

Submission

to the

State Services Commission

on the

Review of the Protected Disclosures Act 2000

14 December 2018

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following seventeen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - MUFG Bank, Ltd
 - China Construction Bank
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the State Services Commission on its review of the Protected Disclosures Act 2000 (**Act**) (**Review**). NZBA commends the work that has gone into the Review and corresponding Options Paper.
4. If you would like to discuss any aspect of the submission further, please contact:

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Introduction

5. Our members are committed to supporting a 'speak up' culture across the banking industry. They work hard to continually improve that culture and develop appropriate whistleblowing mechanisms which staff are confident and able to use. In that regard, our members' primary objective is to ensure that staff feel empowered to speak up internally to their people leaders and specialist support teams (such as HR, Risk and Compliance), and that whistleblowing mechanisms are a safety net for staff to speak up in confidence.
6. Against that background, the industry fully supports the Review. As a result of the findings of the Reserve Bank of New Zealand and Financial Markets Authority review of conduct and culture in retail banks, we are re-doubling our efforts on these issues. To that end our members are working to progress industry-wide whistleblowing initiatives in conjunction with this Review.
7. We support clear and user-friendly processes for those seeking to make protected disclosures. We consider that the legislative framework must adequately protect individuals making protected disclosures, while also enabling organisations to effectively investigate and respond to the substance of such disclosures.
8. Subject to some comments, we support options one, two and three set out in the Options Paper. We consider that these options provide clarification around the application of the framework to the private sector and we are supportive of providing additional support for would-be whistleblowers who may prefer not to use the reporting channels within their organisations. In relation to options 2 and 3, we strongly support the recommendation that the appropriate authority or oversight body has the ability to refer a report back to the organisation concerned where that is appropriate (while respecting the individual's confidentiality). We also support the oversight body having a guidance/information provision function as a port-of-call for individuals and organisations alike.
9. Our responses to the options set out the Options Paper are set out below.

Objectives of the Review

10. NZBA agrees with the objectives of the legislation and the picture of what it would look like if the system was working well. We note that these objectives go beyond what can be achieved by legislation alone and will require engagement across organisations and sectors to create a grassroots culture where speaking up about serious wrongdoing is expected, encouraged, and protected. As an industry, we are supportive of that.
11. We also agree with the risks outlined. An important part of the process is the investigation and resolution of protected disclosures. The framework must maintain the confidentiality and protection of the whistleblower, while enabling the organisation concerned to investigate and respond. Any suggestion of serious wrongdoing must be properly investigated and the individuals involved must be notified of, and given an opportunity to respond to, the matters raised. This is consistent with the principles of natural justice.

Option One

12. NZBA supports option 1.

13. NZBA agrees with and supports the benefits outlined in the Options Paper.
14. In particular, we support the introduction of clear definitions and rules so that the law is easier to understand and use. We agree with the proposal to remove references to bullying and harassment from the definition of 'serious wrongdoing' and the reasons for that proposal.
15. We note that the Options Paper proposes to lower the threshold for making a protected disclosure to 'suspicion'. We support the objective underlying this proposal. However, this must be balanced against the importance of ensuring that the framework does not become a proxy for disputes and employees who have exhausted employment relations avenues. Additionally, there is a risk that a lower standard may encourage the reporting of anecdotal or hearsay matters.
16. Regarding the proposal to include the 'irregular use of money or resources' in the definition of 'serious wrongdoing' – we do not agree this should apply to the private sector. That is because 'irregular use' is a highly subjective standard and, in the private sector, accountability for irregular use of money or resources would be to the shareholders/owners. In contrast, there is clearly a public interest in preventing unlawful or corrupt use of money or resources in the private sector.
17. NZBA also supports the proposal that all organisations – including the private sector – must have "good procedures in place for receiving and handling information about alleged serious wrongdoing..." noting that these will need to take into account any obligations of confidentiality. To that end, we note that all of our members currently have whistleblower policies in place and that these policies include internal and independent channels for reporting.
18. In respect of lead-in time, this will depend on the nature of the changes to the legislation.

Option Two

19. NZBA supports option 2.
20. We agree that this option would be beneficial for people who feel that internal procedures are inadequate, or who fear reprisal. We also consider that this proposal makes the law simpler and clearer for would-be whistleblowers.
21. We consider that in the first instance it will be appropriate for the relevant authority to triage the report and refer it back to the organisation concerned for investigation in the first instance. As such, the authority's role will be to triage reports, and provide information. If that does not resolve the issue, only then should the authority be empowered to take further steps.
22. Option 2 may, however, create an avenue for the inappropriate escalation of customer complaints. For that reason, it will be important for the authority to establish the link between the individual making the report and the organisation. Additionally, as mentioned above, there is a risk that employees who have exhausted employment relations avenues may seek to utilise this option, or that the lowering of the threshold to 'suspicion' from 'belief' may encourage the reporting of anecdotal or hearsay matters.

Option Three

23. NZBA supports option 3.
24. We consider that an independent oversight body which is specialist in protected disclosures, with a clear mandate to provide information/guidance and triage disclosures, would be beneficial for both organisations and would-be whistleblowers. We note that an oversight body may also assist would-be whistleblowers in differentiating between reports which are captured by the Act, and those which ought to be escalated to WorkSafe, the Employment Relations Authority, the Human Rights Commission, etc.
25. Although, we note that there is a risk that this option may lead to some duplication, for example, with respect to whistleblowing channels and industry oversight. We would also not support the creation of multiple oversight bodies through statute as, in our view, that would lead to unnecessary complexity. Additionally, there is a risk that some specialist, industry-specific knowledge may be required to effectively triage reports.
26. We also repeat our concerns set out at paragraphs [15] and [22].

Option Four

27. NZBA has no view on option 4.

Option Five

28. NZBA does not support option 5.
29. Applying oversight to the whole of the private sector would create additional costs without significant benefit. That is particularly true of the banking industry which is already subject to extensive oversight by its regulators. This oversight includes some consideration of internal whistleblowing procedures.