PSA Submission on the Review of the Protected Disclosures Act 2000

7 December 2018

PSA
For a better working life
New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

PSA submission to the Review of the Protected Disclosures Act

About the PSA

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 70,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered. PSA staff and elected delegates work daily to support people to speak up at work.

The PSA is an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU).

PSA comments and recommendations

The PSA welcomes this review and the opportunity this presents to ensure New Zealand remains a world leader in integrity, openness and transparency. Whistle-blowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threaten public health and safety, financial integrity, human rights, the environment and the rule of law. But whistle-blowers

take on high personal risk and may suffer personal and professional disadvantage.[1] Updating the Protected Disclosures Act should help ensure people are better supported to speak up and better protected from reprisals if they do.

This submission responds to many but not all of the questions put in the discussion document.

What non-legislative tools can be used to improve how the regime works?

Within the PSA's areas of coverage there is a need for culture change to better support whistleblowing. Whistleblowing is not separate from but exists within the dynamics of the workplace, shaped by the operating environment and leadership and management systems and practices. And managers are single most important point of disclosure and their actions are crucial to making whistleblowing work[2].

In our experience, there is a wide range of practice and capability between and within public sector organisations in these matters and no public sector organisation, that we are aware of, has an integrated approach to integrity and management approaches and systems.

The PSA would welcome the setting of clear standards for agencies to meet to ensure their disciplinary and management of poor performance practices, and their practices to support positive workplace behaviours and manage negative workplace behaviours, are consistent and integrated with their approach to ensure high integrity and speak-up cultures.

Agencies need to be prompted to move to higher-trust models of management with more upward worker voice, that incorporate more proactive approaches to workplace behaviours that support rather than undermine ethical climate and speak-up cultures. This would include, for example, moving to disciplinary and performance management approaches which draw on restorative approaches and reflect the need for manaakitanga and whakawhanaungatanga in the workplace. It

[1] P. 2 International Principles for Whistleblower Legislation, Transparency International, 2018.

[2] P.3, Whistleblowing: New Rules, New Policies, New Vision work in progress report from the Whistling While They Work 2 Project, Brown AJ, Griffith University, November 2018.

would also involve moving away from performance management practices that include pay increases solely on the basis of managerial discretion as this is a disincentive to speaking up.
It is still the case however that public sector organisations can play a role in supporting community organisations to create speak up cultures where whistle-blowers are protected. As commented recently by the New South Wales Independent Commission Against Corruption[3], the difference identified in Whistling While They Work in capability between the public, private and not-for profit sectors suggests agencies that rely on the private sector and not-for-profit sector to deliver services may need to take steps to compensate for the weaker whistleblowing systems in those sectors. This could include giving external service providers access to agency policies, training materials and reporting channels.

Government agencies could also consider making the existence of a robust ethics and compliance programme a criterion for eligibility to receive access to licences or be awarded public contracts, or as part of due diligence on suppliers and contractors[4].

Does the Act need to change?

Yes. The PSA agrees that there is a need to clarify what can be reported and both strengthen protections for whistle-blowers and the ability for whistle-blowers to talk through concerns with advocates.

The options for change

The PSA supports all the options for change as a suite. Simply issuing guidance on the existing legislation would not in our view create the change needed. We note that research indicates that a requirement to have good whistleblowing policies and procedures in place appears to "have little impact on the organisational support that individual who report wrongdoing actually receive."[5]

[3] P.26, Corruption and Integrity in the New South Wales Public Sector: An Assessment of Current Trends and Events, NSW ICAC, December 2018.

[4] P.33, A Best Practice Guide for Whistleblowing Legislation, Transparency International, 2018.

[5] P.iv, Whistleblowing: New Rules, New Policies, New Vision work in progress report from the Whistling While They Work 2 Project, Brown AJ, Griffith University, November 2018

Changing the definition of serious misconduct

Removing "oppressive and improperly discriminatory behaviour by a public official" from the definition

The discussion document proposes removing "oppressive and improperly discriminatory behaviour by a public official" from the definition of serious misconduct. We do not agree with this.

In our view there is a genuine public interest in the disclosure of such conduct where for example a public official breaches human rights, or otherwise uses their power as a public official to oppress or discriminate. For example, the State Services Commissioner is currently inquiring into how the Ministry of Justice and Department of Corrections dealt with conduct allegations against a Deputy Police Commissioner, presumably because of the public interest in such allegations being properly dealt with by agencies.

In our view limited anecdote gathered from some State Services employers through the targeted consultation about the use of bullying allegations to shield against management of poor performance should not be regarded as sufficient evidence that an undue proportion of those seeking protection for speaking up about oppressive and discriminatory workplace behaviours are doing so to assist in progressing personal matters. In fact, robust evidence from research to which the Commission is a party is that "recognising "mixed" public interest and grievance wrongdoing types, and the significance of "collateral" or informal detrimental effects (not just reprisals) seems key to achieving better reporter outcomes"[6]. Negative workplace behaviours such as bullying are common methods of retaliation and used to deflect attention by wrongdoers. Removing this from the Act risks reducing opportunities for the different pieces of a puzzle to be put together and serious misconduct identified.

Also, it is our view that the justification given in the paper for excluding bullying, that natural justice in bullying situation prevents confidentiality, is not strong. The Protected Disclosures Act itself provides that the protection of confidentiality does not need to be maintained if this is "essential having regard to the principles of natural justice" s19(1)(iii).

[6] P.iv, Whistleblowing: New Rules, New Policies, New Vision work in progress report from the Whistling While They Work 2 Project, Brown AJ, Griffith University, November 2018.

In summary, in our view if publicly funded workplaces are being run in an oppressive and discriminatory manner then this is of legitimate interest to the public, especially as it is these kind of negative, low-ethical-culture working environments that reduce the likelihood of people working in public services speaking out about serious misconduct.

Achieving the exclusion of bullying from the ambit of the Act by removing the reference to "oppressive and improperly discriminatory behaviour", as suggested in the discussion document, would not only the remove ability to be protected when speaking up about oppressive and discriminatory workplace behaviours but also other oppressive and discriminatory behaviour by public officials such as discrimination or oppressive behaviour towards clients or other members of the public. We assume this is not intended.

Extension to concerns about corrupt or irregular use of money or resources in the private and not for profit sector

In our view the legislation should apply to all sectors, including the not-for-profit sector. Research indicates that there is a similar dynamic to whistleblowing in public and private sectors[7] and that it has similar levels of support in all sectors, and so the same legislative regime would seem to be appropriate.

A substantial proportion of the NZ not-for-profit sector is funded by public money and when this is the case there is a particularly strong public interest that these organisations are subject to the same integrity requirements as public sector organisations.

Strengthening the obligations for organisations

We agree with the proposals that organisations to be obliged to have procedures in place for receiving and handling information about alleged serious wrong-doing, and to take action and investigate information about alleged wrongdoing and report back on the outcome.

In addition, we recommend that organisations be given duties to:

- Act to prevent reprisals; and

[7] P.3, Whistleblowing: New Rules, New Policies, New Vision work in progress report from the Whistling While They Work 2 Project, Brown AJ, Griffith University, November 2018.

- Where reprisals take place, to restore the whistle-blower to their previous status and position; and
- Not shield those taking reprisals or cause or permit others to take reprisals.

Enhancing protections for people who speak up

Extending protection to people who have "reasonable grounds to suspect" rather than just "reasonable ground to believe"

We support this. A lower threshold is likely to be more effective. It is rare that one person has all the information needed to identity wrongdoing. As the New South Wales Independent Commission Against Corruption notes, "Information about misconduct does not always surface via an official report or a clearly articulated allegation; it often arises from unplanned or casual conversations or observations. It takes nous to identify and escalate these matters."[8]

More clearly linking to the relevant section of the Human Rights Act that prohibits a person from being mistreated for speaking up if their identity becomes known

Our protected disclosures regime is spread between different pieces of legislation, including the substantive Act, the Human Rights Act and the Employment Relations Act. While we see that there are benefits, and that is a powerful signal to have whistle-blowers as a protected category under the Human Rights Act, it is worth considering whether it would assist effectiveness and uptake to bring all the relevant provisions together under one act. The Health and Safety at Work Act provides a useful example, see for example s90.

Listing the forms of retaliation and requiring organisations to provide tailored support to minimise the risk of these occurring

Again, the description of adverse action in the Health and Safety at Work Act could inform such a list of form of retaliation. Any such list should be non-exhaustive and include protections against all forms of unfair treatments and harms. We would also suggest that, in addition to the harms listed in the discussion document, any such list should include:

- not just "disciplinary sanction" but also "disciplinary action" – which might not necessarily lead to sanction but may be oppressive in itself)

[8] P.28, Corruption and Integrity in the New South Wales Public Sector: An Assessment of Current Trends and Events, NSW ICAC, December 2018.

- withholding of pay or pay increases (for example through discretionary performance pay systems that are endemic in the Public Service)
- imposition of reduced duties or hours
- withholding of flexible working arrangements
- provision of negative work references
- withholding or reassignment of duties
- discrimination in performance evaluation; and
- removal of resources (e.g. budget).

We note that many of these forms of retaliatory action can be very difficult to prove and that there might also be a need for protective monitoring after disclosure. In our view the Act should specify that the burden of proof as to whether action taken against the whistle-blower employee is linked to his or her whistleblowing should rest with the employer.

Clarifying the list of authorities people can report to

We support this. In addition, we would recommend that serious consideration be given to including an ability to report to the public in some limited circumstances. We could follow the British or Canadian example and allow this where there is not sufficient time to make disclosures under other sections of the law, and where the public servant believes on reasonable grounds that the subject matter of the disclosure represents a serious offence, or constitutes an imminent risk to the life, health, or safety of a person or to the environment[9], or where a whistle-blower "reasonably believed he would be victimised if he had raised the matter internally or with a prescribed regulator; he had previously made an internal disclosure of substantially the same information; he believed that the evidence was likely to be concealed or destroyed; or (...) the concern was of an exceptionally serious nature"[10].

[9] Canada Public Servants Disclosure Protection Act

[10] 1998 UK Public Interest Disclosure Act

Being able to report to an appropriate authority at any time, if internal procedures are inadequate or they fear reprisal

We support this and would add the ability to do this where an unreasonable decision was taken not to investigate or the whistle-blower has reasonable cause to believe evidence will be concealed or destroyed, or if there is immediate danger to the public or the environment.

Establishing an independent oversight body

We support this and would add that such a body should have an obligation to ensure personal protection (through the Police) if a whistle-blower has reasonable cause to believe their life or property, or that of their family, is likely to be endangered, and have the power to:

- Investigate in some circumstances
- Sanction breaches of the Act

Sanctions

The discussion paper recommends that there be no sanctions for breaches of the Act. We disagree. In our view this is not an area for light-handed regulation. We note that the Health and Safety at Work Act provides for sanctions of up to $100, 000 for an individual and up to $500, 000 for other persons if adverse action is taken against someone seeking to raise a health and safety matter.

To deter repeated violation of whistle-blower protection it is important to hold retaliators personally accountable and to sanction them[11]. We note that some other jurisdictions allow whistle-blowers to bring a civil law suit against a retaliator for damages[12] or make it a criminal offence to interfere with the making of a disclosure[13].

[11] P.28, A Best Practice Guide for Whistleblowing Legislation, Transparency International, 2018.

[12] Ireland

[13] France

Access to compensation for retaliation

The discussion paper recommends that this should only be through taking a personal grievance under Employment Relations Act, or through the Health and Safety at Work Act. In our view this requires further consideration. These are both very different channels, with different procedural requirements and certainly different remedies available. It is perhaps somewhat ironic that the discussion paper suggests ensuring "personal employment issues" are not captured by the definition of serious misconduct but then recommends using the channels for compensation for personal employment issues as the only channels for compensation.

In our extensive experience, most people would rather walk over hot coals than raise a personal grievance under the Employment Relations Act and all grievances are strongly resisted by employers who automatically take a defensive approach – acting in the perceived interests of the organisation rather than working to establish the facts. All of the burden of proof rests with the employee, which is inappropriate in these circumstances. The Act needs to make employers' protection obligations enforceable by providing rights to compensation both where someone takes detrimental action against a whistle-blower for the specific reason that they blew the whistle, but also where a person or them employer fails to fulfil a duty to protect a whistle-blower from unfair treatment.

Monitoring

We agree that the Act should require all organisation to collect and report information relating to protected disclosures and in our view, there is no justification for excluding organisations from this obligation on the grounds of size or sector.

For further information about this submission, please contact:

Kirsten Windelov
Senior Advisor, policy and strategy
New Zealand Public Service Association
PO Box 3817
Wellington 6140

Phone: 04 495 7633
Email: kirsten.windelov@psa.org.nz