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Protected Disclosure Act 2000 Review 2018

DRAFT Submission, Transparency International New Zealand (TINZ)

TINZ is fortunate to have considerable input from its elected Directors, staff and Members with Delegated Authority who have specific experience in this topic. The TINZ Submission team on this issue is:

- Professor Michael Macaulay: Associate Dean, Professional Education and Professor of Public Administration at the Victoria Business School. He is one of the research team for the 'Whistling While they Work 2: Improving Managerial responses to Whistleblowing in public and private sector organisations'. This is the world's leading research into public interest whistleblowing.
- Debra (Debbie) Gee: An alumnus of Victoria University of Wellington who presented her MBA research project as a case study and teaching note examining themes of whistleblowing ethics, organisational culture and leadership relating to a high-profile fraud case at the Ministry of Transport. She is a TINZ member with delegated authority for protected disclosure, open government and affiliations.
- Suzanne Snively: TINZ Chair who was the Co-Director of the 2013 Integrity Plus Transparency International Integrity Systems Assessment which included evidence about key gaps in the PDA Act and recommendations of work to be done. She has been involved since in discussions leading to further work by officials and research by academics which has contributed to this current initiative to update the legislation.
- Brendon Wilson: A business manager and adviser who has written on protected disclosure and organisational integrity culture for small-medium business; he is a board member of TINZ with responsibilities in business
- Julie Haggie: CEO of TINZ, held the pen.

About Transparency International (TINZ)

TINZ is a chapter of [Transparency International](#), the global civil society organisation against corruption. TINZ is a not-for-profit incorporated society with charitable status; non-political and non-partisan. TINZ is a caretaker of New Zealand's high trust, high integrity society. Its reports, assessment documents and facilitation of discussions have positively impacted New Zealand's approaches towards corruption prevention and open government.

The respect given to TINZ is driven from documents such as [Integrity Plus 2013 New Zealand National Integrity System Assessment \(NIS\)](#) and subsequent updates in 2015 and 2018 towards a 2nd edition, as well as the [Corruption Perceptions Index](#) produced by the global body. TINZ has also worked with central government agencies on initiatives to strengthen understanding on a broad range of issues around transparency, open government, and integrity systems. This includes innovative Public Sector CEO Leadership Integrity Forums, jointly hosted with the Office of the Auditor General. As resources allow, TINZ will extend these initiatives to local government and business.

TINZ actively brings critical and constructive voices to the table wherever anti-corruption expertise, advocacy and action are needed, and has played a key role in efforts to promote integrity and transparency and to resist and expose corruption. The portfolio of Transparency International is wide and its approaches are focused on detecting and preventing corruption. The large network of committed stakeholders places the international body and the New Zealand chapter in the privileged position of being able to continue fighting against corruption even within a global socio-political context that is ever more challenging.

TINZ response to Consultation questions

Starter note

TINZ attempts to use the terms reporter, protected disclosure and 'speaking up' rather than 'whistleblower' which has pejorative connotations. We use whistleblower where it has been directly referred to in research and reports

Need for change

1. TINZ agrees with the proposition that there is need for change, and evidence to support this includes:
 - a. 'Whistle While they Work survey of protected disclosure regimes in Australasia¹, conducted in conjunction with New Zealand's Ombudsman and Victoria University of Wellington. In this survey the New Zealand public sector fared surprisingly poorly. Of the 10 Australasian and NZ public sector jurisdictions that responded, New Zealand's public organisations – central and local – ranked near the bottom, at eighth. Current legislation was described as "weak, patchy and outdated". This research is an excellent wake up call as it highlights the extent of complacent that has previously restricted progress in this important area.
 - b. The Beatie report² arising from the inquiry conducted by the State Service Commissioner into allegations that reporters were disadvantaged in their employment as a result of voicing their concerns at the Ministry of Transport. In this report, Deputy State Service Commissioner Sandi Beatie suggested that the SSC look at complaints procedures including the operation of the Protected Disclosures Act in relation to the broader Public Service, and 'how well this piece of legislation is meeting its purpose'.
 - c. The MBA report by Debra Gee on the Ministry of Transport fraud case³ which reflected that:
 - Early warning signs of conflict of interest and breaches of policies and procedures were ignored or viewed as acts of 'non-compliance';
 - Substantial emotional harm was generated by the fraud, which impacted on those who spoke up but also on a range of staff across the organisation, including feelings of shame, guilt and betrayal. The fraud also harmed the Ministry of Transport's reputation and that of the wider New Zealand public sector.
 - The case raised questions "about the importance of organisational culture and leadership in creating a cultural environment that supports ethical behaviour and protects staff who try to flag what they believe is inappropriate behaviour"⁴.
 - d. The Institute of Business Ethics 'Ethics at work Survey 2019'⁵. This survey indicates that 25% of employees have been aware of misconduct at work and 65% are likely to speak up about misconduct, one in ten employees have felt pressured to compromise ethical standards, but only 22% say their organisation provides incentives to encourage employees to live up to ethical standards. The study also shows that employees in organisations with an ethics programme are more likely to speak up about misconduct. 79% of employees in organisations

¹ Strength of organisational whistleblowing processes – Analysis from Australia and NZ. A J Brown Sandra A Lawrence, July 2017

² Report of investigation into whistle blower treatment within the Ministry of Transport, 13 July 2017, Sandi Beatie QSO

³ Can you hear the Whistle Blow: Examination of factors that may deafen or attune organisations to whistleblowing, MMBA 532 Business Research Report, November 2017

⁴ Can you hear the Whistle Blow. page 23

⁵ IBE, Ethics at Work, 2018 Survey of Employees Australia, New Zealand and United Kingdom, Guedalina Donde, November 2018

with a comprehensive ethics programme who have been aware of misconduct spoke up as opposed to 32% of those in a similar position in organisations without an ethics programme.

- e. TINZ 2013 NIS⁶ which reflected on the limitations of the Protected Disclosure Act.
- f. Three surveys by Deloitte (2012, 2015 and 2017)⁷ that showed consistently that private and public sector respondents considered bribery, corruption and fraud of a low priority and as a result it was through tip offs that large deceptions were brought to the attention of management.
- g. A 2014 study report by Transparency International Australia, and Griffith and Melbourne Universities⁸ (TI) identified strengths and weaknesses of G20 country whistleblower programmes and provided best practice criteria for whistleblowing legislation, including coverage, definitions of wrongdoing and whistleblower, reporting channels, anonymity, remedies and penalties.
- h. A 2011 OECD report noted the importance of clear legislative frameworks to support organisational culture improvements towards whistleblowing in both public sector and businesses:

Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance and detect violations of anti-corruption laws. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.⁹

Objectives, coverage, purpose and risks

2. **Encouraging and requiring organisational responses.** There should be a strong focus on encouraging open organisational cultures and on early risk assessment. The 'Ethics at Work' survey from the Institute of Business Ethics¹⁰ shows why supporting ethics matters, because:
 - organisations with an ethics programme act more responsibly;
 - employees in organisations with an ethics programme are more likely to speak up about misconduct; and
 - line managers in organisations with an ethics programme set a better example.
3. TINZ strongly supports the inclusion of the private sector in the legislation. From recent widely publicised cases, New Zealand society recognises the need for this support and improvement of

⁶ Integrity Plus 2013 New Zealand National Integrity System Assessment (NIS), TINZ 2013

⁷ Deloitte Bribery and Corruption Survey 2015 Australia & New Zealand 'Separate the wheat from the chaff' <https://www2.deloitte.com/au/en/pages/risk/articles/bribery-corruption-2015-survey.html>

⁸ TI Australia, Blueprint for Free Speech, University of Melbourne, Griffith University. Study by Wolfe, Worth, Dreyfus, Brown: Whistleblower Protection Rules in G20 Countries: The Next Action Plan, 2014

⁹ OECD, "Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation, 2011

¹⁰ Institute of Business Ethics, 'Ethics at Work, 2018 survey of employees Australia, New Zealand And United Kingdom', November 2018

integrity. There is no justification for the private sector being treated differently to the public sector.

4. It is the informed view of TINZ that, along with the legislation, non-legislative tools will assist organisational cultural change, including governance. We also consider that the improvement in organisation integrity cultures and active observance will strongly contribute to corruption prevention and to the reputational risk mitigation for New Zealand.
5. The 2018 'Whistling while they Work' Australasian research¹¹ provides convincing evidence for risk assessment and proactive management steps to reduce the likelihood of inappropriate management or isolation or intimidation of the reporter. It shows that:
 - whilst 82% of reporters experienced negative repercussions, this was overwhelmingly in regard to collateral effects such as anxiety, stress, etc. This shows the importance of early response, organisational awareness, good training, leadership and management, to mitigate the outcomes for reporters.
 - risk assessment and proactive management steps reduce the likelihood of inappropriate management or isolation or intimidation of the reporter. When risk assessment and proactive management to prevent detriment to the reporter occur, treatment and detriment outcomes are substantially improved;
 - where organisations say they conduct early risk assessment, it is more likely that reporters will be provided with a designated support person or other support; and that they will face significantly fewer repercussions – on average, around half as much; and
 - to deal with situations effectively, however, organisations clearly need to be proactive about identifying risks early – as soon as a report is made.
 - In the assessment of reporter treatment, the support and emotional provision provided by the manager to the reporter, were the strongest associates. The manager's work level, organisational ethical culture were also significantly (but weakly) associated with the reporter's treatment.
 - Lack of trust in organisational response, fear and self-protection are key drivers in not reporting, and there appears to be a lower level of awareness and confidence among New Zealand respondents when compared to Australia. That pattern begins with awareness of basic policies. Both nationally and locally there appears to be less awareness of policies in New Zealand.
 - Ethical leadership, ethical role modelling by senior management, and ethical behavioural reinforcement played a significant positive role of shaping reporter repercussions.

Organisations clearly need to be proactive about identifying risks early – as soon as a report is made. It is crucial that they provide care in the first instance, then follow the rules of procedural justice throughout any investigation.

6. In recognition of the unique relationship between the Crown and Maori under the Treaty of Waitangi, TINZ strongly recommends specific negotiation with Maori to improve the understanding of how legislative changes may impact on and interact with tikanga and Te Ao Maori, and whether serious wrongdoing ought to include that which has a serious impact on Treaty relationships.
7. **Definition of wrongdoing.** Surveys show that the largest reporting of wrongdoing is in relation to bullying harassment and discrimination.

¹¹ Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private organisations, 2018

- a. We acknowledge the reasons for wanting to clarify the legislation around wrongdoing at the serious end. However 'serious wrongdoing' is not always first apparent. The Ministry of Transport case indicated that breaches of policy and procedure can be framed as 'carelessness' rather than as potential indicators of more serious wrongdoing. Will the considered changes support the ability of organisations to recognise red flags that may lead to discovery of serious misconduct?
 - b. Will the significant issues of bullying and harassment be sufficiently dealt with? Is there a case for an offence of 'Misconduct in Public Office' to address this element of misuse of power in public office?
8. TINZ acknowledges that confusion can be generated due to the cross over with employment and health and safety legislation around practices such as bullying and harassment. We note that the Australasian study¹² indicates the influence of wrongdoing type on the management of cases, with poor outcomes being more strongly associated with reporting cases involving a mixture of public interest wrongdoing and personal/workplace grievances, than with either personal/workplace or public interest wrongdoing alone. If the legislation is changed to remove bullying and harassment will outcomes be better or worse for the parties concerned, and can legislation or support systems adequately mitigate this risk?¹³ What elements of the current wording 'oppressive, improperly discriminatory or grossly negligent conduct or gross management' assist in revealing serious misconduct?
9. **Breadth of coverage.**
- a. TINZ notes from the European Commission FAQ on Whistleblower protection¹⁴, that the EU is proposing a new law to strengthen whistleblower protection in the EU. It recommends that a reporter is granted protection when reporting on breaches of EU rules in the areas of: public procurement, financial services, anti-money laundering and counter terrorist financing, product safety, environmental protection, nuclear safety, public health, food and feed safety, animal health and welfare, consumer protection, protection of privacy and personal data, and security of network and information systems.
 - b. It also applies to breaches relating to Union competition rules, breaches harming the EU's financial interests and, in view of their negative impact on the proper functioning of the internal market, to breaches of corporate tax rules or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law. Would these be useful parameters to consider when looking at the scope of NZ legislation?
 - c. The current legislation covers conduct that poses a serious risk to public health, safety, the environment or maintenance of the law. We think that serious risks to the relationship between the Crown and Maori should also be included in this definition.
10. **Including private and not for profit?** TINZ supports the extension of protected disclosure legislation to include the private sector and not for profit sector. With regards Not for Profit we think that 'public sector' should include NFPs contracted to perform a public function (as per the Victorian State legislation), and private sector should include not-for-profit companies.

¹² Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private organisations, Brown, Macaulay, Brough, Smith, Hall, Tsahuridu, Lawrence, Dozo. 2018

¹³ Working Paper 2 Why protect whistleblowers? Importance versus treatment in the public & private sectors A J Brown, Jane Olsen & Sandra Lawrence, from Whistleblowing: Improving managerial responses to whistleblowing in public and private organisations, November 2018

¹⁴ file:///C:/Users/US/Downloads/MEMO-18-3442_EN.pdf

11. Exemptions

- a. On balance TINZ supports the law applying to all organisations including private and NFP and including micro businesses. We do not support micro, community, NFP and voluntary organisations having to accept reporting obligations. We also think the reporting provisions for the private sector should not be initially imposed, but research should be supported that informs future decisionmaking.
- b. Any exemption should not be on the basis of staff numbers, rather turnover and including some activity exceptions. There are likely to be organisations (eg financial services, digital or engineering services) managing substantial sums of public or private money or involved in activity that has potential for significant impact, whilst employing a small number of staff. If it is considered appropriate to provide small and micro companies or organisations with an exemption then TINZ suggests exceptions to that exemption for companies operating in the field of financial services, or vulnerable to money laundering or terrorist financing due to the high risks arising from their business activities. Employees in these companies could report to designated public authorities.

12. Media Exemption. With regards to the SSC proposing not to extend the scope to include reporting to the media, we refer again to the EU recommendations that in general:

"..a whistleblower should use internal and external reporting channels in order to be guaranteed protection under the new law. But that, in cases where internal and/or external channels do not function or could not reasonably be expected to function properly, (for instance when it is reasonable to suspect a collusion between the perpetrator of the crime and the state authorities responsible for prosecuting them or in cases of urgent or grave danger for the public interest, or risk of irreversible damage, persons making a public disclosure (including to the media) will also be protected under the new law. "By providing protection to whistleblowers as journalistic sources, the new law will have a clear positive impact in terms of promoting investigative journalism, and more generally media freedom. It will provide potential whistleblowers with legal certainty about the conditions under which they can go to the press, and will reassure them that they will be protected from retaliation if their identity is exposed."¹⁵

TINZ suggests that this be considered for any revised legislation, using the word 'reporters' instead of 'whistleblowers'.

13. Which option is preferred

On balance TINZ prefers option 3, because we are supportive of a single oversight body for people working in the public, private and not-for-profit sectors to go to for advice on raising a concern. We think the Ombudsman would be a more appropriate agency than the SSC as the Ombudsman already has channels and processes in place for recording complaints and the progress at addressing them..

14. Monitoring

It is neither desirable nor necessary to require monitoring across the private sector, at least initially. The compliance load would be counter-productive to the goal of supporting active organisational leadership and culture change.

¹⁵ file:///C:/Users/US/Downloads/MEMO-18-3442_EN.pdf

15. No penalty for breach.

TINZ agrees that at this introductory stage there should be no penalty for employers not complying with monitoring or implementation. Ideally, the greater knowledge of the significant role that reporting channels can play in protecting organisations should motivate employers to adopt stronger and more effective channels.

16. What we don't know – other challenges and problems

- a. There is insufficient knowledge about whistleblowing, especially in the New Zealand business and NGO sectors (it is important to recognise too, that as found by the 'Whistling while they work' project, there is also insufficient knowledge in much of the public sector).
- b. Research could be supported by engaging business representative agencies/associations and NGO sector leaders. This may be more effective than requiring monitoring in these sectors.
- c. Senior managers need understanding and evidence showing that shareholding value and organisational reputation benefit immeasurably more by supporting reporting of wrongdoing than by ignoring and hushing the exposed matter.
- d. There needs to be closer consultation with Maori and Pacific communities, with NGOs and with Small Business Owners
- e. We would raise one concern about the ability of some 'appropriate authorities' listed (eg professional regulatory bodies) and whether they would be able to encompass this sort of investigation within their current complaints/disciplinary regime, procedures and legislation. Also, multiple silo'd approaches from a range of authorities may increase confusion.
- f. The law should enable strong sanction where frivolous/vexatious or selfish complaints are pursued through this mechanism.

17. Other Opportunities: Information provision

Governance, professional bodies, unions and compliance support agencies should be encouraged to develop and adopt tools and advisory resources for use across business, local government and the NGO sector, with support from appropriate government agencies. If handled in this way, it would bring wide positive opportunities.

Thank you for the opportunity to consult on this matter.

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TINZ VISION

A world with trusted integrity systems in which government, politics,
business, civil society and the daily lives of people are free of
corruption