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Whistling in the Dark? Is the Protected Disclosures Act 2022 a form of placebo policy?

Abstract

This article examines the development of the Protected Disclosures Act 2022, and evaluates the changes that it has made to previous legislation. It argues that it provides relatively few substantive improvements in the legal protections for disclosers and that even these are clouded by ambiguity. The article outlines alternative suggestions that were made throughout the passage of the Act and explores the extent to which it might be read as a placebo policy. It closes by looking at similar patterns of punch-pulling in other recent integrity initiatives.

Keywords protected disclosures, misconduct, whistleblowing, placebo

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The Protected Disclosures (Protection of Whistleblowers) Act 2022 (the Protected Disclosures Act) was enacted on 1 July 2022, after many years in legislative development. The Act promised to make improvements to its predecessor (the Protected Disclosures Act 2000) and was initially backed in part by a major research project into whistleblowing in Australia and New Zealand. In reality, however, the resulting legislative changes are arguably cosmetic at best, and negligible at worst. Yet there was ample time and discursive space to create a more robust set of protections. Many major recommendations of the research project were jettisoned before public consultation had commenced. The majority of submissions to the select committee, all of which called for greater change and legislative protections, were ignored. At the eleventh hour, amendments to the bill proposed by the Green Party's Jan Logie to solidify obligations to actively support people reporting misconduct were rejected by the Labour government on grounds that, as will be shown, are somewhat dubious.

This article charts the development and passage of the Protected Disclosures Act and suggests that, potentially, what Aotearoa New Zealand received was a placebo policy; one that has the appearance of doing something when effectively it does very little (McConnell, 2020). Furthermore,

it will argue that similar patterns are evident in the last ten years where governments of all stripes have introduced legislation pertaining to integrity matters in regard to electoral funding, anti-bribery legislation, lobbying registers and other matters.

It is necessary and proper to declare an interest here. The author was the New Zealand lead for the research project which helped shape the initial consultation paper; gave both written and verbal submissions at the select committee stage; and helped redraft the amendments that were, ultimately, unsuccessful. This is not an exercise in axe-grinding, however, and will simply present an historical case study which charts the development of a piece of legislation over roughly a five-year time frame. It draws on a range of documents and secondary sources, and where first-hand sources are used it will draw on field notes and other recorded artefacts. Value judgements are not completely omitted, but will be made explicit as and when they occur.

Box 1 Key changes brought about by Protected Disclosures Act 2022

- extends the definition of serious wrongdoing to cover private sector use of public funds and authority and to cover behaviour that is a serious risk to the health and safety of any individual
- enables people to report serious wrongdoing directly to an appropriate authority (a trusted external party who can be approached if the discloser is not confident about making a disclosure within their own organisation) at any time, while clarifying the ability of the appropriate authority to decline or refer the disclosure to another agency
- strengthens protections for disclosers by:
  - specifying what a receiver of a disclosure should do, including requirements for protecting the identity of the discloser and where the discloser needs to be consulted
  - clarifying the protections available to those who volunteer supporting information for a disclosure
  - enabling disclosers to make a complaint to the Privacy Commissioner if confidentiality requirements are breached
  - clarifying that protecting a discloser is a conclusive reason not to release identifying information under the Official Information Act and the Local Government Official Information and Meetings Act
- clarifies internal procedures for public sector organisations and requires them to state how they will provide support to disclosers
- clarifies the potential forms of adverse conduct disclosers may face.

Placebo policies

McConnell's concept of placebo policies is a deliberate attempt to extend Edelman's classic work on symbolic politics, which charted the extent to which governments shape public opinion to progress, block or justify different policy initiatives. McConnell argues:

> a placebo policy is a policy produced partially or significantly 'for show', and hence policy-making is *driven in part* by the desire to demonstrate that government is 'doing something' to tackle a tough policy problem. (McConnell, 2019, p.252)

Placebos are more likely to be used to tackle policy issues that emerge in a crisis, or which have full media and public attention, or simply as a response to highly 'wicked' problems. Placebos are designed to give the *appearance* of action, which not only reassures the public that something is being done, but also negates the need for governments to provide genuine solutions. McConnell further argues that placebos are more likely to be found when there is a 'policy trap' (McConnell, 2020, p.960), in which governments have limited resources to deal with an issue where they are under pressure, and proposes five criteria by which observers can identify what he labels 'placebo tendencies'. These are: (1) the public visibility of a problem; (2) the complexity of an issue; (3) the degree of urgency around the issue; (4) expectations for government actions; and (5) the capacity to address the perceived problem (ibid., p.962).

Enacting placebo policies provides numerous benefits for governments. Placebos can enhance reputation and create performative advantage, enabling governments to take credit for solutions that have an ameliorating effect rather than directly addressing the issue, and also allowing them to be seen to be leading on that issue. Placebos also enable governments to set the agenda in the direction they wish, which may help them to control the risk assessment of that issue for the future.

The article turns, then, to the Protected Disclosures Act and will investigate whether it displays placebo policy tendencies.

The Protected Disclosures Act 2022

The Protected Disclosures (Protection of Whistleblowers) Act 2022 came into force on 1 July 2022. It had undergone a long, Covid-affected gestation, and was grounded in significant research evidence. It has not received significant media attention, although that is perhaps not unexpected. As is often the case, this will surely change once a major whistleblowing issue occurs and the Act is put to the test.

The Protected Disclosures Act was authored and shepherded through the legislative process by the Public Service Commission, and in a recent article (Mabbett and Nicholls, 2022, p.20) the commission set out the main features of the Act (see Box 1). This article will not go through each specific item in detail, but will instead make a few initial observations here.

The majority of these changes are relatively minor. Under the previous legislation (the Protected Disclosures Act 2000) disclosers have always been able to contact an appropriate authority, for example, so while there is an improvement

it is an imprecise one. The Protected Disclosures Act 2022, section 13 now gives those who receive a disclosure 20 days to acknowledge and process it. How this will be monitored is unclear and it at best represents a quantitative rather than a qualitative change. Furthermore, the range of appropriate authorities has not been altered. A discloser loses all protections by going to the media (traditional or digital), a state of affairs that is unaltered from the previous legislation.

By far the most significant change is the enhanced range of protections that public sector organisations need to have in place. Previously, the legislation was quite vague about internal processes, specifying only that:

(1) Every public sector organisation must have in operation appropriate internal procedures for receiving and dealing with information about serious wrongdoing in or by that organisation.
(2) The internal procedures must –
  (a) comply with the principles of natural justice; and
  (b) identify the persons in the organisation to whom a disclosure may be made; and
  (c) include reference to the effect of sections 8 to 10.
(3) Information about the existence of the internal procedures, and adequate information on how to use the procedures, must be published widely in the organisation and must be republished at regular intervals. (Protected Disclosures Act 2000, s.11)

Section 29 of the new Act elaborates on the new protections and specifies what particular processes must be in place, including:

- guidance on what a receiver should do (in accordance with section 13);
- protection of confidentiality of the discloser (in accordance with section 17);
- protection against employee retaliation (in accordance with section 21);
- protection against other forms of victimisation (in accordance with section 22);
- explanation that the receiver of a disclosure can pass it along to an appropriate authority (in accordance with section 16).

> … one key rationale for the new legislation was to offer more clarity to disclosers who wished to come forward: 'disclosers were unclear about how to make a disclosure internally'

These changes are positive steps forward, but ambiguities remain. The obligations above are placed solely on public sector organisations; they do not apply to private or not-for-profit organisations, even though the Protected Disclosures Act is cross-sectoral in other respects. They are also all reactive, outlining what needs to happen in cases of a disclosure being made. More proactive processes and protections were identified by research evidence, and subsequently put forward in the suggested amendments. But these have been omitted and excluded.

Some of the rationale for change is rather cloudy. For example, one key rationale for the new legislation was to offer more clarity to disclosers who wished to come forward: 'disclosers were unclear about how to make a disclosure internally' (Mabbett and Nicholls, 2022, p.20). As can be seen above, however, section 11(2)(b) of the Protected Disclosures Act 2000 already made it a legal obligation for organisations to make clear the person to whom a disclosure could be made. If an agency had not informed employees who they could make a disclosure to, they were already breaking the law. The 2022 Act does not alter that in any shape, way or form: having a clear pathway to disclosure was always central in existing legislation. The rationale offered underlines that if a person was unclear about how to make a disclosure internally, then they were in a workplace that was already in breach of the existing law.

Section 13 of Protected Disclosures Act 2022 outlines guidance on what should happen on receipt of a disclosure. As outlined a few paragraphs above, a person receiving a disclosure must, within 20 days: (a) acknowledge the report; (b) consider whether it warrants investigation; (c) check with the discloser to see if it has been made elsewhere (and with what outcome); (d) deal with the matter; and (e) inform the discloser what has happened. These steps are to be followed even if the 20-day time frame is unsustainable.

Crucially, however, none of this guidance is legally binding. Section 13 of Act clearly states:

> (3) This section is guidance only. It does not confer a legal right ... or impose a legal obligation on any person that is enforceable in a court of law.[1]

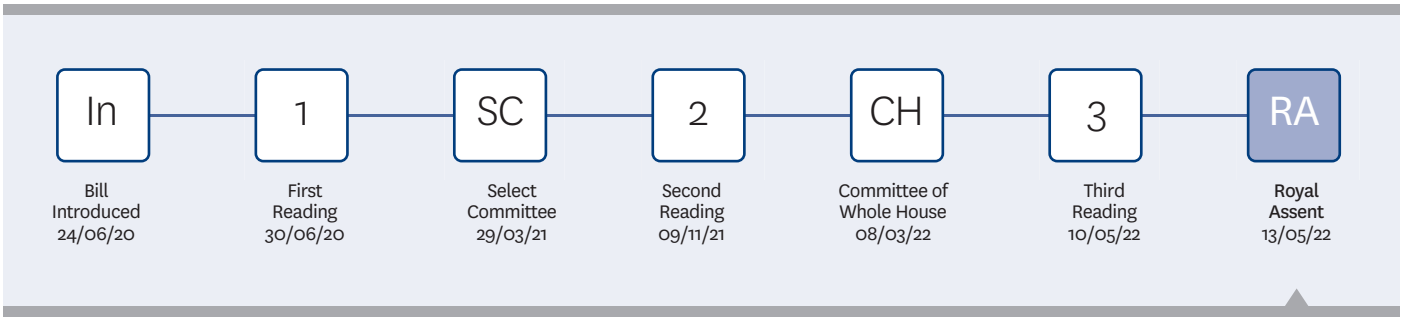
In other words, there is no legal obligation to commit to the processes outlined in the law. The extent to which this non-binding guidance will be enacted is difficult to assess.

Even at face value, then, there are concerns about the Protected Disclosures Act. Most of its new protections are small extensions of rights and obligations in previous legislation. Some of its new components only apply to certain sectors, whereas the legislation supposedly has universal coverage across all sectors. In considering, however, whether or not this means that Protected Disclosures Act is a policy placebo, a little more investigation is required.

Was there a policy trap? The genesis of the Protected Disclosures Act 2022

The Protected Disclosures Act 2022 began as a public consultation document issued by the Public Service Commission in 2018. Following this a bill was introduced in June 2020, and there was a subsequent two-year passage through Parliament (see Figure 1).

Figure 1: Timeline of the passage of the Protected Disclosures Act 2022[2]



Preceding the initial public consultation were a number of key drivers, both reactive and proactive. Uppermost in the public's view was the case of Joanne Harrison, who was appointed general manager organisational development at the Ministry of Transport in 2013. Between 2013 and 2016, Harrison defrauded the ministry of hundreds of thousands of dollars. Following her arrest and conviction in 2017 it was discovered that Harrison was a serial fraudster and had used many aliases in numerous jurisdictions over the years. What complicated the case in the Ministry of Transport is that a number of people had come forward to express their concerns about Harrison's behaviour. Each of these people subsequently was made redundant in a ministry restructuring. An ensuing investigation found that the loss of employment was not linked to the restructuring, but nonetheless the disclosers received an undisclosed sum in compensation following the report.

The Harrison case highlighted the paucity of procedures surrounding key recruitment processes in the New Zealand public service, as well as the ambiguities in making a report of misconduct. The Public Service Commission took this seriously and issued new 'Speaking Up' standards, which have more recently been updated in the document 'Acting in the spirit of service: speaking up' (Public Service Commission, 2022), and there is no doubt these were a welcome and constructive development, but they only applied to the public sector, and, obviously, did not have the same status as legal protection.

All of which indicates that there are grounds for thinking that the circumstances surrounding the creation of Protected Disclosures Act corresponded to one of McConnell's policy traps, albeit perhaps a moderate rather than a strong one.

What is also interesting, and perhaps less widely known, is that throughout 2015–18 the Public Service Commission and New Zealand ombudsman were both official partners in the largest research project ever undertaken into whistleblowing. The research, titled Whistling While They Work 2, was led by Griffith University in Queensland and was the first of its kind to look across sectors (i.e., public, private and not-for-profit), including central and local government, and conduct its research across both Australia and New Zealand. Most importantly, it was designed and conducted with 23 organisations across both jurisdictions, and its intent was to create meaningful change, including legislative improvements. Conducted in different stages, its final survey reached nearly 18,000 respondents.

In short, the project provided the Public Service Commission with probably the broadest and deepest evidence base for reforms on whistleblowing that has, to date, ever been established. Phase one of the project, assessed the strength of current disclosure practices and policies and found that Aotearoa lagged behind its Australian counterparts:

> New Zealand public agencies reported processes that on average were weaker (at 5.51) than recorded for all Australian public sector jurisdictions other than Northern Territory agencies and Tasmanian local governments. (Brown and Lawrence, 2017, p.16)

More importantly, there was plenty of evidence to show what really works in organisations: organisations that conducted full risk assessments on misconduct reports were shown to create more constructive outcomes for both disclosers and the organisations themselves. The research project ultimately made 29 specific recommendations, across five different areas (three of which were geared towards internal reforms, the final two directed towards policymakers). These included, perhaps inevitably, a recommendation for legislative reform.

Government responses

From the outset it was clear that the Protected Disclosures Act was not going to place much stock in the research in which its own agencies had partnered. This could be seen symbolically as well: during the passage of the bill the Public Service Commission website had one brief reference to the project, which was immediately removed following the Act's assent. Whereas the research proposed the introduction of new independent agencies to oversee protected disclosures (although there was no recommendation as to exactly what their status would be in each jurisdiction), this was not given as an option for discussion during consultation. Likewise, the research found that bullying and harassment are by far the most prevalent forms of misconduct (witnessed, experienced and reported) in the workplace. This is not a new finding, of course, and only reinforces decades of research that has found the same problem. Yet bullying and harassment were not part of the remit for 'serious wrongdoing' as defined in Protected Disclosures Act. Numerous submissions to select committee hearings fought for these behaviours to be covered, all to no avail. Bullying and harassment remain in the realm of employment law. Select committee hearings were quite brief, held online over a couple of days, and led to no significant amendments or changes, despite many individuals and organisations expressing concerns about

the bill's lack of ambition, especially in the narrowness of the definition of serious wrongdoing.

Perhaps the most significant attempt to amend the bill was a last-minute supplementary order paper authored by Jan Logie, who was a member of the select committee, which had already put forward its recommendations. The supplementary order paper was co-written by the author of this article and the Public Service Association and drew heavily on the findings of the original research.[3] It sought to enhance clauses on non-retaliation to also include a more proactive obligation for organisations to actively support disclosers. This obligation would go beyond the guidance in section 13 and elsewhere and sought to establish proper risk assessments to be conducted, and for an independent support person to be made available. Such provisions have been shown to work and provide positive outcomes in numerous organisations across Australasia.

The amendment was rejected by the then minister for the public service, Chris Hipkins:

> In terms of the issues that Jan Logie raised, one of the things that I found – as we went through the policy development for this bill – to be one of the more challenging things is: considering how the bill might be applied in the case of quite small entities compared to large Government departments. We often think about protected disclosures in the form of, you know, big Government entities with lots of resources and lots of ability to do things, and if someone makes a disclosure, yep, it's no problem to provide extra support. But we also have to consider that this legislation includes some quite small NGOs, for example, where they're not necessarily going to always be able to do the sorts of things that the member has outlined. (Hipkins, 2022b)

The argument here is an old one and one we will see again very soon, that such a provision would burden the little person and the small organisation. But this did not need to be the case at all. As has been shown, certain aspects of the Protected Disclosures Act only apply to public sector organisations. There was no reason why an obligation to actively support could not have been similarly applied. Or, perhaps, a clause specifying that the obligation would be applied to an organisation of a certain size. As it stands, however, there is still no legal requirement for any agency to actively support anybody coming forward, a situation that one would have hoped the new legislation would address.

> In the last ten years or so, whenever governments of any stripe have sought to enact legislative and policy change to improve public and political integrity, they have inevitably shied away from meaningful reforms.

The most important piece of evidence that the Protected Disclosures Act 2022 is potentially a policy placebo, however, comes from the same debate, in which Hipkins explicitly admitted that the Act is not at all thorough:

> If we rewind back to when this particular process started, we could have taken the attitude of saying 'Let's do everything. Let's do it all thoroughly', but it would have taken longer … Our capacity to do all of that work all at once is not unlimited. We do have to make some trade-offs and choices and I did – you know, I'll be completely frank – make the decision and make the choice that we should try and progress some of the things that might make the Act more accessible and more usable and more used more quickly and then, of course, continue the work on some of those bigger and more complex challenges. (Hipkins, 2022a)

Obviously, all legislation requires trade-offs and compromises. But, in Hipkins' words, if we rewind back we see that the government had the fullest possible evidence base; indeed, the government was in a position of absolute privilege in terms of available research and ready-made suggestions for improvement. So, one of the choices was to reject that evidence. Throughout the passage of legislation there were further repeated calls for a more serious and rigorous set of protections. So another choice was to not listen to those either. And the final choice was to enact a piece of legislation that the legislators' themselves acknowledged was underpowered.

Is Protected Disclosures Act 2022 a policy placebo?

Using the criteria identified at the outset, it is fair to suggest that, if not an outright placebo, the Protected Disclosures Act exhibits significant placebo tendencies.

Protected disclosures had high visibility following the high-profile nature of the Harrison case and the knock-on effects of the inquiry. Complexity, yes; it is certainly a complex set of issues which one piece of legislation cannot fully resolve. Misconduct is an issue of organisational culture and leadership, as well as individual psychology and ethical standpoints. And, to be fair, nobody has suggested that the Protected Disclosures Act can do all of this. Yet it is fair to say that the changes that have been touted are very weak and, in some cases, are not even legally binding.

The urgency to act was not high, and indeed it took several years, but, crucially, the government argued the opposite. As Chris Hipkins' own words show, he believed there was a pressing need to act and therefore rush through a law that he

acknowledged was not particularly rigorous. The expectations for government actions were demonstrably higher than were met by the new legislation, as evidenced in select committee submissions. And again, to look back at the final parliamentary discussions quoted in this article, the government argued that it had such a limited capacity to act that essentially the Protected Disclosures Act is a maximin version of what might have been. I suggest that these claims exhibit strong placebo tendencies as defined by McConnell. The rush to action masks a reality of long gestation. The suggestion of limited capacity and a best-we-can-do attitude belies the depth and rigour of the government's own evidence base.

Taken on its own terms, the outcomes from this legislative process are disappointing. While some commentators would doubtless just put it down to the restrictions of realpolitik, there is clearly an argument that the Protected Disclosures Act 2022 is essentially a placebo, and by the government's own admission. Taken alongside other recent developments in integrity and anti-corruption measures, however, disappointment turns to genuine concern. Even if we ignore the concept of a policy placebo for a moment, there is an apparent historical pattern evident here. In the last ten years or so, whenever governments of any stripe have sought to enact legislative and policy change to improve public and political integrity, they have inevitably shied away from meaningful reforms.

Perhaps the most obvious example was in the amendments to legislation around bribery and corruption in 2015, which sought to bring New Zealand in line with its obligations under the United Nations Convention Against Corruption (UNCAC) and finally ratify the treaty. The amendments, however, still enabled bribery to be legal under certain circumstances. Even now it is permitted to bribe an overseas official (Crimes Act, s.105C(2E)(3)) through facilitation payments, which are expressly forbidden under UNCAC. The rationale is that it is wiser to take a more ground-up approach and try to encourage the eradication of such payments (Ministry of Justice, 2016). Nobody would suggest that this is a sensible approach, but in essence it meant changes to the law were enacted ostensibly to ratify UNCAC while actively working against UNCAC's conventions. This is almost a definition of a policy placebo (Macaulay and Gregory, 2016).

> Anti-bribery legislation still enables bribery; in designating every citizen a potential lobbyist, actual commercial lobbyists remain off the transparency grid, and loopholes for anonymous party donations abound.

Concerns around political party funding are too numerous and too ingrained to be dealt with properly here. It is important to note, however, that a raft of commentators have fully documented the sheer number of loopholes that successive attempts at regulating party financing have maintained, and sometimes created. As Marriot and Rashbrooke argue in their magisterial report: 'It is as if the country had constructed an elaborate defensive wall, but left open a back door through which money could enter relatively unencumbered' (Marriot and Rashbrooke, 2022, p.8).

The Lobbying Disclosure Bill provides another example, if not of placebo policies, then certainly of political rug-pulling. After initially gaining cross-party support and passing its first reading, the bill was rejected by the Government Administration Committee and was not recommended to continue. Two main reasons were cited for this. The first was the belief that New Zealand does not have the same problems with lobbying as exist worldwide. The debate during the first reading often brought up New Zealand's ranking in Transparency International's Corruption Perceptions Index and used this to argue that while examining the role of lobbyists was a useful and important task, New Zealand did not have a problem of corruption. Second, and eerily close to Hipkins' rationale for the Protected Disclosures Act, it was argued that mandating lobbyists to be registered would discourage ordinary citizens from talking to their MP. Submissions on the bill, including from unions and businesses, spoke about the 'chilling effect' legislation might have if 'ordinary citizens' were caught up and labelled as 'lobbyists' (Gluck and Macaulay, 2017). Interestingly, of course, there was never any need to label all citizens as potential lobbyists. The register simply needed to address the issues of commercial lobbyists, but the prior argument stuck and the Bill collapsed. Yet again, in supposedly trying to protect the little person, the major players all got plenty of space in which to remain hidden.

Conclusion

Let me stress that while this article clearly expresses disappointment in Protected Disclosures Act, it does not wish to denigrate the people who worked on it, all of whom doubtless did so with the best intentions possible. But, to quote an old saying, one should never critique a person's intentions, but one can critique their judgement. The evidence presented here shows that in the case of the Protected Disclosures Act 2022, judgements have gone beyond the art of compromise. The findings of the government's own research were ignored, if not outright rejected; the time frame for legislative change was demonstrably much longer than was suggested in parliamentary debate; and the arguments against the requested amendments were specious. Perhaps more importantly, the government fully admitted that the Act was not what it should be.

Successive politicians, and many commentators, continue to trumpet the high trust, high integrity status of Aotearoa New Zealand, and of course there are very positive developments as well that can be identified. The Office of the Auditor-General, for example, has recently published its public integrity strategy (Office of the Auditor-General, 2022) and work is already underway to help improve and extend that work. More generally, trust in the public service remains high, which is something to be cheered.

The evidence shows, however, that in terms of broader judgement New Zealand governments of all stripes have consistently followed a similar pattern when it comes to issues of integrity. Anti-bribery legislation still enables bribery; in designating every citizen a potential lobbyist, actual commercial lobbyists remain off the transparency grid, and loopholes for anonymous party donations abound. The question is not only why, because it is important to note that this has been the case no matter what government has been in place, but also how does it affect what we really think of ourselves? To speculate on the first question may, alas, end up in a rabbit hole of conspiracy thinking. The second question has perhaps a clearer answer. All the cases above may help us feel better because things are ostensibly being done, despite doing very little. Which is, of course, the very definition of a placebo. And ultimately, placebos do not actually cure any genuine ills.

1 With exceptions to the entitlements under sections 14, 32, and 33.
2 https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_99238/protected-disclosures-protection-of-whistleblowers-bill.
3 https://www.legislation.govt.nz/bill/government/2020/0294/latest/versions.aspx.

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