

19 May 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Protected Disclosures (Protection of Whistleblowers) Bill

Purpose

1. We have considered whether the Protected Disclosures (Protection of Whistleblowers) Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. This advice has been prepared in relation to the latest version of the Bill (PCO 21167/1.37). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill replaces the Protected Disclosures Act 2000 (the Act). The Bill continues the purpose of the Act, which is to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and by providing protection for employees and other workers who report concerns.
5. The Bill proposes to re-enact many provisions of the Act either without change or with only superficial amendments, intended to improve clarity, accessibility, and ease of use for non-lawyers. As such, in considering the consistency of the Bill with the rights and freedoms affirmed by the Bill of Rights Act, we have confined our analysis to provisions that affect the policy of the Act. Key policy changes made by the Bill include:
 - clarifying the definition of serious wrongdoing and extending its application to cover private sector use of public funds and authority;
 - enabling people to report serious wrongdoing directly to an appropriate authority at any time;
 - strengthening protections for disclosers;
 - clarifying receivers' options and obligations;
 - clarifying internal procedure requirements for public sector organisations; and
 - clarifying the potential forms of adverse conduct disclosers might face.

Consistency with the Bill of Rights Act

Section 14 – Freedom of Expression

6. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
7. Several clauses in the Bill compel the provision of certain information, and therefore may be seen to limit s 14 of the Bill of Rights Act. These include new obligations on the receiver of a disclosure to acknowledge receipt, inform the discloser (and, if the disclosure was referred to the receiver by an appropriate authority, the authority) of the progress or outcome of its consideration of the disclosure, and to consult with the discloser prior to referring the disclosure or revealing their identity for certain reasons (cls 12, 15(1), 15 (4), and 16(2) of the Bill). If a receiver of a disclosure does not comply with their core obligations under the Bill, the matter may be escalated to an appropriate authority, Minister, or Ombudsman (cls 13 and 30 of the Bill).
8. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable under s 5 of that Act. The s 5 inquiry may be approached as follows:
 - a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. If so, then:
 - i. Is the limit rationally connected with the objective?
 - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. Is the limit in due proportion to the importance of the objective?²
9. We consider that the limitations in the Bill are minimal and justified when considering the important purpose of the Bill, namely, facilitating the disclosure and investigation of serious wrongdoing in the workplace and protecting persons who report concerns.
10. The limits on the freedom of expression in the Bill are rationally connected to this objective. The steps required of a receiver when responding to a disclosure, including the expressive obligations described above, will encourage the reporting of concerns by giving a potential discloser confidence that their disclosure will be investigated promptly and fairly, and that their anonymity will be protected. The limits impair the freedom of expression of the receiver no more than is reasonably necessary to ensure that protected disclosures are dealt with appropriately, and are proportionate to the important objective of the Bill.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7 at [123].

11. We therefore conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

12. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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