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Protected Disclosures Act Review
State Services Commission
Wellington

By email: submissions@havemysay.govt.nz

Re: Protected Disclosures Act review – options for change

1 The New Zealand Law Society welcomes the opportunity to comment on the discussion document *Review of the Protected Disclosures Act 2000 – Options for Change* (discussion document).

2 The Law Society agrees with the State Services Commission (Commission) that a review of the Protected Disclosures Act 2000 (Act) is timely. This submission identifies some issues for the Commission to consider in its review. The comments are intended to assist with providing clarity for those affected by the Act, while ensuring the Act remains workable in practice.[1]

Q1. Do you agree with the objectives and risks outlined? Please provide a reason for your answer.

3 The Law Society agrees with the objectives and risks outlined by the Commission. Some additional comments are provided below.

4 Currently section 5 states that the purpose of the Act is to promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation, and by protecting employees who make such disclosures.

5 Despite its broad public interest purpose, in key areas the Act is directed primarily at public sector organisations. For example, the Act defines "*serious wrongdoing*" to include misuse of funds in the public sector and any oppressive or improperly discriminatory behaviour by a public official.[2] It requires only a public sector organisation to establish internal procedures.[3] It involves the Ombudsmen when investigating public sector matters.[4] Extending the machinery in the Act to other organisations could assist in achieving the Act's overall

1 On some points the Law Society has no comment to make, and the submission therefore does not respond to questions 2, 11, 13, 21, 24, 33, 35 and 36.

2 Section 3.

3 Section 11 requires every public sector organisation to have appropriate internal procedures for receiving and dealing with information about serious wrongdoing in or by that organisation. No such requirement exists for private organisations.

4 Although section 6B says an Ombudsmen may provide information and guidance to any employee on any matter concerning the Act, the Ombudsmen do not generally investigate matters outside public sector organisations.

purpose. Alternatively, section 5 could change to reflect a shift in focus to primarily the public sector.

6 The Law Society agrees with the Commission that the Act should focus on exposing serious threats to the public interest, "by clearly focusing on conduct in the workplace that poses the biggest threat to the public interest – for example, criminal activity of any kind or a danger to public health and safety".[5]

7 To promote such reporting, the Act must be easy to understand and use. This requires clear definitions for key terms such as "*serious wrongdoing,*" along with easily accessible guidance on what and how to disclose to whom and when.

8 Promoting fairness requires the Act to balance important competing interests: it needs to facilitate reporting without fear of reprisal, whilst not encouraging unfounded or vexatious claims. Ensuring confidentiality for individuals who disclose must be balanced against allowing natural justice for those responding to a disclosure, as well as an employer's obligation to comply with other legislation requiring an organisation to disclose details.[6]

Q3. Do you agree with the characterisation of the key problems? Please provide a reason for your answer.

9 The Law Society agrees with the characterisation of the key problems, as set out below.

Problem 1: People don't always know when to use the law

10 The Act must be easy to use and understand for those looking to it for its protection.

Public / private sector coverage

11 As noted above, currently the Act treats public and private organisations differently, which can be confusing. The Commission's consultation to date indicates that individuals in the private sector are often uncertain whether the Act covers private organisations.[7]

Workplace bullying and harassment

12 It would also be helpful to have more clarity about the best avenue for addressing allegations of workplace bullying and harassment. The Law Society agrees with the Commission that concerns that are valid but that are not serious threats to the public interest – such as workplace bullying or harassment – should be referred to other sources of support and advice (as discussed at paragraph 14 below), and the Act should focus on exposing serious threats to the public interest.[8]

13 Currently the definition of "*serious wrongdoing*" in the Act could include bullying and harassment of an individual in the public sector (serious wrongdoing includes an act, omission, or course of conduct by a public official that is "*oppressive*" or "*improperly*

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5 *Review of the Protected Disclosures Act 2000 – Options for Change*, at p4.

6 For example, section 4 of the Employment Relations Act 2000 entitles an employee to all the information relevant to a decision that could adversely affect the continuation of their employment. Generally, this requires an employer to disclose a complainant's identity, with limited exceptions. Blanket confidentiality would be difficult to reconcile with existing employment obligations.

7 Note 5, at p8.

8 Note 5, at p5.

discriminatory"), and we are aware anecdotally that the protected disclosures process has been used for disclosures of this nature.

14 However, every organisation has an obligation under the Employment Relations Act 2000 (ER Act) and Health and Safety at Work Act 2015 (HSW Act) to deal with bullying and harassment, and Worksafe has produced resources for addressing this risk.[9] The ER Act and HSW Act require allegations of bullying and harassment to be dealt with, and they are better placed to do so than the Act. (The additional protection of confidentiality provided by the Act is easily eroded due to the obligations to a person complained of to disclose the complainant's identity as part of a fair process.[10] This means limited confidentiality can be given to someone who makes a protected disclosure.)

Key definitions – "employees"

15 Other key definitions could be clarified. As noted in the discussion document, "contractors, volunteers, board members and other people who are not 'formal' employees of the organisation can find it particularly hard to know what compensation might be available to them."[11] Using the word "*employee*" in the Act may have given the misleading impression that contractors and volunteers are not covered, even though the section 3 definition of "employee" includes contractors and volunteers. Instead, using the term "*workers*" (widely defined in the HSW Act to include contractors) could convey a clearer picture of who is able to make a protected disclosure under the Act, while retaining a connection to the workplace. This reframing could assist in clarifying that the Act is not just for a narrowly defined group of 'employees'.

Problem 2: People are scared that they will be mistreated or lose their jobs

16 As noted above, disclosing an individual's identity is essential for natural justice. It is hard to conceive of a situation where someone accused of serious wrongdoing would not be entitled to know the identity of the complainant. This means there is little protection for someone who would prefer to not to have their identity revealed. In many cases such persons may choose not to report at all.

17 In addition, there appears to be insufficient protection against adverse treatment as a result of making a protected disclosure. Although the Act provides immunity from civil, criminal or disciplinary proceedings,[12] there is limited ability to prevent or obtain redress for adverse actions (such as dismissal, victimisation or other disadvantage) resulting from a protected disclosure. In the case of employees, there is the ability to bring a personal grievance for an employee who has suffered retaliatory action,[13] or for victimisation under the Human Rights Act 1993 (HR Act) for treating or threatening to treat a person less favourably by reason of

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9 For example: https://worksafe.govt.nz/topic-and-industry/bullying-prevention-toolbox

10 Section 19 of the Act says an organisation must use their "best endeavours" not to disclose information that might identify the person who made the protected disclosure, unless an exception applies such as it being essential to the effective investigation or principles of natural justice.

11 Note 5, at p8.

12 Section 18.

13 Section 17.

having made or being connected with someone who has made a protected disclosure.[14] This may be of little comfort to someone who has been dismissed, disadvantaged or victimised. Strengthening obligations on organisations to prevent adverse action against an employee may be necessary.

18 It is also important to note that the section 17 personal grievance provision applies only to employees within the meaning of section 6 of the ER Act, which excludes contractors and volunteers.

19 Individuals might be more confident to disclose if the protections that do exist were outlined more clearly in the Act or a proactive obligation existed for organisations to protect employees (widely defined to include contractors and volunteers) from adverse action resulting from disclosure. Having to look to other legislation or seek legal advice to know what protections exist creates an unnecessary hurdle for anyone who is reluctant to disclose in the first place and may discourage them from doing so.

Problem 3: People don't always know who to report concerns to inside their workplace

20 As noted in the discussion document, the Act only requires a public sector organisation to have internal procedures for receiving and dealing with information about serious wrongdoing.[15] (These procedures include details about who to disclose to, and when to escalate a disclosure to an appropriate authority.) If there is no legal requirement for private sector organisations to have such procedures, there is little incentive to do so.

21 Even for public sector organisations where procedures are required and have to be published widely "at regular intervals" (undefined), there is no requirement for this to be frequent or effective.

22 If all organisations were required to implement and advertise internal procedures, it could increase awareness of the Act and its protections, encouraging reporting. It is likely smaller businesses would require support in creating and implementing procedures.

Problem 4: People find it hard to know which external body they can go to, and when

23 As noted, private sector organisations are not currently required to publish procedures about how to report and to whom. Consequently, most individuals may not know of their ability to make a disclosure, unless an organisation has proactively put reporting procedures in place.

24 Even in a public sector organisation, it is not clear when or who to escalate a disclosure to; the list of appropriate authorities in the Act gives no guidance beyond naming them.[16] It would be useful for the Act or guidance documents to identify the types of disclosures the authorities deal with, and information about when it is appropriate to escalate a report to an appropriate authority.[17]

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14 Section 20 of the Act refers to section 66 of the Human Rights Act as no longer applying if an allegation is false or made in bad faith.

15 Note 5, at p9.

16 Section 3(1).

17 Section 9(1)(b)-(c): such as urgency or if no action is taken after 20 working days.

25 It would be useful also to highlight that the media is not an appropriate authority. In addition, it is important to highlight that an individual who formerly had the protection of the Act may later lose it if they disclose to the media after feeling dissatisfied with the action (or lack of action) taken by the organisation or appropriate authority.[18]

Problem 5: What we don't know – how big the problem is

26 The Law Society agrees with the Commission that the "lack of information makes it hard to quantify how big the problem is and how much it affects workplaces across New Zealand".[19] Reported cases involving protected disclosures in the employment jurisdiction are rare. This may be unsurprising given the number of cases that settle confidentially at mediation. It is likely parties in cases involving a protected disclosure will be especially motivated to retain confidentiality.

27 It would be useful to know how many people who make protected disclosures, raise and resolve related personal grievances. This would give some indication as to whether the regime is working effectively i.e. people are using it and resolving any concerns resulting from disclosures. MBIE's Mediation Services collect data already. One option would be to explore the possibility of expanding the information collected for this purpose, to include any protected disclosures (provided collection retained confidentiality).

Q4 In your view, what other problems and challenges should be considered? Where possible, please provide evidence or information to support your view.

28 Currently there appears to be no clear way for individuals to be advised of the outcome of an investigation into a protected disclosure and to challenge it, beyond disclosing to an Ombudsman (and this is reserved for the public sector). It would be useful to have an avenue for an employee to challenge any decision made or at least for the outcome to be communicated and commented on (which may prevent the media being used as a last resort).

Q5 How could these problems (either as outlined here or in your answer to the previous question) affect different groups of people in New Zealand?

29 Individuals working in private organisations are less likely to have access to procedures and information about the Act, and therefore are less likely to know how to make a protected disclosure.

Q6 How urgent is the need for change?

30 Without reliable information about how the Act is being used, it is difficult to know how urgent the need for change is.

Q7 What other non-legislative tools could we use to improve how the regime works?

31 Providing resources including template policies and online information would increase awareness and compliance. Educating organisations and individuals at webinars and

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18 See for example, *Bracewell v Richmond Services Limited* [2014] NZEmpC 111.

19 Note 5, at p9.

seminars is also a useful tool to increase awareness of how the regime works and provides opportunities for questions and concerns to be addressed.

Chapter 5: Options for change

Qs 7-10 Other non-legislative tools to improve the regime, should the law be changed, and which option will be most effective in achieving the desired outcomes?

32 Providing resources to organisations including template policies and online information would help increase awareness of and compliance with the Act. Educating organisations and individuals at webinars and seminars is also a useful tool to increase awareness of how the regime works and creates opportunities for questions and concerns to be addressed. Both legislative and non-legislative tools could be used to improve the regime.

33 Option 1 would provide a strong foundation for promoting use of the Act and assessing its effectiveness. The Commission could then consider options 2, 3, 4 and 5. When more is known, it will be better understood whether the costs involved in these other options are warranted.

Option 1 – Strong Foundations

Q12 What do you see as the main benefits, costs and risks of this option (option 1)?

34 Option 1 is intended to remove confusion and ensure organisations have good procedures in place to encourage reporting of serious wrongdoing in the workplace. In response to the points made in the discussion document,[20] the Law Society notes the following:

a Providing more information and guidance to organisations would support the effective use of the Act, with or without any changes to the Act itself.

b Clarifying the definition of "*serious wrongdoing*" in the ways suggested by the Commission could assist people in understanding and using the legislation.[21] However, we note the proposed inclusion of a section to make it clear that people cannot seek the protections in the Act for concerns that relate "solely" to a personal employment grievance or dispute, may be difficult to prove; "primarily" may be easier to understand and apply.

c Applying all aspects of the Act to all organisations (with possible exemptions for smaller employers and discretion as to detail) would increase awareness of the Act. Good guidance on model procedures, and requiring reporting back on progress and the outcome, would help ensure that individuals who make protected disclosures are aware of the applicable protections and are kept informed.

d Clearly referring in the Act to applicable protections in the HR Act would also help increase awareness of the legislation. Identifying examples of retaliation that an organisation is required to proactively prevent would be helpful but would need to be linked with the options an employee has if retaliation occurs.

e Finally, information should be provided so that individuals know which reporting authority to direct their disclosure to. The list of reporting authorities in the Act

20 Note 5, at pp 12-13.

21 Note 5, at p12.

could be enhanced by providing examples of the types of complaints that each authority respectively deals with, how to contact them (along with who is not an appropriate authority – for example the media), and when it is appropriate to do so.

Q14 Can you think of any examples of serious wrongdoing that should be covered by the Act, but would fall outside the proposed definition? Please provide specific examples, where possible

35 Individuals may have different views about what constitutes "reasonable grounds" for making a protected disclosure. However, if people could share their concerns confidentially with an appropriate person in a preliminary way, to establish whether it could qualify as a protected disclosure, then examples of serious misconduct that are finely balanced would be more likely to be reported.

Q15 What do you think the impact of new requirements for organisations would be on small and micro-businesses and non-governmental organisations? Do you think an exemption should apply? If yes, please provide details.

36 In this context resources are relevant to what can reasonably be expected of an organisation. Costs could increase disproportionally, justifying an exemption. Such an exemption would be consistent with the current (or proposed) position in relation to smaller businesses in the employment context. For example:

a Resources are relevant to whether an employer has treated an employee fairly and reasonably in all the circumstances;[22]

b Employers with fewer than 20 staff may in future be able to use (and have in the past been able to use) a trial period provision, to the exclusion of larger employers;[23] and

c Employers with 19 or fewer staff are exempted from being automatically required to accept specified categories of employees in a restructuring situation.[24]

Q16 How would new obligations for employers work alongside existing requirements (e.g. health and safety, employment relations)?

37 As set out above, there is some overlap already, which changes to the law and supporting tools could reduce or address. Employment law is often informed by other areas of law such as privacy. Employers would need to be aware of any changes to ensure they are able to comply. Good resources and education would assist this.

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22 Section 103A(3)(a) of the ER Act says the Authority or Court must consider whether, having regard to the resources available to the employer, the Employer sufficiently investigated allegations against an employee before dismissing or taking other action.

23 Section 67A and 67B of the ER Act currently allows all employers, irrespective of size, to use trial period provisions. Clause 29 of the Employment Relations Amendment Bill 13-3 would restrict this to small to medium sized employers, defined to be an employer who employs fewer than 20 employees (Note: this bill had its third reading on 5.12.18 and is currently awaiting Royal Assent).

24 Section 69CA of the ER Act allows an employer to provide an exempt employer warranty in a restructuring that would otherwise require them to employ transferring employees such as cleaners and caterers.

Q17 What support would help organisations fulfil their obligations? Where possible, please provide specific examples.

38 Smaller organisations especially would benefit from having resources such as template policies and frequently asked questions freely available online.

Q18 In your view, what is the necessary lead-in period for organisations in your sector to implement the changes under this proposal? Where possible, please tell us how you have arrived at this timeframe.

39 The Law Society suggests one to two years would be needed to enable organisations to prepare. For employers, an appropriate lead-in period would enable managers to consult on, and negotiate, any updates or changes to existing employment agreements and/or procedures.

Option 2 – Reporting to an Appropriate Authority

Q19 What do you see as the main benefits, costs and risks of this option (option 2)?

40 Option 2 expands on option 1 by also making it easier for people to report concerns to an appropriate authority at any time. Benefits of this option include encouraging an otherwise reluctant employee to disclose if they believe the appropriate authority would be more objective and independent and ensuring an impartial consideration of the disclosure.

41 This option could however discourage organisations from being primarily responsible and ideally self-policing and motivated to manage protected disclosures effectively. Allowing employees to report to an appropriate authority immediately may see organisations lose an opportunity to effectively manage concerns internally. An appropriate authority may have insufficient knowledge of the workplace, relevant to make a good assessment of whether serious wrongdoing has occurred.

Q20 What changes could be made to improve the effectiveness of this option?

42 Reserving reporting of disclosures directly to an appropriate authority for situations that warrant it, such as urgency, inaction or dissatisfaction with the organisation's response, may help to improve the effectiveness of option 2.

Option 3 – Stronger Oversight

Q22 What do you see as the main benefits, costs and risks of this option (option 3)?

43 Option 3 goes further to provide a "single port of call for advice on when, and how, to use the Act".[25] As in the case of option 2, benefits of this option include encouraging an otherwise reluctant employee to disclose if they believe the appropriate authority would be more objective and independent and ensuring an impartial consideration of the disclosure. Having an independent authority overseeing and being a single port of call, would be useful for providing impartial advice, especially around whether a complaint should be made and how. However, the risks of this option include that the authority may not know the relevant workplace context, and organisations may abdicate responsibility. It would also increase costs for the public sector.

[25] Note 5, at p16.

Q23 What changes could be made to improve the effectiveness of this option?

44 A separate dispute resolution service could be helpful where an investigation has been undertaken but one or more parties are dissatisfied with the process/outcome.

Option 4 – Monitoring for the Public Sector

Q25 What do you see as the main benefits, costs and risks of this option (option 4)?

45 Option 4 would include the option 3 improvements and introduce new obligations on public sector organisations to collect information relating to protected disclosures. As noted in the discussion paper, more information about what is happening in practice would help identify areas for improvement but would also involve additional cost for the public sector.

Q26 What changes could be made to improve the effectiveness of this option?

46 Anonymous and/or confidential reporting may incentivise greater disclosure.

Q27 In your view, what should the public sector be asked to report on?

47 As outlined in the discussion document, it would be useful to know the number and type of disclosures made and number of investigations triggered or underway. It would also be useful to know how many reports resulted in claims of unfair treatment such as personal grievances and were resolved.

Q28 How could we use this information to drive improvements?

48 Problem areas could be targeted for training and scrutiny.

Option 5 – Monitoring for all organisations

Q29 What do you see as the main benefits, costs and risks of this option (option 5)?

49 Option 5 goes further to require reporting obligations for all organisations including private and not-for-profit. Requiring reporting in the private sector would help to provide a better idea of what is going on for all organisations and would otherwise have the same benefits, costs and risks associated with the public sector, as noted above.

Q30 What changes could be made to improve the effectiveness of this option?

50 Collecting data from a range of sources could be helpful for the oversight body, for example via Mediation Services as an alternative. It would not be a complete picture, but it would be useful.

Q31 Do you think small businesses and community, voluntary, and not-for-profit organisations should be exempt from the reporting obligations that would be introduced under this option? Please provide a reason for your answer.

51 Due to the reduced resources available to a smaller employer, an exemption could be justified and would also enable resources to be focused on other areas. Smaller employers could still be asked to voluntarily comply if they choose to.

Q32 In your view, what should employers be asked to report on?

52 Refer to our answer to Q27 and Q47 above.

Changes not proposed

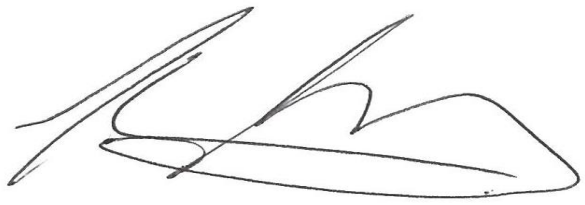
Q34 Do you agree with our rationale for not introducing changes in some areas? Why do you think this?

53 The Law Society agrees with the Commission's rationale for not introducing changes in some areas. It would be counterproductive to extend protections to people who report directly to the media. This would tend to undermine the confidentiality of the process for someone who makes a protected disclosure, as well as preventing the organisation from having a chance to investigate and rectify concerns internally. It could also undermine the integrity of any later investigation.

Conclusion

54 This submission has been prepared by the Law Society's Employment Law Committee. If further discussion would assist, please do not hesitate to contact the committee convenor Maria Dew QC, via the Law Society's Law Reform Adviser Amanda Frank (amanda.frank@lawsociety.org.nz (04) 463 2962).

Yours faithfully



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