

Departmental Disclosure Statement

Protected Disclosures (Protection of Whistleblowers) Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the State Services Commission.

The States Services Commission certify that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

30 April 2020

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Part One: General Policy Statement

This Bill replaces the Protected Disclosures Act 2000 (the Act). The Act promotes the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and provide protection for employees and other workers who report concerns. All workplaces are covered, although some provisions apply specifically to public sector organisations, and to public funds and functions.

The Bill is informed by reviews and by extensive consultation, including public consultation conducted in late 2018. Public consultation highlighted that while the aims of the Act remain sound, there are 4 broad problems which guidance and standards (such as State Services Commission's Speaking Up standards) cannot fully address without changes to the Act. These problems are:

- both organisations and disclosers are confused about when to use the Act;
- disclosers are unclear about how to make a disclosure internally, and some organisations are also unclear about how to respond;
- it is hard for disclosers to navigate the system for reporting concerns externally;
- disclosers fear 'speaking up' because they lack confidence in the protections available to them.

In order to address these problems, the Bill:

- clarifies the definition of 'serious wrongdoing' and extends its application to cover private sector use of public funds and authority;
- enables people to report serious wrongdoing directly to an appropriate authority at any time, provides more clarity relating to appropriate authorities, and clarifies the ability of those authorities to decline or refer the disclosure;
- strengthens protections for disclosers by specifying what a receiver of disclosure should do;
- clarifies the internal procedure requirements for public sector organisations and requires them to state how they will provide support in the form of practical assistance and advice to disclosers;
- clarifies the potential forms of adverse conduct disclosers may face.

In addition, the Bill puts together the existing provisions in the Act into a more accessible form and changes terminology where required to make the scope and intent of the Act clearer.

Clarifies definition of 'serious wrongdoing'

The Bill extends the definition of 'serious wrongdoing' to ensure unlawful, corrupt, or irregular use of public funds or resources is in scope whether it occurs in a public or private organisation and to cover non-government organisations delivering services or exercising authority on behalf of government.

Enables disclosers to make a disclosure direct to an appropriate authority at any time

The Bill enables disclosers to make a disclosure direct to an appropriate authority at any time. The Bill adds a new Schedule with examples of the most likely appropriate authorities, and specifying the nature of disclosure or subject matter for each of those appropriate authorities.

The Bill also clarifies that recipients of disclosures may refer the disclosure back to the employing organisation or decline the disclosure (this addresses concerns that recipients may have to deal with disclosures that do not meet the tests in the Act).

Strengthening protections for disclosers

The Bill strengthens protections by clarifying key steps recipients of disclosures should take on receiving a disclosure. This applies to public and private organisations, and to appropriate authorities.

Clarifying receivers' options and obligations

The Bill clarifies that receivers of disclosures may refer the disclosure back to the employing organisation or decide no action is required. This address concerns that recipients may have to deal with disclosures that do not meet the tests in the Act. The Bill clearly sets out what receivers should do.

Clarifying internal procedure requirements for public sector organisations

The Bill requires public sector organisations' internal procedures to describe what is required of those receiving a disclosure, and state how practical assistance and advice for disclosers will be provided.

Clarifying the potential forms of retaliation or less favourable treatment disclosers might face

The Bill provides further protections to those making a disclosure by explicitly identifying the forms of retaliation or less favourable treatment that disclosers might face.

The Bill makes it clear that things other than dismissal can be a basis for a personal grievance or Human Rights Commission complaint.

Accessibility

Many of the points raised in consultation appear to arise from the disjointed way in which some of the Act's provisions are expressed, together with some potentially misleading terminology. The Bill provides a more accessible form for the processes and protections for protected disclosures.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>Scholtens, M, QC., Review of the operation of the Protected Disclosures Act 2000: Report to the Minister of State Services, 2003.</p> <p>Available at: https://www.beehive.govt.nz/sites/default/files/ACFF62C.pdf</p> <p>State Services Commission, Protected Disclosures Act 2000, Views on strengths, issues and challenges, Summary Report: Targeted Consultation in Feb and Mar 2018.</p> <p>Available at: https://ssc.govt.nz/assets/Legacy/resources/protected-disclosures-act-report-consultation-16apr18.pdf</p> <p>State Services Commission, Help shape improvements to the Protected Disclosures Act to maintain New Zealand's high standards of integrity, Review of the Protected Disclosures Act 2000, Options for Change, Discussion document for public feedback, October 2018.</p> <p>Available at: https://www.havemysay.govt.nz/assets/Review-of-the-Protected-Disclosures-Act-2000-Long-Form.pdf</p> <p>State Services Commission, Review of the Protected Disclosures Act 2000, Submissions Summary Report, April 2019. Available at: https://ssc.govt.nz/assets/Legacy/resources/Summary-of-Submissions-for-the-Protective-Disclosure-Act-Reform.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO
<i>Not Applicable. No Parliamentary examination was required.</i>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
Protected Disclosures reform, State Services Commission, 2019. Available at: https://ssc.govt.nz/assets/SSC-Site-Assets/Proactive-Releases/Regulatory-Impact-Assessment-Protected-Disclosures-Reform.pdf	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
Quality Assurance Statement provided on 7 October 2019: “A Quality Assurance Panel with representatives from the Ministry of Justice and the Treasury Regulatory Quality Team has reviewed the ‘Protected Disclosures reform’ Regulatory Impact Assessment (RIA) produced by the State Services Commission and dated October 2019. The Panel considers that the RIA meets Cabinet’s quality assurance criteria, with one comment. The RIA contains limited quantitative analysis about the number of people who might benefit from the reforms and of the cost to organisations. The RIA notes that this is partly the result of privacy protections, and that the State Services Commission is to do further work on a monitoring regime that provides information on the use of the provisions while protecting privacy. If this work is successful, the Panel would expect future policy proposals to be accompanied by more quantitative analysis”.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
No material changes in policy.	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The main expected impacted parties are:</p> <ul style="list-style-type: none"> • Disclosers will benefit from these changes as they would be better informed about who, when, and how they can report 'serious wrongdoing'. The proposals relating to internal procedures for public sector organisations are intended to make feel better supported. • Public and Private sector organisations – these changes may impose a cost on these organisations as they may increase protected disclosures. However, the benefits to organisations partially offset the costs, and once societal benefits are considered this may give an overall benefit to society. • Appropriate Authorities – these changes may increase the number of protected disclosures, but it will be from a low base. 	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
<i>See response to 2.5 above.</i>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Bill affirms the principle of open government in the public service. This principle is consistent with the commitments New Zealand has made under the international Open Government Partnership.

The State Services Commission is unaware of any other international obligations relevant to the policy to be given effect by the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Bill is consistent with the principles of the Treaty of Waitangi. There are no implications to the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	NO
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BORA vet has been completed

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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3.4.1. Was the Ministry of Justice consulted about these provisions?	NO
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Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
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Yes. This Bill adds protection to disclosers by requiring consultation before their details are passed to others.

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
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The Privacy Commissioner’s comments are included in the LEG paper.

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
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Following initial targeted consultation and the release of a Cabinet paper and discussion document, the public consultation process was undertaken between 29 October and 21 December 2018. We received 73 submissions in total and held four workshops with 54 attendees.

The following departments and agencies were consulted on the related Cabinet paper on the first tranche of proposals: Crown Law Office, Department of Conservation, Department of Corrections, Department of Internal Affairs, Department of Prime Minister and Cabinet, Inland Revenue, Education Review Office, Government Communications Security Bureau, Land Information NZ, Ministry of Culture and Heritage, Ministry for Pacific Peoples, Ministry of Primary Industries, Ministry for Women, Ministry for Environment, Ministry of Business, Innovation and Employment, Ministry of Defence, Ministry of Education, Ministry of Foreign Affairs and Trade, Health, Ministry of Housing and Urban Development, Ministry of Justice, Ministry of Social Development, Ministry of Transport, Oranga Tamariki, Te Puni Kōkiri, NZ Customs, NZ Security and Intelligence Service, Serious Fraud Office, Statistics NZ, Pike River Recovery Agency, Treasury, Parliamentary Counsel Office, Police, NZ Defence Force.

During the development of the related Cabinet paper, officials also contacted representatives of the Ombudsman, Controller and Auditor-General, Inspector of Intelligence and Security, Human Rights Commission, Parliamentary Commissioner for the Environment, Independent Police Conduct Authority, Health and Disability Commissioner, Financial Markets Authority, WorkSafe, Local Government NZ, NZ Society of Local Government Managers and Public Service Association to discuss the proposals.

Feedback from consultees was positive regarding most proposed changes, but some consultees, notably the Chief Ombudsman, Ministry of Justice and the Serious Fraud Office, considered that this package of changes does not go far enough to promote the intent of the Act and were keen to see faster progress on establishing a one stop shop, improving redress, monitoring and reporting. These matters are currently proposed for the second phase of work.

<p>A summary of submissions and the submissions themselves were publicly released on 2 August 2019 at http://ssc.govt.nz/resources/consultation-protected-disclosures-act-reform. Consultation has been undertaken on the LEG paper and Bill with the following departments and agencies: Crown Law Office, Department of Conservation, Department of Corrections, Department of Internal Affairs, Department of Prime Minister and Cabinet, Inland Revenue, Education Review Office, Government Communications Security Bureau, Land Information NZ, Ministry of Culture and Heritage, Ministry for Pacific Peoples, Ministry of Primary Industries, Ministry for Women, Ministry for Environment, Ministry of Business, Innovation and Employment, Ministry of Defence, Ministry of Education, Ministry of Foreign Affairs and Trade, Health, Ministry of Housing and Urban Development, Ministry of Justice, Ministry of Social Development, Ministry of Transport, Oranga Tamariki, Te Puni Kōkiri, NZ Customs, NZ Security and Intelligence Service, Serious Fraud Office, Statistics NZ, Pike River Recovery Agency, Treasury, Parliamentary Counsel Office, Police, NZ Defence Force.</p>	
<p>The following non-Crown agencies have also been consulted: the Office of the Ombudsman, Controller and Auditor-General, Human Rights Commission, Inspector-General of Intelligence and Security, the Parliamentary Commissioner for the Environment and the Privacy Commissioner. Their feedback has been incorporated in the Bill where possible.</p>	
<p>Appropriate authorities included in Schedule 2 of the Bill were consulted on their inclusion and how they are described.</p>	
<p>Other testing of proposals</p>	
<p>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</p>	<p>YES</p>
<p>Further consultation with departments and key appropriate authorities.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
The only regulation-making power proposed in the Bill is the empowering provision to amend and update Schedule 2 as required through Order in Council.	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO