

Protected Disclosures (Protection of Whistleblowers) Bill

Government Bill

As reported from the Education and Workforce Committee

Commentary

Recommendation

The Education and Workforce Committee has examined the Protected Disclosures (Protection of Whistleblowers) Bill and recommends that it be passed with the amendments shown.

Introduction

This bill would replace the Protected Disclosures Act 2000. It would continue the Act's purpose, which is to facilitate the disclosure and investigation of serious wrongdoing in the workplace, and to provide protection for employees and other workers who report concerns. However, the bill would make changes to address problems that have been identified with the current Act.

The bill would:

- clarify the definition of serious wrongdoing and extend its application to cover private sector use of public funds and authority
- enable people to report serious wrongdoing directly to an appropriate authority at any time, while clarifying the ability of the appropriate authority to decline or refer the disclosure
- strengthen protections for disclosers by specifying what a receiver of a disclosure should do
- clarify internal procedure requirements for public sector organisations and require them to state how they will provide support to disclosers
- clarify the potential forms of adverse conduct disclosers may face.

Because of the extent of changes between the Act and the bill, the bill has been proposed as a complete redraft.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments. For example, we are proposing various changes to simplify the language of the bill and ensure it is plain English.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to some issues relating to clause 4, which we discuss below.

Officers of Parliament

As mentioned above, we have examined the bill's consistency with principles of legislative quality and have found an issue with clause 4 relating to Officers of Parliament.

In the bill as introduced, the Parliamentary Commissioner for the Environment (PCE) is the only Officer of Parliament to fall within the definition of a "public sector organisation". This is because the bill carries over the definition of "public sector organisation" from the current Act, which cross-refers to Schedule 1 of the Ombudsmen Act 1975 and Schedule 1 of the Official Information Act 1982. The PCE falls within the definition of "public sector organisation" in the interpretation section, as it is on the schedule to the Official Information Act.

We consider that this exception should apply to all Officers of Parliament. We see no reason to treat the others—the Auditor-General and the Ombudsman—differently from the PCE.

We recommend amending clause 4(b) so that an exception for all Officers of Parliament is added to the definition of "public sector organisation".

As a result of amending clause 4, we also recommend the removal of specific exclusions for the PCE in clauses 30(2), 31(3), and 32.

Meaning of "serious wrongdoing"

We are aware of confusion about the meaning of "serious wrongdoing" set out in clause 10. We recommend amending this clause and simplifying the language so it is easier to understand.

Paragraphs (a) to (e) of clause 10 list types of serious wrongdoing. We recommend reordering them to place paragraph (d) first, relating to an offence generally. In the order as introduced, we believe a reader might assume that the bill only covered serious wrongdoing that specifically related to the public sector.

Our amendment would make it clear that the bill would cover all organisations, not just those in the public sector.

We also recommend amending paragraph (e) to include wording proposed by the Human Rights Commission in regard to unlawful discrimination.

Later in this report we discuss possible further clarification about “serious wrongdoing”.

Disclosing to one’s organisation

Clause 11 provides for a discloser’s entitlement to protection when making a disclosure to their organisation.

We recommend simplifying clause 11(2) by deleting text relating to internal procedures in paragraph (b), and deleting the whole of paragraph (c). As introduced, the clause includes information about how an organisation’s internal procedures relate to a discloser’s ability to disclose to the head or deputy head of their organisation. We believe these details make the clause unnecessarily complicated.

Our amendment would make it clear that a discloser could approach the head of their organisation at any time.

What a receiver should do

Clause 12 sets out several steps the receiver of a protected disclosure should take within 20 working days. Several submitters proposed that this clause, which is framed as guidance only, should be mandatory and enforceable.

We note that legislation that affects public sector organisations only (for example, the Official Information Act 1982) can mandate actions without having a specific enforcement or penalty regime. However, we consider it inappropriate to use “must” without a penalty regime where legislation also covers the private sector. Therefore, we recommend amending clause 12(3) make it clear that this section is intended as guidance only.

We also recommend amending clause 12(1)(e) and 12(2)(d) to clarify that informing the discloser about the outcome of an investigation is included in informing them about any action taken.

Disclosers’ entitlement to disclose further

As introduced, clause 13 sets out what a discloser can do, and the protection that applies, if they believe that the receiver has not acted as they should under section 12 or has not addressed the serious wrongdoing. It provides that they can make a further disclosure to a Minister or an Ombudsman.

Disclosures relating to Officers of Parliament

We recommend amending clause 13(2) to specify that the Speaker—rather than a Minister—should be approached for disclosures relating to serious wrongdoing by an Officer of Parliament, or someone in their office. We consider this appropriate because the Speaker effectively acts as the Minister responsible for Offices of Parliament.

We propose rewording the heading of this clause to read “Discloser’s entitlement to disclose further”.

We also recommend inserting clause 13(2A) to make it clear that the ability to disclose to the Ombudsman is in addition to the ability to disclose to an appropriate authority at any time.

Receivers deciding no action is required

Clause 14 sets out the reasons why the receiver of a protected disclosure might justifiably decide that no action was required. We recommend amending clause 14(1) to require that the discloser be informed of the decision, and the reasons for it. We believe it is vital to inform the discloser of the reasons for deciding no action is required.

Breaches of privacy

Clause 16 provides that every receiver of a protected disclosure must use their best endeavours to keep confidential any information that might identify the discloser. It also sets out the grounds on which such information could be released and the requirement to consult with the discloser before doing so.

We recommend inserting subclause (3A) to require a receiver to inform the discloser if identifying information has been released for one of the reasons under clause 16(2)(c).

We recommend inserting clause 16A relating to protecting confidentiality under the Privacy Act 2020. This insertion would ensure that the Privacy Commissioner would have the ability to investigate any breach of clause 16. We consider that confidentiality is critical in regard to this bill and recognise its importance for the protection of a discloser.

Special rules for intelligence and security information

The bill provides special rules for intelligence and security information (information that is classified or relates to activities of an intelligence and security agency). This kind of information can only be disclosed to someone with an appropriate clearance, and the only appropriate authority is the Inspector-General of Intelligence and Security (IGIS).

We recommend amending or adding to clauses 15, 23, and 25 to allow the IGIS to refer disclosures involving intelligence and security information to other appropriate authorities, subject to the classified information being either withheld or managed in accordance with government protective security requirements. We consider that the IGIS should have a clear ability under the bill to refer all or part of a disclosure to other appropriate authorities, with appropriate safeguards.

Our amendment would include inserting subclauses in clauses 15 and 23 to make clear that the IGIS may refer a disclosure under this provision in a way that is consistent with section 25(1).

As introduced, the bill does not specify a clear escalation pathway where the IGIS has not acted as it should under clause 12, or where it is itself the subject of a disclosure. We recommend amending clause 25 by inserting subclause (2A). This subclause would provide that a discloser is entitled to protection for a protected disclosure to the Prime Minister that is or includes intelligence and security information, and relates to wrongdoing in or by the office of the Inspector-General of Intelligence and Security.

Our amendments would ensure that anyone who makes a disclosure to do with security information would have the necessary protections.

Issues for the Minister to consider

While considering the bill, we have identified a number of issues that we would like the Minister for the Public Service to consider.

Clarifying “serious wrongdoing”

Many submitters said that the definition of “serious wrongdoing” in clause 10 is too narrow to capture “red flags” within the workplace that could be indicators of fraud, corruption, or unlawful behaviour. Submitters also gave examples of wrongful behaviour, including bullying, harassment, or maltreatment of vulnerable people that was not regarded by employers or external authorities as meeting the criteria of “serious wrongdoing”.

We note that the behavioural aspects of the definition are focused on serious and immediate risks or hazards, rather than issues that could have ongoing or cumulative effect on an individual or individuals.

We are aware of concern that staff may use protected disclosures to raise issues that are personal grievances and not serious wrongdoing. However, on balance we consider that the bill provides for this situation already. Clause 14(2)(c) sets out the options given to receivers, including deciding that “the matter is better addressed by other means”.

It is our view that including more specific references to wrongful behaviour towards individuals, putting individuals at risk, or breaching their human rights could help address some of the issues raised in submissions.

We suggest that this be given further policy consideration.

Discloser’s entitlement to protection

Clause 11 sets out a discloser’s entitlement to protection. We note that if another person discloses further information about a wrongdoing in accordance with the legislation, they would also be entitled to protection. This protective clause would preserve the intent of section 19A of the Act, which draws a distinction between a person “volunteering” supporting information or being required to provide it.

However, we note that clause 20(1)(a)(iii) of the bill (which is currently in section 66 of the Human Rights Act 1993) does not make a similar distinction when it comes to victimisation. We consider that the distinction made in clause 11(5) could be counter-

productive if it were to make a discloser's colleagues reluctant to provide supporting information once an investigation has commenced.

We suggest that the Minister consider whether it would be appropriate to remove the distinction between voluntary and required disclosure of supporting information.

Tikanga Māori

We note that the bill as introduced is unclear as to how certain provisions would apply to tikanga Māori.

For those working in Māori organisations, it is not clear how the process of escalating issues to kaumātua under tikanga fits into disclosing “within” the organisation, confidentially seeking advice from another person, or going to an “appropriate authority”.

We were advised that confidentially seeking advice from kaumātua should always be covered under clause 11(4)(d), and that whether a disclosure to kaumātua would be “within” the organisation would depend on how the organisation has structured its internal procedures and its leadership.

However, the way kaumātua would fit into the category of an “appropriate authority” is not certain and could create risk for the discloser.

We consider that it would be useful to have clear provisions relating to tikanga Māori in the bill.

How the bill's protections relate to other legislation

Some submitters questioned how the bill would fit with other situations where disclosure is permitted or required. We note that where legislation has been made or amended since the Act was passed in 2000, disclosure or reporting requirements have been at least partly aligned with the Act, as appropriate. Examples include the immunity in relation to disclosure in section 16 of the Oranga Tamariki Act 1989, and the protections given to those with a duty to disclose in section 214 of the Financial Markets Conduct Act 2013.

Clause 36 states that “this Act does not limit any statutory or other protection, privilege, immunity, or defence relating to the disclosure of information”. We consider that it could be helpful to add to this clause that the bill's protections would still apply and be relevant where a discloser has a statutory or other duty or obligation to disclose wrongdoing to an appropriate authority.

We suggest that consideration be given to this matter. We note that any such addition would require consultation with other agencies to establish how it would interact with other legislation.

Including a five-year review clause

We suggest that the Minister consider proposing a Supplementary Order Paper to include a five-year review clause in the bill. We note that the 2000 Act included a review requirement as the legislation was new and its effects were difficult to predict.

Advisers told us that they were unsure what effect the main changes in the proposed legislation would have, particularly the ability to make a disclosure to an appropriate authority at any time.

We note that the Government has further work under way relating to the bill. For example, the Ministry of Business, Innovation and Employment is consulting about issues involving bullying and harassment.

We consider that adding a review clause would allow time to assess the effects of the bill and for some of the complex issues to be properly analysed and consulted on.

Green Party of Aotearoa New Zealand differing view

The Green Party will support the protected disclosures legislation but would like to register our strong disappointment at the number of substantive issues that have not been addressed in this legislation.

Consultation started on reform of the protected disclosures legislation and framework in 2018, and many stakeholders were engaged in the process.

The Green Party supports the changes as far as they go but notes that in many ways this legislation tidies up the existing system rather than transforming it to be more fair and effective. The evidence we heard painted a very concerning picture of widespread unaddressed bullying and inappropriate behaviour, and a complete failure of existing systems to intervene or prevent the targeting of people who raise concerns.

We heard evidence from people who had made disclosures and had suffered severe consequences. In some cases these people were still working through the processes for acknowledgement and redress years later. The Green Party believes the benefits of a stand-alone agency with training, advice, oversight, and sanctioning capability would be of significant benefit to the country. While disappointed this work was not done over the last three years, we hope work on this progresses swiftly.

We were also presented with very specific and relevant evidence of what a better whistle-blowing policy and practice would look like. We are disappointed this is not reflected in the legislation given the long period of time that has been taken to bring this legislation to the House. The Green Party believes the legislation should include a duty to support and protect, consequences and reparation for detriment, and a far more detailed requirement for all public sector and larger private sector organisations to have an effective whistleblowing policy and practice. The public sector should lead on this issue with mandatory:

- dedicated support persons for all people making disclosures
- risk assessment practices (which should also be specified in section 12) that will help protect the discloser and ensure that natural justice is developed
- appropriate triage for disclosures
- consistent investigative protocols
- communication strategy that offers data on disclosures, as well as just the processes

- education and training to be mandatory for all staff
- appropriate and transparent remediation strategy.

We look forward to further amendments from the Minister as this bill progresses, especially to further clarify the meaning of serious wrongdoing and to better reflect tikanga Māori.

Finally, while we acknowledge a legislative requirement for a review will prevent this important area of work being indefinitely delayed, the Green Party believes the amount of evidence, the work already done, and the importance of the issues at hand requires more urgency. We would prefer a review within three years rather than five years.

Appendix

Committee process

The Protected Disclosures (Protection of Whistleblowers) Bill was referred to the committee on 30 June 2020.

The closing date for submissions on the bill was 28 February 2021. We received and considered 36 submissions from interested groups and individuals. We heard oral evidence from 16 submitters at hearings in Wellington.

We received advice on the bill from the Public Service Commission. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Marja Lubeck (Chairperson)

Chris Baillie

Camilla Belich

Hon Paul Goldsmith

Jan Logie

Jo Luxton

Ibrahim Omer

Angela Roberts

Erica Stanford

Hon Scott Simpson and Jamie Strange participated in our consideration of this bill.

**Protected Disclosures (Protection of Whistleblowers)
Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Chris Hipkins

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Government Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Protected Disclosures (Protection of Whistleblowers) Act **2020**
2021.
- 2 Commencement** 5
This Act comes into force on **1 July 2021**.

Part 1
Preliminary provisions

- 3 Purpose** 10
The purpose of this Act is to promote the public interest—
(a) by facilitating the disclosure and timely investigation of serious wrongdoing in or by an organisation; and
(b) by protecting the people who disclose in accordance with this Act.
Compare: 2000 No 7 s 5
- 4 Interpretation** 15
In this Act, unless the context otherwise requires,—
appropriate authority has the meaning given in **section 23**
classified information has the meaning given to it by section 78AA of the Crimes Act 1961
discloser has the meaning given in **section 8** 20
environment has the meaning given to it by section 2 of the Environment Act 1986

intelligence and security agency has the meaning given to it by section 4 of the Intelligence and Security Act 2017

intelligence and security information means information that—

- (a) is classified information; or
- (b) relates to the activities of an intelligence and security agency 5

internal procedures means any procedures adopted by, and published within, an organisation about how the organisation receives and deals with information about serious wrongdoing in or by that organisation

international relations agency means—

- (a) the Department of the Prime Minister and Cabinet: 10
- (b) the Ministry of Foreign Affairs and Trade:
- (c) the Ministry of Defence:
- (d) the New Zealand Defence Force

international relations information means information that—

- (a) is about the international relations of the Government of New Zealand; 15
and
- (b) is held by an international relations agency; and
- (c) is not classified information; and
- (d) does not relate to the activities of an intelligence and security agency

officer of Parliament means an Ombudsman, the Parliamentary Commissioner for the Environment, or the Controller and Auditor-General 20

Ombudsman means an Ombudsman holding office under the Ombudsmen Act 1975, and includes for the purposes of this Act (except **section 26**)—

- (a) any person holding office under an Ombudsman to whom any of the powers of an Ombudsman have been delegated under section 28 of that Act; and 25
- (b) any person whom the Chief Ombudsman has appointed to perform an Ombudsman's functions under this Act

organisation means a body of persons (including a body comprising 1 employer and 1 or more employees), whether— 30

- (a) corporate or unincorporate:
- (b) in the public sector or in the private sector

protected disclosure has the meaning given in **section 9**

public sector organisation means—

- (a) an organisation named or specified in Schedule 1 of the Ombudsmen Act 1975: 35

- (b) an organisation (except for an officer of Parliament) named in Schedule 1 of the Official Information Act 1982:
- (c) a local authority or public body named or specified in Schedule 1 of the Local Government Official Information and Meetings Act 1987:
- (d) the Office of the Clerk of the House of Representatives: 5
- (e) the Parliamentary Service:
- (f) an intelligence and security agency:
- (g) a council-controlled organisation within the meaning of section 6 of the Local Government Act 2002

receiver means the receiver of a protected disclosure who is either— 10

- (a) the organisation concerned; or
- (b) an appropriate authority

retaliate has the meaning given in **section 19**

serious wrongdoing has the meaning given in **section 10**.

working day means any day of the week other than— 15

- (a) ~~Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday, and Waitangi Day; and~~
- (b) ~~if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and~~
- (c) ~~a day in the period beginning on 25 December in any year and ending on 15 January (both dates inclusive) in the following year.~~ 20

Compare: 2000 No 7 s 3

5 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 25

6 Act binds the Crown

This Act binds the Crown.

Compare: 2000 No 7 s 4

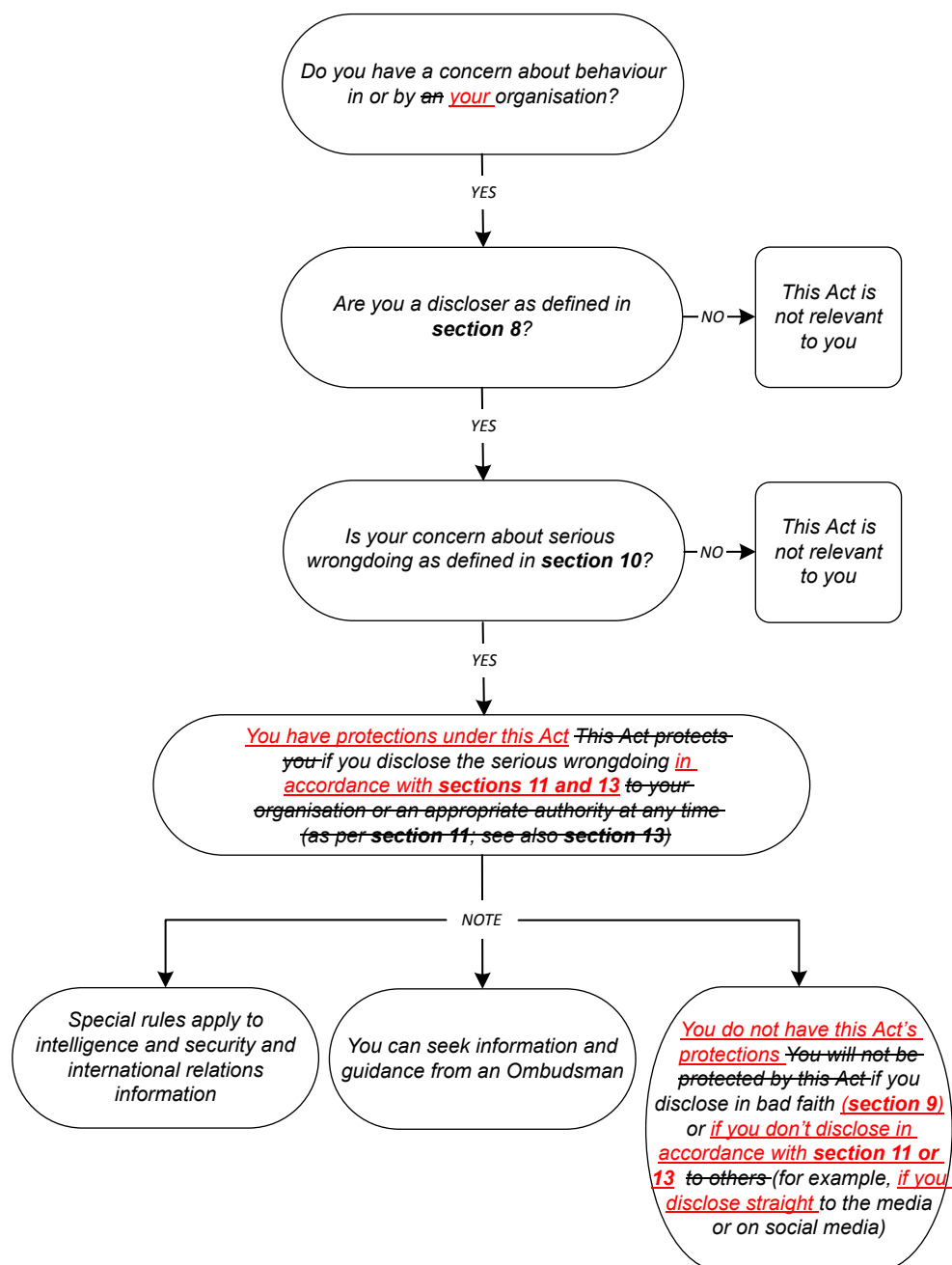
Part 2

Key concepts and what to do

Subpart 1—Key concepts

7 Overview

- (1) The following flowchart gives an overview of how this Act applies to a discloser: 5



Protections under this Act

- (2) A discloser is entitled to protection under this Act for a protected disclosure as follows:
- (a) the receiver must use their best endeavours to keep the discloser's identity confidential (with certain exceptions, see **section 16**); and 5
 - (b) the disclosure ~~must~~ should be considered and dealt with in a timely way (see **section 12**); and
 - (c) there can be no retaliation against the discloser's employment (see **section 19**); and
 - (d) the discloser (and their relatives and associates) cannot be treated less favourably (see **section 20**); and 10
 - (e) the discloser has an immunity for the disclosure in court or disciplinary proceedings (see **section 21**); and
 - (f) the organisation cannot contract out of this Act or have internal procedures that are inconsistent with this Act (see **section 22**); and 15
 - (g) a public sector organisation must provide practical assistance and advice to the discloser in relation to serious wrongdoing in or by that organisation (see **section 27**).
- (3) This section is only a guide to the general scheme and effect of this Act.

8 Meaning of discloser 20

In this Act, **discloser**, in relation to an organisation, means an individual who is (or was formerly)—

- (a) an employee;
- (b) a homeworker within the meaning given in section 5 of the Employment Relations Act 2000: 25
- (c) a secondee to the organisation;
- (d) engaged or contracted under a contract for services to do work for the organisation;
- (e) concerned in the management of the organisation (including, for example, a person who is or was a member of the board or governing body of the organisation): 30
- (f) a member of the Armed Forces (in relation to the New Zealand Defence Force);
- (g) a volunteer working for the organisation without reward or expectation of reward for that work. 35

Compare: 2000 No 7 s 3(1)

9 Meaning of protected disclosure

A disclosure of information is a **protected disclosure** if the discloser—

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(a) believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the discloser's organisation; and	
(b) discloses information about that in accordance with this Act; and	
(c) does not disclose it in bad faith.	
Compare: 2000 No 7 ss 6, 20	5
10	Meaning of serious wrongdoing
In this Act, serious wrongdoing includes 1 or more of the following by or in any organisation:	
(a) an unlawful, a corrupt, or an irregular use of public funds or public resources:	10
(b) an act, an omission, or a course of conduct that is a serious risk to public health, public safety, or the environment:	
(c) an act, an omission, or a course of conduct that is a serious risk to the maintenance of law (including the prevention, investigation, and detection of offences and the right to a fair trial):	15
(d) an offence:	
(e) an act, an omission, or a course of conduct that is oppressive, improperly discriminatory, grossly negligent, or that is gross mismanagement, by 1 or more of the following:	
(i) an employee (if the organisation is a public sector organisation):	20
(ii) a person performing a statutory function or statutory duty or exercising a statutory power:	
(iii) a person performing a function or duty or exercising a power on behalf of a public sector organisation:	
Compare: 2000 No 7 s 3(1)	25
10	Meaning of serious wrongdoing
In this Act, <u>serious wrongdoing</u> includes any act, omission, or course of conduct in (or by) any organisation that is 1 or more of the following:	
(a) <u>an offence:</u>	
(b) <u>a serious risk to—</u>	30
(i) <u>public health; or</u>	
(ii) <u>public safety; or</u>	
(iii) <u>the environment:</u>	
(c) <u>a serious risk to the maintenance of law, including—</u>	
(i) <u>the prevention, investigation, and detection of offences; or</u>	35
(ii) <u>the right to a fair trial:</u>	

- (d) an unlawful, a corrupt, or an irregular use of public funds or public resources:
- (e) oppressive, unlawfully discriminatory, or grossly negligent, or that is gross mismanagement, and is done (or is an omission) by—
 - (i) an employee (if the organisation is a public sector organisation): 5
 - (ii) a person performing (or purporting to perform) a statutory function or statutory duty or exercising (or purporting to exercise) a statutory power:
 - (iii) a person performing (or purporting to perform) a function or duty or exercising (or purporting to exercise) a power on behalf of a public sector organisation. 10

Compare: 2000 No 7 s 3(1)

Subpart 2—What to do (disclosers and receivers)

11 Discloser's entitlement to protection

- (1) A discloser is entitled to protection under this Act for a protected disclosure made (in accordance with this section) to their organisation or to an appropriate authority. 15
- (2) A discloser is entitled to protection for a protected disclosure made to their organisation if it is made—
 - (a) in accordance with any internal procedures; or 20
 - (b) to the head or a deputy head of the organisation ~~if there are no internal procedures; or~~
 - (c) ~~to the head or a deputy head of the organisation if there are internal procedures, but the discloser believes on reasonable grounds that the person who should be the recipient of the disclosure (according to the internal procedures)—~~ 25
 - (i) ~~is or may be involved in the wrongdoing; or~~
 - (ii) ~~is not an appropriate recipient because of a relationship or association with a person who is or may be involved in the wrongdoing.~~
- (3) A discloser is entitled to protection for a protected disclosure made to an appropriate authority at any time. (This applies whether or not the discloser has also made the disclosure to their organisation or to another appropriate authority.) 30
- (4) A discloser is entitled to protection even if—
 - (a) they are mistaken and there is no serious wrongdoing; or 35
 - (b) they do not refer to the name of this Act when making the disclosure; or
 - (c) they technically fail to comply with this section or **section 13** (as long as they have substantially complied); or

- (d) they also make the disclosure to another person, as long as they do so—
 - (i) on a confidential basis; and
 - (ii) for the purposes of seeking advice about whether or how to make a protected disclosure in accordance with this Act.
- (5) Another discloser who discloses further information in accordance with this Act in support of a disclosure is also entitled to protection (unless they were required to do so under any enactment, rule of law, or contract for the purposes of investigating the disclosure). 5
- (6) If the disclosure is or includes intelligence and security information or international relations information, this section is subject to **sections 25 and 26**. 10
Compare: 2000 No 7 ss 6(3), 6A, 7, 8, 9, 19A
- 12 ~~What Guidance: what receiver should do~~**
- (1) Within 20 working days of receiving a protected disclosure, the receiver of the disclosure should—
 - Acknowledge receipt* 15
 - (a) acknowledge to the discloser the date the disclosure was received (and, if the disclosure was made orally, summarise the receiver's understanding of the disclosure); and
 - Consider*
 - (b) consider the disclosure and whether it warrants investigation; and 20
Check
 - (c) check with the discloser whether the disclosure has been made elsewhere (and any outcome); and
 - Deal with*
 - (d) deal with the matter by doing 1 or more of the following: 25
 - (i) investigating the disclosure:
 - (ii) addressing 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**); and 30
 - Inform discloser (with reasons)*
 - (e) inform the discloser (with reasons) about what the receiver has done or is doing to deal with the matter in accordance with paragraph (d).
- (2) However, when it is ~~impractical~~ impracticable to complete these actions within 20 working days, the receiver should do the actions described in **subsection (1)(a) to (c)** within 20 working days and then should— 35

Inform discloser

- (a) inform the discloser how long the receiver expects to take to deal with the matter; and

Update

- (b) appropriately update the discloser about progress; and 5

Deal with

- (c) deal with the matter as described in **subsection (1)(d)**; and

Inform discloser (with reasons)

- (d) inform the discloser (with reasons) about what the receiver has done or is doing to deal with the matter in accordance with **subsection (1)(d)**. 10

- (3) This section ~~(and **section 15**)~~ are is guidance only. It does and do not confer a legal right (apart from the entitlements under **sections 13 and 30**) or impose a legal obligation on any person that is enforceable in a court of law.

Compare: 2000 No 7 s 9

13 Discloser's entitlement to disclose to Minister or Ombudsman further 15

- (1) This section applies if a discloser believes on reasonable grounds that the receiver of a protected disclosure—

- (a) has not acted as it should under **section 12**; or
- (b) has not dealt with the matter so as to address the serious wrongdoing.

- (2) The discloser is entitled to protection under this Act for a protected disclosure made to— 20

- (a) a Minister (unless the disclosure relates to serious wrongdoing in or by the office of an officer of Parliament); or

- (aa) the Speaker (if the disclosure relates to serious wrongdoing in or by the office of an officer of Parliament). 25

- (b) ~~an Ombudsman (if the receiver was not an Ombudsman) so that the Ombudsman may act under **section 15** or **30**.~~

- (2A) This section does not limit—

- (a) **section 11(3)**, which provides a discloser may disclose to an Ombudsman as an appropriate authority at any time; and 30

- (b) **section 30**, which enables an Ombudsman to refer or investigate certain protected disclosures.

- (3) However, ~~this section does not apply~~ if the disclosure is or includes intelligence and security information or international relations information, this section is subject to (and **sections 25 and 26** apply instead). 35

Compare: 2000 No 7 s 10

Protected Disclosures (Protection of Whistleblowers)	
Part 2 cl 14	Bill
14 Receiver may decide no action is required	
(1) A receiver of a protected disclosure may decide that no action is required <u>and, if so, must inform the discloser (with reasons).</u>	
(2) Reasons that may be appropriate for deciding that no action is required include that—	5
(a) the requirements of sections 8 to 10 are not met;	
(b) the length of time between the alleged serious wrongdoing and the disclosure makes an investigation impracticable or undesirable;	
(c) the matter is better addressed by other means.	
15 Receiver may refer disclosure	10
(1) A receiver that is the organisation concerned may refer the disclosure to an appropriate authority.	
(2) A receiver that is an appropriate authority may refer the disclosure to—	
(a) the organisation concerned; or	
(b) another appropriate authority.	15
(3) Before referring a protected disclosure, the receiver must consult the discloser and the intended recipient of a referral.	
(4) The organisation or authority that has received a referral becomes the receiver of the disclosure and this Act applies accordingly.	
(5) If an appropriate authority refers a disclosure to the organisation concerned, the organisation must inform the authority about what the organisation has done or is doing to deal with the matter (at the same time as the organisation informs the discloser of that under section 12(1)(e) or (2)(d)).	20
(6) A disclosure may be referred on more than 1 occasion.	
(7) <u>The Inspector-General of Intelligence and Security may refer a disclosure under this section in a way that is consistent with section 25(1).</u>	25
Compare: 2000 No 7 s 16	

Part 3 Protections

Confidentiality 30

16 Confidentiality	
(1) Every receiver of a protected disclosure must use their best endeavours to keep confidential information that might identify the discloser.	
(2) However, a receiver need not keep a discloser's identity confidential if—	
(a) the discloser consents to the release of the identifying information; or	35

- (b) ~~the release of the identifying information is to a law enforcement or regulatory agency for the purpose of law enforcement; or~~
- (c) there are reasonable grounds to believe that the release of the identifying information is essential—
 - (i) for the effective investigation of the disclosure; or 5
 - (ii) to prevent serious risk to public health or public safety or the environment; or
 - (iii) to comply with the principles of natural justice.
- (3) Before releasing identifying information for a reason described in **subsection (2)(c)**,— 10
 - (a) if the release is for the reason described in **subsection (2)(c)(i) or (iii)**, the receiver must consult the discloser about the release; or
 - (b) if the release is for the reason described in **subsection (2)(c)(ii)**, the receiver must, if practicable, consult the discloser about the release.
- (3A) After releasing identifying information for a reason described in **subsection (2)(c)**, the receiver must inform the discloser. 15
- (4) Anyone may seek information and guidance from an Ombudsman about the duty of confidentiality in this section.
- (5) *See* **section 25** for special rules relating to intelligence and security information. 20

Compare: 2000 No 7 s 19(1), (3)

16A Protecting confidentiality under Privacy Act 2020

- (1) The release of information that might identify the discloser is an interference with the privacy of an individual for the purposes of Part 5 of the Privacy Act 2020 if— 25
 - (a) the release breaches **section 16** of this Act; and
 - (b) the release has—
 - (i) caused, or may cause, loss, detriment, damage, or injury to the discloser; or
 - (ii) adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of the discloser; or 30
 - (iii) resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of the discloser.
- (2) Part 5 of the Privacy Act 2020 applies (with all necessary modifications) to a release described in **subsection (1)** as follows: 35
 - (a) a discloser may make a complaint under section 70 of that Act, and Part 5 of that Act applies to that complaint (and the duties and powers of the Commissioner, Director, and Tribunal under that Act apply accordingly):

- (b)

the receiver has the onus of proving that **section 16(2)** of this Act authorises the release (and section 101 of that Act does not apply):
- (c)

Part 5 of that Act applies subject to **section 25** of this Act.

17

Protecting confidentiality by withholding official information

- (1)

A receiver may refuse a request for information under the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 as contrary to this Act if the information might identify the discloser of a protected disclosure.

5
- (2)

~~However, a receiver may not withhold information from~~ **Subsection (1)** does not apply if the request is from a law enforcement or regulatory agency seeking the information for the purpose of law enforcement.

10

Compare: 2000 No 7 s 19(2)

Obligation not to retaliate or treat less favourably

18

Obligation not to retaliate or treat less favourably

- (1)

Employers must not retaliate against a discloser who is an employee: *see **section 19***.

15
- (2)

A person must not treat another less favourably because of a protected disclosure: *see **section 20***.

19

No retaliation by employer

- (1)

An employer must not retaliate, or threaten to retaliate, against an employee because the employee intends to make or has made a protected disclosure.

20
- (2)

If an employer retaliates, or threatens to retaliate, against an employee in breach of **subsection (1)**, the employee has a personal grievance under **section 103(1)(k)** of the Employment Relations Act 2000.
- (3)

Part 9 of that Act applies accordingly.

25
- (4)

For the purposes of this section and **section 2018(1)**,—

employee has the meaning given in section 6 of the Employment Relations Act 2000

employer has the meaning given in section 5 of the Employment Relations Act 2000

30

retaliate means—

- (a)

doing any of the following:
- (i)

dismissing the employee:
- (ii)

refusing or omitting to offer or afford to the employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available to other employees of the same or substantially similar

35

qualifications, experience, or skills employed in the same or substantially similar circumstances:

- (iii) subjecting the employee to any detriment or disadvantage (including any detrimental or disadvantageous effect on the employee's employment, job performance, or job satisfaction) 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: 5
- (iv) retiring the employee, or requiring or causing the employee to retire or resign: 10
- (b) organising to do anything described in **paragraph (a)**.

Compare: 2000 No 7 s 17

20 No victimisation

- (1) A person (A) must not treat, or threaten to treat, another person (B) less favourably than A would treat other persons in the same or substantially similar circumstances because— 15
 - (a) B (or a relative or associate of B)—
 - (i) intends to make, or has made, a protected disclosure under this Act; or
 - (ii) has encouraged another person to make a protected disclosure; or 20
 - (iii) has given information or evidence in relation to any complaint, investigation, or proceeding arising out of a protected disclosure; or
 - (b) A believes or suspects that B (or a relative or associate of B) intends to do, or has done, anything described in **paragraph (a)**. 25
- (2) **Subsection (1)** ~~is not breached~~ does not apply if B knowingly made a false allegation or otherwise acted in bad faith.
- (3) A breach of **subsection (1)** is unlawful under **section 66(3)** of the Human Rights Act 1993.

Compare: 1993 No 82 s 66

30

No retaliation in court or disciplinary proceedings

21 Immunity from civil, criminal, and disciplinary proceedings

- (1) Neither a discloser who makes a protected disclosure nor a receiver who refers a protected disclosure under **section 15** is liable to any civil, criminal, or disciplinary proceeding because of making or referring the disclosure. 35

Protected Disclosures (Protection of Whistleblowers)	
Bill	
Part 3 cl 22	
(2) Subsection (1) applies despite any prohibition of or restriction on the disclosure of information under any legislation, rule of law, agreement, contract, internal procedure, oath, or practice.	
Compare: 2000 No 7 s 18	
<i>No contracting out</i>	5
22 No contracting out	
(1) This Act applies despite any agreement, contract, or internal procedure.	
(2) A provision in any agreement, contract, or internal procedure has no effect if it apparently requires a person to do any of the following:	
(a) not to disclose serious wrongdoing that is or could be a protected disclosure:	10
(b) to withdraw a protected disclosure:	
(c) to abandon a protected disclosure:	
(d) to make a disclosure of serious wrongdoing in a way that is inconsistent with this Act.	15
Compare: 2000 No 7 ss 6A(2), 23	
Part 4	
Appropriate authorities, special rules for certain organisations, the Ombudsmen's role, etc	
Subpart 1—Appropriate authorities	20
23 Meaning of appropriate authority	
(1) In this Act, appropriate authority , without limiting the meaning of that term,—	
(a) includes the head of any public sector organisation; and	
(b) includes any officer of Parliament; and	25
(c) includes (as examples) the persons or bodies listed in the second column of Schedule 2 ; and	
(d) includes the membership body of a particular profession, trade, or calling with the power to discipline its members; but	
(e) does not include—	30
(i) a Minister; or	
(ii) a member of Parliament.	
(2) However,—	
(a) the appropriate authority for intelligence and security information is the Inspector-General of Intelligence and Security only; and	35

- (b) ~~the appropriate authority for international relations information is an Ombudsman only.~~
- (2) However,—
- (a) the appropriate authority for a protected disclosure that is or includes international relations information is an Ombudsman only: 5
- (b) the appropriate authority for a protected disclosure that is or includes intelligence and security information is the Inspector-General of Intelligence and Security only—
- (i) see section 25(2A) for a disclosure relating to serious wrongdoing in or by the office of the Inspector-General: 10
- (ii) see section 15(7) for the Inspector-General's ability to refer:
- (iii) see sections 13 and 25 for the discloser's entitlement to disclose further.
- Compare: 2000 No 7 ss 3(1), 12(2)(b), 13(2)(a)
- 24 Schedule 2 may be amended by Order in Council** 15
- (1) The Governor-General, by Order in Council made on the recommendation of the Minister responsible for the administration of this Act, may amend **Schedule 2** by doing either or both of the following:
- (a) adding, deleting, or amending the name of an appropriate authority:
- (b) adding, deleting, or amending a description of the nature of concerns. 20
- (2) The Minister must not recommend that an order be made under **subsection (1)** unless the Minister has consulted the relevant appropriate authority.
- (3) An Order in Council made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).
- Subpart 2—Special rules for intelligence, security, and international relations information 25
- 25 Special rules for intelligence and security information**
- (1) A person may only disclose intelligence and security information to someone who holds an appropriate security clearance and is authorised to have access to the information. 30
- (2) A discloser who has made, or is considering making, a protected disclosure that is or includes intelligence and security information may seek information and guidance from the Inspector-General of Intelligence and Security only (and not from an Ombudsman).
- (2A) A discloser is entitled to protection under this Act for a protected disclosure made to the Prime Minister that— 35
- (a) is or includes intelligence and security information; and

Protected Disclosures (Protection of Whistleblowers)	
Bill	
Part 4 cl 26	
(b) <u>relates to serious wrongdoing in or by the office of the Inspector-General of Intelligence and Security—</u>	
<u>and section 11(4) and (5) applies accordingly.</u>	
(3) A person must not disclose intelligence and security information to—	
(a) an Ombudsman; or	5
(b) any Minister except for the Prime Minister or the Minister responsible for an intelligence and security agency.	
(4) An intelligence and security agency, and any other public sector organisation that holds or has access to intelligence and security information, must—	
(a) have internal procedures that reflect the rules in subsections (1) to (3) ; and	10
(b) comply with sections 12, 16 and 27 in a way that is consistent with this section (in relation to intelligence and security information).	
(5) The Inspector-General of Intelligence and Security may disclose intelligence and security information disclosed or referred under this Act only in accordance with subpart 1 of Part 6 of the Intelligence and Security Act 2017.	15
(6) This section overrides sections 13 and 16(4) .	
(7) Section 13 is subject to this section.	
Compare: 2000 No 7 ss 12, 14	
26 Special rules for international relations information	20
(1) An international relations agency must—	
(a) have internal procedures that reflect subsection (3) ; and	
(b) comply with section 27(2)(c) in a way that is consistent with this section.	
(2) The Ombudsman may disclose international relations information only in accordance with the Ombudsmen Act 1975.	25
(3) Despite For the purposes of section 13(2)(a) , the only Minister a discloser may disclose international relations information to is the Prime Minister or the Minister responsible for foreign affairs or trade.	
Compare: 2000 No 7 ss 13, 14	30
Subpart 3—Special rules for all public sector organisations	
27 Public sector organisations must have internal procedures	
(1) Every public sector organisation must have appropriate internal procedures.	
(2) The internal procedures must—	
(a) comply with the principles of natural justice; and	35
(aa) <u>set out a process that complies with section 12; and</u>	

- (b) identify who in the organisation a protected disclosure of serious wrongdoing in or by that organisation may be made to; and
- (c) include, in relation to a protected disclosure of serious wrongdoing in or by that organisation,—
 - (i) a reference to the requirement in **section 19** that the organisation not retaliate, or threaten to retaliate, against the discloser; and 5
 - (ii) a reference to the requirement in **section 20** that the organisation not treat, or threaten to treat, the discloser less favourably than others; and
 - ~~(iii) a reference to the requirement in **section 12** that the organisation consider and deal with the disclosure within 20 working days (unless it is impractical to complete this within 20 working days); and~~ 10
 - (iv) a description of how the organisation will consider the disclosure; and 15
 - (v) a description of the circumstances in which the disclosure may be referred under **section 15**; and
 - (vi) a description of how the organisation will provide practical assistance and advice to disclosers (for example, by having a support person assess any risks to the discloser); and 20
 - (vii) a description of how the organisation will meet the duty of confidentiality in **section 16**.
- (3) The organisation must publish widely (and republish at regular intervals)—
 - (a) information about the existence of the internal procedures; and
 - (b) adequate information on how to use the procedures. 25

Compare: 2000 No 7 s 11

Subpart 4—Ombudsmen’s role

28 Role of Ombudsmen in providing information and guidance

- (1) An Ombudsman may provide information and guidance to any person on any matter about this Act (either after a request or at the Ombudsman’s discretion). 30
- (2) If a discloser notifies the Ombudsmen that the discloser has made, or is considering making, a protected disclosure, an Ombudsman must provide information and guidance to the discloser about the following (as relevant):
 - (a) which disclosures are protected under this Act:
 - (b) the persons to whom information may be disclosed under this Act: 35
 - (c) how to disclose information in accordance with **section 11** in order to be entitled to protection under this Act:
 - (d) a summary of the role of each appropriate authority:

- (e) the protections available under this Act and under the Human Rights Act 1993:
 - (f) how a disclosure may be referred under **section 15**.
 - (3) An Ombudsman may—
 - (a) provide information and guidance to organisations and disclosers about the circumstances in which anonymous protected disclosures may be made; and 5
 - (b) otherwise provide advice and assistance to organisations and other persons about the duty of confidentiality in **section 16**.
 - (4) This section does not apply to a disclosure of that is or includes intelligence and security information (and **section 25** applies instead). 10
- Compare: 2000 No 7 ss 6B, 19(3)

29 Information about internal procedures

- (1) For the purpose of this Act, an Ombudsman may request 1 or more of the following from an organisation: 15
 - (a) information about whether the organisation has established and published internal procedures; and
 - (b) a copy of those procedures; and
 - (c) information about how those procedures operate.
- (2) However, the Inspector-General of Intelligence and Security, and not an Ombudsman, has the power described in **subsection (1)** in relation to an intelligence and security agency. 20
- (3) An organisation is not required to comply with a request made under **subsection (1)** if it is not a public sector organisation. 25

Compare: 2000 No 7 s 6C

30 Ombudsmen may escalate protected disclosure to Minister or investigate disclosure

- (1) An Ombudsman may, with the consent of a discloser who has made a protected disclosure in accordance with this Act to an organisation or another appropriate authority,— 30
 - (a) refer the disclosure to a Minister if the Ombudsman considers, after consulting that Minister, that the receiver of the disclosure—
 - (i) has not acted as it should under **section 12**; or
 - (ii) has not dealt with the matter so as to address the serious wrongdoing; or 35
 - (b) investigate the disclosure if the disclosure relates to serious wrongdoing in or by a public sector organisation and the Ombudsman considers that the receiver of the disclosure—

- (i) has not acted as it should under **section 12**; or
 - (ii) has not dealt with the matter so as to address the serious wrongdoing.
 - (2) ~~**Subsection (1)** does not authorise an Ombudsman to act under that subsection if the disclosure relates to the Office of the Parliamentary Commissioner for the Environment.~~ 5
 - (3) The Ombudsman must promptly notify a referral to any person that the Ombudsman understands may be investigating the disclosure.
 - (4) A disclosure may be referred on more than 1 occasion.
 - (5) This section does not apply ~~to~~ if a disclosure is or includes intelligence and security information (and **section 25** applies instead). 10
 - (6) In relation to a disclosure that is or includes international relations information, an Ombudsman must comply with this section in a way that is consistent with **section 26**.
Compare: 2000 No 7 s 15 15
- 31 **Ombudsmen may take over some investigations or investigate together with public sector organisation**
 - (1) This section applies to a protected disclosure relating to serious wrongdoing in or by a public sector organisation.
 - (2) An Ombudsman may take over an investigation of a disclosure from a public sector organisation, or investigate a disclosure together with a public sector organisation, if— 20
 - (a) the Ombudsman considers that the organisation—
 - (i) has not acted as it should under **section 12**; or
 - (ii) has not dealt with the matter so as to address the serious wrongdoing; and 25
 - (b) the discloser who made the disclosure consents; and
 - (c) in the case of an investigation together with a public sector organisation, the public sector organisation consents to the Ombudsman acting under this section. 30
 - (3) ~~However, **subsection (1)** does not apply to a disclosure—~~
 - (a) ~~relating to the Office of the Parliamentary Commissioner for the Environment; or~~
 - (b) ~~of intelligence and security information (and **section 25** applies instead).~~ 35
 - (3) However, this section does not apply to a disclosure that is or includes intelligence and security information (and **section 25** applies instead).

Compare: 2000 No 7 s 15A

Protected Disclosures (Protection of Whistleblowers)		
Bill		
Part 4 cl 32		
32	Ombudsmen may review and guide investigations by public sector organisations	
(1)	An Ombudsman may review and guide an investigation of a protected disclosure by a public sector organisation (either at the organisation's request or at the Ombudsman's discretion).	5
(2)	However, subsection (1) does not apply to a disclosure—	
(a)	relating to the Office of the Parliamentary Commissioner for the Environment; or	
(b)	of intelligence and security information (and section 25 applies instead).	10
(2)	<u>However, subsection (1) does not apply to a disclosure that is or includes intelligence and security information (and section 25 applies instead).</u>	
(3)	Subsection (1) does not authorise an Ombudsman to issue a direction to a public sector organisation requiring it to act in a particular manner in relation to an investigation.	15
Compare: 2000 No 7 s 15B		
33	Ombudsmen may receive reports on investigations and include information in annual report	
(1)	The Ombudsmen may receive reports on the following investigations:	
(a)	investigations referred under section 30 :	20
(b)	investigations in which an Ombudsman has acted under section 31 :	
(c)	investigations in relation to which an Ombudsman has otherwise provided information or guidance under this Act.	
(2)	The Ombudsmen may include in their annual report under section 29 of the Ombudsmen Act 1975 information about all or any of the following (for the period covered by the report):	25
(a)	current guidance issued by the Ombudsmen about this Act:	
(b)	the number and types of information and guidance inquiries made to the Ombudsmen about the matters in this Act:	
(c)	the number of protected disclosures made to the Ombudsmen:	30
(d)	the number of investigations undertaken or taken over by the Ombudsmen:	
(e)	the number of investigations referred under section 30 :	
(f)	the outcome of the matters referred to in paragraphs (b) to (e) (if known by the Ombudsmen).	35
Compare: 2000 No 7 s 15C		

34 Chief Ombudsman may appoint persons to perform Ombudsman's functions under this Act

The Chief Ombudsman may, by notice, appoint a person to perform an Ombudsman's functions under this Act.

Compare: 2000 No 7 s 15D

5

35 Ombudsmen's functions and powers

(1) The functions and powers of Ombudsmen under the Ombudsmen Act 1975, including the function of each Ombudsman to investigate a matter of their own motion under section 13(3) of that Act, are not limited by this Act.

(2) The Ombudsmen have the same powers in relation to investigating a protected disclosure made under this Act as Ombudsmen have in relation to a complaint under the Ombudsmen Act 1975, but are not bound to investigate a protected disclosure.

10

(3) Sections 19, 20, and 30 of the Ombudsmen Act 1975 apply, with all necessary modifications, to allow an Ombudsman to obtain information, documents, papers, or things that would in the Ombudsman's opinion assist the Ombudsmen to act under this Act in relation to a public sector organisation.

15

Compare: 2000 No 7 s 15E

Subpart 5—Other protections and privileges

36 Other protections not limited

20

This Act does not limit any statutory or other protection, privilege, immunity, or defence relating to the disclosure of information.

Compare: 2000 No 7 s 21

37 Legal professional privilege

(1) Nothing in this Act authorises a person to disclose information protected by legal professional privilege.

25

(2) A disclosure of such information is not a protected disclosure.

Compare: 2000 No 7 s 22

Subpart 6—Consequential amendments and repeal

38 Consequential amendments

30

Amend the Acts specified in **Schedule 3** as set out in that schedule.

39 Repeal of Protected Disclosures Act 2000

The Protected Disclosures Act 2000 (2000 No 7) is repealed.

Schedule 1

Transitional, savings, and related provisions

s 5

Part 1

Provisions relating to this Act as enacted

5

- 1 **Disclosure made after commencement of this Act**
- (1) This Act applies to a protected disclosure made after the commencement of this Act (whether the alleged serious wrongdoing occurs before or after then).
- (2) If substantially the same disclosure was also made under the Protected Disclosures Act 2000, **sections 11 to 15** apply with all necessary modifications. 10
- 2 **Disclosure made before commencement of this Act**
- The Protected Disclosures Act 2000 continues to apply to a protected disclosure made under that Act before the commencement of this Act.

Schedule 2

Examples of concerns and examples of appropriate authorities

s 23

Nature of concerns	Appropriate authority
Anticompetitive conduct	Commerce Commission
Banks (registered banks)	Reserve Bank of New Zealand
Charities	Department of Internal Affairs
	Solicitor-General
Consumer protection	Commerce Commission
Crime	Commissioner of Police
	Director of the Serious Fraud Office
Education service	Ministry of Education
	Education Review Office
Energy safety	WorkSafe
Environment	Ministry for the Environment
	Department of Conservation
Financial reporting (private sector—issuers and large companies)	Financial Markets Authority
Financial reporting (public sector)	Controller and Auditor-General
<u>Financial service providers' conduct</u>	<u>Financial Markets Authority</u>
Health	Ministry of Health
	Health and Disability Commissioner
Insurers (licensed insurers)	Reserve Bank of New Zealand
Intelligence and security or classified information	Inspector-General of Intelligence and Security only (see section 25)
	Ombudsman only (see section 26)
International relations	Ombudsman
Local Government	Controller and Auditor-General
	Department of Internal Affairs
Police	Commissioner of Police
	Independent Police Conduct Authority
Professional or trade conduct	Ministry of Business, Innovation, and Employment
	Solicitor-General
Prosecutions	Ombudsman
Public sector	Controller and Auditor-General
	<u>Public Service Commission</u>
<u>Public service</u>	Commerce Commission
Sector regulation	State Services Commission <u>Public Service Commission</u>
State services	The Treasury (for State-owned enterprises, Crown companies, and organisations named or described in Schedule 4 of the Public Finance Act 1989)

Schedule 2	Protected Disclosures (Protection of Whistleblowers) Bill	
Nature of concerns		Appropriate authority
Transport and transport safety issues		Ministry of Transport
Whistleblowing and protected disclosures		Ombudsman
Work health and safety		Ministry of Business, Innovation, and Employment
		WorkSafe

Schedule 3 Consequential amendments

s 38

Employment Relations Act 2000 (2000 No 24)

In section 67B(3), replace “(j)” with “(k)”. 5

After section 103(1)(j), insert:

- (k) that the employer has retaliated, or threatened to retaliate, against the employee in breach of **section 19** of the Protected Disclosures (Protection of Whistleblowers) Act **2020** (because the employee has made a protected disclosure). 10

After section 110A, insert:

110B Retaliation against whistleblower

- (1) For the purposes of this Part, **retaliate** has the meaning given to it by **section 19** of the Protected Disclosures (Protection of Whistleblowers) Act **2020**. 15
- (2) An employer may be found to have retaliated, or threatened to retaliate, only if the protected disclosure was a substantial reason for the employer’s relevant actions or omissions. 15
- (3) The burden of proof is on the employer to prove, on the balance of probabilities, that the disclosure was not a substantial reason for the employer’s actions or omissions. 20

In section 111, replace “and **adverse conduct for prohibited health and safety reason**” with “**adverse conduct for prohibited health and safety reason, and retaliate**”.

In section 111, replace “and 110A” with “110A, and **110B**”.

Human Rights Act 1993 (1993 No 82) 25

Replace section 66 with:

66 Victimisation of whistleblower or person making use of rights prohibited

- (1) It is unlawful for any person (**A**) to treat, or threaten to treat, another person (**B**) less favourably than A would treat other persons in the same or substantially similar circumstances because— 30
- (a) B (or a relative or associate of B)—
- (i) intends to make use of their rights under this Act; or
- (ii) has made use of their rights, or promoted the rights of another person, under this Act; or
- (iii) has given information or evidence in relation to any complaint, investigation, or proceeding under this Act; or 35

Human Rights Act 1993 (1993 No 82)—continued

- (iv) has declined to do an act that would contravene this Act; or
- (v) has otherwise done anything under or by reference to this Act; or
- (b) A believes or suspects that B (or a relative or associate of B) intends to do, or has done, anything mentioned in **paragraph (a)**.
- (2) ~~It is not unlawful for any person to treat, or threaten to treat, another person less favourably because that other person~~ **Subsection (1)** ~~does not apply if B knowingly made a false allegation or otherwise acted in bad faith.~~ 5
- (3) ~~It is unlawful for any person to breach~~ **section 20(1)** ~~of the Protected Disclosures (Protection of Whistleblowers) Act 2020 (which requires people to treat whistleblowers, and their relatives and associates, no less favourably than others).~~ 10
- (3) Any breach of **section 20(1)** of the Protected Disclosures (Protection of Whistleblowers) Act 2020 is unlawful under this Act. The rest of this Act applies to that breach (so that, for example, if B is an employee or agent, section 68 of this Act applies to any employer or principal of B). 15

Intelligence and Security Act 2017 (2017 No 10)

After section 171(4), insert:

- (5) The ability to complain under this section is in addition to the ability to make a protected disclosure under the Protected Disclosures (Protection of Whistleblowers) Act **2020**. 20

Ombudsmen Act 1975 (1975 No 9)

In section 15(1) and (2), replace “Protected Disclosures Act 2000” with “Protected Disclosures (Protection of Whistleblowers) Act **2020**”.

In section 26(1)(a) and (b), (3), and (4), replace “Protected Disclosures Act 2000” with “Protected Disclosures (Protection of Whistleblowers) Act **2020**”. 25

In section 29, replace “Protected Disclosures Act 2000” with “Protected Disclosures (Protection of Whistleblowers) Act **2020**”.

Legislative history

24 June 2020	Introduction (Bill 294–1)
30 June 2020	First reading and referral to Education and Workforce Committee
30 March 2021	Reported from Education and Workforce Committee (Bill 294–2)