NEW ZEALAND COUNCIL FOR CIVIL LIBERTIES
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Submission: Protected Disclosures (Protection of Whistleblowers) Bill

28 January 2021

About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization whose objects include promoting human rights and maintaining civil liberties.

2. We wish to appear before the Committee to make an oral submission.

Introduction

3. The Council supports strengthening the law to protect those who raise concerns about wrongdoing. The ability to 'blow the whistle' on wrongdoing within the public sector is an important check on the misuse of power. Protection of whistleblowers helps to ensure that government agencies and employees are following the law and honouring our rights as contained in the NZ Bill of Rights and other laws. In the private sector, protection for whistleblowers is also crucial if we are to expose wrongdoing that affects things like people's pensions, savings and their healthcare.

4. Good governance is integral to safeguarding our rights, and the Council agrees with Professor A J Brown's 2017 research, conducted in conjunction with Victoria University of Wellington's Institute for Governance and Policy Studies, that *"Whistleblowing processes … are vital to integrity and good governance."*[1]

[1] Brown, A.J. & Sandra A. Lawrence. "Strength Of Organisational Whistleblowing Processes – Analysis from Australia & New Zealand" https://www.wgtn.ac.nz/__data/assets/pdf_file/0009/909126/Strength-of-whistleblowing-processes-report-Australia-and-New-Zealand-4July2017.pdf

5. We note from the Regulatory Impact Assessment that the Public Service Commission says it will do more work on whistleblower protection in the future. Nevertheless we make suggestions for strengthening this Bill.

Summary of Submission

6. The NZ Council for Civil Liberties recommends:

   i. that the definition of serious wrongdoing is broadened and improved

   ii. that the scope of who is protected is broadened

   iii. that the Ombudsman and Auditor General are brought within the definition of 'public sector organisation'

   iv. that the Act should recognise a support person appointed by a whistleblower to begin the process of a protected disclosure similar to the person referred to in clause 11(4)(d).

   v. the inclusion of the Ombudsman as a legitimate authority to receive protected disclosures from staff at intelligence and security agencies or others dealing with intelligence and security information.

   vi. a similar framework to that found in the UK enabling disclosure about serious imminent risks to public health and safety to news entities (as defined in the Privacy Act 2020) in exceptional circumstances.

Meaning of 'serious wrongdoing'

7. Clause 10 of the Bill defines the term 'serious wrongdoing'. It is crucial to get this right, because it is the disclosure of information about 'serious wrongdoing' that is given protection.

8. In our view, the wording of the clause will mean the law fails to achieve the policy objective of encouraging people to speak up about wrongdoing, which we note is different from the clause 3 purposes of the Bill – namely to 'promote the public interest' by protecting people who disclose in accordance with the Bill.

9. There are three reasons the clause fails to do this:

i. First, some parts of it still uses language that may not be clear to many potential whistleblowers, and this lack of clarity may cause them to doubt whether they will be protected.

ii. Second, the clause does not cover enough kinds of wrongdoing.

iii. Third, as Transparency International NZ has pointed out in its submission to the Committee, clause 10 uses phrases such as 'gross mismanagement' which describe the outcome, or end point, of a period of behaviour and actions that were inappropriate, and fails to support early disclosure of problematic behaviour.

10. The Council believes the Bill could be strengthened by addressing all three of these issues, and that we can draw on the legislation from both the UK and Ireland in particular to do this.

11. For example, the UK's Public Interest Disclosure Act 1998, which inserted provisions into the country's Employment Rights Act 1996, defines disclosures qualifying for protection in the following way:

> ***43B Disclosures qualifying for protection.***
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

12. The UK paragraph (1)(a) reference to a criminal offence is both wider than clause 10(d) of the current Bill, as well as much easier to understand than

clause 10(c), which uses the phrase 'the maintenance of the law'. The UK provision also has a lower threshold, covering situations where an offence 'is likely to be committed', something that would appear to be ruled out by clause 10(c) which states there must be a 'serious risk' to maintenance of the law.

13. Paragraph (1)(b) of the UK provision is also clearer than clause 10 when it relates to an official failing to comply with a legal obligation. If enacted here, this would cover circumstances like officials or ministers failing to comply with section 17 of the NZ Public Records Act duty to create and maintain records of government business, or failures to comply with their obligations under the Official Information Act. It is far from clear that clause 10(c)'s 'serious risk' threshold would protect a whistleblower revealing these examples of poor governance, which are key indicators of behaviour that could cover up fraud or other malfeasance.

14. The Bill's clause 10(b) again has a high threshold of 'serious risk', but also concerns 'public health' and 'public safety', both of which would seem to mean the health or safety of several people, but not possibly an individual. The UK Act instead makes clear that if even one person's health or safety is – *or is likely to be* (again broader than the New Zealand approach) – endangered, then the disclosure will be protected. It is easy to envision the UK drafting to be more comprehensible to someone who is, for example, worried about a person being abused in a care home.

15. A similar problem is encountered with issues to do with the environment. The UK Act has a low threshold of the environment being, or likely to be, 'damaged', whereas the Bill not only uses more complex language of 'an act, an omission, or a course of conduct' but again has the high threshold of 'serious risk to … the environment'. A serious risk of what? If the answer is 'of harm to the environment', then why not specify that, as the UK Act does?

16. Clause 10(c) is possibly meant to cover miscarriages of justice, but unlike the UK Act, it is unclear if this is the case. The drafting of clause 10(c) imports the language of section 6(c) of the Official Information Act 1982, for reasons that are unclear. But the UK's 'miscarriage of justice' drafting has wider application

than simply 'a fair trial', and could possibly cover circumstances such as a mishandled employment investigation in a workplace that results in someone being unfairly punished for something they did not do, or did not merit the punishment meted out.

17. The Bill appears not to protect a whistleblower who discloses information of the kind described in paragraph (f) of the UK Act's definition – that there has been, is, or is likely to be a cover up of one of the other kinds of wrongdoing that the Act is concerned to help expose. This reinforces the Transparency International NZ point about the Bill appearing to deal with consequences of wrongdoing, rather than encouraging disclosure of information that might constitute 'warning signs' of wrongdoing.

18. The UK whistleblowing charity, Protect, which was instrumental in securing passage of the UK legislation, has proposed adding several additional categories of wrongdoing to those quoted above, based on both their 20 years' experience of receiving calls for advice from whistleblowers, and recommendations of the UK's Financial Conduct Authority:

    (ea) gross waste or mismanagement of public funds

    (eb) serious misuse or abuse of authority

    (ec) a breach of employers policies and procedures

    (ed) behaviour that harms or is likely to harm the reputation or financial wellbeing of the employer

19. The proposed (ea) is arguably better covered by clause 10(a) of the Bill. Clause 10(e) of the Bill is both more long-winded than the proposed (eb), as well as being unclear whether it covers 'abuse of authority'. In either event, the qualifying sub-paragraphs of clause 10(e) mean that it only appears to apply to the public sector whereas the proposed amendment to the UK Act would cover both the public and private sectors.

20. The amendments suggested by the UK Financial Conduct Authority in (ec) and (ed) are clearly not covered by the Bill if we're talking about wrongdoing in the private sector. But it is also arguable that neither would be caught by clause 10(e) in relation to the public sector. If it is intended that they are behaviours

meant to be caught by the Bill's protections, then it would be better to say so clearly.

Extra-territoriality

21. The Council notes that the UK Act is explicit that if a failure to comply (or a likely failure to comply) with a legal obligation takes place outside the United Kingdom, someone blowing the whistle about that overseas failure – whether it relates to UK law or of another country – would be making a qualifying disclosure:

> *(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.*

22. The Bill appears to be silent on this issue. We understand this to mean that, for example, if an employee of either a New Zealand government agency (or a New Zealand company) working overseas had concerns about a person breaking a local law in that country, a disclosure about that wrongdoing may not be protected under this Bill. Whether it is a member of the Defence Force posted overseas, or a Fonterra employee concerned about the quality of baby milk formula produced by an overseas factory, the Council believes this law should be clear that they will be protected if they raise a concern appropriately.

Who is covered - scope

23. Clause 8 of the Bill defines who a 'discloser' is for the purposes of this law. In other words, who is entitled to its protection if they blow the whistle.

24. There appear to be a number of categories of people that should be protected by the Bill if they blow the whistle, who are not. These include:

    i. public and private office holders (judges, officers of Parliament, etc)

    ii. job applicants

    iii. interns, or individuals undertaking work placements and work experience

    iv. paid or unpaid trainees

v. shareholders

vi. foster carers

vii. priests and ministers of religion

viii. suppliers, partners and business associates of the employer, and any persons working under the supervision and direction of subcontractors and suppliers

ix. trade union representatives

x. partners in partnerships or limited liability partnerships (although these may be covered by 8(e))

xi. a person receiving coaching or training for sporting or recreational purposes (whether or not that person pays for such coaching or training).

25. This list is taken from proposals drawn up by Protect to strengthen the UK's Public Interest Disclosure Act. It is clear from the current Royal Commission of Inquiry into Abuse in Care, and incidents of people being abused by sports coaches, that the Committee will want to consider a significantly broader group of people who should be protected if they feel the need to raise a public interest concern.

26. Clause 4 of the Bill defines various terms, one of which is 'public sector organisation'.

27. There are two notable omissions from the list of types of organisations captured by the definition of that term: the Ombudsman, and the Controller and Auditor General. While both are organisations which we would all hope are immune from any of the kinds of behaviour which clause 10 of the Bill describes, both are institutions comprised of people, and people are fallible. It also seems odd that while every other 'appropriate authority' defined in clause 23 and listed in Schedule 2 is covered by the definition of 'public sector organisation', these two key institutions designed to uphold integrity in public life are not.

28. The Council also believes that just as s 2(5) of the Official Information Act captures "any information held by an independent contractor engaged by any

public service agency or Minister of the Crown or organisation in his capacity as such a contractor", so too this Bill should cover as a 'public sector organisation' any private sector organisation providing services to the public under contract from a public sector organisation.

Appointment of a support person

29. This Bill assumes that everyone who has information that should be disclosed is capable of making that disclosure without assistance. Failure to allow for a support person would be discrimination prohibited in section 21(1)(h) of the Human Rights Act (1993) when the support person mitigates a need specified in that section.

30. The Council recommends that the Bill should recognise a person appointed by a whistleblower similarly to the person referred to in clause 11(4)(d). This support person need not meet the criteria of section 8 of the Bill as long as the whistleblower themselves does.

31. In addition to meeting the requirements of the Human Rights Act (1993), allowing a support person would enable protected disclosure when the whistleblower fears retaliation. Whilst Parliament may not wish to acknowledge this truth, in the lived experience of Council members fear of retaliation for speaking out is widespread in our government. Although the Bill expressly forbids retaliation there is an existing concern that retaliation may materialise in subtle ways that may negatively impact the individual (e.g. insider threat investigation if the information is sensitive). Appointment of an external support person to effectively begin the whistleblowing process would help alleviate this fear.

Whistleblowing for staff of intelligence and security agencies

32. Under the proposed Bill, as under the Protected Disclosures Act, staff of intelligence and security agencies may disclose to either the Inspector-General of Intelligence and Security (IGIS). However, if the IGIS is unable to receive the disclosure, the staff member must then report the wrongdoing to the Minister or Prime Minister.

33. The requirement to escalate to a Minister is a significant burden to place on an individual seeking to blow the whistle. It is impossible for an individual to interact directly with a Minister without an extremely good reason. In practice this would mean that an individual would likely need to inform the staff at the Minister's office (which may include a representative from the home agency of the individual) of their intent to blow the whistle. This adds risk to the individual's identity being discovered by others in their agency and places them in a position with a significant power imbalance while undertaking an intimidating process.

34. Further complicating this process is that the Minister often does not have regular access to a classified system or other material. In some circumstances they may not operate inside a secure facility, which would make any discussion very difficult for those disclosures involving classified information. It also raises the question of why the Ombudsman would not be an appropriate authority to accept disclosures.

Identifying security and intelligence information

35. The proposed Bill sets out a definition for intelligence and security information as information that is classified or relates to the activities of an intelligence and security agency. This poses some issues for those people wishing to make a protected disclosure.

36. For example, an individual at the Department of Internal Affairs (DIA) who has access to classified material as part of their role would have to make any protected disclosure involving that information to the IGIS, Prime Minister or the Minister responsible for an intelligence and security agency. This then leads to the IGIS investigating the disclosure where necessary.

37. However, investigating DIA's practices does not fall within the scope of the functions of the IGIS under subpart 1, Part 6 of the Intelligence and Security Act 2017. This may then leave the IGIS' investigation open to review if it is indeed outside the jurisdiction of the Office.

38. In addition to the question of jurisdiction, the individual making the disclosure may find it stressful to navigate the complexities of setting up a meeting with

the IGIS. It would likely require liaising with other staff (increasing the risk of identity exposure) and following unfamiliar procedures for a highly secured building, which would be intimidating and stressful for anybody not accustomed to the procedures.

39. This is also complicated further in situation where agencies who are not dealing with classified information all day every day may find it difficult to identify when information becomes classified. For example, if the DIA individual was to broadly blow the whistle on serious wrongdoing about a fellow employee's actions then that may be unclassified. However, if the disclosure then went on to detail the exact person whose passport was being cancelled because of an order from the NZSIS then that would likely be classified. This may mean that an individual would need to make a partial disclosure to the Ombudsman but then switch to the IGIS if the information escalated to a classified level. This could have a significant impact on the individual's trust in the system and own wellbeing if they felt passed off.

40. NZCCL recommends the inclusion of the Ombudsman as a legitimate authority to receive protected disclosures from staff at intelligence and security agencies or others dealing with intelligence and security information. The Ombudsman and his staff clearly have the necessary clearances, or they could not conduct their investigation functions under the Official Information Act.

Public health and safety disclosures to the media

41. In the United Kingdom, an individual may, in exceptional circumstances, choose to approach the media with their concerns. In most cases this would not be considered a legitimate avenue to blow the whistle. However, in those exceptional circumstances the individual maintains their whistleblower rights even when disclosing to the media.

42. In these circumstances, it is necessary for the individual to satisfy the following criteria:

    i. The allegation and the disclosed information must be reasonably believed to be substantially true
    ii. They cannot act for personal gain

iii. They must reasonably believe their employer will subject them to "detriment" or conceal evidence if they approach their employer or prescribed person.

43. NZCCL recommends a similar framework enabling disclosure to news entities (as defined in the Privacy Act 2020) in exceptional circumstances.
