

HELP SHAPE IMPROVEMENTS TO THE PROTECTED DISCLOSURES ACT TO MAINTAIN NEW ZEALAND'S HIGH STANDARDS OF INTEGRITY

REVIEW OF THE PROTECTED DISCLOSURES ACT 2000

Options for Change

Discussion document for public feedback

October 2018

STATE SERVICES COMMISSION
TE KAWA MATAAHO





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CHAPTER 1: INTRODUCTION

Why are we consulting the public?

Sometimes, people find out their manager or co-worker is engaging in activities that are illegal, corrupt or pose a serious threat to public safety. The Government is committed to protecting New Zealanders who 'speak up' in these circumstances.

We have a law in New Zealand - the Protected Disclosures Act 2000 - to protect people from losing their jobs or getting mistreated for speaking up in the public interest.

However, after 18 years of operation, we now have a better understanding of what works and what doesn't. People have told us that they don't always know when to use the Act and can find it difficult to navigate.

We have identified five options for change and would like to encourage all New Zealanders to share their views on the benefits and risks of different proposals.

These options were informed by our earlier engagement with stakeholders in February and March 2018 to learn more about the challenges people encounter under the current regime and the pros and cons of different international approaches. This included a range of organisations from the public and private sector and people with experience of using the Act.

For more information, see:

- [Fact sheet: What is the Protected Disclosures Act 2000?](#)
- [Fact sheet: What do other countries do?](#)
- [Summary report: Targeted Consultation in February and March 2018](#)
- [Briefings to the Minister and Cabinet Paper](#)

How to have your say

Your feedback will help shape reforms to the Protected Disclosures Act.

Your submission may respond to any or all of the questions posed in this document. We also encourage your input on any other relevant areas.

Where possible, we would also appreciate any evidence you are able to share to support your views - for example references to independent research, case studies or facts and figures.

When you are ready to provide feedback, you can:

- Complete it online at www.havemysay.govt.nz
- Email us at submissions@havemysay.govt.nz
- Post it to Submissions, State Services Commission, PO Box 329, Wellington 6140

You may wish to include your name, or the name of your organisation, and contact details so that we can contact you directly if we require further information to clarify any matters covered in your submission.

Please provide your submission by **5pm, 7 December 2018**.

How will we use your feedback?

We will use your feedback and other evidence to advise the Minister of State Services on final options for change. The consultation period ends on 7 December 2018.

The State Services Minister may then seek Cabinet's agreement to his preferred options. If Cabinet agrees, a Bill will be drafted.

If this happens, then the Bill would be expected to be introduced to Parliament in 2019. You will then have an opportunity to comment on the draft legislation when it is considered by a Select Committee.

The Government is working towards having the Bill passed by late 2020.

Other ways to get involved

Making a written submission is one way you can suggest improvements to the Protected Disclosures Act. You can also join the conversation with us on [the SSCNZ Facebook page](#).

If you have any questions about the consultation process or the proposals, please email us at info@HaveMySay.govt.nz.

Use of information

We intend to publish all written submissions on the SSC website.

Please note also that all submissions are subject to the Official Information Act 1982, and that your submission may therefore be the subject of a request.

If you do not want your submission to be made public, please state this clearly, together with your reasons, and whether your objection relates to your whole submission or to a part or parts of it.

Any personal information you supply in the course of making your submission will be used by us only in relation to the matters covered in this discussion paper. Please clearly indicate in your submission if you do not want your name to be included in any summary of submissions that we publish.

HAVE YOUR SAY

The Protected Disclosures Act helps preserve New Zealand's high standards of integrity, so it's important you help us shape a clear and effective regime for speaking up that will best meet the needs of our country now, and in to the future.

It's easy to have your say.



WEB

Go online to www.havemysay.govt.nz to read more about the options and make your submission.



EMAIL

Got a question? Email us at info@HaveMySay.govt.nz.
You can also email your submission to submissions@HaveMySay.govt.nz.



SOCIAL

Join the social conversation. Like and follow us on [SSCNZ](#).

CLOSING DATE: The public consultation closes on 5pm, Friday 7 December 2018.

If you have any questions about the consultation process or the proposals, please email us at info@havemysay.govt.nz.



CHAPTER 2: WHAT DO WE WANT TO ACHIEVE?

New Zealand is a world leader in integrity, openness and transparency.

In 2017, New Zealand was ranked the least corrupt country in the world in Transparency International's [Corruptions Perception Index](#).

In line with this reputation, we were one of the first countries in the world to introduce a dedicated law to protect 'whistleblowers' in 2000 – the Protected Disclosures Act.

This law exists to support people to expose criminal, fraudulent or other serious misconduct in their workplace by protecting them from unfair dismissal or treatment.

It is vital to get this right. When something is wrong, people need to be able to raise issues safely without fear of punishment and reprisal.

However, the law is now 18 years old and is not working as well as it should. People don't always know how to use the Act, or feel safe using it.

This needs to change. If we want to maintain our high standards, we must continue to work hard to tackle instances of serious misconduct across New Zealand.

We have an opportunity to update the Act and ensure it supports a clear and effective process for speaking up in the workplace.

We think the legislation should:

Help expose 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.

Encourage open organisational cultures

...by requiring all organisations to have good procedures in place that make it easy for people to speak up freely and without fear.



Be easy to use and understand

...by setting out clear definitions and rules that make it easy for people to know what the Act does and when, and how, to use it.

Promote fairness for everyone

...by ensuring everyone is treated with respect throughout the process.



That sounds good. But it gets complicated.

- What if people have genuine concerns that a co-worker or manager is doing something wrong, but end up being mistaken?

- What if employers find it hard to fulfil obligations and investigate allegations of serious wrongdoing because of insufficient information, resources or know-how?
- What if we open the regime up too wide and the law becomes a vehicle for false or misleading allegations, or concerns that are valid, but not in the public interest?

We need to ensure:

- people speak up about the right things.
- everyone is treated fairly and people do not suffer unfair reputational harm.
- obligations are easy to comply with and employers are supported to take action.

Questions

1. Do you agree with the objectives and risks outlined above? Please provide a reason for your answer.
2. Do you have any other ideas for defining the purpose of the regime and assessing options? If yes, please provide details.

What would this system look like if it was working well?

People have access to the right kind of advice when they see or hear something that looks like ‘serious wrongdoing’, but are unclear about whether to use the Act or not.

When concerns are valid, but not in the public interest – for example, about being bullied or harassed by their manager or co-workers, they are referred to other sources of support and advice that are better suited to helping them.

When concerns are about conduct that could pose a serious threat to the public interest, organisations have simple and user-friendly processes in place for reporting concerns.

This means people:

- know who to report to and understand the protections that are available to them – wherever they work
- feel safe raising concerns and receive wrap-around support to minimise the risk of any unfair treatment
- are confident that the information they come forward with will be acted on and resolved in a timely manner
- will remain protected if they had genuine concerns but end up being mistaken.

Throughout the process:

- employers know what is expected of them and have the skills and ‘know-how’ to handle information about serious wrongdoing effectively
- people are satisfied that their concerns are listened to and taken seriously
- people are clear on the compensation available to them if they are mistreated or lose their job for speaking up
- the person and/or organisation suspected of serious wrongdoing is treated fairly.



CHAPTER 3: HOW DOES THE CURRENT LEGISLATION WORK?

The Protected Disclosures Act helps people report serious wrongdoing in their workplace by protecting them if they ‘blow the whistle’.

What is serious wrongdoing?

- Unlawful, corrupt or irregular use of public money or resources.
- Conduct that poses a serious risk to public health, safety, the environment or maintenance of the law.
- A criminal offence.
- Oppressive, improperly discriminatory or grossly negligent conduct or gross mismanagement by public officials.

Who can make a disclosure?

To make a protected disclosure, a person must be an employee of the organisation concerned. ‘Employee’ has a wide definition - for example it can include contractors, volunteers and board members.

Public service employees can make a disclosure about all the types of serious wrongdoing listed above. People in the private and not-for-profit sectors can use the Act to expose information about a criminal offence or activities in their workplace that pose a serious risk to the public, environment or maintenance of the law.

What protections does the Act provide?

The main protection is confidentiality, which means the person won’t be identified.

However, their personal information may need to be revealed in certain circumstances, for example, if it is essential to investigate the allegations.

No civil, criminal, or disciplinary proceedings can be taken against the person for making a protected disclosure.

When is a disclosure protected?

A disclosure is protected if:

- the information is about serious wrongdoing in the workplace
- the person reasonably believes it to be true or likely to be true
- the person wants the matter investigated
- the person wants the disclosure to be protected.

The disclosure is not protected if the person knows the allegations are false, acts in bad faith or the information is protected by legal professional privilege.

How does a person make a disclosure?

If someone sees serious wrongdoing at work, they are generally required to follow their workplace procedures and report to someone inside their organisation first.

Every public sector organisation is required to have procedures in place for receiving and handling information about alleged serious wrongdoing.

There are no procedure requirements for the private sector.

The Ombudsman can provide guidance on how to make a disclosure and on any matters relating to the Act.

Can information about serious wrongdoing be reported outside the workplace?

There are a number of appropriate authorities a person can speak to in certain circumstances. For example, if the matter is urgent or the organisation concerned has not taken any action within 20 days of receiving the complaint. The appropriate authorities are:

- Commissioner of Police.
- Controller and Auditor-General.

- Director of the Serious Fraud Office.
- Inspector-General of Intelligence and Security.
- The Ombudsman.
- Parliamentary Commissioner for the Environment.
- Independent Police Conduct Authority.
- Solicitor-General.
- State Services Commissioner.
- Health and Disability Commissioner.
- Head of every public sector agency.
- Heads of some private sector professional organisations who have disciplinary powers over members.

In the public sector, a disclosure may be escalated to a Minister or the Ombudsman if all other avenues fail. There is no equivalent backstop for the private sector.

What happens after a person makes a disclosure?

Each organisation and appropriate authority has their own procedures for handling protected disclosures.

There is no legal requirement for an organisation to investigate allegations or report back on the outcome.

In some cases, the Ombudsman has powers to take over investigations in the public sector.

What happens if a person is mistreated for speaking up?

The Protected Disclosures Act 2000 does not explicitly prohibit a person from being mistreated if their identity becomes known. However, the Human Rights Act 1993 states it is illegal to treat someone less favourably for using their rights under the Protected Disclosures Act.

If someone does suffer harm or retaliation as a result of speaking up, they have the following options available to them:

1. They can raise a personal grievance under the Employment Relations Act against their employer if they believe they were unfairly dismissed or disadvantaged in some way.

Only employees and former employees of an organisation can raise a personal grievance.

The Ministry of Business, Innovation and Employment offers a free mediation service to help resolve the issue.

There are a number of ways the person may be compensated for unfair treatment including reimbursement for lost wages and a payment for hurt or humiliation.

2. They can complain to the Human Rights Commission if they believe they have been treated less favourably than others in similar circumstances. For example, not being selected for a promotion.

Anyone can make a complaint to the Human Rights Commission, including contractors, volunteers or board members.

A free mediation service is provided by the Human Rights Commission.

There are a range of remedies available including compensation for emotional harm.

Check out the [legislation](#) for more information



CHAPTER 4: WHAT ISN'T WORKING SO WELL NOW?

In February and March 2018, the State Services Commission engaged with a range of organisations across the public and private sectors to learn more about the challenges people encounter under the current regime. We've summarised the key issues we heard below. For more information, see the [Targeted Consultation Summary Report](#).

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

It's confusing to know who can report concerns about suspected misconduct in their organisation – employees only? Or contractors and volunteers too?

It's confusing to know what counts as serious wrongdoing and when someone should come forward with information.

- What if they only see a small part of something and are not sure if it is 'serious' enough to tell someone?
- What if they're being bullied by their manager or co-worker – is that 'oppressive' behaviour under the Act or a 'serious threat to public health and safety'?
- What if they work in the private or not-for-profit sector and suspect a co-worker is misusing funds – is that covered by the Act?

It's also confusing to know what to do if someone comes forward with a range of complaints that are covered by different pieces of workplace legislation. For example, a person may claim that their co-worker is engaging in activity that could endanger the environment, and is also harassing them. Both issues need to be resolved, but which formal process should they use – the Protected Disclosures Act, the Health and Safety at Work Act or the Employment Relations Act?

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

The Act states that a person's identity should be kept confidential. However, this cannot be guaranteed. Sometimes it may be necessary to identify someone to help progress an investigation. Sometimes people talk and it can be easy to find out who reported on whom.

This can leave the person vulnerable to mistreatment. There is currently no legal obligation on organisations to prevent this from happening.

When it does occur, compensation can be difficult to access. 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.

The main options – raising a personal grievance against their employer or making a complaint to the Human Rights Commission – rely on both the employer and the person who has made the disclosure voluntarily agreeing to mediation. If the employer refuses to engage, no further action can be taken.

Even when both parties agree to mediation, seeking compensation can be a long and drawn-out process because the cases are so complex. In particular, it is hard to tell whether someone was mistreated or dismissed as a result of 'speaking up' or because of their poor performance at work. This means cases are often left unresolved or withdrawn.

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

The Act currently only requires public sector organisations to have procedures in place for receiving and handling information about suspected wrongdoing. There are no requirements for the private and not-for-profit sector. This means that there are huge differences in the way organisations handle allegations of serious wrongdoing.

In some large organisations, there are a range of ways to speak up. For example, some organisations have an integrity 'hotline' or a specialist team to report to.

In some small organisations, there are no internal procedures at all. People don't always know who to report concerns to. Their line manager? What if their line manager repeatedly ignores the concern? Or what if their line manager is involved? Who should they go to then?

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

People usually have to report concerns inside their workplace first. This can be difficult because of the issues outlined above – what if they fear mistreatment? Or what if there are no internal procedures at all?

In these circumstances, it can be difficult to know who to go to outside their workplace. The Act lists 10 different 'appropriate authorities', but it can be confusing to know which one to go to, and when.

What we don't know - how big the problem is.

We don't know how many people try and use the Act because organisations are not required to collect this information.

What we do know is that only a small number of people go to the Ombudsman to seek advice and guidance on making a protected disclosure. For example, over the last five years, the Ombudsman has on average completed 10 requests for guidance and 43 informal enquiries a year in relation to Protected Disclosures.¹

We don't know why this is. Is it because there is no serious wrongdoing in New Zealand? Or because people find the Act difficult to use, or are unaware of it in the first place?

The lack of information makes it hard to quantify how big the problem is and how much it affects workplaces across New Zealand.

Questions

3. Do you agree with this characterisation of the key problems? Please provide a reason for your answer.
4. In your view, what other problems and challenges should be considered? Where possible, please provide evidence or information to support your view.
5. How could these problems (either as outlined here or in your answer to the previous question) affect different groups of people in New Zealand?
6. How urgent is the need for change?

¹ Ombudsman Annual Reports, 2013/14 to 2017/2018



CHAPTER 5: OPTIONS FOR CHANGE

We are seeking feedback on what a new regime might look like.

The proposed reforms to the Protected Disclosures Act aim to create a clear legal framework for speaking up in the workplace. We invite you to be part of this critical conversation. Your feedback on the different options will help inform further policy development, and shape amendments to the Act.

WHAT IF WE DID NOTHING TO THE LEGISLATION?

The State Services Commission has issued [model standards](#) for the state sector which outline the minimum expectations on organisations to promote a ‘speak up’ culture, develop good processes, and keep people safe from reprisals or other punishment.

We could build on this through better communications, guidance and support for all organisations.

- **Communications:** Regularly promoting an ‘if in doubt, speak up’ message could help to reinforce the value of people raising issues about serious misconduct in the workplace.
- **Guidance:** Clearly setting out what the Act does – and doesn’t – could help people understand when and how to speak up.
- **Support:** Training and best practice guidelines could help employers develop effective and user-friendly procedures for people to raise concerns freely and without fear.

We think this approach would make the Act easier to understand and use. For example, around:

- What does – and does not – constitute serious wrongdoing
- What good organisational policies and procedures look like
- How, and when, to report concerns to an external authority
- The relationship between the Act and other workplace related legislation such as the Health and Safety at Work Act and Employment Relations Act.

However, an approach that relies solely on better communications, guidance and support may not address the Act’s biggest weaknesses. For example:

- The Act’s definition of serious wrongdoing does not clearly focus on the issues that pose the biggest threat to the public interest as it is:
 - too narrow in some areas – for example, it does not explicitly cover corruption or misuse of funds in the private or not-for-profit sectors
 - too broad in other areas – for example, it covers ‘oppressive’ behaviour in the public sector, which could be used to further a personal grievance.
- The Act does not require all employers to have good procedures in place; nor does it require them to actually take action and investigate concerns.
- The Act does not clearly forbid employers from dismissing or mistreating a person who speaks up; nor does it require them to proactively prevent this occurring.
- The Act does not allow people to report concerns to an external organisation first if they are unsure how to speak up inside their workplace, or too scared to do so.

Questions

7. What other non-legislative tools could we use to improve how the regime works?
8. How likely is it that the range of non-legislative tools (either outlined here or in your answer to the previous question) could result in greater benefits than those discussed here?
9. Do you think we should change the law? Why do you think this?

Legislative reform: five possible futures

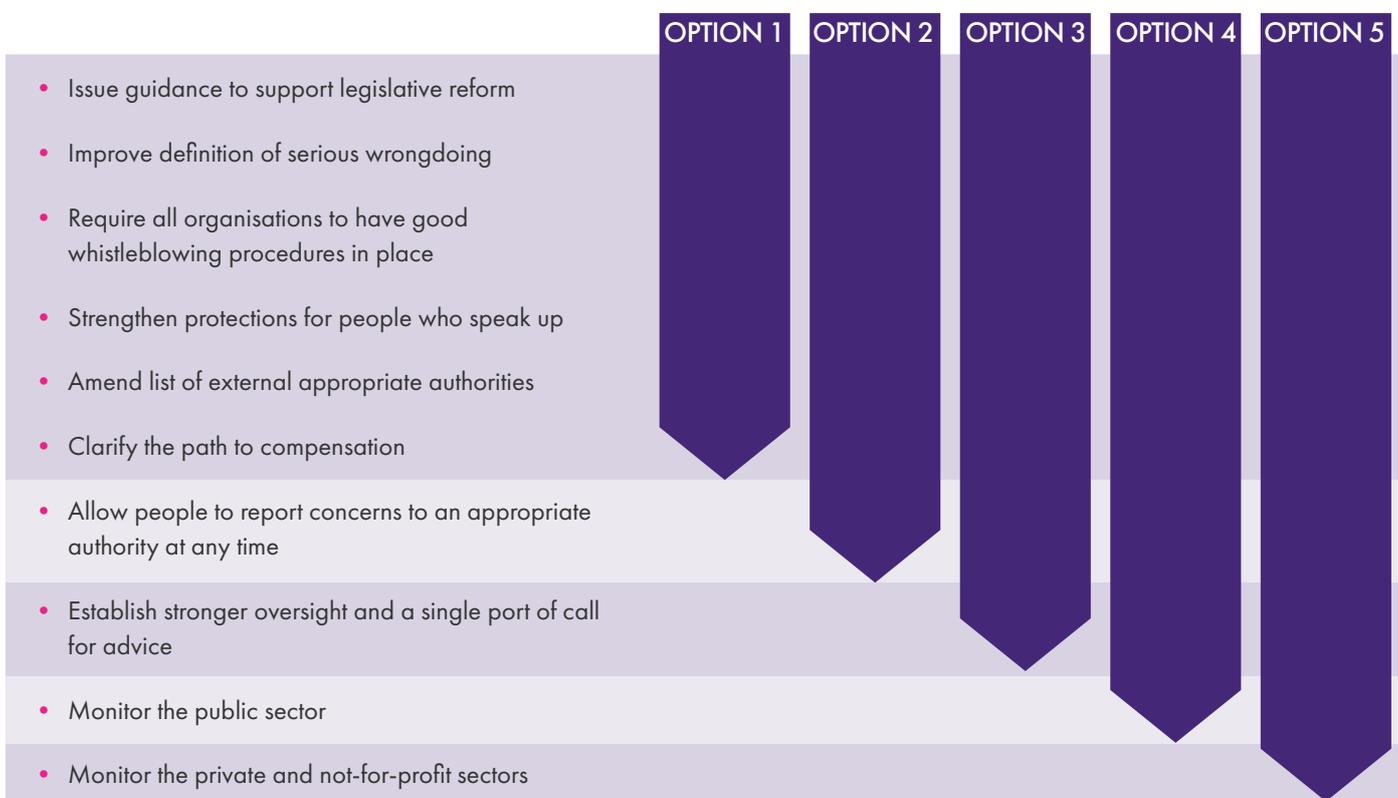
We have outlined five possible futures and invite your feedback on the pros and cons of different approaches.

- [Option 1: Build strong foundations](#)
- [Option 2: Allow people to report concerns to an appropriate authority at any time](#)
- [Option 3: Establish stronger oversight](#)
- [Option 4: Monitor the public sector](#)
- [Option 5: Monitor all organisations](#)

All five options include a combination of guidance and targeted improvements to the law that aim to:

- ensure a clear focus on the issues that pose the biggest threats to the public interest
- build strong foundations and encourage open organisational cultures
- set out clear definitions and rules to make the law easy to use and understand
- promote fairness by ensuring everyone is treated with respect throughout the process.

As shown in the diagram, the options build on one another so that the proposals in the first carry through to the fifth. These range from the minimum changes required to make the Act fit-for-purpose through to more significant changes that increase the level of oversight to support people to use and understand the law.



COST OF CHANGE

Importantly, while we are seeking feedback on which, if any, of the five options are preferred, none are set in stone. They are intended as a basis for discussion about the pros and cons of each and what may or may not work in practice.

Your feedback will inform our final proposals to the Minister, which will include details for how the proposed changes will be implemented to ensure they achieve their desired impact.

Questions

10. In your view, which option will be most effective in achieving the desired outcomes? Why do you think this?
11. Are there any other ideas that you think we should consider to address the problems with the current system? If yes, please provide details.

OPTION 1: BUILD STRONG FOUNDATIONS

Overview

This option aims to build strong foundations by removing confusion and ensuring organisations have good procedures in place that encourage staff to speak up about potential failings or misconduct in their workplace.

Key changes

Providing information and guidance

The State Services Commission, as the administrator of the Act, could issue guidance to make it easier for people to understand what is covered by the Act, and how to use it. This could cover:

- when to make a disclosure under the Act
- what does and does not count as 'serious wrongdoing' and where people can go to for complaints not covered by the Act
- which appropriate authority to go to, and when
- what protections are available to people who 'speak up'
- how to ensure everyone is treated fairly, including the person suspected of wrongdoing
- what compensation is available for those who suffer retaliation for speaking up, and how to access it.

Improving the definition of serious wrongdoing

Serious wrongdoing could include:

- unlawful, corrupt or irregular use of money or resources
- conduct that poses a serious risk to public health, safety, the environment or the maintenance of law
- a criminal offence
- grossly negligent conduct or gross mismanagement by a public official

This proposed definition would be:

- Broadened to include concerns about corrupt or irregular use of money or resources in the private and not-for-profit sector.
- Narrowed to exclude conduct relating to workplace bullying and harassment (i.e. by reframing or removing references to 'oppressive and improperly discriminatory' behaviour).

The threshold for making a protected disclosure would be lowered by requiring people to have 'reasonable grounds to suspect' serious wrongdoing is being committed, rather than 'reasonable grounds to believe'. This would aim to encourage people to speak up when they suspect something might be wrong, but do not have enough information to be 100 per cent sure.

To avoid doubt, we could include a section in the Act that makes it clear that people cannot seek the protections under the Act for concerns that relate solely to a personal employment grievance or dispute.

Why are we proposing to remove references to bullying and harassment from the definition of serious wrongdoing?

During targeted consultation, we heard that the inclusion of 'oppressive and improperly discriminatory' behaviour in the definition of serious wrongdoing is used to raise concerns about individual cases of workplace bullying and harassment.

However, there are other, much better, avenues to deal with these issues. The Employment Relations Act provides a complaints mechanism via the well-established personal grievance process. The Health and Safety at Work Act, which was passed after the Protected Disclosures Act, provides another mechanism for people to raise concerns about the health and safety of workers and workplaces.

The only benefit of using the Protected Disclosures Act over these other mechanisms are the confidentiality provisions. However, these would not necessarily apply in the case of bullying and harassment because of the exemptions under the Act, which allow the identity of a person to be disclosed if it's essential to the principles of natural justice. In other words, the person who is alleged to be committing this sort of behaviour has the right to know who has made the complaint.

Targeted consultation also showed us that the overlaps between these three complaints mechanisms is confusing for both individuals and organisations. The proposed changes therefore aim to clarify the boundaries between different pieces of legislation.

Strengthening obligations for organisations

All organisations and appropriate authorities – across the public, private and not-for-profit sectors – could be required to have good procedures in place for receiving and handling information about alleged serious wrongdoing, which cover:

- how someone can report a concern internally and externally
- the protections available (e.g. confidentiality and wrap-around support)
- how disclosures will be handled (e.g. how it will be recorded and investigated, and how the person will be kept informed of progress)
- how the organisation will ensure everyone is treated fairly throughout the process
- how the organisation will promote the policy to their staff.

In addition, all organisations could be legally required to take action and investigate information about alleged wrongdoing, and report back on the outcome.

These principles could be accompanied by guidance on what model procedures and policies look like. Organisations would have discretion on how to tailor these to their own circumstances.

Enhancing protections for people who ‘speak up’

The Act could more clearly link to the relevant section of the Human Rights Act, which prohibits a person from being mistreated for speaking up if their identity becomes known.

The legislation could also list forms of retaliation and require organisations to provide tailored support to minimise the risk of these occurring. This list could include (but is not limited to) any of the following:

- Dismissal
- Demotion
- Suspension
- Failure to promote
- Ostracism
- Blocking access to resources
- Disciplinary sanction
- Bullying or harassment
- Victimisation

Clarifying the list of appropriate authorities people can report to

The ‘head of every public sector organisation’ could be removed as an authority to lessen confusion around who to go to, for what.

There does not appear to be a strong rationale for someone to go to the head of a public sector organisation rather than one of the named authorities which have a clear remit to investigate the types of wrongdoing covered by the Act.

The appropriate authorities are:

- Commissioner of Police.
- Controller and Auditor-General.
- Director of the Serious Fraud Office.
- Inspector-General of Intelligence and Security.
- The Ombudsman.
- Parliamentary Commissioner for the Environment.
- Independent Police Conduct Authority.
- Solicitor-General.
- State Services Commissioner.
- Health and Disability Commissioner.
- Head of every public sector agency.
- Heads of some private sector professional organisations who have disciplinary powers over members.

Clarifying the path to compensation in the event of retaliation

The Act would make existing arrangements for compensation clearer in the Act so people know what compensation they can seek, and how to access it, if they suffer harm or retaliation as a result of speaking up. For example:

- Raising a personal grievance against their employer if they believe they were unfairly dismissed or disadvantaged in some way
- Making a complaint to the Human Rights Commission for being victimised if they believe they have been treated less favourably than others in similar circumstances.

We think this option will have the following benefits:

- ✓ Better information and guidance would raise awareness and make it easier for people to understand and use the Act.
- ✓ Changes to the definition of serious wrongdoing would help expose the most serious threats to the public interest by broadening it out to the private and not-for-profit sectors and narrowing it down to exclude personal employment matters.
- ✓ Changing when the protections apply would encourage people to speak up if they have legitimate concerns and suspect serious wrongdoing, but do not have enough information to prove it.
- ✓ Requiring all organisations to have fit-for-purpose procedures in place for handling disclosures and proactively supporting whistleblowers would make it easier for people to raise issues without fear of retaliation.
- ✓ Changing the list of appropriate authorities would ensure there is a clear link between the types of wrongdoing the Act is committed to exposing and the organisations with the responsibility to address them.

We think this option will have the following costs:

- ✘ Fulfilling new requirements may be difficult and costly for employers - particularly smaller organisations - because of a lack of resources, skills and know-how.
- ✘ People would still be required to report all concerns inside their workplace first, which may prevent people from speaking up.
- ✘ The list of “appropriate authorities” may still be confusing to navigate and there would be no single source of advice for people working in the private and not-for-profit sector.

Questions

12. What do you see as the main benefits, costs and risks of this option?
13. What changes could be made to improve the effectiveness of this option?

Questions about specific proposals

14. 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.
15. 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.
16. How would new obligations for employers work alongside existing requirements (e.g. health and safety, employment relations)?
17. What support would help organisations fulfil their obligations? Where possible, please provide specific examples.
18. In your view, what is the necessary lead-in period for organisations in your sector to implement the changes under this proposals? Where possible, please tell us how you have arrived at this timeframe.

OPTION 2: ALLOW PEOPLE TO REPORT CONCERNS TO AN APPROPRIATE AUTHORITY AT ANY TIME

Overview

This option would include all the improvements described under option 1, but go one step further in making it easier for people to report concerns to an appropriate authority at any time.

Key changes

Reporting directly to an appropriate authority

People would no longer need to meet a certain set of criteria before reporting a concern to one of the appropriate authorities – they would be able to go to one of these organisations at any time, if they fear speaking up inside their workplace, or don't know how to.

Appropriate authorities would be able to refer cases to one another or back to the organisation concerned, if they believe another organisation is better placed to investigate the alleged wrongdoing.

We think this option will have the following benefits compared to option 1:

- ✓ People would be able to report to an appropriate authority at any time, if internal procedures are inadequate or they fear reprisal.

We think this option will have the following costs compared to option 1:

- ✗ Organisations may find it difficult to deal with people reporting concerns outside the workplace without first being given an opportunity to investigate and respond.
- ✗ Organisations may rely on appropriate authorities to avoid costly internal investigations, seeing them as an "easy alternative". This would increase the risk of external processes substituting for poor organisational practice.
- ✗ Appropriate authorities are likely to experience a higher volume of complaints, which will require more resources and funding for investigations.
- ✗ People reporting to appropriate authorities would not receive the same wrap-around care as those reporting inside the workplace.

Questions

19. What do you see as the main benefits, costs and risks of this option?
20. What changes could be made to improve the effectiveness of this option?

Questions about specific proposals

21. Do you think we should consider any limitations on people reporting concerns directly to an appropriate authority? If yes, please provide details.

OPTION 3: ESTABLISH STRONGER OVERSIGHT

Overview

This option would include all the improvements described under option 2 and create a single port of call for advice on when, and how, to use the Act.

Key changes

Establish stronger oversight

There would be a single port of call for people working in the public, private and not-for-profit sectors to go to for advice on raising a concern.

This oversight body, or bodies, could perform a 'triage' function. People would be able to report directly to them if they do not know how to, or do not want to, report concerns inside their workplace or to one of the named external authorities.

This organisation could then direct the information to the most appropriate organisation for investigation and keep the person up to date on progress.

The oversight body, or bodies, could also dedicate resource to supporting and promoting good practice through training and other tools.

We think this option will have the following benefits compared to option 2:

- ✓ Increasing oversight would help to ensure all organisations have good procedures in place.
- ✓ The oversight body, or bodies, would provide advice, support and information to make it easier for people to navigate the system and ensure that concerns are directed to the right organisation the first time.

We think this option will have the following costs compared to option 2:

- ✗ Increasing oversight will introduce additional costs to the system and may add another layer of duplication and complexity. This would risk making the new system as confusing as the current system.

Questions

22. What do you see as the main benefits, costs and risks of this option?
23. What changes could be made to improve the effectiveness of this option?

Questions about specific proposals

24. In your view, what specific functions should the oversight body, or bodies, perform?

OPTION 4: INTRODUCE MONITORING FOR THE PUBLIC SECTOR

Overview

This option would include all the improvements described under option 3 and introduce new reporting obligations for all public sector organisations to promote transparency and good practice.

Key changes

Introduce reporting requirements

All public sector organisations would be required to collect information relating to protected disclosures and report these to the oversight body – for example:

- The number and type of disclosures made
- The number of investigations that have been triggered or are underway

The oversight body could receive and collate these reports in the public sector to improve transparency and identify key issues and trends to direct improvement efforts.

This option would need to ensure that confidentiality and privacy considerations are addressed appropriately.

We think this option will have the following benefits compared to option 3:

- ✓ Increase transparency and provide a fuller picture of what is happening across the public sector. This would help identify areas for improvement.
- ✓ Help incentivise good practice in the public sector.

We think this option will have the following costs compared to option 3:

- ✗ Reporting obligations for the public sector would impose additional costs. This may disproportionately affect smaller agencies and organisations.
- ✗ Collecting reports from the public sector would require new systems and processes for monitoring compliance.
- ✗ Organisations may be disincentivised to publish honest accounts of the number of disclosures they have received because of the potential reputational damage.

Questions

25. What do you see as the main benefits, costs and risks of this option?
26. What changes could be made to improve the effectiveness of this option?

Questions about specific proposals

27. In your view, what should the public sector be asked to report on?
28. How could we use this information to drive improvements?

OPTION 5: INTRODUCE MONITORING FOR ALL ORGANISATIONS

Overview

This option would include all the improvements described under option 4 and introduce new reporting obligations for all organisations to promote transparency and good practice across the board.

Key changes

Introducing reporting requirements

All organisations would be required to collect information relating to protected disclosures and report these to the oversight body – for example:

- The number and type of disclosures made
- The number of investigations that have been triggered or are underway

The oversight body could receive and collate these reports to improve transparency and identify key issues and trends to direct improvement efforts.

This option could include an exemption for small businesses and community, voluntary, and not-for-profit organisations.

This option would need to ensure that confidentiality and privacy considerations are addressed appropriately.

We think this option will have the following benefits compared to option 4:

- ✓ Increase transparency and provide a fuller picture of what is happening across the whole system. This would help identify areas for improvement.
- ✓ Help incentivise good practice across all organisations.

We think this option will have the following costs compared to option 4:

- ✗ Reporting obligations for all organisations would impose additional costs. This may disproportionately affect smaller organisations.
- ✗ Collecting reports from every employer would require extensive systems and processes for monitoring compliance.
- ✗ Organisations across the private and not-for-profit sectors may be disincentivised to publish honest accounts of the number of disclosures they have received because of the potential reputational damage.

Questions

29. What do you see as the main benefits, costs and risks of this option?
30. What changes could be made to improve the effectiveness of this option?
31. 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.

Questions about specific proposals

32. In your view, what should employers be asked to report on?
33. How could we use this information to drive improvements?



CHAPTER 6: CHANGES WE ARE NOT PROPOSING

We began testing the benefits and risks of different reform choices in early 2018 with stakeholders across the public, private and not-for-profit sectors, which informed our decision not to include the following changes in the five options for change. We set out why below and invite your feedback.

Extending the protections of the Act to people who report directly to the media

Extending the protections of the Act to people who report concerns to the media could help expose serious threats to the public interest and incentivise organisations to take action.

But it's complicated.

People could simply get it wrong, or worse deliberately make a false claim, which could cause unfair reputational damage to the people involved in the public domain. We think this would undermine the aim of promoting fairness for everyone.

Extending the protections of the Act to people who report concerns anonymously

Extending the protections of the Act to people who make an anonymous tip-off would provide a safer route for people to come forward to expose serious threats to the public interest.

But it's complicated.

It could reinforce the perception that speaking up is something to be feared and kept behind closed doors. We think this would undermine the aim of creating open organisational cultures.

It could make investigations more difficult to carry out. We think this would undermine the aim of taking firm action against the biggest threats to the public interest.

It could lead to a rise in false or vindictive allegations. We think this would undermine the aim of clearly focusing on conduct that poses the biggest threat to the public interest and promoting fairness for everyone.

Therefore, we do not propose going any further than the current provisions around anonymous reporting in the Act. People will still be able to report concerns anonymously, but would not receive the same protections.

Introducing penalties for employers who breach their obligations

Penalising employers for not having good procedures in place or retaliating against a person who speaks up would send a strong signal of the importance of protecting people who help to expose the biggest threats to the public interest.

But it's complicated.

It could encourage employers to follow the "letter of the law", but undermine their willingness to develop good procedures that actually work. We think this would undermine the aim of creating open and fair organisational cultures.

In our view, it's better to direct resources towards enabling employers to develop good procedures and train staff in them. If this approach doesn't work, we would consider introducing stronger interventions at a later stage.

Questions

- 34: Do you agree with our rationale for not introducing changes in some areas? Why do you think this?
- 35: Are there any other ideas that you think we should consider to encourage people to report concerns? If yes, please provide details.
- 36: Are there any other ideas that you think we should consider to improve compliance with the law? If yes, please provide details.