

Hon Chris Hipkins
Minister of State Services

Review of the Protected Disclosures Act 2000

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Title: Cabinet Paper - Review of the Protected Disclosures Act 2000
GOV-19-MIN-0042 Minute
GOV-19-SUB-0042 Summary
CAB-19 MIN-0544 Report of the Cabinet Government Administration
and Expenditure Review Committee
Review of the Protected Disclosures Act 2000 – Submissions Summary
Report

Author: State Services Commission

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In Confidence

Office of the Minister of State Services

Chair, Cabinet Government Administration and Expenditure Committee

Review of the Protected Disclosures Act 2000

Proposal

1. This paper seeks agreement to strengthen the Protected Disclosures Act 2000 as it relates to the public sector and to clarify and in some respects extend its application to the private sector.
2. The Protected Disclosures Amendment Bill holds a Category 4 on the 2019 Legislative Programme (to be referred to Select Committee in 2019).
3. I have also asked the State Services Commission (SSC) to undertake a second tranche of work, with other agencies as required, to:
 - consult on further possible amendments to the Act with a view to reform beyond 2020
 - build on existing standards and guidance to improve awareness of the Act across the public and private sectors
 - test the feasibility and usefulness of establishing reporting and monitoring arrangements, starting with the core public services.

Executive Summary

4. New Zealand was one of the first countries in the world to introduce dedicated whistle-blower protection legislation in 2000. The Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees and other workers who report concerns. The Act covers all workplaces, although some provisions only apply in the public sector. The Act focuses on the worker/employer relationship because while staff may have information or insights not available to the public, they also have obligations of confidentiality to their employers and risk losing their employment and damaging their reputations if these are breached.
5. SSC has been working to provide disclosers and agencies in the public sector with better guidance, including the SSC's 'Speaking Up' standards. The Ombudsman has also been developing guidance on the Act applying to public and private sectors. However in a 2017 investigation into the treatment of whistleblowers at the Ministry of Transport, and a subsequent review of the Act, SSC identified a number of areas where the current regime is unclear, confusing, and creates barriers to making disclosures that the Speaking Up standards and guidance cannot fully address without supporting changes to the underlying legislation.

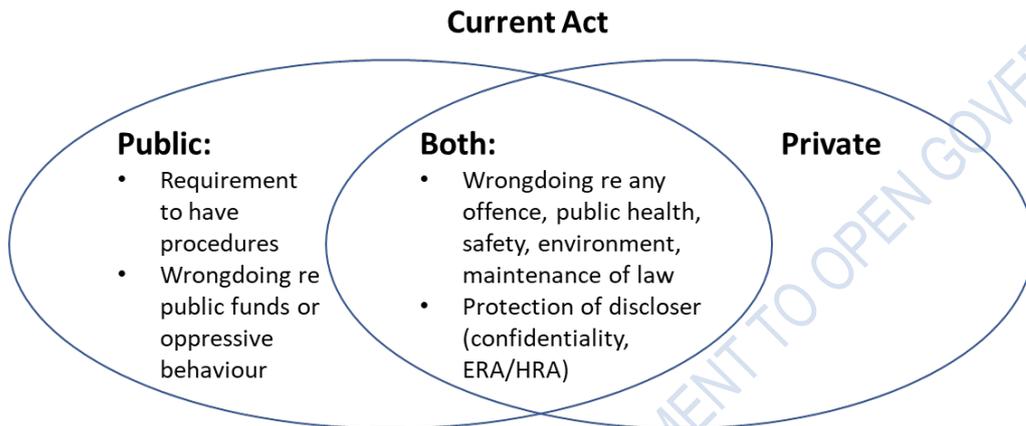
6. On 13 August 2018, Cabinet confirmed the decision to undertake a review and seek public feedback on five options for change (GOV-18-MIN-0051 refers). The five options consulted on, which are cumulative, were:
 - Foundational changes to clarify the existing legislation and improve protections
 - Allow people to report concerns externally at any time
 - Introduce dedicated system leadership
 - Introduce monitoring for the public sector
 - Introduce monitoring for the private sector.
7. Public consultation conducted in late 2018 supported many of the proposals and the summary of submissions is attached as Annex 3. This paper proposes taking forward most of the proposals in the first two options above through legislation in the first instance and progressing the other options in a second tranche of work. The main changes I propose to the Act are (Annex 1):
 - Requiring public sector organisations to provide support for disclosers
 - Allowing people to report directly to an appropriate authority at any time; conversely, making explicit the ability of that authority to decline a disclosure or refer it back to the discloser's organisation
 - Strengthening protection for disclosers by outlining what those receiving disclosures must do, and by being more explicit about the forms that adverse conduct might take
 - Extending the interpretation of some aspects of 'serious wrongdoing' in the Act to address the potential for private sector organisations (including non-government organisations) to be involved in unlawful, corrupt, or irregular use of public funds or resources, and to engage in 'oppressive, improperly discriminatory, or grossly negligent' conduct when delivering services on behalf of government. Staff in private organisations should have the opportunity to make protected disclosures regarding such wrongdoing when it involves public funds or public services.
8. I expect these changes to have a significant impact on the main issues with the Act that have been identified, especially when combined with the non-legislative elements of the second tranche of work. In the drafting process I will also invite Parliamentary Counsel to consider whether the Act can more clearly set out the existing triple test for protected disclosures, namely that the person a) believes on reasonable grounds that there is wrongdoing, b) that the wrongdoing is serious and c) that the disclosure is not made in bad faith or known to be false. The table in Annex 2 shows the proposals we consulted on that I intend to implement at this stage and the proposals that are subject to further work.
9. The changes should give those making and receiving disclosures much greater clarity regarding the scope of the Act and greater understanding of and confidence in the process. I therefore expect to see some increase in the number of protected disclosures.
10. I have also asked SSC to undertake a second tranche of work, with other agencies as required, to: consult on further possible amendments to the Act with a view to

reform beyond 2020; build on existing standards and guidance to improve awareness of the Act across the public and private sectors; and test the feasibility and usefulness of establishing reporting and monitoring arrangements, starting with the core public services.

Background

The Act

11. The Act currently covers the public and private sectors as shown:



12. The Act aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees (including former employees, contractors, secondees, board members and volunteers) who report concerns. Disclosures are protected if the information is about 'serious wrongdoing' and the discloser believes on reasonable grounds that the information is true or likely to be true. 'Serious wrongdoing' includes any serious offence; unlawful, corrupt or irregular use of public money or resources; conduct that poses a serious risk to public health and safety; or gross mismanagement by public officials. The protections offered to disclosers include best endeavours to preserve confidentiality and immunity from civil and criminal proceedings.
13. Effective organisational processes and legal protections for employees who 'blow the whistle' play a key role in uncovering serious misconduct, fraud and corruption in both public and private workplaces. This is critical to maintaining public confidence in the integrity of government and business in New Zealand. International research found that reporting by employees is the single most important method by which wrongdoing in, or by, an organisation is brought to light.¹

Problem definition

14. The aims of the Act remain sound, but there are four broad problems which guidance and standards, such as SSC's Speaking Up standards, can only partly mitigate:
- Both organisations and disclosers are confused about when to use the Act

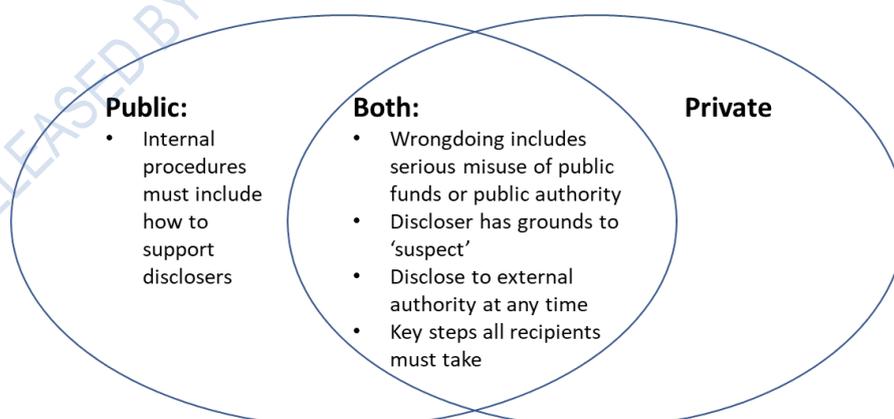
¹ Griffith University, *Whistling While They Work: Improving managerial responses to whistleblowing in public and private sector organisations*, September 2017. The findings are based on a survey of over 12,000 employees and managers in 38 Australian and New Zealand organisations.

- Disclosers are unclear about how to make a disclosure internally, and some organisations are also unclear about how to respond
- It is hard for disclosers to navigate the system for reporting concerns externally
- Disclosers fear ‘speaking up’ because they lack confidence in the protections available to them.

Proposals

15. In response to these four problems I have identified a package of proposals to amend the Act now, followed a second tranche of work. The overall objectives for this package are:
- Disclosers and organisations are familiar with the Act and know when to use it
 - Disclosers know who to report to and understand the support that is available to them
 - Organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively
 - Disclosers have confidence in the protections available to them and do not fear reprisal.
16. The legislative changes I propose at this stage build on work already being undertaken by SSC and the Ombudsman. SSC administers the Act and is responsible for providing leadership to the State services, including in the areas of integrity and conduct. SSC is undertaking considerable work developing model processes, procedures and guidance, including the Speaking Up standards and Positive Workplace Behaviour standards in the State services. The Ombudsman holds a statutory role under the Act which includes providing information and guidance to any employee on any matter concerning the Act.
17. The initial legislative package that I propose, set out in Annex 1, is based on measures that received a high level of support in public consultation.² The main effects on public and private sectors would be:

Proposed changes to Act



² The summary of submissions is attached as Annex 3

18. The main changes that affect the private sector in this package will be:
- Changes to the definition of 'serious wrongdoing' to enable protected disclosures regarding serious wrongdoing by private organisations (including non-government organisations) when it involves public funds or the delivery of public services
 - Setting out the key steps all recipients of disclosures must take, including confirming whether disclosure is to be protected, confidentiality (subject to existing exceptions) and providing a response to the discloser
 - Ability for disclosers to go direct to an external organisation will affect private sector organisations both as employers and as 'appropriate authorities' (for example professional bodies).
19. Significant concerns were expressed in consultation about the time and costs involved in seeking remedies through the existing Human Rights Act and Employment Relations Act channels. Clarifying what recipients of disclosures need to do and improving awareness of those requirements should help to reduce the number of adverse consequences for those making protected disclosures. MBIE has been asked by Minister Lees-Galloway to prepare an Issues Paper on bullying and harassment at work. Drafting is underway and the Issues Paper is expected to be released in early 2020. I have also asked SSC to add the effectiveness of the remedies processes to the matters it will consider in the second tranche of work.
20. In addition to this package of legislative changes, I propose a second tranche of work, to be led by SSC working with other agencies as required, comprising:
- Further research and policy work regarding some of the more complex issues covered by the consultation that might merit inclusion in a future review of the Act
 - Promotion of guidance, processes and procedures
 - Testing the value and feasibility of reporting and monitoring arrangements (in the public service in the first instance)
 - Ongoing consideration of the potential for a 'one stop shop' lead for disclosures.
21. The second tranche of work will ensure that most of our original consultation proposals are considered. At this stage I have no plans to progress proposals that would fundamentally affect the scope and nature of the Act, such as expanding the definition of those who can make protected disclosures to cover people other than employees, such as victims of domestic abuse, immigrants, people who receive government benefits, auditors, or suppliers; protecting disclosures made direct to media; or providing financial rewards where a disclosure results in a successful prosecution.

Changes in policy

Require public sector organisations to include how they will support disclosers in their internal procedures

22. Currently there is no obligation in the Act for organisations to provide support to disclosers other than using best endeavours to maintain confidentiality of their identity.
23. The SSC Speaking Up standards already make express provision for keeping employees safe. Any process needs to reflect that support required will be dependent on the circumstances, which is why the standards refer to a support plan. In addition, I propose adding an explicit reference to public sector organisations providing support to disclosers. How an organisation will support a discloser could form part of the existing internal processes that organisations are required to put in place and publish. I am not proposing extending this duty to the private sector at this stage; it would also not apply when external authorities receive a disclosure.
24. I propose to leave the question of support for those who are the subject of a disclosure to the discretion of their employer.

Allow disclosers to report serious wrongdoing directly to an appropriate authority at any time

25. The Act requires any discloser to report information about serious wrongdoing internally within the organisation first, unless the discloser believes on reasonable grounds:
 - The head of the organisation is or may be involved in the serious wrongdoing
 - Immediate reference to an appropriate authority is justified by the urgency of the matter, or some other exceptional circumstances, or
 - There has been no action or recommended action within 20 working days.
26. Disclosers may not want to report concerns internally if they fear their identity will become known, particularly if the information about serious wrongdoing has undermined their confidence in the organisation. Without access to an external reporting channel, serious wrongdoing is likely to go unreported.
27. Some consultees expressed concern that direct access to an external channel could result in unfair reputational damage and/or take the onus off organisations to create an internal speaking-up culture, maintain good internal procedures or investigate complaints. My view, however, is that well-managed organisations should be keen to ensure that their culture supports staff to raise serious issues internally. I therefore propose to enable disclosers to make a disclosure externally to an appropriate authority at any time.
28. Where an external authority considers it appropriate, the Act already provides that they may refer the matter to another appropriate authority for investigation. I expect external authorities to ask disclosers whether they have made the same disclosure elsewhere. I also propose to add explicit powers for authorities to refer a disclosure back to the employing organisation or refuse to investigate or further investigate a

disclosure on grounds like those in section 17 of the Ombudsmen Act 1975 and section 71 of the Privacy Act 1993, such as triviality, delay, or the complaint being better dealt with through other mechanisms.

Clarifying the definition of 'serious wrongdoing' and extending its application to cover public sector services and powers carried out by the private sector

29. Clarity about what the Act does and does not cover is critical to ensuring the Act can be used for the right purposes and helps to expose serious threats to the public interest. Consultees observed that the complexity of the definition inhibits people from making disclosures because they are unsure whether the conduct they have seen fits within the definition of 'serious wrongdoing', and thus whether any disclosure would be protected. Although 'serious wrongdoing' will always be a matter of judgement, the Act does not remove protection from disclosers unless they act in bad faith or know their disclosure to be untrue.
30. I propose updating the definition of 'serious wrongdoing' to reflect that many public functions, including some involving the exercise of statutory powers, are carried out by private organisations. It needs to cover any 'unlawful, corrupt, or irregular use' of public funds or resources whether by a public or private organisation. Wrongdoing by a 'public official' also needs to cover 'an act, omission, or course of conduct by *any person delivering services on behalf of a public sector organisation* that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement'.

Legislative clarifications

More clarity on appropriate authorities for receiving disclosures

31. 'Appropriate authorities' are the external bodies to which a protected disclosure may be made. A discloser is only protected if they make the disclosure to those 'appropriate authorities'. The list in the Act includes some named officers and also:
 - the head of every public sector organisation, whether or not specifically named
 - a private sector body which comprises members of a particular profession or calling and which has power to discipline its members.
32. Consultation confirmed that it is difficult for disclosers to determine which authority to disclose concerns to, as there is no clear alignment between the authorities and the categories of serious wrongdoing. I propose to use a new Schedule to the Act, to be updated through Order in Council, to name the most likely appropriate authorities and specify the nature of the disclosure/subject matter which relates to that authority's functions and investigative and disciplinary powers.
33. Although it is not clear when it would be appropriate to make a disclosure to any 'head of every public sector organisation', I have decided not to propose removal of this catch-all, as it would be invidious for a discloser to find that they were not protected solely because they made their initial disclosure to an agency not on the Schedule.

Clarifying the Act to strengthen protections for disclosers

34. The main protection disclosers have against retaliation is through the personal grievance provisions of the Employment Relations Act (which does not cover contractors), and the protection against victimisation in section 66 of the Human Rights Act.
35. People told us that despite protections, it can be very difficult to prevent retaliation from occurring in practice, especially given the difficulty of maintaining confidentiality, for example if the organisation needs to carry out a thorough investigation, if the community or organisation is small, or if the accused needs to be made aware of the disclosure for natural justice reasons.
36. As well as requiring public organisations' internal procedures to include protection and support for disclosers (paragraph 25-26 above), I propose to strengthen protection for disclosers by spelling out steps that all recipients of disclosures must take, and providing more detail on the forms of retaliation or adverse conduct that disclosers might face, whether by reference to other Acts or as a separate list. These steps should help to make organisations more aware of the need to manage the risks faced by disclosers and therefore reduce the number of instances where disclosers experience disadvantage.

Outlining steps those receiving protected disclosures must take

37. As well as the confidentiality requirement currently explicit in the Act, steps all those receiving disclosures (including external authorities and private organisations) must take would include establishing whether: the disclosure is intended as a protected disclosure; it prima facie meets the tests in the Act; it should be referred elsewhere for resolution. All of these are currently implied in the Act, but it was clear from consultation feedback that they are poorly understood.

Clarifying the potential forms of adverse conduct disclosers may face

38. The Act refers to recourse through personal grievance and victimisation provisions in the Employment Relations Act and Human Rights Act. These references focus largely on dismissal. I believe that providing or linking to a more comprehensive list of the forms of retaliation or adverse conduct that disclosers might face would encourage employers to think more carefully about how to protect disclosers. The Health and Safety at Work Act includes an extensive list of forms of disadvantage.

Clarify the internal procedure requirements for public sector organisations

39. The Act requires public sector organisations to have published internal procedures for receiving and handling information about alleged wrongdoing. The requirements for these are weak, leaving room for poor practice in how some organisations handle disclosures and uncertainty for those considering making disclosures. The SSC's Speaking Up standards address this problem in the State sector.
40. The Act provides that after 20 working days a discloser may go to an appropriate external authority. This implies that an organisation receiving a disclosure must respond to the discloser within 20 working days, but this is not explicit. Feedback in

consultation highlighted that some disclosers encounter inaction after reporting concerns, which can perpetuate the belief that making a protected disclosure is futile.

41. I propose adding an explicit requirement that published internal procedures include investigating alleged wrongdoing and reporting back to the discloser on progress within 20 working days after the date the disclosure is made, and continuing to report until the investigation is complete.
42. As well as progress reporting and how the organisation will support disclosers, internal procedures should cover establishing whether the disclosure will be treated as a protected disclosure, how the discloser is to be protected and in what circumstances the disclosure should be referred direct to another authority.
43. This proposal will only address the situation relating to entities that have internal procedures, mainly public sector organisations. I am not proposing at this stage to extend the requirement for internal procedures to the private sector, although good private sector employers may well model their processes on what is required in the public sector.

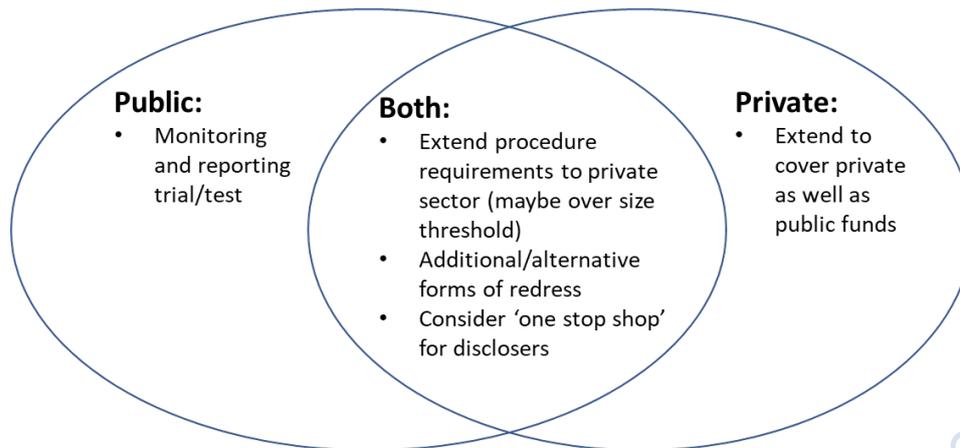
General logic and coherence of the provisions of the Act

44. Many of the points raised in consultation appear to arise from the disjointed way in which some of the Act's provisions are set out and expressed. I propose to invite Parliamentary Counsel to consider whether there are clearer ways to set out in the legislation, for example, the existing triple test for protected disclosure (that the person a) believes on reasonable grounds that there is wrongdoing, b) that the wrongdoing is serious and c) that the disclosure is not made in bad faith or known to be false). We have considered whether it would be helpful to include a requirement for disclosures to be made in 'good faith' instead of the current 'not in bad faith', but this shifts the burden of proof from the organisation onto the discloser. It may also be helpful to be explicit that the protections of the Act continue to apply if it is determined that the discloser was honestly mistaken.

Second tranche of work

45. In addition to this basket of legislative changes, I propose a second tranche of work, to be led by SSC working with other agencies as required, comprising:
 - Further research and policy work regarding some of the more complex issues covered by the consultation, to feed into a potential second round of legislative changes
 - Promotion of guidance, processes and procedures
 - Testing the value and feasibility of reporting and monitoring arrangements (in the public service in the first instance).

Matters to consider in further work



Further policy work

46. The policy issues not covered by the initial legislative package above are likely to require joint work with other agencies, especially MBIE, in light of their potential impact on the private sector.
47. *Whether to move the threshold for disclosures from 'believe' to 'suspect'*: feedback in consultation was that 'believe' may be too high a standard, and that 'suspect' might result in earlier disclosure, for example of matters such as fraud where the discloser may have difficulty getting enough evidence to support 'belief'. However it will be important to ensure that either 'belief' or 'suspicion' are based on reasonable grounds.
48. *A 'one stop shop' for protected disclosures*: the Act divides system responsibilities between SSC (administering the Act and responsible for providing leadership to the State services) and the Ombudsman (investigative powers and providing advice and guidance to those using the Act). While there was strong support in consultation for a one stop shop, the diverse expectations expressed in the feedback and officials' analysis show more work needs to be undertaken on:
- what the functions of a 'one stop shop' would be
 - what powers it would require
 - what it would mean for the current range of appropriate authorities
 - where it would best sit
 - how it would add value
 - whether implementing it would require changes to legislation.
49. *Redress for disclosers*: As noted above, consultees were concerned about the costs and time delays involved in seeking redress for retaliatory action through the existing Employment Relations Act and Human Rights Act channels. I am hopeful that more clarity about the obligations on those receiving protected disclosures in the first place will limit the incidence of retaliatory action, but I wish to keep under review the timeliness and costs of the ERA and HRA processes in case there is merit in

establishing another redress mechanism, for example through the courts. MBIE has been asked by Minister Lees-Galloway to prepare an Issues Paper on bullying and harassment at work. Drafting is underway and the Issues Paper is expected to be released in early 2020.

50. *Private sector wrongdoing:* The package above extends the definition of serious wrongdoing to cover corrupt or irregular use of **public** funds and resources by private firms. The question arises (for example in light of the recent ANZ scandal) as to whether there is a public interest in whistleblowing regarding misuse of **private** funds and resources, noting that anything that constitutes an 'offence' is already covered by the definition.
51. *Private sector procedure requirements:* Allowing disclosers to go direct to an external authority may reduce the potential benefit in requiring private organisations, possibly above a certain size, to have internal procedures for protected disclosures and to support disclosers. However it would be worth revisiting this issue once we have more information on the effectiveness of internal procedures in public organisations.
52. *Other issues emerging during consultation on the present proposals:* these include whether there are forms of serious impropriety that would not fall within the 'serious wrongdoing' definition; whether some forms of disclosure should be automatically covered by the Act irrespective of whether 'protected disclosure' status has been requested; whether any additional provisions are required in relation to anonymous disclosures; and whether further protections are needed for those who 'speak up' in non-confidential fora.

Building on current work to raise awareness of the Act and encourage use of processes and guidance

53. SSC is undertaking considerable work developing model processes, procedures and guidance, including promoting the existing Speaking Up standards and driving these through new Positive Workplace Behaviour standards. While there may be work required in the extended public sector, the main issues with awareness and lack of understanding of the Act reside in the private sector. The Ombudsman intends to continue development of guidance on the Protected Disclosures Act that can apply across all organisations in the public and private sectors.

Monitoring and reporting within the Public Service

54. Currently no single body collects and reports on the number of protected disclosures, so use of the Act is unclear. Consultation feedback supported better reporting for the public sector, ideally through existing mechanisms, such as MBIE's Mediation Services, agencies' annual reports, or the Office of the Ombudsmen's annual report.
55. The Ombudsman and SSC have already undertaken a programme of work to improve Official Information Act compliance in the State services. I propose to ask SSC to investigate requiring statistics on protected disclosures from Public Service departments and departmental agencies in the first instance, to test what, if any, monitoring and reporting arrangements might be practicable and useful in the wider public and private sectors.

56. I propose SSC continue to advance its programme of work including its Speaking Up standards and the work it is leading on positive workplace behaviours, and consulting the Ombudsman on guidance to agencies and organisations, including model procedures, responding to the areas of confusion highlighted during the consultation process, with a view to reconsidering the nature and potential of a 'one stop shop' as part of work on any future Bill.

Consultation

57. The following departments and agencies have been consulted on this paper: Crown Law Office, Departments of Conservation, Corrections, Internal Affairs, Prime Minister and Cabinet, Inland Revenue, Education Review Office, Government Communications Security Bureau, Land Information NZ, Ministries of/for Culture and Heritage, Pacific Peoples, Primary Industries, Women, Environment, Business, Innovation and Employment, Defence, Education, Foreign Affairs and Trade, Health, Housing and Urban Development, Justice, Social Development, Transport, Oranga Tamariki, Te Puni Kōkiri, Customs Service, NZ Security and Intelligence Service, Serious Fraud Office, Statistics NZ, Pike River Recovery Agency, The Treasury, Parliamentary Counsel Office, Police, NZ Defence Force, Ombudsman.
58. During the development of this paper, officials also contacted representatives of the Ombudsman, Controller and Auditor-General, Inspector of Intelligence and Security, Human Rights Commission, Parliamentary Commissioner for the Environment, Independent Police Conduct Authority, Health and Disability Commissioner, Financial Markets Authority, Worksafe, Local Government NZ, NZ Society of Local Government Managers and Public Service Association to discuss the proposals.
59. Feedback from consultees was positive regarding most proposed changes, but some consultees, notably the Ombudsman, Ministry of Justice and the Serious Fraud Office, considered that this package of changes does not go far enough to promote the intent of the Act and were keen to see faster progress on establishing a one stop shop, improving redress, monitoring and reporting. For reasons outlined above these matters are currently proposed for the second tranche of work.
60. Following initial targeted consultation and the release of a Cabinet paper and discussion document, the public consultation process was undertaken between 29 October and 21 December 2018. We received 73 submissions in total and held four workshops with 54 attendees. A summary of submissions and the submissions themselves have been published on the SSC website.

Financial Implications

61. None identified. Our consultation indicated that the present number of protected disclosures was too small for agencies to identify the related costs, and an increase in the number of disclosures was not seen by most consultees as likely to result in significant additional costs. Some agencies noted that they have already experienced an increase in internal disclosures through the implementation of the Speaking Up standards, and may receive external disclosures as well under the proposals.

Legislative Implications

62. Most of the proposals in this paper require legislation. A Bill to update the Protected Disclosures Act is on the 2019 legislative programme with a category 4 priority (introduce in 2019).
63. The Act binds the Crown (section 4) and I do not propose to change this.

Impact Analysis

64. The Regulatory Impact Assessment is attached as Annex 4. A Quality Assurance Panel with representatives from the Ministry of Justice and the Treasury Regulatory Quality Team has reviewed the 'Protected Disclosures reform' Regulatory Impact Assessment (RIA) produced by the State Services Commission and dated October 2019.
65. The Panel considers that the RIA meets Cabinet's quality assurance criteria, with one comment. The RIA contains limited quantitative analysis about the number of people who might benefit from the reforms and of the cost to organisations. The RIA notes that this is partly the result of privacy protections, and that the State Services Commission is to do further work on a monitoring regime that provides information on the use of the provisions while protecting privacy. If this work is successful, the Panel would expect future policy proposals to be accompanied by more quantitative analysis.

Human Rights

66. This paper has no negative implications for human rights and is not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A Bill of Rights Act vet will be undertaken once the Bill is drafted.

Gender Implications and disability perspective

67. The small number of disclosures to date make it impossible to assess how and to what extent women, people with disabilities, non-binary and transgender and ethnic and religious minorities already make use of the Act and will benefit from these proposals. Bullying and harassment are known to disproportionately affect these groups and corruption is likely to exacerbate uneven power dynamics. The intention of the proposals is to produce better protection for disclosers and greater confidence in their ability to speak up.

Proactive Release and Publicity

68. I intend to release this paper proactively in full and will issue a press release at that time.

Recommendations

69. I recommend that the Committee:
 - 1) note that the Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious

- wrongdoing in the workplace, and providing protection for employees and other workers who report concerns
- 2) note that the Act covers all workplaces, although some provisions only apply in the public sector
 - 3) note that four main problems have been identified with the Act as it stands:
 - both organisations and disclosers are confused about when to use the Act
 - disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)
 - it is hard for disclosers to navigate the system for reporting concerns externally
 - disclosers fear 'speaking up' because they lack confidence in the protections available to them.
 - 4) note that on 13 August 2018, Cabinet decided to undertake a review of the Act and seek public feedback on five cumulative options for change (GOV-18-MIN-0051 refers), namely:
 - Foundational changes to clarify the existing legislation and improve protections
 - Allow people to report concerns externally at any time
 - Introduce dedicated system leadership
 - Introduce monitoring for the public sector
 - Introduce monitoring for the private sector.
 - 5) note that the legislative recommendations in this paper cover most of the proposals in the first two options, while the other options will be addressed through a second tranche of work
 - 6) note that an amendment Bill for the Protected Disclosures Act is on the 2019 legislative programme with a priority of 4 (refer to Select Committee in 2019 if possible)

Policy changes

- 7) note SSC Speaking Up Standards make express provision for support for employees
- 8) agree to require public sector organisations to state in their published internal procedures how support for disclosers will be provided
- 9) agree to allow people to report serious wrongdoing directly to an appropriate authority at any time
- 10) agree that where an appropriate authority considers it appropriate, they will be able to refer the matter back to the workplace organisation for investigation

- 11) agree that an appropriate authority should have the power to refuse a disclosure on grounds similar to the grounds for refusal in the Ombudsmen Act and Privacy Act
- 12) agree to amend the definition of 'serious wrongdoing' to ensure that unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation, is within the scope of serious wrongdoing
- 13) agree to extend the wording and interpretation of serious wrongdoing by a 'public official' to cover non-government organisation staff carrying out public functions

Legislative clarifications

- 14) agree to create a new Schedule to the Act to name the most likely appropriate authorities for particular subject matter
- 15) note that I also intend to retain the appropriate authority status of the head of any public sector agency
- 16) agree to strengthen protections for disclosers by specifying what any organisation receiving protected disclosures must do
- 17) agree to include or refer to a list of the ways in which retaliation against a discloser may occur
- 18) agree to clarify what key aspects the internal procedures for public sector organisations need to cover
- 19) agree that Parliamentary Counsel examine how to reorganise and reword other provisions in the Act to make it clearer, for example bringing together the different elements (reasonable grounds to believe, serious wrongdoing and not in bad faith) required for a protected disclosure; and clarifying that protection still applies if the discloser is honestly mistaken

Second tranche of work

- 20) note that I have asked the State Services Commission to continue to work on several other policy issues with a view to a second tranche of amendments to the Act, involving other agencies as appropriate:
 - Options for what a 'one stop shop' for protected disclosures could do, how it would interact with other appropriate authorities, how it could be implemented and what benefit it would provide
 - The adequacy of the current Employment Relations Act and Human Rights Act channels for redress where disclosers suffer retaliatory action
 - Whether corrupt or irregular use of private, as well as public, funds and resources needs to be covered in the definition of 'serious wrongdoing'
 - Whether there is value in requiring private organisations to have internal procedures for protected disclosures and to support disclosers

- A potential shift in threshold from 'belief on reasonable grounds' to 'suspect on reasonable grounds'
- 21) note that the State Services Commission is undertaking considerable work developing model processes, procedures and guidance, including the Speaking Up standards and positive workplace behaviour standards, and the Ombudsman has also been developing guidance on the Act applying to public and private sectors
- 22) note that I have requested the State Services Commission to test the feasibility and usefulness of monitoring and reporting arrangements for core government departments
- 23) invite the Minister of State Services to issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft the Bill
- 24) authorise the Minister of State Services, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters required to finalise the Bill

Authorised for lodgement

Chris Hipkins

Minister of State Services

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Annex 1: How the proposals in this legislative package address the problems and goals

Problem/goal	Current	Proposed	Why
<p>Problem: both organisations and disclosers are confused about when to use the Act</p> <p>Goal: all employees and organisations are familiar with the Act and know when to use it</p>	Definition of ‘serious wrongdoing’ appears to have gaps	<p>Change: extend the wording and interpretation of serious wrongdoing by a ‘public official’ to cover non-government organisation staff carrying out government functions</p>	Means serious misconduct by private sector staff performing functions on behalf of government is also covered
		<p>Change the definition of ‘serious wrongdoing’ to cover unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation</p>	Currently reads as misuse only ‘within’ a public organisation
	Act unclear about ability for recipients of disclosures to refer or decline them except where passing to another appropriate authority	<p>Add powers for those receiving disclosures to refer the disclosure back to the employing organisation or decline the disclosure for reasons like those in s17 of the Ombudsmen Act and section 71 of the Privacy Act</p>	Addresses concerns that authorities may have to deal with disclosures that do not meet the tests in the Act
<p>Problem: disclosers are unclear about how to make a disclosure internally (and some organisations are also unclear about how to respond)</p> <p>Goal: disclosers know who to report to and understand the support that is available to them</p> <p>Goal: organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively</p>	Little clarity in the Act about when it applies and what recipients of disclosures need to do – for example whether the discloser needs to specifically claim protection under the PDA and at what point the confidentiality requirements start	<p>Change: specifying what those receiving protected disclosures must do</p>	Helps organisations to understand what is required of them, including confirming immediately whether this is intended as a protected disclosure
	Public sector organisations required to have internal procedures, but little clarity about what these need to cover	<p>Clarify the internal procedure requirements for public sector organisations</p>	More certainty for disclosers

<p>Problem: it is hard for disclosers to navigate the system for reporting concerns externally</p> <p>Goal: disclosers know who to report to and understand the support that is available to them</p> <p>Goal: organisations know what is expected of them and have the skills, competencies and ethics to handle disclosures effectively</p>	<p>Must make disclosure internally and wait 20 working days unless certain exceptions apply (e.g. believing CE is involved in the wrongdoing)</p>	<p>Change: allow people to report serious wrongdoing directly to an appropriate authority at any time</p>	<p>Enables disclosers to proceed if they have concerns about internal disclosure</p>
	<p>Very large number of potential external 'appropriate authorities' to receive disclosure</p>	<p>Create a new Schedule to the Act, to be amended from time to time by Order in Council, to name the most likely appropriate authorities and specify the nature of disclosure/subject matter</p>	<p>Gives disclosers better information about where to take their disclosure (without removing 'head of any public organisation' option)</p>
<p>Problem: disclosers fear 'speaking up' because they lack confidence in the protections available to them.</p> <p>Goal: disclosers have confidence in the protections available to them and do not fear reprisal</p>	<p>Act requires public sector organisations to have and publish internal procedures for protected disclosures, but not clear what these must cover</p>	<p>Change: require public sector organisations to state in their published internal procedures how they will support disclosers</p>	<p>Give disclosers in public organisations clarity on what they can expect</p>
	<p>Act vague on what those receiving disclosures need to do – 'confidentiality' section 19 is vaguely worded apart from the reasons why confidentiality may be overridden</p>	<p>Clarify what all receiving protected disclosures (including appropriate authorities, public and private sector employers) must do</p>	<p>Both the discloser and the person receiving the disclosure are clear about what needs to happen</p>
	<p>Unclear what actions other than dismissal might be grounds for personal grievance or case to HRC</p>	<p>Clarify the forms that retaliation could take, eg by reference to the Health and Safety at Work 'adverse conduct' provisions in the sections covering recourse</p>	<p>Makes it clear that forms of detriment other than dismissal can still be basis for grievance/HRC complaint</p>

Annex 2: How the proposals in the consultation document are being progressed

Proposal consulted on	In this legislative package	Future or non-legislative work	Not progressed
Option 1			
SSC to provide information and guidance	n/a	Building on 'Speaking Up' guidance	
Improving definition of serious wrongdoing: <ul style="list-style-type: none"> Concerns about corrupt or irregular use of funds/resources in private sector Excluding workplace bullying and harassment 	Partial - extend to cover misuse of public funds, resources or power whether by public or private sector Partial – power to decline to investigate where better covered by other legislation	Further work on whether corrupt/irregular use of private funds/resources needs to be covered (most should be covered under 'offence'?)	
Lower threshold to 'suspect' not 'believe' serious wrongdoing	No	Part of the further work to contribute to potential tranche 2 of legislation	
Obligations for all organisations: <ul style="list-style-type: none"> To have procedures and what these cover To take action and investigate 	Partial – clarify what should be in public organisations' procedures	Further work on whether requiring procedures for private organisations adds value, especially as implementing option 2	Requirement to investigate – overtaken by option 2
Enhancing protections for disclosers and making path to potential compensation for victimisation clearer: <ul style="list-style-type: none"> Clarify link to Human Rights Act List forms of retaliation Require organisations to provide support to disclosers 	Partial: clarify forms of retaliation, and require public sector organisations to indicate in their procedures how they will support disclosers	Further work on potential to require private sector organisations to support disclosers	
Clarify list of appropriate authorities	List key authorities in a Schedule to the Act, but keep backstop of head of any public sector organisation		
Option 2 – enable reporting directly to an appropriate authority at any time	Yes		
Option 3 – establish a single oversight body	No	Part of the further work to contribute to potential tranche 2 of legislation	
Option 4 – introduce reporting obligations and monitoring for public sector	No	SSC to work with Public Service to test what reporting and monitoring would add	
Option 5 – introduce monitoring for all organisations	No	Consider if Option 4 shows value	

Annex 3: Summary of submissions

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Annex 4: Regulatory Impact Assessment

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Cabinet Government Administration and Expenditure Review Committee

Minute of Decision

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Review of the Protected Disclosures Act 2000

Portfolio **State Services**

On 17 October 2019, the Cabinet Government Administration and Expenditure Review Committee:

- 1 **noted** that:
 - 1.1 the Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees and other workers who report concerns;
 - 1.2 the Act covers all workplaces, although some provisions only apply in the public sector;
- 2 **noted** that the State Services Commission identified four main problems with the Act as it stands:
 - 2.1 both organisations and disclosers are confused about when to use the Act;
 - 2.2 disclosers are unclear about how to make a disclosure internally and some organisations are unclear about how to respond;
 - 2.3 disclosers find it hard to navigate the system for reporting concerns externally;
 - 2.4 disclosers fear ‘speaking up’ because they lack confidence in the protections available to them;
- 3 **noted** that in August 2018, the Cabinet Government Administration and Expenditure Committee agreed to a review of the Act and approved public consultation on the following options for change:
 - 3.1 foundational changes to clarify the existing legislation and improve protections;
 - 3.2 allow people to report concerns externally at any time;
 - 3.3 introduce dedicated system leadership;
 - 3.4 introduce monitoring for the public sector;
 - 3.5 introduce monitoring for the private sector;

[GOV-18-MIN-0051]

- 4 **noted** that the decisions in paragraphs 6 to 11 and 13 to 18 below address the matters in paragraph 3.1 and 3.2 above, while the remaining matters will be addressed through a second tranche of work;

Policy changes

- 5 **noted** that the State Services Commission's Speaking Up Standards make express provision for support for employees;
- 6 **agreed** that public sector organisations be required to state, in their published internal procedures, how support for disclosers will be provided;
- 7 **agreed** that people be allowed to report serious wrongdoing directly to an appropriate authority at any time;
- 8 **agreed** that where an appropriate authority considers it appropriate, they will be able to refer the matter back to the workplace organisation for investigation;
- 9 **agreed** that an appropriate authority have the power to refuse a disclosure on grounds similar to the grounds for refusal in the Ombudsmen Act 1982 and Privacy Act 1993;
- 10 **agreed** to amend the definition of 'serious wrongdoing' to ensure that unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation, is within the scope of serious wrongdoing;
- 11 **agreed** to extend the wording and interpretation of serious wrongdoing by a 'public official' to cover non-government organisation staff carrying out public functions;

Legislative clarifications

- 12 **noted** that the Protected Disclosures Amendment Bill holds a category 4 priority on the 2019 Legislation Programme (to be referred to a select committee in 2019);
- 13 **agreed** to create a new Schedule to the Act to name the most likely appropriate authorities for particular subject matter;
- 14 **noted** that the Minister of State Services intends to retain the appropriate authority status of the head of any public sector agency;
- 15 **agreed** to strengthen protections for disclosers by specifying what any organisation receiving protected disclosures must do;
- 16 **agreed** to include or refer to a list of the ways in which retaliation against a discloser may occur;
- 17 **agreed** to clarify what key aspects the internal procedures for public sector organisations need to cover
- 18 **invited** the Minister of State Services to:
- 18.1 issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft the Bill;
- 18.2 request that PCO examine how other provisions of the Act may be reorganised and reworded to make it clearer;

- 19 **authorised** the Minister of State Services, in consultation with other Ministers as appropriate, to take decisions on any minor and technical matters required to finalise the Bill;

Second tranche of work

- 20 **noted** that the State Services Commission will continue to work on the following policy issues, with other agencies as appropriate, with a view to a second tranche of amendments to the Act:
- 20.1 options for what a ‘one stop shop’ for protected disclosures could do, how it would interact with other appropriate authorities, how it could be implemented and what benefit it would provide;
 - 20.2 the adequacy of the current channels for redress where disclosers suffer retaliatory action under the Employment Relations Act 2000 and the Human Rights Act 1993;
 - 20.3 whether corrupt or irregular use of private, as well as public, funds and resources needs to be covered in the definition of ‘serious wrongdoing’;
 - 20.4 whether there is value in requiring private organisations to have internal procedures for protected disclosures and to support disclosers;
 - 20.5 a potential shift in threshold from ‘belief on reasonable grounds’ to ‘suspect on reasonable grounds’;
- 21 **noted** that the State Services Commission is developing model processes, procedures and guidance in relation to protected disclosures, and that the Ombudsman has also been developing guidance on the Act applying to public and private sectors;
- 22 **noted** that the State Services Commission will test the feasibility and usefulness of monitoring and reporting arrangements for core government departments.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Chris Hipkins (Chair)
Hon Kris Faafoi
Hon Ron Mark
Hon Tracey Martin
Hon Peeni Henare
Hon James Shaw

Officials present from:

Officials Committee for GOV

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Minister of State Services



Cabinet Government Administration and Expenditure Review Committee

Summary

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Review of the Protected Disclosures Act 2000

Portfolio	State Services
Purpose	This paper seeks agreement to legislative amendments to strengthen the Protected Disclosures Act 2000 (the Act).
Previous Consideration	In August 2018, the Cabinet Government Administration and Expenditure Committee agreed to a review of the Act and approved the release of material attached to the paper for public consultation [GOV-18-MIN-0051].
Summary	<p>Public consultation resulted in 73 submissions and 54 attendees at four workshops. Their views are summarised in Annex 3. This, and the review of the Act, found that the current protected disclosures regime is unclear, confusing and creates barriers to making disclosures.</p> <p>The Minister of State Services (the Minister) proposes three policy changes, outlined in paragraphs 22 to 30:</p> <ul style="list-style-type: none"> • require public sector organisations to state, in internal procedures, how they will support disclosers; • allow disclosers to report serious wrongdoing directly to an appropriate authority at any time; • clarify the definition of “serious wrongdoing”; <p>The Minister also proposes amendments to the Act, set out in Annex 1, to:</p> <ul style="list-style-type: none"> • name the most likely ‘appropriate authorities’ by subject matter; • strengthen protections for disclosers; • clarify internal procedure requirements for the public sector. <p>These changes will build on work being undertaken by the Ombudsman and the State Services Commission (SSC). The Minister also intends to ask the Parliamentary Counsel Office to consider what other changes could be made to clarify the Act.</p>

A second tranche of work, to be undertaken in conjunction with relevant agencies, will look at further policy work on the more complex issues raised in consultation, with a potential second round of legislative amendments after 2020.

Regulatory Impact Analysis	A Regulatory Impact Analysis is attached. A cross-agency Quality Assurance Panel considers that it meets the quality assurance criteria, but comment that it contains limited quantitative analysis about the number of people who may benefit from these reforms and of the cost to organisations.
Baseline Implications	None from this paper.
Legislative Implications	Legislation will be required to give effect to these proposals. The Protected Disclosures Amendment Bill holds a category 4 priority on the 2019 Legislation Programme (to be referred to a select committee in 2019).
Timing Issues	None.
Announcement	The Minister intends to issue a media statement
Proactive Release	The Minister intends to proactively release the paper under GOV-19-SUB-0042 in full.
Consultation	<p>Paper prepared by SSC. DPMC (Prime Minister), MCH, Corrections, Treasury, Crown Law, GCSB, NZSIS, Pike River Recovery Agency, IR, LINZ, MPP, Defence, MoE, MFAT, MoH, MHUD (Housing), MSD, MoT, Customs, Police, OT, PCO, SFO, Stats NZ, TPK, DIA (Community and Voluntary Sector), and DoC were consulted. The Ombudsman, IPCA, Health and Disability Commissioner, FMA, Worksafe, LGNZ and PSA were also consulted.</p> <p>The Minister indicates that the Minister of Corrections, Minister of Finance, Minister for Economic Development, Minister of Justice, Minister for Social Development, Attorney-General, Minister of Police, Minister for ACC, Minister of Agriculture, Minister of Defence, Minister for Children, Minister for Women and Minister for Land Information were consulted.</p> <p>The Minister also indicates that New Zealand First and the Green Party were consulted.</p>

The Minister of State Services recommends that the Committee:

- 1 note that:
 - 1.1 the Protected Disclosures Act 2000 (the Act) aims to promote the public interest by facilitating the disclosure and investigation of serious wrongdoing in the workplace, and providing protection for employees and other workers who report concerns;
 - 1.2 the Act covers all workplaces, although some provisions only apply in the public sector;

- 2 note that the State Services Commission identified four main problems with the Act as it stands:
- 2.1 both organisations and disclosers are confused about when to use the Act;
 - 2.2 disclosers are unclear about how to make a disclosure internally and some organisations are unclear about how to respond;
 - 2.3 disclosers find it hard to navigate the system for reporting concerns externally;
 - 2.4 disclosers fear ‘speaking up’ because they lack confidence in the protections available to them;
- 3 note that in August 2018, the Cabinet Government Administration and Expenditure Committee agreed to a review of the Act and approved public consultation on the following options for change:
- 3.1 foundational changes to clarify the existing legislation and improve protections;
 - 3.2 allow people to report concerns externally at any time;
 - 3.3 introduce dedicated system leadership;
 - 3.4 introduce monitoring for the public sector;
 - 3.5 introduce monitoring for the private sector;
- [GOV-18-MIN-0051]
- 4 note that the changes in the paper under GOV-19-SUB-0042 address the matters in paragraph 3.1 and 3.2 above, while the remaining matters will be addressed through a second tranche of work;

Policy changes

- 5 note that the State Services Commission’s Speaking Up Standards make express provision for support for employees;
- 6 agree that public sector organisations be required to state, in their published internal procedures, how support for disclosers will be provided;
- 7 agree that people be allowed to report serious wrongdoing directly to an appropriate authority at any time;
- 8 agree that where an appropriate authority considers it appropriate, they will be able to refer the matter back to the workplace organisation for investigation;
- 9 agree that an appropriate authority have the power to refuse a disclosure on grounds similar to the grounds for refusal in the Ombudsmen Act 1982 and Privacy Act 1993;
- 10 agree to amend the definition of ‘serious wrongdoing’ to ensure that unlawful, corrupt, or irregular use of public funds or resources, whether in a public or private organisation, is within the scope of serious wrongdoing;
- 11 agree to extend the wording and interpretation of serious wrongdoing by a ‘public official’ to cover non-government organisation staff carrying out public functions;

Legislative clarifications

- 12 note that the Protected Disclosures Amendment Bill holds a category 4 priority on the 2019 Legislation Programme (to be referred to a select committee in 2019);
- 13 agree to create a new Schedule to the Act to name the most likely appropriate authorities for particular subject matter;
- 14 note that the Minister of State Services intends to retain the appropriate authority status of the head of any public sector agency;
- 15 agree to strengthen protections for disclosers by specifying what any organisation receiving protected disclosures must do;
- 16 agree to include or refer to a list of the ways in which retaliation against a discloser may occur;
- 17 agree to clarify what key aspects the internal procedures for public sector organisations need to cover
- 18 invite the Minister of State Services to:
 - 18.1 issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft the Bill;
 - 18.2 request that PCO examine how other provisions of the Act may be reorganised and reworded to make it clearer;
- 19 authorise the Minister of State Services, in consultation with other Ministers as appropriate, to take decisions on any minor and technical matters required to finalise the Bill;

Second tranche of work

- 20 note that the State Services Commission will continue to work on the following policy issues, with other agencies as appropriate, with a view to a second tranche of amendments to the Act:
 - 20.1 options for what a 'one stop shop' for protected disclosures could do, how it would interact with other appropriate authorities, how it could be implemented and what benefit it would provide;
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 - 20.3 whether corrupt or irregular use of private, as well as public, funds and resources needs to be covered in the definition of 'serious wrongdoing';
 - 20.4 whether there is value in requiring private organisations to have internal procedures for protected disclosures and to support disclosers;
 - 20.5 a potential shift in threshold from 'belief on reasonable grounds' to 'suspect on reasonable grounds';

- 21 note that the State Services Commission is developing model processes, procedures and guidance in relation to protected disclosures, and that the Ombudsman has also been developing guidance on the Act applying to public and private sectors;
- 22 note that the State Services Commission will test the feasibility and usefulness of monitoring and reporting arrangements for core government departments.

Rachel Clarke
Committee Secretary

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Cabinet

Minute of Decision

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Report of the Cabinet Government Administration and Expenditure Review Committee: Period Ended 18 October 2019

On 21 October 2019, Cabinet made the following decisions on the work of the Cabinet Government Administration and Expenditure Review Committee for the period ended 18 October 2019:

GOV-19-MIN-0042 **Review of the Protected Disclosures Act 2000** CONFIRMED
Portfolio: State Services

Out of Scope

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Michael Webster
Secretary of the Cabinet

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