

Submission

By



to the

Government Administration Select Committee

on the

Protected Disclosures Amendment Bill

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PROTECTED DISCLOSURES AMENDMENT BILL¹

1. Introduction

- 1.1. This is the second time this matter has come before Parliament, the first being in 1997 in response to a specific situation rather more in the nature of a clinical difference of opinion than something the legislation ultimately introduced could have been expected to cover.
- 1.2. In its submission on the original bill, the then New Zealand Employers' Federation (since amalgamated with the New Zealand Manufacturers' Federation to form Business New Zealand) saw little need for the legislation believing it to be contrary to principles of natural justice and providing no useful addition to existing procedures either for the investigation of serious wrongdoing or for the protection of employees treated in an unjustifiable way (as recent events would seem to confirm).
- 1.3. Business New Zealand has not resiled from that earlier view but has particular concerns that the legislation should not be further extended to the private sector.

2. Recommendations

- 2.1 Business New Zealand recommends that on the basis of the argument set out below, particular references to the private sector should, as appropriate, either be omitted from the bill or amended to exclude their application to the private sector. The clauses in question are:

Clause 6 (inserting new s6C): The introductory sentence to s6C should be reworded: 'For the purposes of this Act, an Ombudsman may request 1 or more of the following from a public sector organisation'

Clause 7 (inserting new s10 (2)(b)): Subclause (2)(b) should be omitted.

Clause 8 (inserting new s15(1)): The introductory sentence should be reworded: 'An Ombudsman may, with the consent of a public sector employee ...'

3. Discussion

- 3.1. From a private sector point of view certain of the proposed extensions to the ambit of the Protected Disclosures Act would appear to be unnecessary and would further confuse the role of the Ombudsmen, which is primarily to investigate complaints against public sector organisations. The fact that the bill has been sent to the Government

¹ Background information on Business New Zealand is attached as Appendix 1

Administration Select Committee highlights the legislation's tenuous applicability to the private sector.

- 3.2. While the current s15 permits an Ombudsman to provide information and guidance to 'an employee' - presumably referring to either a private or public sector employee – on the kind of disclosures protected (and so on), its proposed replacement (cl8) goes much further, allowing an Ombudsman to act on an employee's behalf by referring the disclosure to the appropriate authority or to a Minister of the Crown.
- 3.3 For referral to an appropriate authority to occur, the Ombudsman must believe that the head of the organisation concerned is likely to be involved in serious wrong doing or that urgency justifies immediate reference, or that there has so far been no action on the matter within 20 working days of the disclosure being made. For referral to the Minister, the appropriate authority must have decided not to investigate the matter, have investigated but failed to make reasonable progress, or have investigated but neither taken any action nor have recommended the taking of an action in respect of the matter in question.
- 3.4 It is true that an Ombudsman is to investigate only if the disclosure relates to a public sector organisation (cl5(1)(c)(i)) but extending the Ombudsman's advice/information-giving role to encompass more active involvement shows every sign of being a step in the direction of Ombudsman investigation in respect of both public and private sectors.
- 3.5 In any event, Ombudsman referral to the 'appropriate authority' would send a strong message that 'authority' investigation was required, possibly regardless of a disclosure's merit. And whether a Minister of the Crown would be in a position to adequately examine the merits of a private sector disclosure is open to question. In either case, there is the likelihood of any investigation cutting across the employment relations sphere, something Business New Zealand would strongly oppose.
- 3.6. Similar objections can be made to cls6 and 7 and their proposed insertion of new ss 6C and 10(2)(b).
- 3.7. New s6C allows an Ombudsman to request information as to whether an organisation has established and published internal procedures for receiving and dealing with information about serious wrong doing, a copy of the procedures, and information about how they operate.
- 3.8. Proposed s6C does not make clear that only public sector organisations are *required* to have such procedures. S8(1)(a) notwithstanding, the message conveyed is that private sector organisations could be viewed less than favourably if such procedures are lacking.

- 3.9. In respect to a private sector organisation, cl7 (inserting new s10(2)(b)) reinforces the ability of an Ombudsman, rather than the employee concerned, to refer a matter raised in connection with a private sector organisation to appropriate authority or to the Minister if the reasons for such disclosure set out in cl8 (inserting new s15(1)(a)) apply (see 3.3 above).
- 3.10. The Ombudsmen's current advice/information-giving role may not affect the private sector to any great extent but it is far from appropriate for Ombudsmen, concerned in the main with public sector complaints, to make what would in effect be quasi-judicial decisions about private sector organisations by taking on the task of complaint referral. As indicated, inherent in such an outcome is the creation of an 'obligation' on the 'appropriate authority' or the Minister to do something about a disclosure, possibly outside either's terms of reference.
- 3.11. As with the original bill, there is also the potential for conflict between organisational 'house rules' prohibiting the disclosure of confidential company information and the fact that little protection is provided for an employer whose employee, for whatever reason, sees fit to engage in unjustified disclosure. S20 of the principal Act states that the statute's protections do not apply to employees who make false or bad faith allegations but that would be little comfort to an employer subject to such an allegation. Employees who wish to make disclosures should therefore be required to do so on their own account.
- 3.12. As the Employers' Federation earlier noted, there should be no ability to disclose confidential commercial information other than to someone within the employing organisation. Where house rule confidentiality provisions are in place, these should take precedence over any right to disclose or to agree to Ombudsman referral. Statutory protections currently are very much all one way.
- 3.13. Business New Zealand has not departed from the Employers' Federation view that the present legislation is inappropriate both for the state and private sector but believes its application to the private sector (to the extent that it does apply) should certainly not be extended. Business New Zealand therefore recommends that in particular, the proposed extensions to the private sector should be omitted from the bill.

4. Recommendations

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APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 70 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.