Chief Ombudsman's submission

Review of the Protected Disclosures Act 2000

7 December 2018

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Introduction

A review of the Protected Disclosures Act 2000 (PDA) has been necessary for some time. Although New Zealand was one of the first jurisdictions to implement 'whistleblowing' legislation, we have not maintained best practice or implemented the statutory powers or resourcing needed by integrity bodies to ensure effective oversight.

It needs to be said upfront that regulatory reform will be insufficient on its own. It must be accompanied by the wholesale encouragement of a 'speak up' culture, and cross-organisational commitment to creating a positive internal reporting culture, beyond just the report of serious wrongdoing. Much of this change needs to occur at both the system-wide and individual organisation level, in addition to the formal legislative protections for when things go wrong.

In parallel with this, there are some legislative changes that can be made to assist in the effective oversight and monitoring of the protected disclosures regime, targeted to the areas in which organisations most often get it wrong. I have outlined below the important changes that I would like to see, including mandatory reporting by public sector agencies.

I provide this to you in two parts. First, an overview of my role under the current PDA and what I see to be some limitations on this and key issues to be addressed by any proposed reform. Secondly, I have provided my submission on each of the options proposed by the Discussion Document. This submission is based on the work and experience of the Ombudsmen since the PDA came into effect, as well as the growing body of research on the topic of whistleblowing. There will be overlap with the information I have provided in Part One.

I recommend that:

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 be included in the type of information that may form a protected disclosure.
3. Any new legislation retains the current section 6A, which allows the Ombudsman to require information about a public sector organisation's internal procedures, 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;
    - 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 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 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 have received a protected disclosure, the nature of the disclosure, and whether they are 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.

I value this opportunity for the public to have their say on how the law should protect them, and how best they could be made to feel safe in raising these important issues of public interest. I look forward to reading the results of this consultation.

Peter Boshier
Chief Ombudsman

Part One: My role under the PDA & key issues I have identified

Important notes on the Discussion Document

1. At the outset, I would like to expand on two points made within the Discussion Document, for the benefit of members of the public who may have read certain aspects as meaning there is less support available to them than is actually the case.

2. Firstly, it is important that the public knows that if they hold genuine concerns that a member of their organisation is committing serious wrongdoing, but are ultimately mistaken, the protections under the PDA continue to apply to them. Section 6(3) of the PDA provides that such a disclosure must be treated as complying with the requirements for a protected disclosure, for the purposes of the protections provided by the PDA and by section 66(1)(a) of the Human Rights Act 1993.

3. Further, section 6A of the PDA provides that a 'technical failure' to comply with the PDA, or failure to refer to the PDA, does not prevent the disclosure of information from being a protected disclosure. So, if an employee refers their disclosure to the incorrect person within an organisation, it is not prevented from being a protected disclosure.

4. Page 4 of the discussion document appears to suggest that people will not be protected if it eventuates that they are mistaken about the alleged serious wrongdoing. I would strongly encourage the correction of this perception.

5. Secondly, under section 6B of the PDA, my Office provides information and guidance to *both public and private sector employees*. It is important that the public is very clear on the fact that any employee can contact my Office for information and guidance on any matter relating to the PDA, and in particular:

    - The kinds of disclosures that are currently covered by the PDA;
    - The manner in which, and to whom, disclosures may be made;
    - The broad role of each appropriate authority;
    - Available protections and remedies available under the PDA and the Human Rights Act 1993; and
    - Referral processes under the PDA.

6. On a number of occasions, I have provided this advice to private sector employees.

7. Although the average number of inquiries I have received over the past five years is not particularly high (43), this average does not tell the full story. In the last financial year, my office responded to seven requests for advice and guidance (this can include receipt of a substantive protected disclosure) and 72 enquiries, across the public and private sector. This was an increase of approximately 115 percent on previous years. In the year to date, a period of approximately five months, I have so far completed 14 requests for advice and guidance and 32 enquiries. If this trend continues, this will represent a continuing, dramatic increase in substantive requests for advice and guidance.

8. As noted, these enquiries and even substantive disclosures, relate to both public and private sector organisations. In some cases, the issue is as simple as explaining to an individual how the PDA operates, or discussing with them whether the information they wish to disclose relates to serious wrongdoing. In other circumstances, I have referred disclosures to another appropriate authority for consideration, provided advice to individuals who believe they are the subject of reprisal conduct, and obtained and provided details of an organisation's internal procedures.

9. Of course, this increase has coincided with publicity surrounding the Ministry of Transport, and this review. To me, this indicates that continued attention on the right to 'speak up', and public discussion of the protected disclosures regime, contributes significantly not just to awareness, but to the willingness of the public to take those first steps towards disclosure. Having stimulated this discussion, we have a responsibility to follow through with genuine reform.

The Ombudsman's role under the PDA

10. It is worth outlining my role under the current PDA regime, as this points to a number of opportunities for improving oversight arrangements.

11. As noted above, an Ombudsman may provide '*information and guidance*' to an employee on '*any matter*' concerning the Act, either at the employee's request, or at the Ombudsman's discretion. Where an employee notifies the Ombudsman that they have made a disclosure, or are considering making a disclosure, the Ombudsman *must* provide information and guidance on certain matters.

12. This does not apply only to public sector organisations. I have an information and guidance role in respect of both private and public sector disclosures, and the number of individuals making inquiries about the PDA increased from 34 to 73 in the 2017/18 financial year. I also provide advice and assistance to both organisations and employees regarding the confidentiality protections afforded by the Act.[1] I do receive such inquiries, and I have had occasion to investigate complaints about the breach of confidentiality where a protected disclosure has been made.[2]

13. Importantly, an Ombudsman is also an 'appropriate authority' in their own right under the PDA, meaning that employees may make a protected disclosure to the Office, in the circumstances outlined in section 9 of the PDA.

14. An Ombudsman may also '*review and guide*' any investigation of a protected disclosure by a public sector organisation, either at the organisation's request or at their own discretion.[3] However, this relies on the public sector organisation seeking my review, as there is no correlating requirement for organisations to report to me that they are investigating a protected disclosure. In other words, as I am currently reliant on an

[1] Section 19(3) PDA, both private and public sector organisations.

[2] For example, see my Office's 2016/17 Annual Report, page 30. Available online: http://www.ombudsman.parliament.nz/resources-and-publications/corporate-documents/annual-reports

[3] Section 15B PDA.

organisation choosing to inform me that they have received a protected disclosure and seeking my intervention, I am not currently in a position to proactively exercise this power.

15. In terms of the internal procedures that organisations are required to have under the PDA, section 6C of the PDA provides that an Ombudsman can request from any organisation:

- Information about whether the organisation has established and published internal procedures for receiving and dealing with protected disclosures;
- A copy of those procedures; and
- Information about how those procedures operate.

16. Only public sector organisations are required to comply with such a request. I have exercised this power, and do so typically in the event that an employee approaches my Office wanting to make a disclosure in accordance with their organisation's internal procedure, but are hesitant to take the initial step of asking someone within the organisation as to where they might find that document.

17. Once a protected disclosure has been made to a public or private organisation, or appropriate authority in accordance with the PDA, an Ombudsman may also choose to do the following, with the consent the of the discloser:[4]

- Refer the disclosure to an appropriate authority, if it appears that the head of the employee's organisation is involved in the wrongdoing, there has been no action or recommended action within 20 working days of the disclosure, or if there is some urgency or exceptional circumstances warranting referral.
- Refer the disclosure to a Minister of the Crown, where it appears that the organisation has decided not to investigate the matter, or has made no progress within a reasonable time, or having investigated has not taken any action in respect of the matter.
- In certain circumstances, and only in the case of a disclosure relating to a public sector organisation, investigate the disclosure.

18. However, an Ombudsman's ability to escalate a disclosure in this way relies on the employee or organisation approaching my office to inform me of the disclosure. The absence of a positive reporting obligation on organisations means that I cannot proactively identify when an organisation is failing to act within the required timeframe, and make an appropriate decision on whether escalation or investigation by me is required.

19. An Ombudsman may also take over the investigation of a protected disclosure by a public sector organisation, or investigate in conjunction with that organisation, where:

[4] Section 15 PDA.

- The disclosure relates to that public sector organisation (i.e. it is not an investigation being conducted by an appropriate authority);
- The Ombudsman considers that the person to whom the disclosure was made has decided not to investigate, or has decided to investigate but not made progress within a reasonable time, or has investigated but not taken any action; and
- The employee who made the disclosure consents to the Ombudsman investigating; and
- If investigating in conjunction with the organisation, the organisation consents.

20. However, again there is no requirement for the organisation to inform me that a protected disclosure has been received or is being investigated. You will note that it is a recurring theme, that the lack of a positive reporting obligation on public sector organisations means that I cannot effectively exercise this power. It would require an employee who has made a disclosure, which is under investigation, to be aware of this provision and any factors that might mean they should request that I take this course of action. Ideally, the Ombudsman should be notified of protected disclosures that are received, as well as investigations that have been commenced, and apprised of progress so as to determine if or when intervention is required.

21. Finally, the Ombudsmen may also receive reports on the following:[5]

- Investigations escalated by the Ombudsman to an appropriate authority or Minister of the Crown;
- Investigations for which the Ombudsman has provided review or guidance;
- Investigations for which the Ombudsman has otherwise provided information or guidance under the PDA.

22. They may include this information in their annual report, in addition to any information about guidance that the Ombudsman has issued, the inquiries received, and investigations undertaken.

Current activities

23. The Ombudsman's role under the PDA is well complemented by the Ombudsmen Act 1975 jurisdiction, and the constitutional position and function of the Ombudsmen. This was acknowledged as a benefit in the 1995 Ministerial Review, and in the 2003 report that reviewed the operation of the PDA. [6]

24. The latter review resulted in a number of additional functions being conferred on the Ombudsman, however (as noted above) this was not accompanied by all the requisite powers needed to perform that role effectively.

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[5] Section 15C PDA.

[6] *'Review of the Operation of the Protected Disclosures Act 2000: Report to the Minister of State Services'* (12 December 2003), Mary Scholtens QC, at 6.10.

25. Nonetheless, in the time that Ombudsmen have been responsible for performing certain functions under the PDA, several investigations have been undertaken, including one in which the failure of an organisation to maintain confidentiality arose as an ancillary issue. Guidance and information has also been provided to an increasing number of public and private sector employees.

26. I currently have four staff authorised to handle protected disclosures, and requisite processes in place to ensure that only those staff have access to information about any protected disclosure. I have also been engaging with various Australian Ombudsmen, who perform similar, though enhanced, functions under their protected disclosures legislation. You will of course be aware that I have been involved in a research project run by Griffith University; *Whistle While They Work (1 and 2).* This is a highly valuable research project producing data and insights that ought to be taken into account as New Zealand reviews its current regime.

27. In addition to this, I am currently in the process of developing guidance on best-practice protected disclosures policies for both public and private sector organisations. Guidance is currently available for individuals considering making a disclosure, and this will also be reviewed. Future guidance will relate to the conduct of investigations and confidentiality, matters which public sector organisations have previously approached my office for guidance on. I will also continue to provide advice to public sector organisations on the content of their internal procedures.

28. This is intended to assist organisations (both public and private sector) in the development of their internal policies and procedures for receiving and handling protected disclosures. In order to identify areas in which existing procedures might require additional work, or where existing procedures provide for best practice or an innovative approach, I have commenced a 'mini review' of public sector policies, obtaining and reviewing the policies of all 31 government departments/ministries. In the course of my obtaining this information, some departments have also advised me of areas in which they would appreciate additional guidance.

29. Prompted by concern in the past few years about how the PDA is operating, this guidance forms part of a wider programme of work that I am undertaking with the aim of raising awareness and promoting compliance and best practice. As noted above, this will be achieved through the development of guidance that extends beyond the bare requirements of the PDA, informed by research developments and the current practices of public sector organisations. The role of the SSC in embedding this work and fostering the necessary culture will be crucial.

The Ombudsman's future role

30. Options 3 to 5 in the Discussion Document include the establishment of a single oversight body, which would:

    - Provide information and advice to all people working in the public, private, and not-for-profit sectors;

- Perform a 'triage' function, receiving disclosures where parties are unsure of where to go or do not want to report internally, and then direct the information to the most appropriate organisation for investigation; and
- Provide dedicated resource to support and promote good practice, through training and other tools.

31. I already carry out aspects of these functions, and any additional functions in that respect 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.

32. 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.

33. 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.

34. There are a number of additional benefits to placing oversight responsibility with an Ombudsman. This has been recognised in some Australian state jurisdictions, too. Former New South Wales Ombudsman Professor John Macmillan commented in 2016[7] on the benefit of having PDA oversight responsibilities vested in one body:

> *… intelligence gained through performing a particular function can assist with the performance of others. This ensures that limited resources are employed where they are likely to have the greatest impact*

35. In particular, Professor Macmillan identified that the NSW Ombudsman had been able to use these protected disclosures functions to bolster oversight efficiently, and in a number of ways:

[7] *Review of the Public Interest Disclosures Act 1994: Submission of the NSW Ombudsman* (9 August 2016), at page 7.

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 enable wider systemic monitoring or reviews taken as a result.

36. 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.

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

38. 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.

Recommendation One: the oversight function remains with the Ombudsman, with necessary enhancements to statutory functions and powers under new or amended legislation.

Key issues

39. In July 2017, initial results were released from *Whistling While they Work 2* (WWWK2), the trans-Tasman survey of organisational whistleblowing processes and procedures. This represents the first time that information of this type has been available in the New Zealand context. However, the results were disappointing. Out of 10 public sector jurisdictions, the New Zealand public sector ranked close to the bottom at eighth, above only Tasmania and the Northern Territory. A press release from Griffith University[8] described this as confirming the *'weaknesses in the framework established by the New*

[8] Griffith University is the 'home' of the WWWK2 project.

Zealand Protected Disclosures Act 2000, which have led to calls for review of this legislation for some time'. Further:

> *The wide diversity of results among New Zealand agencies – with many scoring well but also many scoring more poorly – tends to suggest agencies are operating without the support and guidance provided under stronger legislative regimes elsewhere.*

40. More recently, results from WWWK2[9] have shown that:

- The nature of whistleblowing is similar across both the public and private sectors, suggesting that management of whistleblowing is not sector-specific, but relates to *'organisational and management dynamics'* that cut across all organisations.
- Whistleblowing is seen by all sectors as critically important, and in a large proportion of cases, reporting of wrongdoing led to positive organisational change and reform.
- Whistleblowers themselves reported less-than-positive outcomes. In a disturbing 81 percent of public sector cases, whistleblowers reported suffering negative repercussions because of having made a disclosure. Forty-two percent of all reporters advised that they were poorly treated by management or colleagues.
- New Zealand respondents to the survey reported a slightly higher incidence of workplace bullying (over 50 percent), and lower levels of both immediate manager support and emotional support. New Zealand respondents had a lower awareness of whistleblowing policies and procedures within their organisations (57.3% reported that they did not know if their organisation had a formal policy), and were less likely to have received related training (only 16% of local authority respondents and 22% of national organisations).
- When a risk assessment is undertaken upon receipt of the disclosure, it is significantly more likely that steps will be taken to proactively manage problems. Disclosers are also more likely to perceive better treatment by colleagues and managers, and face fewer repercussions.
- Awareness of whistleblowing procedures has a significant impact on outcomes, and procedural and interpersonal justice throughout investigation plays a *'critical role'* in outcomes.

41. From this research, the experience that Ombudsmen have had under the current legislation, and our engagement with other jurisdictions, I have identified what I consider to be key issues that need to be considered in light of what New Zealand ultimately seeks from a protected disclosures regime:

- Definition of 'serious wrongdoing';

[9] Brown, A J (eds), *Whistleblowing: New Rules, New Policies, New Vision* (Work-in-progress results from the Whistling While They Work 2 Project), Brisbane: Griffith University, November 2018

- 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]

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[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:

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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.

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[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.