PSA Submission on the Protected Disclosures Bill

to the Education and Workforce Select Committee

January 2021

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

PSA submission to the Education and Workforce Select Committee on the Protected Disclosures (Protection of Whistleblowers) Bill

28 January 2020

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 77,000 members. We are a democratic and bicultural organisation representing people working in: the Public Service including for departments, crown agents and other crown entities, and state owned enterprises; local government; tertiary education institutions; and non-governmental organisations working in the health, social services and community sectors. Te Rūnanga o Ngā Toa Āwhina is the Māori arm of the PSA membership.

The PSA is affiliated to Te Kauae Kaimahi the New Zealand Council of Trade Unions, Public Services International and UniGlobal.

Our values

Solidarity - Kotahitanga
We champion members' interests with a strong effective voice. We stand together, supporting and empowering members, individually and collectively.

Social justice - Pāpori Ture Tika
We take a stand for decent treatment and justice. We embrace diversity and challenge inequality.

Integrity and respect - Te Pono me te Whakaute
Our actions are characterised by professionalism, integrity and respect.

Solution focused - Otinga Arotahi
We are a progressive and constructive union, constantly seeking solutions that improve members' working lives.

Democratic - Tā te Nuinga e Whakatau ai
We encourage participation from members. We aim to be transparent, accessible and inclusive in the way we work.

This submission

This submission begins with a note on PSA involvement in the Joanne Harrison fraud case that in part prompted the review of the Protected Disclosures Act 2000 that has led to Bill. It then summarises our comments and recommendations for changes to the Bill and finally makes recommendations for other changes needed to support the outcomes sought by the Bill.

We recognise the expertise and leadership provided by Transparency International New Zealand and also by Professor Michael Macaulay on the subject matter of the Bill and support their submissions.

The Joanne Harrison fraud case

The review of the Protected Disclosures Act 2000 that has led to this Bill was in part prompted by the fraud committed by Joanne Harrison at the Ministry of Transport. At the time of the fraud and investigation, and following this, the **PSA provided legal advice and support to PSA members** working at the Ministry of Transport. **We have a duty of confidentiality to these members and we cannot discuss this** in any detail in this submission or at the Committee hearing.

We have been the union for people working in the Public Service since 1913. It is our experience that **bullying and oppressive management practices are used to obscure mismanagement, incompetence and fraud**; particularly where the perpetrator of that fraud is in a position of power. **The consultation that was part of the review of the Act discussed the exclusion of bullying and harassment from the definition of serious misconduct** through the removal of "oppressive and improperly discriminatory behaviour by a public official"**. We are very pleased that bullying and harassment are not excluded by the Bill and would have very strong concerns if this was to be proposed in any future amendments to the Act.** Robust evidence from research to which Te Kawa Mataaho (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"[1].

Restructuring, which is an overused tool in the Public Service in any case, **can also be used for this purpose**. This is one of the reasons why we advocate for procedurally fair and transparent restructuring processes that are free from bias and discrimination and which are agreed as part of the negotiation of collective employment agreements. We understand that employers need flexibility in order to achieve change, and we support change to improve processes and outcomes;

[1] 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.

but this must be balanced with the public interest, and the interests of employees, in procedurally fair processes that provide protection from bias, discrimination and potentially retaliatory practices designed to shield serious misconduct.

PSA comments and recommendations for changes to the Bill

The PSA welcomed the review of the Act and the opportunity presented to ensure New Zealand remains a world leader in integrity, openness and transparency. Whistleblowers 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 whistleblowers also take on high personal risk and may suffer personal and professional disadvantage[2]that has significant and long-lasting negative impacts on their, and their family's, wellbeing and earnings.

This updating of the Protected Disclosures Act 2000 should address some of the more confusing or unhelpful aspects of the current Act. However, **in our view it does not fundamentally improve the current regime and further steps are needed if the Bill is to achieve its purpose.** We have asked ourselves: If the Bill was in place at the time of the Joanne Harrison fraud, would this have resulted in greater likelihood of staff coming forward with information or concerns and being supported and protected by the Ministry of Transport? We are not confident that the changes proposed by the Bill would be enough to have made a significant difference.

We understand that the Commission has recommended to the Minister a second tranche of reform to follow this Bill. In our view some of the matters proposed to be covered in the second tranche should be bought forward with urgency and **we recommend the Committee ask the Commission to go back to the policy process and present them with a strengthened version of the Bill which includes the changes outlined below.**

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

Changes recommend

1. Clarify and complement the proposed definition of serious wrongdoing with a list of examples

While we prefer the proposed definition of serious wrongdoing in clause 10 to the definition in the current Act, **we support Professor Michael Macaulay's submission** that this could be complemented by the inclusion of an additional schedule, mirroring schedule 2, to show **concrete examples**, of what serious wrongdoing looks like**.** Dr Macaulay is well placed to advise the Committee on which examples should be included.

2. Make the requirements of *Cl 12: What the receiver should do* obligations, rather than options

Cl 12 is guidance only and confers no legal right or obligation. We believe that it should and that in cl 12(1) **"should" should be changed to "must"**. Without clarity of what is required of organisations, the door is left open for bias or retaliation to shape the process followed.

3. Further extend requirements for private organisations

Australia has recently required all public companies (large proprietary companies and proprietary companies that are trustees of registrable superannuation entities) **to have a whistleblower policy** available to officers and employees. Such policies must include who, how, specific legal protection, investigation procedures, fair treatment, and clear accessibility to this information.

Whistleblowers in the Australian private sector can also disclose on matters where there is an 'improper state of affairs or circumstances'. **This is in the public interest**; as Transparency International notes, "(t)his sort of reporting can indicate a systemic issue that the relevant regulator should know about to properly perform its functions. It may also relate to business behaviour and practices that may cause consumer harm."[3]

We recommend that the Bill is amended to include these requirements.

4. Establish an independent oversight body

The Bill does not do this, and the Commission recommends consideration of this in the proposed second tranche of reforms. Having an independent, accessible and resourced oversight body with well-trained staff would be a game changer and is international best practice. In our view this should be bought forward and incorporated in the current Bill.

[3] https://www.transparency.org.nz/blog/protected-disclosures-upate

A "one-stop-shop" for oversight, advice and guidance, and for sanctions was strongly supported in the consultation process and in our view the establishment of such a body should be enabled by the current bill, rather than being kicked for touch. Such a body should have the power to:

- Investigate in some circumstances
- Sanction breaches of the Act; and
- also 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.

Having an independent body with oversight of, and ability to investigate, the robustness of agencies' cl12 receiver obligations, and in particular their decision under cl12(1)(b) whether or not to investigate, is particularly important. This would have greatly assisted in the Joanne Harrison case where Ms Harrison was emboldened by the receiver's dismissal of the disclosure made by our member.

5. Include key elements of best practice in Part 4, Sub part 3 – special rules for all public sector organisations, including a requirement to remediate

Cl 27 requires public sector organisations to have internal procedures. These should be amended to **require key elements of best practice** as identified by Professor Michael Macaulay in his submission including:

- Dedicated support persons for all people making reports
- Risk assessment practices (which should also be specified in s. 12) that will help protect the reporter and ensure that natural justice is developed
- Appropriate triage for reports
- Consistent investigative protocols
- Communication strategy that offers data on reports, as well as just the processes
- Education and training to be mandatory for all staff
- Appropriate and transparent remediation strategy.

On remediation: The Bill provides no change to the current avenue for remedies, which is through the employment law framework. This framework is intended to remediate (by way of damages, reinstatement and so on) but does not do so adequately in many cases; due for example to reduction of remedies due to considerations of contribution and full legal costs almost never being awarded. A remediation strategy would include a description of how the organisation will remediate a discloser who has suffered retaliation or victimisation or breach of their confidentiality, including

how they will be restored to their previous standing and position within the organisation without disadvantage.

6. Include sanctions and a clearer pathway to access compensation for retaliation or victimisation

The Bill does not include sanctions for breaches of the Act. We strongly recommend that it should. A bill that prohibits behaviour but provides inadequate sanctions or compensation will fail to achieve its aims. In our view this is not an area for light-handed regulation.

The only access to compensation provided by the Bill is through avenues designed to deal with issues experienced by individuals – personal grievances via the Employment Relations Act 2000 (ERA), a breach of human rights under the Human Rights Act 1993, or through the Health and Safety at Work Act 2015 (HSWA). Only those who are not employees suing their employer can use the civil procedures under the HSWA (cf. s 95(4) HSWA) and otherwise personal grievance provisions apply.

These are all very different channels, with different procedural requirements and certainly different remedies available. More consistency is required across the various regimes in terms of procedural requirements and remedies and penalties. For example the Health and Safety at Work Act 2015 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, while compensation awarded by the Human Rights Commission or as a result of a personal grievance is of a different scale.

For a range of reasons, personal grievances under the ERA are regarded by complainants as the worst jurisdiction to seek redress or compensation under; there is a 90 day limitation, reduction in remedies for contribution, and generally low awards.

In our extensive experience, most people would rather walk over hot coals than raise a personal grievance 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 or looking to uncover further wrongdoing. While we appreciate that amendments proposed in Schedule 3 to the Employment Relations Act (proposed 110B(2)) shift the burden of proof to the employer, this will not be enough. The reality is that the resources of the organisation are pitted against the individual.

To deter repeated violation of whistleblower protection it is important to hold retaliators personally accountable and to sanction them[4]. We note that some other jurisdictions allow whistle-blowers to bring a civil lawsuit against a retaliator for damages[5] or make it a criminal offence to interfere with the making of a disclosure[6].

In addition, personal grievances are by their nature about personal employment issues. While it is true that with retaliation or victimisation to prevent or in response to whistleblowing it is a person who suffers this, this is also an organisational and systems issue that the organisation itself needs to take responsibility for. If the issue is raised via a personal grievance this is extremely unlikely. Most personal grievances (80%+) are resolved in mediation and most mediation settlements are confidential.

The Act needs to make employers' protection obligations enforceable by providing sanctions and rights to compensation both where someone takes detrimental action against a whistleblower (retaliates) for the specific reason that they blew the whistle or to prevent them from doing this, but also where a person or them employer fails to fulfil a duty to protect a whistle-blower from unfair treatment or fails to remediate or compensate them from the disadvantage they suffered as a result.

7. Remove the higher bar for access to compensation set by proposed consequential Employment Relations Act amendments

The consequential amendments proposed in Schedule 3 to the Employment Relations Act 2000 must be reconsidered. These include a clause that introduce a new legal test to the definition of retaliation and so raises the bar for access by whistleblowers to redress through a personal grievance. **This should be removed from the Bill**.

In Schedule 3, proposed clause 110B(2) of the Employment Relations Act "an employer may be found to have retaliated or threatened to retaliate *only if the protected disclosure was a substantial reason* for the employer's relevant actions or omissions". S111 of the Employment Relations Act then provides that the meaning in employment agreements of "retaliation" would be determined by the higher bar set by proposed cl 110B(2), rather than the Protected Disclosures Act. In our view,

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

[5] Ireland

[6] France

this will create an unnecessary hurdle to people in an already vulnerable situation taking a decision to access compensation through challenging their employer.

We strongly recommend deleting proposed clause 110B(2) and also replacing proposed 110B(3) with a rebuttable presumption clause – an example of which is already provided within the Employment Relations Act at s119(2).

Other changes needed to support the aims of the Bill

Public Service agencies can make changes that don't require legislation and will support the aims of the Bill. We urge the Committee to include recommendations on these matters in its report so that agencies have a clear mandate to make these changes.

8. Change needed to approach to culture and people management

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 both the operating environment and leadership and management systems and practices. And managers are the single most important point of disclosure - their actions are crucial to making whistleblowing work[7].

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 people management approaches and systems.

The **PSA has welcomed the introduction by Te Kawa Mataaho of the Speaking Up and Positive and Safe Workplaces Model Standards** which have helped by setting clear standards for agencies to meet to ensure 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 have some way to go to fully implement these standards.**

Further changes to practice and approach are needed to support high integrity cultures that both reduce the need for whistleblowing and support speak-up cultures within positive and safe workplaces.

[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.

Agencies need to be prompted to move to higher-trust models of management with more upward worker voice. They need to move to exemplar approaches to people management that incorporate more proactive approaches to workplace behaviours and management of discipline and performance that support, rather than undermine, ethical climate and speak-up cultures.

We ask the Committee to support our call for agencies to move to workplace behaviours, disciplinary and performance management approaches that draw on restorative and Te Ao Māori approaches and reflect and build manaakitanga and whanaungatanga in the workplace.

9. Support private and community organisations to make the change needed

The Bill extends the application of the Act to private organisations carrying out public functions, duties or powers. **Public Service agencies can play a role in supporting the private and not-for-profit organisations they fund to create speak up cultures where whistleblowers are protected.**

The New South Wales Independent Commission Against Corruption[8] comments that 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.

MBIE should be mandated to amend the government procurement rules to make 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[9].

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

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

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: 04 816 5065
Email: kirsten.windelov@psa.org.nz