STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

Protected Disclosures Act 2000

Views on strengths, issues and challenges

Explanatory note

In early 2018, the State Services Commission held a targeted consultation process with stakeholders on their views of the Protected Disclosures Act 2000.

This report summarises the major themes that emerged from our conversations on the strengths, issues and challenges with the current regime. We have tried to capture the range of perspectives we heard in this report.

The views and opinions expressed in this report are strictly those of the individuals we consulted and do not necessarily reflect the official policy or position of the State Services Commission, nor the New Zealand Government.

A copy of this report was provided to the Minister of State Services as part of our ongoing discussion around the Protected Disclosure Act.

SETTING THE SCENE

- The State Services Commission (SSC) has begun exploring whether the law and procedures to protect individuals who report concerns about alleged wrongdoing need to be strengthened to provide for a more comprehensive regime in New Zealand.
- The current Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and protecting employees who report concerns. It applies to both the public and private sector.
- However, questions have been raised as to whether New Zealand's legislation is working effectively and whether it lags behind international practice.

THE TARGETED CONSULTATION

- A targeted consultation took place during February and March 2018 to gather perspectives on the strengths, issues and challenges with current legislation and practice and the benefits and risks of different reform choices.
- This consultation was designed to get different perspectives on the complex issues involved to inform the State Services Commission's advice to the Government. It was not intended to be representative or definitive.
- The Minister of State Services' announcement of the review reinforced that there is public interest in this area. A number of individuals approached us to share their experiences and we benefited from the diverse perspectives they brought to the table.

19 FEBRUARY — 19 MARCH 2018		
Who we spoke to*	**What we did**	**What we explored**
• Unions • Individuals with experience of making a protected disclosure • Professional bodies • Business, community and voluntary sector representative organisations • Oversight and regulatory agencies • Public service agencies • Academics and experts * The organisations we spoke to are not a representative sample of each of the groups.	• Ran 3 workshops • Conducted 16 interviews • Engaged with 38 organisations and individuals	• Objectives of the Protected Disclosures regime • Strengths, issues and challenges with current legislation and practice • Benefits and risks of different reform choices

- In advance of the workshops and interviews, participants were sent background material about the current Act, the key issues and potential areas for reform based on SSC's initial review of the legislation and international practice (see Annex).
- This report provides a summary of the major themes that came out of our conversations, which will inform our advice to the Government on priority areas of focus and next steps.

WHAT DO WE WANT TO ACHIEVE?

There was general consensus that the overall objective of the Protected Disclosures regime was to address serious wrongdoing in the workplace and ensure the safety of all the individuals concerned.

This relies on four key shifts:

> "To prevent or stop wrongdoing without any casualties."

Embedding a positive culture around voicing concerns

We heard that it is critical to shift organisational cultures and behaviours so that "speaking up" is valued, organisations are proud of having a disclosure policy in place and employees are able to raise concerns, in any circumstance, freely without fear. These cultural changes cannot be achieved by "changing bits of paper" alone. Legislative reform needs to be supported by longer-term changes in organisational culture.

> "This is about trust in the system. The law won't change that by itself."

Having simple, clear and effective processes that inspire trust and confidence

We heard that it is important to have clear, transparent and effective procedures for wrongdoing to be reported, detected and investigated. Individuals need clarity about the avenues available to them; confidence that their disclosure will be taken seriously and acted on; and assurance that they will be genuinely protected during the process.

> "We need a safe, workable regime that actually gets used."

Ensuring consistency with different pieces of legislation

We heard that it is important that the Protected Disclosures Act aligns with other pieces of legislation such as the Health and Safety at Work Act 2015 and the Employment Relations Act 2000. This would enable employees and organisations to be clear on the channels and procedures to use in different circumstances.

> "There needs to be clear pathways and consequences for using different Acts."

Minimising false or misleading accusations

We heard concerns about inappropriate use of the Act, including for false or misleading allegations made during an employment dispute to advance personal grievances. This could cause undue reputational harm to the individual named in a disclosure. It is critical that the regime is built around natural justice and due process for all parties.

> "There is a climate of witch-hunts now so the protections need to go both ways."

HOW DOES IT WORK IN PRACTICE?

There was general consensus that the legislation was not particularly effective in achieving the objectives of the Protected Disclosures Regime and there is significant variation in how well equipped organisations are to handle disclosures of alleged wrongdoing.

The following challenges were highlighted around the stages of disclosing and handling information about alleged wrongdoing:

- Coming forward with concerns and meeting the "serious threshold" test
- Internal and external procedures for handling disclosures
- Support, protections and compensation available to those who disclose wrongdoing

COMING FORWARD WITH CONCERNS AND MEETING THE "SERIOUS THRESHOLD" TEST

People are not familiar with the current Act and what it means in practice

We heard that there is general confusion and uncertainty surrounding the Act. While some are unaware of its existence, others have different interpretations of how to apply it. For example, some organisations take up to 20 days to decide whether to trigger the confidentiality provisions in the Act, whereas others argue that they should apply immediately.

"The current Act leaves too much to chance."

People fear invoking "scary" legislation

We heard that it currently feels like a "big step" for employees to use the legislation because of the negative stereotypes associated with whistleblowing (i.e. tell-tale or trouble-maker) and the possible implications for their careers and livelihoods. This is particularly an issue in smaller countries, like New Zealand, where "word gets around quickly" and it may be more difficult to find work elsewhere.

"It is often seen as career and personal suicide."

People often come forward with a range of concerns — for example fraud, bullying and harassment

This makes it difficult for individuals responsible for handling disclosures to separate out "serious wrongdoing" from other employment matters, especially when the discloser is also involved in an employment dispute. Organisations' abilities to navigate these complex situations varied significantly.

"Often disclosures are part of a very individually-focused dispute or relationship issue."

The "serious wrongdoing" test is seen as too narrow in scope

We heard that the current definition does not encompass the full range of misconduct issues – for example, conflicts of interest, bullying and sexual harassment. These could appear small in isolation, but add up to a more "serious" issue that is systemic to the organisational culture. This confusion around what counts as "serious wrongdoing" is reinforced by vague terms such as "irregular use of resources", which can discourage individuals from coming forward.

> "There is general confusion - people don't know if their information relates to serious wrongdoing or not."

INTERNAL AND EXTERNAL PROCEDURES FOR HANDLING DISCLOSURES

Larger organisations tend to be better equipped in managing disclosures, but this is not universally the case

We heard that some large organisations – in both the public and private sector – have specialist HR personnel, an integrity "hotline", codes of ethics and investigators to manage different levels of complaints. However, we also heard of instances where the internal procedures for managing disclosures are non-existent and not well understood.

> "An organisation's ability to deal with complaints is indicative of how well-equipped they are to deal with disclosures."

NGOs and small businesses tend to lack the resources to handle and investigate disclosures

We heard that employees in smaller organisations do not always know who to report to and what procedures applied. In practice, some organisations tend to either side-line the complaint or look for ways to resolve it informally, without having to invoke the protections under the Act.

> "Smaller organisations have greater difficulties – not because of ill-intentions, but because they are ill-informed and under-resourced."

There is currently no single organisation for individuals in the private and not-for-profit sector to go to for advice on making a disclosure

While the Ombudsman can provide advice to public sector employees, there is no direct equivalent for employees in the private and not-for-profit sector. In one case, an individual was "kicked around three different authorities" for eight months as it was not clear who was best placed to handle and investigate the disclosure.

> "There is no one place or central authority for the private sector, so consistency varies."

There is currently no obligation on organisations or appropriate authorities to investigate information about alleged wrongdoing

We heard that the lack of hard, legal requirements for organisations to investigate allegations, and report back on the outcome, can give organisations the licence to dismiss concerns as purely personal or frivolous. This is more likely to occur when organisations are also involved in an employment dispute with the discloser.

> "Every time we went to someone we were told "I will deal with it" – but didn't hear anything back."

Few organisations report on the number and outcome of the disclosures they have received [1]

We heard that the lack of internal monitoring means that we do not currently have a full picture of the size, scale and nature of alleged wrongdoing in workplaces across New Zealand. A number of people emphasised that low levels of reporting by international standards do not necessarily indicate an absence of wrongdoing, but may indicate an absence of effective processes for detecting wrongdoing in the first place.

> "No-one is aware of what is going on."

SUPPORT, PROTECTIONS AND COMPENSATION AVAILABLE TO THOSE WHO DISCLOSE WRONGDOING

It can be hard to maintain the confidentiality of an individual who has come forward in practice

We heard that it was often difficult to protect the identity of those who "speak up" as individuals tend to "make some noise before formally blowing the whistle" and "insiders know who is involved in what". For example, we were informed of a case where a disclosure was made public in the media with the intention of holding the responsible individuals to account for their wrongdoing, but in doing so revealed the identity of the discloser.

> "New Zealand is a small country and word gets around."

There is an absence of dedicated redress and support for individuals who come forward

We heard that those who do come forward do so at great personal and financial risk, and some are unprepared for what is involved (including the impact on their family). There is currently no obligation on organisations to provide a wrap-around service for individuals who "speak up", including protecting them from any adverse consequences and providing pastoral care during what is often a long and drawn out process.

> "This is the biggest hole in our legislation."

The existing legal remedies are seen by some as an inadequate means of settling compensation claims

On one hand, we heard from individuals with experience of making a disclosure that victimisation under the Human Rights Act 1993 and personal grievance remedies under the Employment Relations Act 2000 are expensive and time-consuming processes. On the other, we heard from some organisations that employees can effectively leverage their protected disclosure for compensation and use the employment relations settlement process for personal gain.

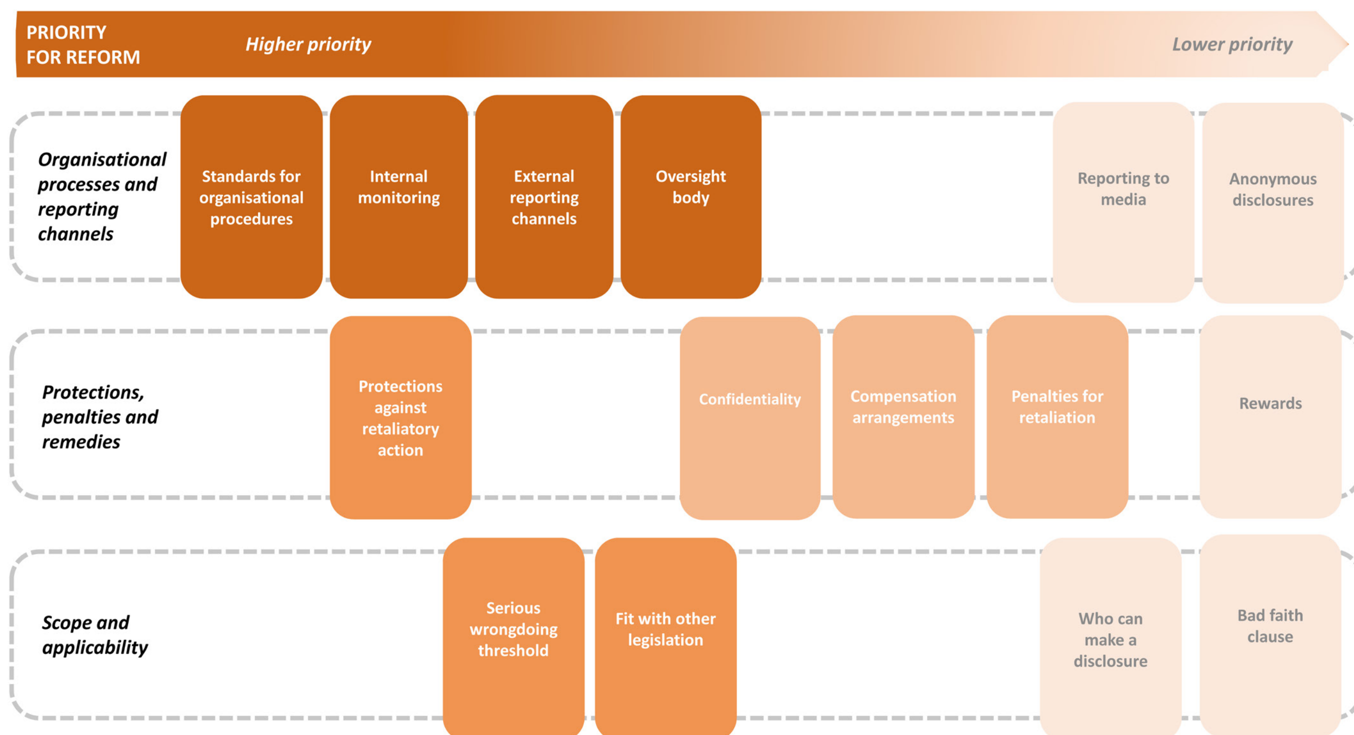
> "There is a huge power imbalance as you're dealing with companies with millions of dollars who can hire large law firms."

1 In 2016/17, the Ombudsman completed 10 requests for guidance and responded to 34 informal enquiries relating to Protected Disclosures. This information is not available from all appropriate authorities or organisations themselves.

POTENTIAL AREAS FOR REFORM

There are a number of areas that could be reformed to provide for a more comprehensive regime in New Zealand. We canvassed views on the benefits and risks of different international approaches and the priority areas of focus.

We sought views on whether there were any other areas the State Services Commission should consider. The only substantive addition made was ‘fit with other legislation’. The diagram below provides a snapshot of the areas that emerged as key priorities for reform. The darker the shade, the more consensus there was around the need for change.



The areas that received the strongest support for reform were:

- Improving organisational standards for handling disclosures
- Clarifying external reporting channels
- Establishing an oversight body

IMPROVING ORGANISATIONAL STANDARDS FOR HANDLING DISCLOSURES

There was strong consensus on the value of introducing a statutory duty for organisations to have simple, clear and user-friendly procedures in place to deal with disclosures internally

These would need to limit the number of hurdles individuals faced in coming forward and be underpinned by a positive tone from the top where staff are encouraged to “do the right thing and speak up”. Getting this right would allow New Zealand to “catch up” with international advances.

> “There’s a need to humanise the process so it doesn’t require heroic effort or selflessness on the part of the whistleblower.”

There was strong support for a tailored, rather than one-size-fits all approach which takes account of organisational differences

We heard that organisations would naturally vary in their ability to comply with new requirements. Larger organisations are typically better resourced to handle complaints of all kinds, often with specialist employment personnel, trained managers, investigators and strong governance. However, NGOs and smaller businesses may struggle to resource an effective internal disclosures policy and require support from an external organisation. [2]

In the private and not-for-profit sector, there could be a minimum requirement to have a policy in place which is consistent with high-level principles

For example, organisations could be required to have an internal disclosure policy in place which provides information about the support and protections available to disclosers; how, and to whom, a disclosure can be made (whether inside or outside the organisation); and how the organisation will investigate disclosures and ensure fair treatment of all parties. This could be disseminated through induction and other training.

In the public sector, the level of prescription could be increased so that there is a statutory requirement to adhere to specific standards

For example, making it a mandatory requirement to appoint a “senior disclosure officer” for handling disclosures, report back on the outcome of an investigation to key parties and fulfil compulsory reporting obligations to an oversight agency on the number and outcome of disclosures (for example, to the State Services Commission under its integrity mandate). This oversight agency would be responsible for supporting agencies to comply with requirements, ensure consistency in practice and stimulate improvements across the system – similar to the approach taken to improving agencies’ abilities to respond to Official Information Act requests.

CLARIFYING EXTERNAL REPORTING CHANNELS

There was strong consensus on the need for effective reporting channels to external agencies as a back-up, or alternative, to reporting inside an organisation

These channels provide an important “safety net” for individuals who are either unaware of who to go to inside their organisation, or fear retaliation.

> “It is useful for people to go to an independent authority if they cannot raise an issue internally.”

2 97 percent of enterprises have fewer than 20 employees: http://www.mbie.govt.nz/info-services/business/business-growth-agenda/sectors-reports-series/pdf-image-library/the-small-business-sector-report-and-factsheet/small-business-factsheet-2017.pdf

There was less agreement on whether to operate a tiered system where concerns are escalated only when internal channels have been exhausted, or whether concerns can be directed to an external body at any stage

On one hand, we heard that organisations are closer to the issues so are better placed to handle disclosures in the first instance. On the other, we heard that organisations may not have the capacity to conduct a full investigation, or may not be best placed to because of a conflict of interest, especially if the wrongdoing occurs further up the hierarchy. In these cases, the option to go directly to an external agency was important.

Regardless of which model is adopted, there was consensus on the need for more clarity on the roles and functions of different external agencies so individuals and organisations know who to report to, and when.

ESTABLISHING AN OVERSIGHT BODY

There was strong consensus on the need for an independent oversight body, which provides leadership, raises awareness and stimulates improvements across the system

There was discussion about whether this oversight body had to be "new" or whether an existing organisation could be "powered up" to take on a range of functions. These included:

> "An oversight body would provide leadership, independence and objectivity."

- **Acting as a first port of call for advice on making a disclosure for people across the public, private and not-for-profit sector.** The introduction of a a "one-stop-shop" would make it easier for people to report concerns and seek advice and guidance on how to make a disclosure. This would be particularly beneficial to those working in the private and not-for-profit sector where there is currently no direct equivalent to the Ombudsman.
- **Performing an asessment and triage function for all complaints.** The body could make an initial assessment of the information and determine who is best placed to handle the case. It is expected that any oversight body would receive a large number of complaints in the first couple of years, but volume would taper off as organisations change and improve their behaviour.
- **Setting standards and monitoring compliance.** The body could provide guidance to organisations and appropriate authorities to help them understand their requirements under the Act; ensure consistency, coordination and flow of information across the system; and, improve practice in areas such as timeliness, support for individuals, investigations and reporting.
- **Receiving reports from public sector organisations and appropriate authorities to identify key trends, issues and hotspots.** Reports on the number of disclosures an organisation receives, the types of wrongdoing that have been brought to an organisations' attention and the outcome of investigations would provide crucial intelligence on the critical issues that need addressing in the public sector.
- **Investigating complaints and having back-up powers.** Some argued that it was critical for the oversight body to have this capacity, especially if an organisation was unable or unwilling to investigate themselves. Others argued that it would risk overwhelming the oversight body and diluting its effectiveness from the start.

Regardless of which functions are adopted, there was consensus on the need for clarity around the core purpose of any oversight body, and where it sits in relation to internal and external procedures.

There was also some support for the following areas, but different views on what "better" would look like:

- Enhancing the support available to individuals who report concerns.
- Redefining the serious threshold test and ensuring better fit with other legislation.

ENHANCING THE SUPPORT AVAILABLE TO INDIVIDUALS WHO REPORT CONCERNS

There was a strong consensus on the need for organisations to provide 'wrap-around support' for both the complainant and the subject of a complaint

This would make the process safe for all the individuals involved and allow New Zealand to "catch up" with international standards. However, there was less agreement on how this could be achieved. For example, whether it would involve offering individuals access to an employee assistance programme, introducing penalties for employers who undertake retaliatory action and/or enhancing compensation avenues for employees who suffer detriment (for instance, by reversing the burden of proof such that employers have to establish that they did not engage in retaliation as a result of the employee "speaking up").

REDEFINING THE SERIOUS THRESHOLD TEST AND ENSURING BETTER FIT WITH OTHER LEGISLATION

There was some support for re-defining the serious wrongdoing threshold for reporting concerns to make it easier to understand and apply

However, there was less agreement on what this means in practice. For example, whether it would involve removing "serious-ness" from the equation; widening the scope to include behavioural misconduct, such as systemic workplace bullying and abuse of power; and, requiring organisations to aggregate "small" or "low-level" concerns, which in isolation would sit below the threshold, but together build a picture of wider, systemic issues.

However, a balance needs to be struck so that the threshold is high enough to exclude purely personal grievances and employment matters

It was suggested that this could be achieved by different means – for example, listing the types of complaints that are excluded and would allow organisations to take no further action; adding a "public interest" test to the definition to explicitly exclude personal grievances; changing the name of the Act itself to ensure a more direct link to the objective of increasing the integrity and transparency of workplaces (e.g. Public Interest Disclosure Act); and, making it clear what alternative legal channels and remedies are available for areas not covered by the Act.

There was little appetite for reform in the following areas. The general view was that the potential risks outweighed the benefits. These were:

- **Expanding the scope of who can make a disclosure.** Allowing a broader set of people to disclose wrongdoing (e.g. members of the public, an employee's family member or a public servant who has relevant information about another agency) may help to detect and tackle more instances of wrongdoing. However, broadening it out too far could undermine the distinctive focus of the legislation on insiders of organisations that tend to need both more encouragement and protections to report concerns.
- **Enhancing confidentiality provisions.** Tightening the confidentiality provisions in the Act further could create a safer environment for people to "speak up". However, we heard that prohibiting the referral of information to anyone that may reveal the identity of the discloser would make investigations and providing wrap-around support far more difficult. While penalising those who breach confidentiality could be unworkable in a small country like New Zealand where maintaining confidentiality at current levels is already challenging.
- **Allowing anonymous disclosures.** Introducing hot-lines or other mechanisms for anonymous disclosures could provide a safer route for people to come forward (some listed companies already have 0800 phone lines). However, we heard that it could 1) increase the number of complaints motivated by personal gain rather than wrongdoing, which would undermine the purpose of the regime and; 2) make investigations more difficult to carry out as further information could not be requested from the discloser. This is particularly relevant in cases where the wrongdoing relates to behaviours rather than fraudulent activities. Participants highlighted that companies should be able to choose whether to provide mechanisms for anonymous reporting, but that it should not be an explicit requirement under the law.
- **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.
- **Removing the "bad faith" clause.** Removing the "bad faith" clause could provide an incentive for individuals to come forward and allow more wrongdoing to be reported. However, we heard that this technical provision in the Act acts as a useful "safeguard" against potentially vexatious allegations.
- **Introducing a reward system.** Financial or non-monetary rewards could potentially encourage people to come forward and help to embed a more positive culture around "speaking up". However, we heard that it could introduce the wrong incentives for individuals and may undermine the "spirit of reporting".

NEXT STEPS

Special thanks are due to all those across the public, private and not-for-profit sector who gave their time generously to share their views and refine our thinking.

This is clearly a highly complex and contentious area of reform where there are no easy answers. We benefited from the wealth of perspectives individuals and organisations brought to the table and have drawn on this to inform our advice on priority areas for reform to the Government for their consideration.

ANNEX

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

Review of the Protected Disclosures Act 2000

Purpose of the consultation

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

AIMS OF THE PROTECTED DISCLOSURES REGIME

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

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

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

KEY FEATURES AND ISSUES

HOW THE LEGISLATION CURRENTLY WORKS

- The Act applies to both the **public and private sector**.
- **"Serious wrongdoing"** includes unlawful, corrupt or irregular use of public money or resources; conduct that poses a serious risk to public health and safety; or, gross mismanagement by public officials.
- **Current employees, former employees, homeworkers, contractors, secondees and volunteers** can all report wrongdoing.
- Disclosures are protected if the information is about **serious wrongdoing** and the individual believes on reasonable grounds that the **information is true or likely to be true**.
- Disclosures must be made in accordance with an **organisation's internal procedures**. Public sector organisations are required to have these internal procedures (it is discretionary for the private sector).
- The Act lists a number of **"appropriate authorities"** to whom a disclosure can be made in certain circumstances (including the Ombudsman and State Services Commissioner).
- The **protections offered to employees** include: confidentiality, immunity from civil and criminal proceedings and personal grievance against retaliation under the Employment Relations Act and remedies for victimisation under the Human Rights Act.
- These protections don't apply if employees know the allegations to be false or act in **"bad faith".**
- The **Ombudsman** can provide information to an employee on making a protected disclosure and, in some cases, take over an investigation in a public sector organisation.

AREAS THAT ARE NOT COVERED IN THE LEGISLATION

There are no specific requirements on organisations to:

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

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

Research suggests that:

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

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

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

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

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

POTENTIAL AREAS FOR REFORM

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

WHO CAN MAKE A DISCLOSURE

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

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

SERIOUS THRESHOLD TEST

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

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

CONFIDENTIALITY

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

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

BAD FAITH CLAUSE

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

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

ANONYMITY

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

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

REWARDS

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

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

STANDARDS FOR ORGANISATIONAL PROCEDURES

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

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

EXTERNAL REPORTING CHANNELS

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

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

REPORTING TO THE MEDIA

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

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

PROTECTIONS AGAINST RETALIATORY ACTION

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

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

PENALTIES FOR RETALIATION

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

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

COMPENSATION ARRANGEMENTS

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

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

INTERNAL MONITORING

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

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

OVERSIGHT BODY

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

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

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

What will happen next?

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