

29 November 2018

State Services Commission
PO Box 329
Wellington 6140

Email: submissions@havemysay.govt.nz

Submission on the review of the Protected Disclosures Act 2000

The Institute of Directors (IoD) welcomes the [review](#) of the Protected Disclosures Act 2000 (the Act) and appreciates the opportunity to comment. The Act is intended to support people who expose criminal, fraudulent or other serious misconduct in their workplace by protecting them from unfair dismissal or treatment. We appreciate the opportunity to have participated in the review process to date with the State Services Commission, and we are very supportive of improving whistleblowing and speak-up procedures in New Zealand and have been promoting this with our members. We would welcome continued involvement as the review progresses.

Summary

The IoD welcomes the review of the Act to ensure it is fit-for-purpose and meets international best practice standards. We support the overall intent of the review, but we are very concerned that small and medium sized organisations will be disproportionately burdened by some of the proposals for reform. More specifically, we strongly oppose the proposals to require *all* organisations to have internal whistleblowing procedures, and to collect information on protected disclosures and report this to an oversight body.

We encourage the Government to provide greater guidance on the Act and support for all organisations, and we suggest that there needs to be a transitional period of at least two years to ensure organisations have sufficient time to comply.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of about 9,000 members drawn from listed issuers, large private organisations, small and medium enterprises, state sector organisations, not-for-profits and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Overview of the Act and issues

The Act facilitates the disclosure of serious wrongdoing in and by organisations and protects those who make such disclosures. *Serious wrongdoing* includes:

- unlawful, corrupt or irregular use of funds or resources of a public sector agency
- conduct that poses a serious risk to health and safety
- damage to the environment
- unlawful or illegal conduct by an individual or organisation
- covering up wrongdoing
- any criminal offence.

Protected disclosures must generally be made in accordance with an organisation’s internal procedures. However, they can be made to an appropriate authority (defined in the Act) in certain circumstances.

The Act applies to both the public and private sector. Public service employees can make a protected disclosure about any *serious wrongdoing*, while employees in the private and not-for-profit sectors can only seek protection for certain limited disclosures. Every public sector organisation is required to have procedures in place to manage disclosures, however there are no similar requirements for private sector organisations or not-for-profits. No criminal, civil or disciplinary proceedings can be taken against anyone making a disclosure in accordance with the Act.

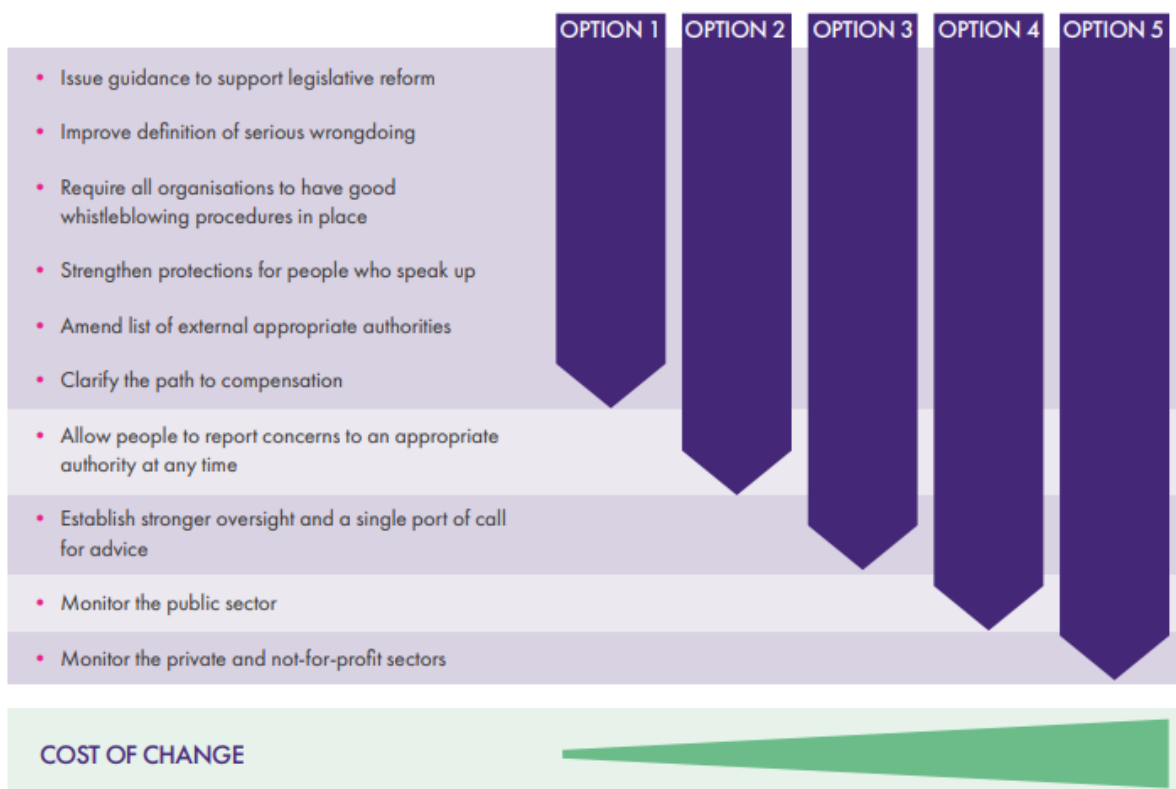
Issues with the Act

The review has highlighted a number of issues with the Act including:

- confusion around when the Act can be used, how to manage multiple concerns from the same employee, and how the Act fits with related legislation and regulation
- fear that speaking up will expose a staff member to acts of retaliation or mistreatment
- staff not always knowing who they can talk to within their organisations or having no internal procedures to follow
- confusion around which external authority an employee can report to and when
- uncertainty around the extent of whistleblowing in New Zealand (as organisations are not required to report on how many disclosures have been made under the Act).

Options for reform

The review puts forward the following options for reform and each option builds on one another. The proposals (ie the bullet points set out on the left hand side of the diagram) are cumulative, for example option 5 includes all 10 proposals.



We make some general comments below before commenting on proposals 3 and 10.

General comments

Boards set the tone for ethical conduct by reinforcing and communicating a culture of speaking up. They also hold management to account on transparency and accountability on ethical behaviour. Whistleblowing policies and speak-up procedures help promote and support an ethical workplace culture. Our 2018 Director Sentiment Survey shows that 44% of directors discussed whistleblowing and how their organisation makes speak-up provisions effective in the last 12 months, up from 32% in 2017. We are very supportive of improving whistleblowing and speak-up procedures and have been promoting this with our members.

We welcome the review of the Act to ensure it is fit-for-purpose and meets international best practice standards. We are aware of a number of issues with the Act and we support the overall intent of the review. However, we are very concerned that small and medium sized organisations will be disproportionately burdened by some of the proposals. We note that small businesses (defined as enterprises with fewer than 20 employees) make up 97% of all enterprises in New Zealand.¹ We discuss this concern further below.

We encourage the Government to provide greater guidance and support for all organisations around the operation of the Act and best practice guidelines to help employers develop effective whistleblowing policies and procedures. Individuals will also need access to advice on making a disclosure.

The review notes that the Government is working towards having a Bill passed by late 2020. We suggest that there needs to be a transitional period of at least two years to ensure organisations have sufficient time to comply. We also note that there are a number of legislative and regulatory reforms on the horizon that will affect organisations in the private and not-for-profit sectors in terms of compliance and this should be borne in mind by the review team.

As noted above, five options for reform have been put forward and these consist of cumulative proposals. We comment on some of the proposals below.

Specific comments

Proposal 3: Require all organisations to have good whistleblowing procedures in place

Under the Act, only public sector organisations are required to establish internal whistleblowing procedures. We strongly oppose proposal 3 (which runs across all options) requiring *all* organisations to have whistleblowing procedures in place, including for the following reasons:

- it is not practical or appropriate for *all* organisations to have internal whistleblowing procedures, for instance many small businesses are owner-operated or have only a couple of employees.
- the cost of this requirement will disproportionately impact small to medium sized organisations and not-for-profits
- there is already a significant compliance burden on organisations and boards. Our 2018 Director Sentiment Survey found that time spent on compliance activities continues to increase for a majority of directors (71%).

We note that the NZX Corporate Governance Code and the Financial Markets Authority's Corporate Governance handbook refer to whistleblowing procedures and many large organisations already have these in place. Larger organisations are generally better placed to deal with disclosures. If the requirement for internal procedures is to be extended to other organisations, there would need to be an appropriate threshold (eg limiting this requirement to larger organisations in New Zealand). Other organisations should be encouraged to voluntarily develop whistleblowing and speak-up procedures where practical and appropriate.

¹ Ministry of Business, Innovation & Employment: Small business factsheet.

Proposal 10: Monitoring and reporting for all organisations

This proposal (in option 5 only) would introduce new reporting obligations for *all* organisations to collect information relating to protected disclosures and report these to an oversight body. The IoD strongly opposes this proposal, including for the following reasons:

- it is not practical to expect small businesses and other organisations including not-for-profits (many of which have very limited external reporting obligations) to comply with this requirement
- there is already a significant compliance burden on organisations and the cost of this requirement will disproportionately impact small to medium sized organisations and not-for-profits
- The agency monitoring reporting would need significant resources and it won't be feasible to properly monitor all disclosures.

We suggest that mandatory reporting on whistleblowing be restricted to public service departments. However, other organisations (which prepare annual reports) could be encouraged to publicly report statistics and a differential reporting framework may be appropriate. This would be consistent with other disclosure requirements, for example the NZX Corporate Governance Code which is a 'comply or explain' framework.

Conclusion

We support the review of the Act, but we are very concerned that small and medium sized organisations will be disproportionately burdened by some of the proposals for reform. More specifically, we strongly oppose the proposals to require *all* organisations to have internal whistleblowing procedures, and to collect information on protected disclosures and report this to an oversight body. Accordingly, we don't support any of the five options (as they currently stand) for reform.

We encourage the Government to provide greater guidance on the Act and support for all organisations, and we suggest that there needs to be a transitional period of at least two years to ensure organisations have sufficient time to comply.

We appreciate the opportunity to comment on behalf of our members and would be happy to discuss this submission with you.

Yours sincerely



Felicity Caird

**General Manager, Governance Leadership Centre
Institute of Directors**