

# **Protected Disclosures Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

The Bill is designed to give the Ombudsmen an enhanced guiding, reviewing, and investigating role in relation to disclosures of serious wrongdoing, with the Office of the Ombudsmen facilitating a collaborative cross-agency approach.

When the Protected Disclosures Act 2000 (the **Act**) was reviewed under section 24 of the Act in 2003 by Mary Scholtens QC, she brought to light some evidence of delays, inconsistencies, and other difficulties in using the legislative procedures properly, partly because whistle-blowers and some organisations were unsure of how to go about it. The reviewer also noted that there has been a degree of confusion about various definitions, lack of communication with whistle-blowers, lack of confidentiality and protection of identity, and a lack of appreciation that the Ombudsmen can assist.

More explicit information requesting and advising powers will be given to the Ombudsmen in the Bill, in order to facilitate disclosures and their appropriate investigation, and to ensure the Ombudsmen are on a firmer footing in their dealings with investigating organisations. For example, the Ombudsmen will be authorised to request information about internal procedures of both public and private organisations from them directly, and will be able to advise organisations on those procedures to ensure the level of protection of identity afforded to whistle-blowers is in keeping with the Act's purpose.

While the Act gives a whistle-blower a broad range of appropriate authorities to choose from, no one authority is obliged to investigate a disclosure of information. Also, whistle-blowers and organisations

have not always successfully identified the “appropriate authorities” for specific investigations. Accordingly, there are risks of confusion and of disclosures of serious wrongdoing falling between the gaps in various organisations’ investigative jurisdictions.

The Bill seeks to address these risks by giving the Ombudsmen a more substantial managing and co-ordinating role. However, this enhanced role is not an advocacy role for the whistle-blower. It does not give the Ombudsmen power to investigate or take over investigations in relation to private sector organisations. Nor does it authorise the Ombudsmen to take over investigations conducted by appropriate authorities in relation to other organisations.

The Bill clarifies and extends the group of people who can make disclosures of serious wrongdoing and come within the Act’s protections. For example, volunteers and board members will now be treated as employees for most of the Act’s purposes. Whistle-blowers who substantially comply with the Act but for a minor technical failure, or who do not mention the Act by name, will also come within its scope. Witnesses in support of an existing disclosure will be able to use the Act in defined circumstances.

### **Clause by clause analysis**

*Clause 1* is the Title clause.

*Clause 2* provides for the Bill to come into force on the day after the date on which it receives the Royal assent.

*Clause 3* states that the Bill amends the Protected Disclosures Act 2000 (the Act).

### **Part 1 Amendments to principal Act**

*Clause 4* amends the definition of employee in section 3 by—

- clarifying that a person who is a member of the board or governing body of the organisation is an employee; and
- extending it to include a person who works voluntarily for the organisation without reward or expectation of reward.

The clause also consequentially amends the definitions of Ombudsman and public official and clarifies the status of the example in *new section 6A*.

*Clause 5* amends section 6 (which relates to disclosures to which the Act applies). This section currently requires the disclosed information to be about serious wrongdoing. The amendment ensures that if the employee believes on reasonable grounds that the information is about serious wrongdoing but the belief is mistaken, the disclosure will not lose its protection under the Act.

*Clause 6* inserts *new sections 6A to 6C*.

*New section 6A* ensures that a disclosure of information will not lose its protection under the Act merely because—

- of a technical failure to comply with the disclosure requirements of the Act if the employee has substantially complied with the Act; or
- the employee does not expressly refer to the name of the Act when the disclosure is made.

*New section 6B* clarifies that an employee may seek, and an Ombudsman may provide, information and guidance on any matter concerning the Act at any time. The information and guidance that an Ombudsman must provide under section 15 has been moved to this new section as *subsection (2)*.

*New section 6C* allows an Ombudsman to request that either a public or private sector organisation provide information about its internal procedures. This will assist the person making the disclosure to comply with section 7 (which requires disclosure to be made in accordance with the organisation's internal procedures). Under *new section 15E(3)*, an Ombudsman can, in relation to public sector organisations, require information, documents, papers, or things to be provided that would assist him or her to act under *new section 6C*.

*Clause 7* amends section 10 (which allows disclosures to be made to a Minister or an Ombudsman in certain circumstances) as a consequence of *new section 15* (see *clause 8*).

*Clause 8* inserts *new sections 15 to 15E*. These provisions contain a number of new Ombudsmen powers that give the Ombudsmen a more prominent co-ordinating role in progressing the effective handling of disclosures and their investigation. This role is over and above the role of the other appropriate authorities. In large part these amendments pick up improvements to the Act recommended by Mary Scholtens QC.

*New section 15* allows an Ombudsman, with the consent of an employee who has made a disclosure to any organisation, appropriate authority, or other person in accordance with the Act,—

- to refer the disclosure to an appropriate authority or to another appropriate authority if the Ombudsman considers that any of the circumstances in section 9(1)(a) to (c) apply (for example, the head of the organisation is or may be involved in the serious wrongdoing); or
- to refer the disclosure to a Minister of the Crown if the Ombudsman considers that any of the circumstances in section 10(1)(b)(i) to (iii) apply (for example, the person or appropriate authority to whom the disclosure was made has decided not to investigate or has decided to investigate but has not made progress within a reasonable time); or
- to investigate the disclosure if the Ombudsman considers that the disclosure relates to a public sector organisation and any of the circumstances in section 9(1)(a) to (c) or 10(1)(b)(i) to (iii) apply.

*New section 15A* allows an Ombudsman, with the consent of the employee, to take over an investigation of a disclosure by a public sector organisation, or to investigate the disclosure in conjunction with a public sector organisation, if—

- the disclosure is in respect of the public sector organisation; and
- the Ombudsman considers that any of the circumstances in section 10(1)(b)(i) to (iii) apply; and
- in the case of an investigation in conjunction with a public sector organisation, the public sector organisation consents.

The Ombudsmen's powers under this section do not extend to the private sector or to any public sector organisation investigating a complaint against another organisation.

The Act does not currently give guidance about unsatisfactory investigations. *New section 15B* allows an Ombudsman to review and guide an investigation by a public sector organisation (whether or not the investigation is an internal one). The section does not authorise an Ombudsman to issue directions. Under *new section 15E(3)*, an Ombudsman can, in relation to public sector organisations, require information, documents, papers, or things to be provided that would assist him or her to act under *new section 15B*.

*New sections 15 to 15B—*

- do not allow an Ombudsman to act if the protected disclosure of information is in respect of the Office of the Parliamentary Commissioner for the Environment; and

- are subject to sections 12 to 14 (which contain special rules relating to intelligence and security and international relations).

By the first exclusion, the Parliamentary Commissioner for the Environment is treated in the same way as the other Offices of Parliament (as defined in the Public Finance Act 1989). Unlike the Commissioner, the other Offices of Parliament (the Office of the Auditor-General and the Office of the Ombudsmen) are not public sector organisations as defined in the Act. The second exclusion in relation to intelligence and security already appears in sections 7 to 10 and is being carried into the new provisions.

*New section 15C* allows the Ombudsmen to receive reports on investigations in relation to which an Ombudsman has been involved and to include specified information relating to those investigations in the Office's annual report to Parliament under section 29 of the Ombudsmen Act 1975. Under *new section 15E(3)*, an Ombudsman can, in relation to public sector organisations, require information, documents, papers, or things to be provided that would assist him or her to act under *new section 15C*.

*New section 15D* allows the Chief Ombudsman to appoint persons to perform an Ombudsman's functions under the Act.

*New section 15E* provides that—

- the functions and powers of Ombudsmen under the Ombudsmen Act 1975 are not limited by the Act;
- the Ombudsmen have the same powers in relation to investigating a disclosure of information made under the Act as Ombudsmen have in relation to a complaint under the Ombudsmen Act 1975.

The provision carries over the current section 23. However, in addition to the existing powers relating to an investigation, *new section 15E(3)* allows an Ombudsman to exercise a power under the Ombudsmen Act 1975 to require a person to provide information, documents, papers, or things that would in his or her opinion assist him or her to act under *new section 6C, 15B, or 15C*. The new power only applies in relation to public sector organisations.

*Clause 9* inserts a new heading above section 16.

*Clause 10* amends section 19 (which relates to confidentiality). Section 19(2) currently allows a request for information under the Official Information Act 1982 to be refused if it might identify a person who has made a protected disclosure. The amendment

extends the provision to a request under the Local Government Official Information and Meetings Act 1987.

In order to ensure that organisations better protect the identity of the person making the disclosure, in accordance with their duty under section 19, *clause 10* also empowers an Ombudsman to—

- provide information and guidance concerning the circumstances in which anonymous disclosures of information may be made under the Act; and
- otherwise provide advice and assistance in relation to the duty of confidentiality.

*Clause 11* inserts *new section 19A*. *New section 19A* extends the Act's protections to employees who volunteer information in support of another employee's protected disclosure of information. The provision does not apply if the information was provided only after the person was legally required to do so or after the person was approached during the course of the investigation. The exclusions distinguish volunteers from those who are obliged, legally or otherwise, to provide the information, with the intention of making the provision's coverage clear and more workable.

Volunteers in support already have some, although limited, protection under section 66(1)(a)(iii) of the Human Rights Act 1993 (which prevents victimisation).

*Clause 12* substitutes a *new section 23* that prohibits contracting out of the Act. The clause repeals the existing section 23 (which has been moved to *new section 15E*) and section 24 (which is spent because it relates to the review of the operation of the Act that has been carried out).

## **Part 2**

### **Transitional provision**

*Clause 13* is a transitional provision that provides the amendments made by the Bill apply to disclosures of information made after the commencement of the Bill.

---

*Hon Annette King*

## **Protected Disclosures Amendment Bill**

Government Bill

### **Contents**

	Page
1 Title	2
2 Commencement	2
3 Principal Act amended	2

### **Part 1**

#### **Amendments to principal Act**

4 Interpretation	2
5 Disclosures to which Act applies	3
6 New sections 6A to 6C inserted	3
6A Technical failure to comply with or refer to Act	3
6B Role of Ombudsmen in providing information and guidance	4
6C Information about internal procedures	5
7 Disclosure may be made to Minister of the Crown or Ombudsman in certain circumstances	5
8 New heading and sections 15 to 15E substituted	5
<i>Further provisions concerning Ombudsmen</i>	
15 Ombudsmen may escalate disclosure to appropriate authority or Minister or investigate disclosure	5
15A Ombudsmen may take over some investigations or investigate in conjunction with public sector organisation	6
15B Ombudsmen may review and guide investigations by public sector organisations	7
15C Ombudsmen may receive reports on investigations and include information in annual report	7
15D Chief Ombudsman may appoint persons to perform Ombudsman's functions under this Act	8
15E Miscellaneous provisions relating to Ombudsmen	8
9 New heading inserted	8

10	Confidentiality	9
11	New section 19A inserted	9
	19A Protections extend to volunteers of supporting information	9
12	New section 23 substituted	10
	23 No contracting out of Act	10
<b>Part 2</b>		
<b>Transitional provision</b>		
13	Transitional provision	10

**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Protected Disclosures Amendment Act **2007**.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

5

**3 Principal Act amended**

This Act amends the Protected Disclosures Act 2000.

**Part 1**

**Amendments to principal Act**

**4 Interpretation**

10

(1) Paragraph (e) of the definition of **employee** in section 3 is amended by adding “(including a person who is a member of the board or governing body of the organisation)”.

(2) The definition of **employee** in section 3 is amended by adding the following paragraph:

15

“(g) a person who works for the organisation as a volunteer without reward or expectation of reward for that work”.

(3) Paragraph (b) of the definition of **Ombudsman** in section 3 is amended by omitting “whom an Ombudsman” and substituting “whom the Chief Ombudsman”.

20

(4) Section 3 is amended by repealing the definition of **public official** and substituting the following definition:



“**public official** means a person who is an employee of a public sector organisation”.

(5) Section 3 is amended by adding the following subsection as subsection (2):

“(2) An example used in this Act has the following status: 5

“(a) the example is only illustrative of the provision to which it relates and does not limit the provision; and

“(b) if the example and the provision to which it relates are inconsistent, the provision prevails.”

## **5 Disclosures to which Act applies** 10

(1) Section 6(1) is amended by omitting “the manner provided by” and substituting “accordance with”.

(2) Section 6 is amended by adding the following subsections:

“(3) If an employee of an organisation believes on reasonable grounds that the information he or she discloses is about serious wrongdoing in or by that organisation but the belief is mistaken, the information must be treated as complying with subsection (1)(a) for the purposes of the protections conferred by this Act and by section 66(1)(a) of the Human Rights Act 1993. 15

“(4) This section is subject to **section 6A**.” 20

## **6 New sections 6A to 6C inserted**

The following sections are inserted after section 6:

### **“6A Technical failure to comply with or refer to Act**

“(1) A disclosure of information is not prevented from being a protected disclosure of information for the purposes of this Act merely because— 25

“(a) of a technical failure to comply with sections 7 to 10 if the employee has substantially complied with the requirement in section 6 to disclose the information in accordance with this Act; or 30

“(b) the employee does not expressly refer to the name of this Act when the disclosure is made.

<p><b>Example</b></p> <p>Person A is an employee of Organisation B.</p> <p>B's internal procedures for receiving and dealing with information about serious wrongdoing require the information to be provided to B's Human Resources Manager using a particular form.</p> <p>Person A provides the information using the form to B's chief executive rather than the Human Resources Manager. Person A otherwise substantially complies with the Act.</p> <p>The failure to comply is merely technical. Under this section, the disclosure is still a protected disclosure for the purposes of this Act.</p>	<p>5</p> <p>10</p>
“(2) This section applies despite anything to the contrary expressed or implied in the relevant internal procedures.	
<b>“6B Role of Ombudsmen in providing information and guidance</b>	
“(1) An Ombudsman may provide information and guidance to an employee on any matter concerning this Act (either on a request made at any time or at the Ombudsman's discretion).	15
“(2) If an employee notifies the Office of the Ombudsmen, orally or in writing, that he or she has disclosed, or is considering the disclosure of, information under this Act, an Ombudsman must provide information and guidance to that employee on the following matters:	20
“(a) the kinds of disclosures that are protected under this Act:	
“(b) the manner in which, and the persons to whom, information may be disclosed under this Act:	25
“(c) the broad role of each authority referred to in paragraph (a)(i) to (x) of the definition of appropriate authority in section 3(1):	
“(d) the protections and remedies available under this Act and the Human Rights Act 1993 if the disclosure of information in accordance with this Act leads to victimisation of the person making the disclosure:	30
“(e) how particular information disclosed to an appropriate authority may be referred to another appropriate authority under this Act.	35

**“6C Information about internal procedures**

For the purpose of this Act, an Ombudsman may request 1 or more of the following from an organisation:

- “(a) information concerning whether the organisation has established and published internal procedures for receiving and dealing with information about serious wrongdoing; and 5
- “(b) a copy of those procedures; and
- “(c) information about how those procedures operate.”

**7 Disclosure may be made to Minister of the Crown or Ombudsman in certain circumstances 10**

Section 10 is amended by repealing subsection (2) and substituting the following subsection:

- “(2) A disclosure under this section may be made to an Ombudsman only if— 15
  - “(a) it is in respect of a public sector organisation and it has not already been made to an Ombudsman under section 9; or
  - “(b) it is in respect of an organisation other than a public sector organisation and the disclosure is made for the purpose of allowing the Ombudsman to act under **section 15** or 16.” 20

**8 New heading and sections 15 to 15E substituted**

Section 15 and the heading above that section are repealed and the following heading and sections substituted: 25

*“Further provisions concerning Ombudsmen*

**“15 Ombudsmen may escalate disclosure to appropriate authority or Minister or investigate disclosure**

- “(1) An Ombudsman may, with the consent of an employee who has made a protected disclosure of information to any organisation, appropriate authority, or other person in accordance with this Act,— 30
  - “(a) refer the disclosure to an appropriate authority or to another appropriate authority if the Ombudsman considers, after consultation with that appropriate authority, that any of the circumstances in section 9(1)(a) to (c) apply; or 35
  - “(b) refer the disclosure to a Minister of the Crown if the Ombudsman considers, after consultation with that

- Minister, that any of the circumstances in section 10(1)(b)(i) to (iii) apply; or
- “(c) investigate the disclosure if the Ombudsman considers that—
- “(i) the disclosure relates to a public sector organisation; and 5
- “(ii) any of the circumstances in section 9(1)(a) to (c) or 10(1)(b)(i) to (iii) apply.
- “(2) **Subsection (1)**—
- “(a) applies despite sections 7 to 10: 10
- “(b) does not authorise an Ombudsman to act if the protected disclosure of information is in respect of the Office of the Parliamentary Commissioner for the Environment.
- “(3) If an Ombudsman makes a referral under this section, he or she must promptly notify any organisation or other person that he or she is aware may be investigating the disclosure that the information disclosed has been referred under this section to an appropriate authority or Minister of the Crown for investigation. 15
- “(4) A protected disclosure of information does not, by reason of an Ombudsman acting under **subsection (1)**, cease to be a protected disclosure of information. 20
- “(5) Nothing in this section prevents a protected disclosure of information being referred under—
- “(a) this section on more than 1 occasion; or 25
- “(b) section 16.
- “(6) This section is subject to sections 12 to 14.
- “**15A Ombudsmen may take over some investigations or investigate in conjunction with public sector organisation** 30
- “(1) An Ombudsman may take over an investigation of a disclosure of information by a public sector organisation, or investigate a disclosure of information in conjunction with a public sector organisation, if—
- “(a) the disclosure is in respect of the public sector organisation; and 35
- “(b) the Ombudsman considers that any of the circumstances in section 10(1)(b)(i) to (iii) apply; and
- “(c) the employee who made the disclosure consents to the Ombudsman acting under this section; and 40

- “(d) in the case of an investigation in conjunction with a public sector organisation, the public sector organisation consents to the Ombudsman acting under this section.
- “(2) However, **subsection (1)** does not authorise an Ombudsman to act if the protected disclosure of information is in respect of the Office of the Parliamentary Commissioner for the Environment. 5
- “(3) This section is subject to sections 12 to 14.
- “15B Ombudsmen may review and guide investigations by public sector organisations 10**
- “(1) An Ombudsman may review and guide any investigation of a protected disclosure of information by a public sector organisation (either on the organisation’s request or at the Ombudsman’s discretion). 15
- “(2) **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.
- “(3) **Subsection (1)** does not apply if the public sector organisation is the Office of the Parliamentary Commissioner for the Environment. 20
- “(4) This section is subject to sections 12 to 14.
- “15C Ombudsmen may receive reports on investigations and include information in annual report**
- “(1) The Ombudsmen may receive reports on the following investigations: 25
- “(a) investigations referred under **section 15**:
- “(b) investigations in relation to which an Ombudsman has acted under **section 15B**:
- “(c) investigations in relation to which an Ombudsman has otherwise provided information or guidance under this Act. 30
- “(2) The Ombudsmen may include (among other matters) in their annual report under section 29 of the Ombudsmen Act 1975 information concerning all or any of the following in respect of the period covered by the report: 35
- “(a) current guidance issued by the Ombudsmen in respect of this Act:

- “(b) the number and types of information and guidance inquires made to the Ombudsmen in respect of this Act:
- “(c) the number of protected disclosures of information made to the Ombudsmen:
- “(d) the number of investigations of disclosures of information undertaken or taken over by the Ombudsmen: 5
- “(e) the number of investigations referred under **section 15**:
- “(f) the outcome of the matters referred to in **paragraphs (b) to (e)** (if known by the Ombudsmen).
- “**15D Chief Ombudsman may appoint persons to perform Ombudsman’s functions under this Act** 10  
The Chief Ombudsman may, by written notice, appoint a person to perform an Ombudsman’s functions under this Act.
- “**15E Miscellaneous provisions relating to Ombudsmen**
- “(1) The functions and powers of Ombudsmen under the Ombudsmen Act 1975, including the function of each Ombudsman to make an investigation into a matter of his or her own motion under section 13(3) of that Act, are not limited by this Act. 15
- “(2) The Ombudsmen have the same powers in relation to investigating a disclosure of information made under this Act as Ombudsmen have in relation to a complaint under the Ombudsmen Act 1975, but are not bound to investigate the disclosure of information. 20
- “(3) Sections 19 and 20 of the Ombudsmen Act 1975 apply, with all necessary modifications, for the purpose of allowing an Ombudsman to obtain information, documents, papers, or things that would in his or her opinion assist him or her to act under **section 6C, 15B, or 15C** in relation to a public sector organisation.” 25 30
- 9 New heading inserted**  
The following heading is inserted above section 16: “*Reference from one appropriate authority to another of information disclosed*”.

**10 Confidentiality**

- (1) Section 19(2) is amended by inserting “or under the Local Government Official Information and Meetings Act 1987” after “Official Information Act 1982”.
- (2) Section 19 is amended by adding the following subsection: 5
- “(3) An Ombudsman may—
- “(a) provide information and guidance to organisations and employees concerning the circumstances in which anonymous disclosures of information may be made under this Act; and 10
- “(b) otherwise provide advice and assistance to organisations and other persons in relation to the duty specified in subsection (1).”

**11 New section 19A inserted**

The following section is inserted after section 19: 15

**“19A Protections extend to volunteers of supporting information**

- “(1) The protections conferred by sections 17 to 19 apply, with all necessary modifications, to a person who volunteers supporting information as if the information were a protected disclosure of information. 20
- “(2) In this section, a person volunteers supporting information if the person—
- “(a) provides information, in support of a protected disclosure of information made by another person, to— 25
- “(i) a person investigating the disclosure; or
- “(ii) the person who made the disclosure; and
- “(b) is an employee of the organisation in respect of which the disclosure was made; and
- “(c) wishes to provide the supporting information so that the serious wrongdoing can be investigated. 30
- “(3) However, a person does not volunteer supporting information if the person provides the supporting information only after being—
- “(a) required to do so under any enactment, rule of law, or contract for the purposes of the investigation; or 35
- “(b) approached during the course of the investigation by, or on behalf of, the person investigating the matter.”

**12 New section 23 substituted**

Sections 23 and 24 are repealed and the following section is substituted:

**“23 No contracting out of Act**

“(1) This Act has effect despite any provision to the contrary in any agreement or contract. 5

“(2) Any provision in any agreement or contract that purports to require an employee to withdraw or abandon a disclosure of information made under this Act is of no effect.”

**Part 2**

10

**Transitional provision****13 Transitional provision**

The amendments made by this Act apply to disclosures of information made after the commencement of this Act.