

5 December 2018

## Submission Review of the Protected Disclosures Act 2000

The New Zealand Shareholders Association is the only body that represents retail investors in New Zealand.

Our comments relate primarily to companies listed on the NZX.

Answers are in order of the questionnaire.

### Questions

- 1. Do you agree with the objectives and risks outlined above? Please provide a reason for your answer.**

The prime objective of the legislation should be to establish robust structures and mechanisms that allow genuine whistle blowers to report any behaviour that could be detrimental to shareholders in NZX listed companies. A recent Australia New Zealand study conducted by Griffith University with support from Victoria University and the State Services Commission found that 42% of people reported being badly treated by their organisation for speaking up, and 82% feared speaking up would lead to bad repercussions for them. In addition, in a recent New Zealand survey conducted by the UK based Institute of Business Ethics in association with Victoria University revealed that over 25% of employees were aware of misconduct in their workplace during the previous 12 months, and that only 29% of workplaces have a comprehensive ethics programme. It also revealed 10% of workplaces have no ethics programme. Consequently, the need for a review of the Protected Disclosures Act as proposed seems timely.

- 2. Do you have any other ideas for defining the purpose of the regime and assessing options? If yes, please provide details.**

See under Question 4.

- 3. Do you agree with this characterisation of the key problems? Please provide a reason for your answer.**

Yes, as far as it goes. See below.

**4. In your view, what other problems and challenges should be considered? Where possible, please provide evidence or information to support your view.**

The paper doesn't address matters concerning organisational dysfunction such as poor processes and procedures. As an example, we consider recent problems at Fletcher Building Ltd to be an example. Here, governance and management issues resulted in a culture of fear and an apparent unwillingness for staff to speak-up when issues were becoming apparent or information flows were inadequate. The company had a confidential whistle-blower line, but it was ineffective as few people appear to have believed it would not bring about personal repercussions. At least in part, this led to losses of over \$4 Billion, impacting not only the direct stakeholders in the company but also more generally affecting staff, suppliers and Government taxation income. The NZSA was approached by whistle blowers about the problems and as a result the Association approached the Fletcher Board who appear to have discounted our concerns. It does not appear this situation is covered by any current legislation or regulation, so the problem fell between the cracks and there was no one or no organisation able to take responsibility for bringing about the necessary changes to prevent or mitigate the losses.

We believe this should be a matter of public concern as this will likely not be the last case of its kind, yet the excuse appears to be it's just a natural market failing. We don't believe this is a valid excuse. With the levels of Government oversight already applied in many areas it appears unsatisfactory that this area is not also covered.

We believe these issues must be addressed in order to better prevent, or at least mitigate, repetition. This will involve developing robust structures and mechanisms to allow genuine whistle blowers to report in a manner that will result in effective measures being taken to address the issues rather than being swept under the carpet.

**5. How could these problems (either as outlined here or in your answer to the previous question) affect different groups of people in New Zealand?**

See above. Large losses as in this case can have economic and social repercussions.

**6. How urgent is the need for change?**

We believe that change is long overdue. We agree the current Act is deficient and requires amendment. However, solutions must be well thought out or unintended consequences could occur. For example, companies might take a tick-box approach if regulation was overly prescriptive and not address the underlying issues.

**7. What other non-legislative tools could we use to improve how the regime works?**

In essence we agree with the statements. This is about behaviour and culture. Legislation and regulation can only go so far in bringing about the necessary changes in behaviour and culture. Non-legislative tools such as those suggested should support the legislation. The Government through the State Services Commission should set the required standards. We don't see why these standards or principles should not be required for companies above a certain size and potentially all NZX listed companies.

**8. How likely is it that the range of non-legislative tools (either outlined here or in your answer to the previous question) could result in greater benefits than those discussed here?**

See our comments above.

**9. Do you think we should change the law? Why do you think this?**

Yes. For the reasons set out in the paper and in our submission. It is clear that the current law has not encouraged these issues to be adequately addressed, particularly in the private sector. However, a number of government agencies also clearly have not put adequate systems and processes in place.

**10. In your view, which option will be most effective in achieving the desired outcomes? Why do you think this?**

Many NZX listed companies already have Whistle Blowing or as we prefer to term them "Speak Up" programmes and these are usually set out on their websites and in their Annual Reports. We believe it should be mandatory for all NZX listed companies to have a programme, or if resourcing is an issue, at least those above a certain turn-over. We also believe there need to be appropriate structures and mechanisms in place for people to report behaviour that breaches legislation and regulation and that could also result in harm to the organisation as set out in our comments under Question 4.

**11. Are there any other ideas that you think we should consider to address the problems with the current system? If yes, please provide details.**

We have no further comments.

**12. What do you see as the main benefits, costs and risks of this option?**

The biggest risk is that malicious or frivolous complaints could have significant commercial impact on an organisation, particularly where matters get into the public sphere. For this reason, we

think there needs to be a balancing responsibility to ensure that those making reports must have reasonable grounds for doing so.

**13. What changes could be made to improve the effectiveness of this option?**

No comment.

**14. Can you think of any examples of serious wrongdoing that should be covered by the Act, but would fall outside the proposed definition? Please provide specific examples, where possible.**

No comment.

**15. What do you think the impact of new requirements for organisations would be on small and micro-businesses and non-governmental organisations? Do you think an exemption should apply? If yes, please provide details.**

See above.

**16. How would new obligations for employers work alongside existing requirements (e.g. health and safety, employment relations)?**

No comment.

**17. What support would help organisations fulfil their obligations? Where possible, please provide specific examples.**

In the case of most NZX listed companies and large private companies, we believe they have the resources to fulfil their obligations and that these are no more than should reasonably be expected of such organisations.

**18. In your view, what is the necessary lead-in period for organisations in your sector to implement the changes under this proposal? Where possible, please tell us how you have arrived at this timeframe.**

We have no specific time line as it will depend on the establishment of the structures and mechanisms to allow people to Speak Up in the circumstances we have outlined at Question 4.

**19. What do you see as the main benefits, costs and risks of this option?**

No comment.

**20. What changes could be made to improve the effectiveness of this option?**

No comment.

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

We believe the effectiveness of a Speak Up programme is to not place restrictions on the initial approach by the person or persons wishing to speak up. Often, they will be fearful of the possible repercussions of them speaking up. Good public policy should allow them to act in the first instance.

If their actions are later found to be vexatious or motivated by any undesirable intention this can be dealt with at that time.

History has shown that sometimes when a person does speak up their actions lead to and uncover events that are more serious than they understood.

Good policy should assume a person wishing to make a disclosure is acting in good faith until proven otherwise. To assist with this, one option could be that a suitable independent person must first be consulted before a complaint can be made, however there would be a cost to this. On the other hand, all complaints require investigation, so by introducing an appropriate culture, companies and organisations can potentially minimise any cost.

Genuine disclosure should be encouraged not discouraged.

**22. What do you see as the main benefits, costs and risks of this option?**

In the case of NZX listed companies either the NZX or FMA could act as the oversight body. They already have some oversight over NZX listed companies so this work would be an extension of their current operations. Whether the FMA has the necessary expertise may be another matter. The matters that are likely to be raised could be highly technical and require a level of expertise to understand the problems. The costs could be funded by the companies as the benefits of early detection and appropriate remedial action would flow back to those companies. The main risk as always is that the person or persons making the disclosure are identified and suffer harm from those who are responsible for the behaviour. This should not be understated, as history has shown there can sometimes be traumatic impacts on the discloser not being adequately protected from the perpetrators. It is not overstating the matter to say that in some cases suicides or other harm have resulted from making disclosures.

**23. What changes could be made to improve the effectiveness of this option?**

See below.

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

Those who believe they have evidence of any behaviour covered by the legislation could make a confidential disclosure to the oversight body or person. This would be investigated as appropriate and action taken to determine the veracity of the information provided. In the case we outlined under Question 4 the problem was with the Board of the company not being aware of poor process and decision making by management and being overly sceptical when evidence was presented to it.

We agree this is problematic but given the quantum of the resulting losses we believe there needs to be serious thought given to appropriate solutions. Significant losses as in this case or total company failure as in some other cases mean it is not satisfactory to dismiss a solution as being in the 'too hard basket'.

**25. What do you see as the main benefits, costs and risks of this option?**

No comment.

**26. What changes could be made to improve the effectiveness of this option?**

No comment.

**27. In your view, what should the public sector be asked to report on?**

No comment.

**28. How could we use this information to drive improvements?**

No comment.

**29. What do you see as the main benefits, costs and risks of this option?**

In the case of NZX listed companies the oversight body would already have the information (see our comments under Question 22)>

**30. What changes could be made to improve the effectiveness of this option?**

No comment.

**31. Do you think small businesses and community, voluntary, and not-for-profit organisations should be exempt from the reporting obligations that would be introduced under this option? Please provide a reason for your answer**

We think there is a minimum size where the process becomes too complex and costly. With small businesses, the majority of issues would fall under the ERA and it is reasonable to assume that the owners (who typically work in the business) would be motivated to encourage staff feedback where they may know of other issues that need to be addressed.

**32. In your view, what should employers be asked to report on?**

In the case of NZX Listed companies there would be no need for employers to report as the oversight body would already hold the necessary information. However, in all cases, there should be a requirement to report back (at least at a high level) to the complainant with a summary of the actions taken and the broad outcome. If no feedback is received, people feel they have taken a risk for nothing. The IBE report shows this is a relatively significant concern. This report can be seen at

[https://www.ibe.org.uk/userassets/surveys/ibe\\_survey\\_report\\_ethics\\_at\\_work\\_2018\\_survey\\_of\\_employees\\_nz\\_int.pdf](https://www.ibe.org.uk/userassets/surveys/ibe_survey_report_ethics_at_work_2018_survey_of_employees_nz_int.pdf) and is titled "Ethics at work: 2018 survey of employees: Australia, New Zealand and United Kingdom".

**33. How could we use this information to drive improvements?**

By publishing suitable summaries of "typical" issues that are reported, it would inform other companies of the scale and type of issues that their boards and management should be aware of. Equally, if unsubstantiated reports were also disclosed in summary form, it would provide a balance.

**34. Do you agree with our rationale for not introducing changes in some areas? Why do you think this?**

In one high profile case, whistle blowers went to the media who investigated and uncovered the circumstances behind the governance and management failures. Unfortunately, by this time the damage had already been done and losses had occurred. We believe if the persons with the information had been able to disclose, at the time they were aware of the problems, and

appropriate action had been taken, the losses may have been mitigated. In these cases, time is often of the essence.

As regards vexatious complaints we believe these can be dealt with by the body to whom the whistle blower reports to. Placing unnecessary restrictions on genuine whistle blowers will defeat the purpose of the legislation. In addition, history has shown that those seeking to blow the whistle may fear for their own safety.

**35. Are there any other ideas that you think we should consider encouraging people to report concerns? If yes, please provide details.**

Unless genuine whistle blowers believe they will be listened to and their concerns given appropriate attention and that they will not suffer harm by making their disclosures we do not see that the objectives of the legislation will be achieved.

The fact that the Act has not been used since its inception 18 years ago, yet there have been a number of high-profile cases including in the public service, demonstrates the need for root and branch reform.

**36. Are there any other ideas that you think we should consider to improve compliance with the law? If yes, please provide details.**

In the case of NZX listed companies, given the relatively small number of companies, and as many already have whistle blowing processes and procedures, we do not believe the incidence of reporting will be high but that the financial losses involved in such cases can be significant.

Yours sincerely,



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