New Zealand Law Society
Te Kāhui Ture o Aotearoa

Protected Disclosures (Protection of Whistleblowers) Bill

28/01/2021

Submission on the Protected Disclosures (Protection of Whistleblowers) Bill

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Protected Disclosures (Protection of Whistleblowers) Bill (**Bill**).

1.2 The Bill proposes to replace the Protected Disclosures Act 2000 (**Act**) to continue to promote the public interest by:

a. facilitating the disclosure and timely investigation of serious wrongdoing in or by an organisation; and

b. protecting the people who disclose in accordance with the provisions of the Bill.[1]

1.3 This submission sets out the Law Society's comments and recommendations on a range of practical issues to ensure the proposed Bill is clear and workable in practice and achieves its stated objectives.

1.4 The Law Society does not wish to be heard.

2 Clause 7 – Overview

2.1 Public consultation has highlighted that both organisations and disclosers are unclear about how to make a disclosure internally under the Act, and some organisations are unclear about how to respond.[2] In addition, it has been identified that disclosers fear speaking up because they lack confidence in the protections available to them.[3] To address this, clarity in drafting is essential. This is emphasised by the statement in the clause-by-clause analysis of the Bill that the intention of the Bill is to "create an accessible Act that is fit for purpose and easy for non-lawyers to use".

2.2 Many potential disclosers will refer to the overview diagram set out in clause 7 of the Bill for guidance. It is therefore essential that this diagram is both accurate and easy to navigate. The Law Society submits that a number of changes could be made to the diagram to improve accuracy:

a. The overview flowchart does not currently make any reference to clause 9 (which provides that disclosures made in bad faith do not attract the protections provided by the Act).

b. Clause 7(2)(a) states that the receiver "must" keep the discloser's identity confidential. However, the cross-referenced clause 16 only requires that receivers use "best endeavours" to keep identifying information confidential and also provides for a number of instances where this information need not be kept confidential. This is a key point which could result in disclosers being unaware their identity may be disclosed to an alleged wrongdoer as part of an effective investigation or to comply with the rules of natural justice. Having clear criteria and guidance for organisations

1 Clause 3 of the Protected Disclosures (Protection of Whistleblowers) Bill (**Bill**), and the Bill's Explanatory Note, at p 1.

2 Bill's Explanatory Note, at p 1.

3 Bill's Explanatory Note, at p 1.

and ensuring that disclosers are aware of the extent to which confidentiality can be protected is key to instilling confidence in the protections provided by the Bill.

c. Clause 7(2)(g) states that the public sector organisation must provide practical assistance and advice to a discloser. However, clause 27(2)(c)(vi) only requires that there be a policy in place with a description of how that support will occur.

d. The overview could also better guide potential disclosers by stating that the Bill would protect a discloser who makes a Protected Disclosure (in accordance with clause 9) from retaliation by their employer (in accordance with clause 19), less favourable treatment by another person (in accordance with clause 18) and victimisation (in accordance with clause 20). The Act does not guarantee that their disclosure will be investigated or that any particular outcome will be reached in respect of their concern.

Recommendation

2.3 The Law Society recommends the following changes (in red font):

a. The overview flowchart be amended to include a step that asks if the reader is making a protected disclosure in accordance with clause 9;

b. The overview flowchart be amended to state "This Act protects you from retaliation and victimisation (see sections 18 – 20) if you disclose the serious wrongdoing to your organisation or an appropriate authority at any time (as per section 11; see also section 13);"

c. Clause 7(2)(a) be amended to read "unless certain limited exceptions apply, the receiver must use reasonable endeavours to keep the discloser's identity confidential (*see* **Section 16**)"; and

d. Clause 7(2)(g) be amended to state "a public sector organisation must have a policy in place about how it will provide practical assistance and advice to the discloser in relation to serious wrongdoing in or by that organisation (*see* **section 27**).

3 Clause 9 – Meaning of protected disclosure

3.1 Clause 9 provides that a disclosure will not be protected for the purposes of the Act if it is made in bad faith. Non-lawyers may not be clear as to what is meant by "bad faith", and how this differs from the proactive duty of "good faith" under the Employment Relations Act 2000 (**ERA**).

Recommendation

3.2 The Law Society considers that the clarity of the Act (particularly for non-lawyers) could be assisted though the provision of a definition, perhaps by way of a non-exclusive list of examples, of bad faith.

3.3 A further minor point is that the Bill is silent as to whether a disclosure must be made in writing. This suggests that disclosures may be made using any means. To avoid uncertainty, we recommend that this is clarified using language similar to section 12(1AA) of the Official Information Act 1982 (**OIA**), for example, by stating:

A disclosure may be made in any form and communicated by any means (including orally).

4 Clause 11 – Discloser's entitlement to protection

4.1 Existing protections under the Act have been criticised for a lack of effectiveness, including due to disclosers being disadvantaged for "doing the right thing."[4] Therefore it could be useful to provide an additional internal avenue for escalating concerns to the head or a deputy head of the organisation where a discloser believes that the recipient of a disclosure has not acted on a previous report or prior advice of the wrongdoing.

Recommendation

4.2 Clause 11(2)(c) could include the following, as a new sub-clause (iii), to clarify that a discloser is entitled to bring a concern to the attention of the head or the deputy head of an organisation if the person who should be the recipient of the disclosure:

(iii) has not acted on a previous report or prior advice of the wrongdoing.

5 Clause 12 – What receiver should do

5.1 It is important to ensure the timeframes imposed in clause 12 are reasonable. Clause 12(1)(d) requires the receiver to "deal with" the complaint within 20 working days. Given the complexity of investigations into serious wrongdoing, this timeframe is unlikely to be complied with.

5.2 These timeframes are provided as guidance rather than a legal right or obligation.[5] However, the guidance for what needs to be done within the initial timeframe must be realistic, so that receivers are not required to routinely apply the exception in clause 12(2).

5.3 In addition, it is also unclear whether, once a decision has been made to investigate a particular disclosure, a receiver needs to inform the discloser of the outcome of that investigation (i.e., whether their concern was substantiated or not) and any steps taken in response to the disclosure. This is important for two reasons:

a. to provide clarity as to the outcomes that a discloser can expect when making a disclosure, and

b. because clause 13 allows for escalation of a disclosure to a Minister or Ombudsman where the discloser believes on reasonable grounds that the receiver has not dealt with the disclosure so as to address the serious wrongdoing.

Recommendation

5.4 The Law Society suggests:

a. Clause 12(1)(d) be amended (as noted in red):

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4 For example, see https://ssc.govt.nz/resources/media-statement-report-investigation-whistle-blower-treatment-within-ministry-transport/.

5 Clause 12(3) of the Bill.

12 What receiver should do

(1) Within 20 working days of receiving a protected disclosure, the receiver of the disclosure should—

…

Deal with

(d) deal with the matter by doing 1 or more of the following

(i) commencing an investigation into ~~investigating~~ the disclosure:

(ii) taking steps to address~~ing~~ any serious wrongdoing by acting or recommending action:

(iii) referring the disclosure under section 15:

(iv) deciding that no action is required (under section 14); …

b. Clause 12(1)(e) should be amended to clarify:

(i) whether organisations are encouraged (noting that clause 12 provides guidance only) to inform the discloser of the broad outcome of any investigation (i.e., whether the concern is substantiated, partially substantiated or unsubstantiated), and

(ii) what, if any, further action is proposed to be taken in response to the concern, including a reference to situations where an outcome is being addressed with individuals involved, but the substance of those actions cannot be disclosed to protect the privacy of those individuals.

6 Clause 14 – Receiver may decide no action is required

6.1 Clause 14(2)(a) provides that one of the grounds for deciding not to act is where the requirements of sections 8 to 10 are not met. Clauses 8 to 10 set out the pre-requisites for a matter to fall within the Act, therefore, if any one of the factors is not met, it would appear that the Act does not apply.

Recommendation

6.2 This could be clarified by amending clause 14(2)(a) (as noted in red font):

> "the matter does not fall within the scope of the Act because the requirements of sections 8 to 10 are not met …"

6.3 It is also recommended that where a decision is made not to take further action, the organisation must inform the discloser of that fact, provide the reason for not taking further action and inform the discloser of their entitlement under clause 13 to disclose to a Minister or Ombudsman. This is similar to the requirement in section 19(b) of the OIA.

7 Clause 16 – Confidentiality

7.1 Clause 16 sets out the core protection for disclosers: confidentiality. As currently drafted, this clause reflects the current law around fair process for an alleged wrongdoer who is an

employee. For example, the principles of natural justice often require an employer to disclose the identity of a discloser as part of the duty of good faith, with limited exceptions.[6]

7.2 This is a key provision of the Bill. The issue of confidentiality will be an important concern for people who are considering making a disclosure and once information is disclosed there is no way of fully mitigating any issues that may arise as a result. Further, many disclosers will not be familiar with legal concepts such as natural justice. It is therefore important that the approach taken by organisations is consistent and that appropriate protections apply, and disclosers are aware that their identity can and will be disclosed in situations that warrant it, even if they do not consent. Coupled with changes to the overview as noted above, further guidance ought to be provided (in addition to the guidance in the Bill) to ensure a discloser is aware their identity may be disclosed.

Recommendation

7.3 We recommend that the Bill is amended to require that organisations inform disclosers if a decision is made to disclose confidential information. We also suggest including a reference to section 4(1A)(c) of the ERA in any accompanying guidance about the limits of confidentiality, particularly in any employment investigations.

8 Clause 17 – Protecting confidentiality by withholding official information

8.1 For completeness we recommend that this provision provides a cross-reference to section 18(c) of the OIA, which provides for a request to be refused where making the requested information available would be contrary to a specified enactment.

9 Clause 19 – No retaliation by employer

9.1 The definition of "retaliate" does not seem to cover examples that are a 'disadvantage.'[7] Even though there is a personal grievance option already available in the ERA, it is useful to emphasise that 'retaliation' is also prohibited in this context.

Recommendation

9.2 We therefore suggest amending clause 19(4)(a)(iii) by adding 'disadvantage' to the definition of "retaliate":

> **retaliate** means—
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> …
>
> (iii) subjecting the employee to any detriment (including any detrimental effect on the employee's employment, job performance, or job satisfaction) or any disadvantage

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6 An employer is required to provide all information relevant to a decision that could negatively impact on their ongoing employment, and an opportunity to comment before a decision is made, as per section 4(1A)(c) of the Employment Relations Act 2000 (**ERA**).

7 See, for example, Sandie Beatie QSO *Report of investigation into whistle blower treatment within the Ministry of Transport* (July 2017) at page 8, where a former Legal Team member disclosed concerns about remuneration. A copy of the report can be found at: Report-of-investigation-into-whistle-blower-treatment-within-the-Ministry-of-Transport.pdf (publicservice.govt.nz).

in relation to their employment or conditions of employment, in circumstances in which other employees employed by the employer in work of that description are not or would not be subjected to such detriment or disadvantage: …

10 Clause 20 – Victimisation

10.1 Clause 20(2) states that subsection 20(1) is not breached if a disclosure is made in bad faith or relates to a false allegation. However, a disclosure will not meet the definition of "protected disclosure" (at clause 9) if the discloser does not believe on reasonable grounds that there is, or has been, serious wrongdoing, or the information is disclosed in bad faith. We therefore suggest deleting clause 20(2).

11 Clause 21 – Immunity

11.1 Immunity is provided only to disclosers or to a receiver who refers it on. A discloser could be a person who is "engaged or contracted under a contract for services to do work for the organisation".[8] This does not seem to cover individuals who are employed or subcontracted by a third party to do work for the organisation —for example, an accountant of a contracted supplier or contracted firm who might come across financial anomalies.

11.2 A further example is where a travel agent discovers an employee was charging the company for personal travel. An agent in that situation might hesitate to tell the employer, to avoid losing business. The clause as it stands only covers "work", and not the supplier of goods and services that might come across fraud. If the purpose of the Bill is to extend protections to such situations, that needs to be made clear.

Recommendation

11.3 A key aim of the Bill is to create certainty for disclosers. To achieve this aim of certainty, the Bill must clearly define who falls within the meaning of a discloser. We therefore suggest amending the meaning of "discloser" in clause 8(d) (as noted in red font):

> **8 Meaning of discloser**
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> In this Act, **discloser**, in relation to an organisation, means an individual who is (or was formerly)—
>
> …
>
> (d) engaged or contracted, directly or indirectly, under a contract for services to do work or provide goods or services for the organisation …

12 Clause 22 – No contracting out

12.1 People who are entitled to protection under the Bill ought to benefit from any additional protections provided under any agreement, contract, or internal procedure. Currently clause 22(1) could override any agreement, contract, or internal procedure that exceeds the minimum requirements of the Bill.[9]

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8 Clause 8(d) of the Bill.

9 A similar approach is taken to contracts, agreements or other arrangements under section 10 of the ERA, and employment agreements under Section 6 of the Holidays Act 2003.

Recommendation

12.2 We suggest replacing clause 22(1) with the following:

> Any contract, agreement, or internal procedure has no force or effect to the extent that it is inconsistent with this Act. This Act does not prevent an organisation from providing protections that are enhanced or additional to those outlined in this Act.

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