Hon Chris Hipkins

Minister of State Services

Enhancing the Protected Disclosures Act 2000
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Title: Cabinet Paper Enhancing the Protected Disclosures Act 2000

Author: State Services Commission

The Hon Chris Hipkins, Minister of State Services, is releasing the Cabinet paper and Cabinet Minute as context for the Government's review of the Protected Disclosures Act 2000.

Explanatory note

Public engagement on how the Act could be improved will be undertaken for a six-week period from 29 October to 7 December 2018. The material referred to in the Cabinet paper as Appendix 1 is the material that will be publicly available on 29 October 2018.

In Confidence

Office of the Minister of State Services

Chair, Cabinet Government Administration and Expenditure Committee

Enhancing the Protected Disclosures Act 2000

Proposal

1 This paper seeks Cabinet's agreement to review the Protected Disclosures Act 2000 and release the attached material, which invites public feedback on options for change.

Executive Summary

2 New Zealand is a world leader in integrity, openness, and transparency. In 2017, it was ranked the least corrupt country in the world in Transparency International's Corruptions Perception Index.

3 Upholding New Zealand's high standard of integrity is critical, as it contributes to key wellbeing outcomes for New Zealanders. Importantly, integrity supports public trust and confidence in our processes and institutions. Our reputation for integrity also supports economic wellbeing because it enables New Zealand to attract and retain international investment.

4 Uncovering serious wrongdoing is an important part of maintaining integrity – and research has found that reporting by employees is the single most important method by which illegal or corrupt activity in the workplace is brought to light. A clear and effective regime that encourages people to speak up about serious wrongdoing is therefore an essential element of a strong integrity framework.

5 New Zealand was one of the first countries in the world to introduce dedicated legislation to protect people who report concerns of serious wrongdoing – the Protected Disclosures Act 2000 (the Act). Unlike in many other jurisdictions, the Act applies to both the public and private sectors.

6 However, after 18 years of operation, we now have a better understanding of how an effective regime should work. An investigation into the treatment of whistleblowers at the Ministry of Transport, and a subsequent review of the Act by the State Services Commission, has identified a number of areas where we can do better.

7 The current regime is unclear and confusing, and it is difficult to understand how the Act fits within our complex framework of workplace-related legislation. The Act is also weak in a number of key areas, particularly in relation to the private sector.

8 Without monitoring requirements, very little is actually known about the nature or volume of protected disclosures in New Zealand. However, we do know that the Act is a core part of our integrity framework, and we also know we can improve in several key areas. As a world leader in integrity, we can and should do better.

9 I am seeking Cabinet's agreement to review the Act to ensure it supports a clear and effective regime for 'speaking up' in the workplace. The benefits of a review would be particularly significant for private sector organisations and employees.

10 I propose that the objectives of the review should be to ensure that the Act: helps to expose serious threats to the public interest; encourages open organisational cultures; is easy to use and understand; and promotes fairness for all parties.

11 I propose releasing the attached material to invite public feedback on five possible options for change (Appendix 1). The material will be uploaded to an online platform for a period of six weeks, from 29 October to 7 December 2018.

12 I will report back to Cabinet in April 2019 to seek agreement on final policy proposals.

Background

13 New Zealand's Protected Disclosures Act 2000 was one of the world's first pieces of dedicated whistleblower protection legislation. The Act's distinctive purpose is to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in public and private sector organisations, and to provide protection for employees who report concerns.

14 Unlike in many other jurisdictions, the Act applies to both the public and private sectors[1]. This is a key strength of New Zealand's system, as some jurisdictions have no protections for the private sector at all, and in other jurisdictions the regime is scattered across multiple pieces of legislation.

15 Now, eighteen years after the Act's introduction, there is a need to strengthen the obligations on private sector organisations. The Act requires more of public sector organisations because there is significant public interest in uncovering serious wrongdoing in government. But there is also public interest in ensuring that New Zealand businesses and not-for-profit organisations operate with high integrity. This is critical to maintaining our international reputation for low levels of corruption, which contributes to New Zealand's strong relationships with other nations and stimulates investment in our economy.

Key provisions of the Act

16 Disclosures are protected under the Act if the information is about serious wrongdoing, and the employee believes on reasonable grounds that the information is true, or likely to be true.

17 'Serious wrongdoing' is defined broadly as conduct that constitutes: unlawful, corrupt or irregular use of resources in a public sector organisation; a serious risk to public health and safety, the environment, or to the administration of law; an offence; or conduct by a public official which is oppressive, improperly discriminatory, or grossly negligent, or which constitutes gross mismanagement.

18 'Employee' is also defined broadly, and includes current or former employees, homeworkers, secondees, contractors, governance or board members, and volunteers. In relation to the New Zealand Defence Force, it also includes members of the Armed Forces.

[1] For the purposes of this paper, 'private sector' includes the not-for-profit, community, and voluntary sectors.

19 Disclosures must be made in accordance with an organisation's internal procedures for handling information about serious wrongdoing. It is mandatory for public sector organisations to have these procedures in place, but discretionary in the private sector.

20 In certain circumstances, a disclosure can be made to one of a number of appropriate authorities listed under the Act, including the State Services Commissioner and the Ombudsman. This mechanism provides an external channel for employees to report concerns of serious wrongdoing outside their organisation, although the Act requires that internal reporting channels are exhausted first.

21 The Act provides protections for employees who have made a protected disclosure, including confidentiality, and immunity from civil, criminal, and disciplinary proceedings. It also provides compensation for retaliation in the workplace under the Employment Relations Act 2000 and the Human Rights Act 1993. Protections and compensation are not available if the employee knows the allegations to be false, or if they act in bad faith.

22 The Act also sets out the role of the Ombudsman in relation to the protected disclosures regime.

2009 Amendments to the Act

23 Minor amendments were made to the Act in 2009. These changes resulted from a review commissioned by the former Minister of State Services, which had highlighted that there was confusion around some of the Act's definitions and procedures, a strong perception that employees who disclosed concerns would not be protected, and limited awareness of the Ombudsman's role in providing information and guidance.

24 One of the amendments was to expand the Ombudsman's role under the Act. The Ombudsman can now advise public or private sector employees on matters relating to the Act, request information about public sector organisations' internal policies, and, in some cases, take over an investigation in a public sector organisation.

2017 Investigation into whistleblower treatment at the Ministry of Transport

25 In May 2017, the State Services Commissioner launched an investigation into the Ministry of Transport's handling of concerns about suspected wrongdoing by Joanne Harrison, a former employee of the Ministry. The Commissioner was concerned about allegations that public servants had raised issues about Ms Harrison's activities at the Ministry of Transport and subsequently lost their jobs in a restructure Ms Harrison was involved in.

26 The investigation's terms of reference were confined to the specific circumstances at the Ministry of Transport, and the final report did not contain recommendations about the general effectiveness of the Act. However, the report highlighted that a number of Ministry employees were uncertain about how their concerns would be treated under the Act and the legal protections available to them. Some interviewees also thought the Act was outdated and should be reviewed.

27 The report suggested that the State Services Commissioner should consider how well the Act is meeting its purpose. In July 2017, the Commissioner launched a set of model standards, *Speaking Up in the State Service*s, which outlines the minimum expectations for organisations to support staff to speak up in relation to wrongdoing concerns that could damage the integrity of the State services. Unlike the Act, the model standards apply to a

broad range of concerns, regardless of whether they meet the standard of 'serious wrongdoing' in the Act. These expectations only apply to the State services.

28 In addition to releasing the *Speaking Up* model standards, the State Services Commission began an initial review of New Zealand's protected disclosures regime. Officials conducted a review of international practice and academic research, including the *Whistling While They Work* report – the first study to rank whistleblowing practices across Australia and New Zealand.[2] Of the ten Australian and New Zealand public sector jurisdictions that were surveyed, New Zealand's public organisations ranked near the bottom at eighth.

29 In December 2017, I directed officials to undertake targeted consultation with key stakeholders from the public and private sectors to better understand the size, scale, and nature of the challenges associated with the Act.

30 The Commission held several workshops and interviews with 38 individuals and organisations in February and March 2018. Attendees included people with experience of making a protected disclosure, unions, professional bodies, oversight and regulatory agencies, public service departments, and organisations representing the business, community, and voluntary sectors.

Key Issues

31 The Commission's initial review of the Act surfaced two key issues:

31.1 The regime is unclear and confusing to navigate; and

31.2 The Act is weak – particularly in relation to the private sector.

Lack of clarity

32 The protected disclosures regime lacks clarity – not only because the Act itself is unclear, but because it is difficult to understand how it fits within the complex framework of workplace-related legislation that has evolved over the years. This makes the Act difficult to use, both for individuals who want to make a disclosure, and for employers who need to understand their legal obligations.

33 I consider that the key areas that require clarification are:

33.1 **The definition of serious wrongdoing**: This definition underpins the entire Act because it determines when a disclosure can be protected. However, feedback from workshops suggested that the current definition is vague and confusing. Clarity about what the Act does and does not cover is critical to ensuring that it is used for the right purposes and helps to expose serious threats to the public interest;

33.2 **Requirements on organisations for dealing with a protected disclosure**: During targeted consultation, employers expressed confusion around how to apply the Act in practice. For example, some organisations take up to 20 days to decide whether to trigger the confidentiality provisions in the Act, whereas others argue that they should apply immediately. While there is a balance to be struck to ensure

[2] Griffith University, *Whistling While They Work: Improving managerial responses to whistleblowing in public and private sector organisations*, September 2017.

the Act is not overly prescriptive, it is important that its provisions are clear enough for employers to understand their obligations;

33.3 **How and when employees can report concerns externally**: It is difficult for individuals to determine which authority to disclose concerns to, as there is no clear alignment between the authorities and the categories of serious wrongdoing. For example, the Act designates the head of every public sector organisation as an appropriate authority, but it is not clear when it would be appropriate to make a disclosure to them; and

33.4 **The relationship between the Act and other workplace-related legislation**: It is difficult to navigate the overlaps and linkages between the Act and other workplace-related legislation. For example, compensation is provided for under the Employment Relations Act and the Human Rights Act, but these avenues are not clearly sign-posted in the Protected Disclosures Act.

Weak provisions

34 The Act is also weak or silent in a number of key areas – particularly in relation to the private sector. I consider that the Act's key areas of weakness are:

34.1 **No requirement on organisations to investigate**: There is no requirement on organisations to investigate a disclosure, which undermines the purpose of the Act to uncover serious wrongdoing. During targeted consultation, officials heard that some employees encounter inaction after reporting concerns, which can perpetuate the belief that making a protected disclosure is futile;

34.2 **Weak requirements around internal procedures**: The current requirements on public sector organisations to have internal procedures for disclosing concerns of serious wrongdoing are weak – and there are no requirements on private sector organisations. This leaves room for poor practice in how some organisations handle disclosures;

34.3 **Employees are required to report suspected serious wrongdoing internally first**: Employees may not want to report concerns internally if they fear their identity will become known and they may be mistreated as a result – particularly if the suspected serious wrongdoing has undermined their confidence in the organisation. Without access to an external reporting channel, people may not feel safe raising concerns, and serious wrongdoing is likely to go unreported;

34.4 **Weak protections for employees from retaliation**: The Act does not explicitly prohibit the victimisation of those who come forward, and there is no statutory duty for organisations to take reasonable steps to prevent this from occurring;

34.5 **Level of knowledge required to make a protected disclosure**: Employees must 'believe' on reasonable grounds that the information disclosed is true, or likely to be true. This high threshold is at odds with the concept of promoting an 'if in doubt, speak up' culture – particularly when employees suspect, but may not have sufficient grounds to believe, that serious wrongdoing is taking place; and

34.6 **Conduct by a public official which is oppressive, improperly discriminatory, or grossly negligent, or which constitutes gross mismanagement**: During targeted consultation, officials heard that this clause is used to raise concerns

about individual cases of workplace bullying and harassment. However, there are other avenues where these concerns can be dealt with far more effectively. The Employment Relations Act provides a complaints mechanism via the well-established personal grievance process. The Health and Safety at Work Act, which was passed after the Protected Disclosures Act, provides another mechanism to raise concerns about the health and safety of workers and workplaces. Although WorkSafe only responds to urgent or serious health and safety concerns, the Health and Safety at Work Act imposes a number of obligations of organisations to deal with these issues. Targeted consultation demonstrated that the overlaps between these three complaints mechanisms is confusing for both individuals and organisations.

Supporting legislative reform with long-term cultural change

35 A key theme that emerged from targeted consultation and academic research was the importance of positive organisational culture in building an effective regime for disclosing suspected wrongdoing.

36 Legislation alone cannot solve this challenge. While it is important to get the settings right, legislative reform needs to be supported by long-term cultural change.

37 It is therefore critical to shift cultures and behaviours so that 'speaking up' is valued, organisations are proud of having a disclosures policy in place, and employees are able to raise concerns freely and without fear of reprisal. This could help to dispel the negative stereotypes associated with whistleblowing at a societal level.

Options for Change

38 The State Services Commission's initial review of the Act has revealed that as a world leader in integrity, we can, and should, do better.

39 I propose publicly consulting on five different 'packages' as possible options for change. By proposing packages, the public will be able to consider how a range of possible solutions could work together as a coherent system, and how employees and organisations would experience a new regime.

Objectives and risks

40 The options for change have been developed to meet the objectives listed below:

40.1 **help expose serious threats to the public interest** by clearly focusing on conduct in the workplace that poses the biggest threat to the public interest – for example, criminal activity of any kind or a danger to public health and safety;

40.2 **encourage open organisational cultures** by requiring all organisations to have good procedures in place that make it easy for people to speak up freely and without fear;

40.3 **be easy to use and understand** by setting out clear definitions and obligations so that individuals know what the Act does, and when and how to use it; and

40.4 **promote fairness for all parties** by providing protection for everyone regardless of where they work and ensuring those who are suspected of committing wrongdoing are treated fairly throughout the process.

41 There are also some risks to consider alongside the objectives. It is important to ensure that both the person making a report and the person suspected of serious wrongdoing are treated fairly and do not suffer unfair reputational damage; that obligations for employers are proportionate and easy to comply with; and that the regime does not incentivise vexatious or untrue claims, or claims which are not in the public interest.

Scope

42 All five packages include both legislative and non-legislative change. While non-legislative change, such as guidance and leadership, is critical to driving improvements, I consider that we cannot address the regime's biggest weaknesses without amending the Act.

43 On the other hand, I do not propose that we introduce a stringent regime with penalties for non-compliance. We may be challenged on whether real improvement can be achieved without penalties, however at this stage I consider a punitive approach is unwarranted for the following reasons:

43.1 New Zealand already has high standards of integrity and there is little evidence to suggest we face the challenges that have prompted stringent regimes in other countries. It would be premature to introduce a punitive regime before we have gathered data on the size, scale, and nature of the problem;

43.2 Our assumption is that most organisations want to do the right thing, but will need time to adapt to a new regime and support in fulfilling their obligations effectively – particularly in the private sector, where there are currently no requirements to have internal procedures in place;

43.3 Information and awareness-raising is the preferred model for building buy-in and improving compliance. In my view, the legislation should aim to promote good conduct and make it easy for organisations to do the right thing rather than encourage minimum compliance through deterrence and penalties. The Legislation Design and Advisory Committee observes that, once it has been established that legislation is needed to address a problem, the least coercive approach to improving voluntary compliance is a good way of ensuring that the legislation is a proportionate solution; and

43.4 A punitive regime is expensive to administer, and likely to divert resources away from promoting good conduct through initiatives such as guidance and training.

44 This approach would not prevent us from introducing penalties for non-compliance at a later stage, if reforms prove inadequate in driving desired improvements.

45 I also note there are several exceptions in the Act relating to intelligence and security agencies. I do not propose we amend these provisions.

Alignment to GOV objectives

46 The Cabinet Priorities Committee has agreed to establish 12 priority outcomes to help coordinate a cohesive government work programme. This proposal aligns with the Cabinet

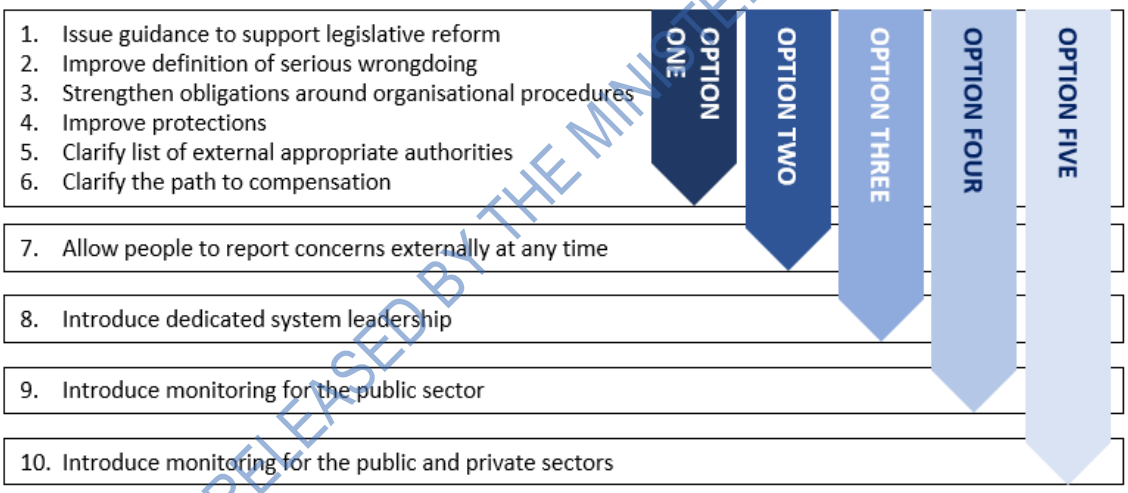
Government Administration and Expenditure Review Committee's priority outcome 'to deliver responsible governance with a broader measure of success'.

47 Improving our protected disclosures regime will support organisations to identify and mitigate risks to integrity, and encourage people to speak up about serious wrongdoing in the fear of reprisal. This will help to maintain New Zealand's standing as a world leader in integrity matters.

Summary of Options

48 This section summarises the five options for change. Further detail is attached at Appendix 1, where officials set out how each option for change would work in practice, describe the associated costs and benefits, and invite public feedback.

49 As shown in the diagram below, the five options are cumulative, so that the proposals in the first carry through to the fifth. The options are also scaled by level of intervention, ranging from minor amendments to the Act through to more significant changes. Consequently, I anticipate that the costs will build, with Option One being the least expensive and Option Five being the most expensive. If Cabinet agrees to a review of the Act, my final policy proposal in April 2019 will provide a full costing for the recommended approach.



50 In developing the options, officials have considered key themes from targeted consultation, academic research, and a review of international approaches. It is worth noting that no single regime is recognised as international 'best practice'.

<u>Option 1: Build strong foundations</u>

51 This option would aim to remove confusion and ensure organisations have good procedures in place. It would involve changes in the following areas:

51.1 **Guidance**: Issue guidance to promote a 'speak up' culture and support better understanding of the Act – including how to navigate linkages to other workplace-related legislation. This would build on the State Service Commission's model standards, *Speaking Up in the State Service*s;

51.2 **Definition of serious wrongdoing**: Clarify the definition of serious wrongdoing so it is easier to understand, and the same across the public and private sectors.

Amend the wording to clarify that bullying and harassment issues are not covered by the Act. Amend the threshold of knowledge required to make a disclosure from 'believe' to 'suspect' to encourage individuals to speak up if in doubt;

51.3 **Organisational procedures**: Strengthen the obligation on public sector organisations to have effective disclosures procedures in place, including high-level incident tracking, and introduce this obligation for appropriate authorities and the private sector. There are questions around whether small businesses and community, voluntary, and not-for-profit organisations should be exempt from this obligation, given the compliance costs may be disproportionate – and how we could give effect to such an exemption;

51.4 **Protections**: Enhance the requirement on organisations to protect employees from adverse consequences in the workplace that result from disclosing serious wrongdoing;

51.5 **External reporting channels**: Amend the list of appropriate authorities to clearly align with the new definition of serious wrongdoing, and remove the provision that designates the head of every public sector organisation as an appropriate authority; and

51.6 **Clarify the path to compensation**: Clear sign-post to other Acts that provide for compensation.

Option 2: Allow people to report concerns externally at any time

52 This option would include all elements of Option 1, and also remove the requirement to exhaust internal reporting channels first, so that disclosures of serious wrongdoing could be made to the amended list of external authorities at any time.

Option 3: Introduce dedicated system leadership

53 This option would include all elements of Options 1 and 2, as well as identify an oversight body, or bodies, with the following functions:

53.1 Assist individuals to navigate the regime by providing assessment and triage support. For example, the oversight body could provide advice on whether a concern about serious wrongdoing is covered by the Act, or which appropriate authority to go to in relation to a particular disclosure; and

53.2 Provide guidance and training to organisations and external authorities to support them to fulfil their statutory obligations.

Option 4: Introduce monitoring for the public sector

54 In addition to all elements of Options 1 to 3, this option would introduce monitoring requirements for all public sector organisations, including appropriate authorities. The data would be reported to an oversight body to provide a fuller picture of what is happening across the public sector. It would also increase organisations' accountability for good performance.

55 There would be questions to work through around how to manage confidentiality and privacy considerations.

Option 5: Introduce monitoring for the public and private sectors

56 In addition to all elements of Options 1 to 4, this option would introduce monitoring requirements for all organisations across the public and private, including appropriate authorities. The data would be reported to an oversight body to provide a fuller picture of what is happening across the public and private sectors. It would also increase organisations' accountability for good performance.

57 There would be questions to work through around:

57.1 whether small businesses and community, voluntary, and not-for-profit organisations should be exempt from this obligation, given compliance costs may be disproportionate – and how we could give effect to such an exemption; and

57.2 how to manage confidentiality and privacy considerations.

Public Consultation

58 I consider that it is important to test the options for change with the public at this early stage, particularly given the potential impact on employees and organisations across the public and private sectors. Public consultation will also assist officials to develop an effective implementation plan as part of the final policy proposal.

59 To enable sufficient time for members of the public to provide feedback, I propose consulting for a period of six weeks, from 29 October to 7 December 2018. Officials will also build in opportunities for specific consultation with key stakeholders, such as the Public Service Association and Business New Zealand.

60 I intend to upload the text contained at Appendix 1 to an online platform to invite public feedback. Officials will also hold public engagement events to test the options for change.

Departmental Consultation

61 Officials have consulted with the following agencies: the Ministry of Business, Innovation and Employment, the Department of Corrections, the Crown Law Office, the Ministry of Defence, the Ministry of Education, the Education Review Office, the Ministry for the Environment, the Ministry of Foreign Affairs and Trade, the Government Communications Security Bureau, the Ministry of Health, the Inland Revenue Department, the Department of Internal Affairs, the Ministry of Justice, the Ministry of Māori Development, the New Zealand Security Intelligence Service, the Ministry for Pacific Peoples, the Serious Fraud Office, the Ministry of Social Development, Statistics New Zealand, the Ministry of Transport, the Treasury, the Ministry for Women, and the New Zealand Police. Officials have informed the Department of the Prime Minister and Cabinet.

Financial Implications

62 This paper has no financial implications. If Cabinet agrees to a review of the Act, my final policy proposal in April 2019 will set out the financial implications of the recommended approach.

Human Rights

63 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. If Cabinet agrees to review the Protected Disclosures

Act, my final policy proposal in April 2019 will set out the human rights implications of the recommended approach.

Legislative Implications

64 This paper has no legislative implications. If Cabinet agrees, the State Services Commission will undertake a legislative review of the Protected Disclosures Act 2000. My final policy proposal to Cabinet in April 2019 will set out the legislative implications of the recommended approach.

Gender Implications

65 This paper has no gender implications. If Cabinet agrees to a review of the Act, my final policy proposal in April 2019 will set out the gender implications of the recommended approach.

Regulatory Impact Analysis

66 The Treasury has confirmed that no formal Regulatory Impact Assessment is required at this stage, since the relevant analysis is contained in the draft material for release (Appendix 1). A Regulatory Impact Assessment will be required when final policy proposals are submitted.

Publicity

67 If Cabinet agrees to a review of the Act, I propose using the two months leading up to consultation to generate public interest in this matter.

I also intend to release this paper proactively.

Recommendations

The Minister of State Services recommends that the Committee:

1 note that an effective regime for disclosing serious wrongdoing in the workplace is critical to maintaining New Zealand's high standard of integrity, openness, and transparency;

2 note that the report following an investigation into whistleblower treatment at the Ministry of Transport suggested that the State Services Commissioner should consider how well the Protected Disclosures Act 2000 (the Act) is meeting its purpose;

3 note that the State Services Commission has undertaken an initial review of the Act and identified where improvements are needed;

4 note that the current protected disclosures regime lacks clarity, and that the Act is weak in a number of key areas – particularly for the private sector;

5 agree to a review of the Act to ensure it supports a clear and effective regime for speaking up about serious wrongdoing in the workplace;

6 agree that the objectives of the review should be to ensure that the Act: helps to expose serious threats to the public interest; encourages open organisational cultures; is easy to use and understand; and promotes fairness for all parties;

7 agree to invite public feedback on the attached material, which proposes five possible options for change to improve the Act (Appendix 1);

8 note my intention to upload the material to an online platform and hold public engagement events to test the five options for change with the public;

9 note that officials will make final edits to the text at Appendix 1 to ensure accessibility and integration with the website design;

10 agree to a public consultation period of six weeks from 29 October to 7 December 2018; and

11 note that I will report back to Cabinet in April 2019 to seek agreement on final policy proposals.

Authorised for lodgement

Hon Chris Hipkins

Minister of State Services