) promoting fairness for everyone.

   These submissions are discussed in more detail below.

Fallacy that risks outweigh benefits

5. The Commission's discussion documents indicate that during the targeted consultation process, there was little appetite for extending the protections of the Act to people who report directly to media. However, the Summary Report on the Targeted Consultation in February and March

2018 also suggests that the targeting consultation did not involve any media representatives who could have shed light on the validity of those perceived risks, and the ways in which the wider environment within which the media operates help to mitigate against those risks.

6. The risks identified during the targeted consultation appear to focus on the potential of unfair reputational damage being caused by reporting on disclosures that are false or misleading. This seems to assume media would report on such disclosures without conducting any investigations of their own into the veracity of the claims. *1 News* is New Zealand's most trusted news brand and we can categorically state that this would never happen in our newsroom.

7. News media are obliged under Broadcasting Standards and Media Council Principles, not to mention professional ethics, to ensure that (i) what they report is accurate and does not mislead the public, and (ii) those who are the subject of media reports are treated fairly. By way of example, we draw the Commission's attention to Standards 9 and 11 of the Free-to-Air Television Code of Broadcasting Practice (https://bsa.govt.nz/standards/free-to-air-television-code) and Principle 1 of the Media Council's Principles (http://www.mediacouncil.org.nz/principles#principles). Both the Broadcasting Standards Authority and the New Zealand Media Council have complaints procedures in place which enable individuals and/or organisations who consider these requirements have not been complied with to voice their concerns.

8. It is important to note that the repercussions for media if they report on false or misleading claims are not solely restricted to the BSA and/or NZMC complaints processes. To the extent such reporting has in fact caused unfair reputational damage to a third party, it would be open to the third party in those circumstances to bring a claim in defamation – and this in turn could result in significant financial and reputational ramifications for the media responsible.

9. In short, the wider ethical, regulatory and legal framework the media operates in works to reduce the likelihood of the risks identified above actually eventuating. And that same framework provides third parties with a means of redress in the event media chooses to publish reports based on false or misleading information. In those circumstances, TVNZ submits the benefits of extending the protections of the Act to people who report directly to media overwhelmingly outweigh any potential risks.

Extending protections aligns with objectives of the regime

10. The discussion documents acknowledge extending protections *"could help expose serious threats to the public interest and incentivise organisations to take action"*. TVNZ endorses this view and considers the fact that the UK, Australia and Canada all empower employees to disclose directly to the media in certain circumstances demonstrates widespread international support for this position. If one of the objectives of the reform is to help maintain New Zealand's position as a world leader in integrity, openness and transparency, then we submit New Zealand should adopt a position which is aligned with its international counterparts.

11. One of the stated objectives of the regime is to *"Help expose serious threats to the public interest… by clearly focusing on conduct in the workplace that poses the biggest threat to the public interest"*. Newsrooms around the country make editorial decisions on a daily basis to

determine which stories are most in the public interest. As such, the media is well placed to be able to assess and evaluate whether protected disclosures warrant further investigation and/or publication.

12. Some of the options proposed by the Commission involve the introduction of monitoring for different sectors to help promote transparency and good practice. TVNZ submits the media can also play an important role in promoting transparency and good practice by providing a backstop for all sectors should concerns that have been raised by individuals via appropriate channels be ignored. Examples suggested by members of TVNZ's news and current affairs team include: the melamine milk contamination where Fonterra managers knew about it but did not announce a public recall to stop parents feeding it to their babies; Pike River where an employee complained about safety issues but management shut them down; or the reports of inappropriate behaviour by Anthony Peden at Cycling New Zealand which was not acted upon until *1 News* revealed that concerns had previously been raised internally by both athletes and staff.

13. Finally, we note the Hon Chris Hipkins' 7 August 2018 Cabinet Paper on this issue indicated that one of the reasons for not proposing to introduce a stringent regime with penalties for non-compliance was *"A punitive regime is expensive to administer, and likely to divert resources away from promoting good conduct through initiatives such as guidance and training".* TVNZ considers the media could fulfil an important role in helping to incentivise good behaviour, as the reputational costs of media reporting on a company's failure to act on information could act as an equally if not more effective punishment than a costly punitive regime would provide.

REPORT IT NOW. ETHICAL BUSINESS REPORTING

Friday 7 December

Lily Clark
Protected Disclosures Act
Review Policy Team
State Services Commission
BY EMAIL

Dear Lily
Protect Disclosures Act 2000 – Submission

Introduction

Report It Now™ is an independent organisation which equips businesses with the tools and capabilities to foster an open and honest work environment through ethical business reporting.

Formed in 2007 in response to evidence that unethical workplace conduct and wrongdoing was on the rise, Report It Now™ ensures the highest level of information security for its clients.

Our Case Management System, the first whistleblowing system of its kind in New Zealand, is a trusted, safe and secure method for staff to report fraudulent and dishonest behaviour. Employees can phone, text, enter online or post a submission to report wrongdoing anonymously and confidentially.

Report It Now™ is proud to be a New Zealand owned Limited Liability Company. Our service is international and has an interpretation service available. We operate systems for a range of clients including small-to-medium businesses, NZX retail companies , local government and government agencies.

While not invited to participate in the targeted consultation that occurred earlier in the year, Report It Now is nonetheless very open to briefing the policy team on its learnings, successes and insights as appropriate.

We have welcomed the opportunity to prepare this submission and our recommendations reflect our eleven years of business in the specialised field of protected disclosure.

We are happy to have our submission available for public view.

Yours sincerely

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Director

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REPORT IT NOW. ETHICAL BUSINESS REPORTING

Protected Disclosures Act Review: Questions

1. Do you agree with the objectives and risks as outlined? Please provide a reason for your answer.

Help 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.

Report It Now does not agree with this. The definition of 'Conduct that poses the biggest threat to the public interest' is excessive. It demonstrates a disconnect between the concerns and issues confronting everyday New Zealanders in the workplace and the legislative environment designed to protect them / enhance the future wellbeing of everyone.

It also overlooks the reality that the interests and well-being of the individual in the workplace is also important. Public interest is an externally focussed objective. Our organisation believes it should also be internally focussed.

In addition, while there is specific legislation such as the Health and Safety Act, this Act is not well known for its reporting function. It is mainly presented as a means to prevent tangible accidents rather than psychological damage or stress hazards. To the best of our knowledge and experience the Health and Safety Act is not socialised into the workplace on the basis of protected disclosure – safe reporting. Our organisation therefore recommends that the scope of the new Act is broadened to cross pollinate with other pieces of legislation.

The Me Too campaign for example has significant implications and ramifications for the public and private sector in NZ – our organisation is not convinced however that for many women, with different levels of education/literacy/ confidence or types of cultural values, that the 'serious threat' wording would ever have encouraged reporting. Report It Now supports the view however that Me Too is actually the type of behaviour or poor conduct that needs calling out and warrants Protected Disclosure to do so.

We know that a previous ACFE survey indicates that, by far, the most common way companies detect fraud is through the use of anonymous tips received via fraud or ethics hotlines. According to the survey, 37.8 percent of frauds in U.S. companies were discovered through tips, while only 17.1 % were uncovered by management

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review and 13.7 percent by internal audit. (Whitepaper, Why Hotlines are Considered Best Practice, 2nd May 2013).

A whistleblowing service should be part and parcel of a wider system for employees to disclose potential wrongdoing. One of the key things that a responsible organisation can do to build trust in its whistle-blower service is to ensure that genuine concerns raised through it are promptly and thoroughly investigated. Even if the matter appears trivial, or could more appropriately have been initiated through say an employee process, allowing such matters to be dealt with through the whistleblowing process builds trust in the service, so that when the worst happens, someone in the know will pick up the phone. (PWC, Global Economic Crime Survey 2018, page 17).

Encourage 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.

Report It Now agrees with this statement. It is strongly recommended this applies and is implemented in full across both the private and public sector.

Be 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.

Report It Now agrees with this statement.

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

Report It Now agrees with this statement.

2. Do you have any other ideas for defining the purpose of the regime and assessing options? If yes, please provide details

The Protected Disclosures Act should be focused on providing New Zealanders with the means to provide information about behaviour that is likely to:

- cause serious harm or injury, or put at risk, individuals or the public at large
- lead to fraudulent or corrupt outcomes in a business, health, or institutional environment
- deceive or mislead
- intimidate, coerce, isolate or prevent the exercise of free will and personal liberty
- cause environmental damage or endanger negatively impact the conservation estate

While there are other acts that apparently provide a channel for subsequent prosecution or investigation they do not provide the detailed protection and safety from retaliation and recrimination that is afforded under the Protected Disclosures Act.

3. Do you agree with this characterisation of the key problems? Please provide a reason for your answer. The key problems are stated as:

People don't know when to use the law
People are scared
People don't always know who to report to
People find it hard to know which external body to report to

Report It Now agrees with these key problems but has identified others.

Other problems

A major concern of Report It Now is that internal processes create added stress and pressure. It is our recommendation that an external independent reporting line is always provided as another option. The reason for this is that there is never a guarantee that information passed in confidence can be guaranteed confidential from leaks, hackers or maleficence.

Report It Now's experience is that whistle-blowers, from the moment they decide to report on actions involving their colleagues, become nervous and concerned. Every whistle-blower who reports to Report It Now has felt a sense of relief that they are not needing to talk to someone they know or who might also have a friendship or relationship with the perpetrator.

An external reporting line therefore provide assurance that there is no conflict of interest. This is a critical point given New Zealand is such a small country and within many sectors not only does everyone know everyone but senior tiers can often band together. This is especially the case where they may all have attended the same university, church or training institution. Whether the issue lies within the medical profession, police or legal firms it is not unusual for denial and defensiveness to characterise the first response.

The benefit of an external reporting line is that there is no risk of internal leaks or premature identification, there is no conflict of interest, no power imbalance and the people who receive the information are professionally trained in how to record the information and the subsequent processes. Initial discussions can therefore be less defensive and more open.

Training for recipients of information which can often be highly sensitive is, in our opinion, often overlooked within the workplace. Not every senior manager or general counsel is receptive to whistle-blowers and the power imbalance distorts the process.

In the public sector, which is known to be extremely hierarchical, this power imbalance can also contribute to under reporting or fear of reporting.

Further, and especially relevant to some cultural groups, an external reporting line overcomes the personal challenge of being seen to disrespect a senior member by reporting on him/her.

4. **In your view, what other problems and challenges should be considered? Where possible, please provide evidence or information to support your view.**

The issue(s) of anonymity and protection under the act are crucial. Any new Act must be seen to have legislative teeth. By that we mean the Protected Disclosures Act should have integrity and be what it says 'Protected Disclosures'.

Report It Now recommends an ability to receive and protect submissions notwithstanding the fact that some will be malicious.

Our view is that it shouldn't matter (within reason) what the submission is about. It is simply the fact that the employee wishes to raise an issue and is uncomfortable with identifying themself. The fact that they have mustered the courage to bring the issue to the Ethics committee, or whoever it is within the organisation that deals with receipt of the submissions, is evidence that something within the organisation (public or private) is troubling to them and, potentially, warrants investigation.

Report It Now provides a system that allows anonymity but equally allows us to be the effective conduit between employer and employee without the employee being identified - until they are comfortable to identify themselves voluntarily.

This reinforces the benefit of an independent trustworthy reporting line that enables investigation of allegations through the services that act as a conduit.

The current Act does not allow for this and exposes the whistle-blower prematurely which is a major deterrent.

Societal barriers and prejudices also need to be addressed. Too many people will not speak up because it is not acceptable to do so within NZ culture. This largely stems from fear of retaliation, inept internal processes and mistrust of their effectiveness.

The thresholds of 'serious threat' is poorly understood and belies the fact that what may manifest itself as low level bullying may actually hide something inherently more sinister. Bullying is often a means of control and keeping people in line so that they don't report something else that they have seen or witnessed.

In addition, if people have to wait until conduct reaches a serious threat threshold then opportunities to prevent a situation escalating to a level where it has done irreversible damage will have been missed.

If the objective is to protect an individual or the public at large then surely it makes sense to seek to achieve this by early intervention, when the behaviour first starts to become noticeable rather than waiting for a prolonged period until the behaviour (and damage) has escalated.

Again some ethnicities are also unlikely to speak up. This will requires separate attention and effort.

We also recommend that external reporting lines and the companies that provide them:

- be required to be accredited
- are afforded the same exemption from revealing their source as journalists.

5. **How could these problems (either as outlined here or in your answer to the previous question) affect different groups of people in New Zealand?**

We have already referenced our answers to include:

- Different cultural groups - the 'problem' of tradition and respect
- Different organisational tiers – the problem of power imbalance and intimidation
- Different sectors and longer serving employees – the problem of conflict of interest and vested interest in maintaining the status quo

6. How urgent is the need for change?

The need for change is extremely urgent. Critically we recommend the change must embrace the private sector and the change must allow for an independent, accredited, external reporting line as an option.

7. What other non-legislative tools could we use to improve how the regime works?

Mandatory provision of an independent, accredited, external reporting system.

8. How likely is it that the range of non-legislative tools (either outlined here or in your answer to the previous question) could result in greater benefits than those discussed here?

As previously stated, an independent reporting system removes status and power imbalance, avoids conflicts of interest, prevents internal leaks, enables the process to start confidentially until such time as a whistle-blower feels comfortable with disclosure and relies on highly trained individuals and effectives processes.

It is also a free service (for employees/contractors etc) which is paid for by the company/ business concerned. This is important to recognise given complaints or grievances raised under other pieces of legislation often require the input of a lawyer for timely or any resolution / investigation. Legal fees are typically prohibitive for most NZ employees and provide a major barrier.

9. Do you think we should change the law? Why do you think this?

It is essential that New Zealand updates and broadens it law for many of the reasons already stated.

10. In your view, which option will be most effective in achieving the desired outcomes? Why do you think this?

Allowing people to report any concern to an appropriate independent authority, with due protection while simultaneously making it mandatory for public and private sector entities of a certain size and scale to have processes in place for reporting and opportunities for learning how to report provides an integrated means to enable submitters (while still being fair to other stakeholders) who are involved.

11. Are there any other ideas that you think we should consider to address the problems with the current system? If yes, please provide details.

Most of the ideas have already been detailed and are addressed throughout the remaining questions.

Option 1: Build Strong Foundations

Questions 12. What do you see as the main benefits, costs and risks of this option?

It reads as an attempt to develop a positive change in organisational culture which Report It Now would endorse.

Report It Now is opposed to any narrowing of the definition and only endorses broadening. We are acutely aware that bullying , on investigation, can be a cover for more serious behaviour and we also reemphasise that arresting less harmful conduct when it first emerges can prevent serious harm with serious consequences.

Report It Now strongly recommends that the benefit of early intervention is factored into the new Protected Disclosures regime.

13. What changes could be made to improve the effectiveness of this option? Questions about specific proposals

Training to include review and discussion about upheld disclosures and practice / role playing through ethical dilemmas.

14. Can you think of any examples of serious wrongdoing that should be covered by the Act, but would fall outside the proposed definition? Please provide specific examples, where possible.

Animal welfare has become an increasingly contentious area but societal values are changing and our reputation must be safeguarded . There are circumstances in which gross animal abuse warrants reporting.

On this basis and by implication agri-business as a critical export earner and employer must be obviously included - currently we believe identification and reporting is left to organisations such as Farmwatch who work more alongside the media than MPI – indicating, potentially, a level of distrust or dissatisfaction with the

internal MPI processes. This further reinforces our point regarding independence and accreditation of reporting systems.

15. What do you think the impact of new requirements for organisations would be on small and micro-businesses and non-governmental organisations? Do you think an exemption should apply? If yes, please provide details.

There should not be any exception to demonstrating care and concern around the reporting of behaviours that run the risk of destroying founder/investor/stakeholder wealth and ultimately losing reputation and jobs. Communication, guidance and support is simply good leadership regardless of company size.

16. How would new obligations for employers work alongside existing requirements (e.g. health and safety, employment relations)?

It is more appropriate for expertise to be brought in to consider this.

17. What support would help organisations fulfil their obligations? Where possible, please provide specific examples.

Subsidised access to training on aspects such as encouraging a speak up culture to be made available during an initial period or online material to be provided including self-testing. For larger companies there should be a requirement to ensure professional expertise is sought as there is a risk of short cuts and tick box undertakings.

Learning partnerships and public private partnerships with independent providers of reporting systems with associated processes and checks and balances is recommended.

18. In your view, what is the necessary lead-in period for organisations in your sector to implement the changes under this proposals? Where possible, please tell us how you have arrived at this timeframe.

Twelve months.

Option 2: Allow People to Report to Appropriate Authorities

19. What do you see as the main benefits, costs and risks of this option?

Prevents power/status imbalance, conflicts of interest, items as previously stated.

20 What changes could be made to improve the effectiveness of this option?

Report It Now recommends accreditation of appropriate and well governed authorities and emphasises that they must be seen to be transparent and independent of the public sector.

Our organisation also recommends that the means of reporting is widened and promoted. It is now apparent that many people are preferring to upload video, images or voice recordings to provide evidence and to better protect their identity. This is a trend occurring overseas that must be accommodated within any new Act. We believe this trend enhances reporting and both overcomes and removes some of the concerns around confidentiality.

Questions about specific proposals

21. Do you think we should consider any limitations on people reporting concerns directly to an appropriate authority? If yes, please provide details.

It is the view of Report It Now that legislators need to be honest about the intent and desired outcomes of any potential new Act for protected disclosures. Anything that will promote and encourage the reporting of behaviour that is contradictory to good management, honesty, integrity transparency and ethics is advantageous to have reported. Whether it constitutes 'serious threat' or not the opportunity for a whistle-blower, regardless of the level or nature of the complaint, to have an audience, is beneficial .

Option 3: Establish stronger oversight

It is the view of Report It Now that the reference to having a separate body that is owned and run by the Government with public sector appointees is archaic, bureaucratic and cumbersome. It will also compete, with an unfair advantage, over private providers. We recommend a public private partnership to better support independence and an attitude that endorses confidentiality. If an oversight body is agreed it is essential that it is totally removed from hierarchical public sector traditions, political influence and the government of the day.

22. What do you see as the main benefits, costs and risks of this option?

Report It Now does not see any key benefits for the reasons outlined above.

What we would like to see however is the inclusion of independent third parties (in the event that a public private partnership is not upheld) within any new Act to the extent that timeframes are specified, communication and updating of investigations progress / process between parties is specified.

Independent third party agencies that provide external reporting lines should also be afforded protection if the submitter discloses their name but does not want their name passed on to their employer. Currently the legal advice is that if a submitter is not covered by the existing Protected Disclosures Act then we have an obligation to divulge. This is not ideal and undermines the ability of submitters to follow through regardless of how serious the threat.

23. What changes could be made to improve the effectiveness of this option? Questions about specific proposals.

As previously outlined a public private partnership with an appropriate tender process.

24. In your view, what specific functions should the oversight body, or bodies, perform?

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Receiving all submissions, triage and referral of those submissions, advisory and expertise around submissions, a level of audit around quality of organisational communication and support, cumulative data collection and reporting (for example type/nature of call, sector, gender of caller and age of caller).

Option 4: Introduce Monitoring for the Public Sector

25. What do you see as the main benefits, costs and risks of this option?

Report It Now does not see any genuine benefits for this option given we are opposed to a government oversight body. We do however believe that all public sector organisations should be reporting on their internal speak up processes. We believe this clarifies and provides an accurate insight into the culture (health) of the organisation and constitutes more reliable data than that gathered by internal surveys.

An independent oversight body, through a public private partnership should also be obliged to cumulatively record the calls that it receives – where employees have elected to use an external body instead of, or in addition to, internal measures.

26. What changes could be made to improve the effectiveness of this option?
Questions about specific proposals 27.

Public private partnership as above.

27. In your view, what should the public sector be asked to report on?

Quantity of reports, type/nature of reports, sector / department reports arising from / findings or outcome following the investigation.

28. How could we use this information to drive improvements?

The tone from the top is an essential aspect of good leadership and builds a culture where doing the right thing is evident. Not so a dysfunctional culture where misconduct and poor behaviour can take hold. Reporting of information relating to speak up will help improve leadership and longer term the recruitment and training of leaders and line managers. It will also provide assurance about the organisation's focus and performance from the perspective of potential employees and broader stakeholders.

Option 5: Introduce Monitoring for all Organisations

29. What do you see as the main benefits, costs and risks of this option?

Our organisation does not see significant benefit for this quantum leap in compliance especially for smaller organisations. It is inevitable, we believe, that organisations with poor internal conduct and controls will not survive market forces. On this basis penalising well run SME's with extra compliance will bring about accusations of red tape and will not support existing good behaviour.

30. What changes could be made to improve the effectiveness of this option?

Perhaps the size of the organisation and the nature of the risks involved such as a breach within for example GCSB or a food safety breach within for example Fonterra owned subsidiaries needs to be considered. Companies or sectors with higher threats or impacts need to commit to reporting. Listed companies may already have this requirement under the 2017 NZX Governance code which is a comply or explain regime.

31. Do you think small businesses and community, voluntary, and not-for-profit organisations should be exempt from the reporting obligations that would be introduced under this option?

Yes. But their employees should still be able to report to an independent body, ideally as a private public partnership, so that cumulative data can be recorded and reported on as previously mentioned.

32. In your view, what should employers be asked to report on?

As above.

33. How could we use this information to drive improvements?

As previous. Training, imposition of audits until the sector improves, perhaps fines /penalties

Chapter 6: Changes we are not proposing.

Questions 34. Do you agree with our rationale for not introducing changes in some areas?

Protections for reporting to the media – Report It Now does not agree. It is noteworthy that reporting to the media, if internal routes / processes have failed, provides a much faster expose and resolution. Protection should be considered on a case by case basis.

Anonymous reporting – Report It Now does not agree. There is the risk that for some people anonymity is a prerequisite for personal safety. There should not be a black and white determination without first assessing the reasons for the anonymity. Diversity and the citizenship of people from different cultural backgrounds may require different levels of sensitivity to reflect greater personal risk.

Introduction of penalties for employers who breach obligations – We support the introduction of penalties especially for large public or private organisations. Serious threat or a broader scope of reporting must be encouraged and there can't be any midway point. A lacklustre and softly softly approach will not enable effective speak up processes to be embedded and will signal a lack of commitment.

35: Are there any other ideas that you think we should consider to encourage people to report concerns?

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A clear focus on updating the submitter with the actions and processes being undertaken and providing a timeframe for resolution. It may also be necessary to provide support services and/or counselling.

Further there should be some advice given re the types of behaviour that constitute retaliation and over what time frame vigilance is required or comes under the reach of the Act.

If yes, please provide details.

36: Are there any other ideas that you think we should consider to improve compliance with the law? If yes, please provide details.

Not at this point.

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Neha Pawar

From: Chris Cooke 9(2)(a) privacy
Sent: Monday, 19 November 2018 8:27 AM
To: Submissions@havemysay.govt.nz [SSC]
Subject: Public consultation - Feedback regarding Proposed changes to the Protected Disclosures Act 2000

I believe there should be provision in the new law for whistle-blowers to approach the media in certain circumstances and be protected.

A good example would a food contamination crisis.

Consider the matter of when baby milk powder was found to be contaminated with melamine. Fonterra managers knew about it but did not announce a public recall to stop parents feeding it to their babies.
They accepted the local Chinese decision to just take the product off the shelves. Ignoring the fact that parents stockpiled the product n their pantries.

In such a case a staff member, seeing the non-action of managers and the threat to public health, should be able to contact the media and be protected.

I have read your summary from your initial consultation and the brief remark regarding reporting the media. That extract is below.

Extract
***"Reporting to the media**. Protecting disclosures to the media as a "last resort" could provide the best incentive for organisations to put in place effective internal processes for dealing with wrongdoing. However, we heard that the risk of causing unfair reputational damage to the individuals and organisations concerned, in the event that the disclosures are false or misleading, outweighed the potential benefit."*

My response to this is that media organisations have a legal obligation to check and ensure that information is not false or misleading.

Regards **Chris Cooke**

Current Affairs Producer

Neha Pawar

From: Patricia Boyd 9(2)(a) privacy
Sent: Friday, 23 November 2018 10:03 AM
To: Info@havemysay.govt.nz [SSC]
Subject: SSA Reform question from website

My whistle blowing was revealed in my Thesis for a Masters Degree in Medical Science. That ended my career in NZ. Now I work overseas. There are many reasons why NZ drs don't work in NZ.
Overseas drs who work in NZ are more indebted to the system and less likely to whistle blow, The kind of drs that are required to stamp out whistle blowers.