

AIDE-MEMOIRE



[IN-CONFIDENCE]

Protected Disclosures Act – finalised package for lodging

Date: 1 October 2019

For: Hon Chris Hipkins, Minister of State Services

Report No: SSC2019/0333

Protected Disclosures Act – finalised package for lodging

Further to our briefing of 2 September (SSC2019/0289), we attach a final draft of the Cabinet paper, updated to reflect feedback from Ministerial consultation.

Purpose

The package attached includes the Summary of Submissions and Regulatory Impact Assessment (RIA) among the annexes to the paper. Treasury expect to provide their final assessment of the RIA (expected to be at least partially meets requirements) shortly for inclusion in the Cabinet paper.

Date of meeting

The next available GOV meeting is 17 October 2019. The paper would need to be lodged on 10 October.

The key issues raised by Ministerial colleagues related to:

- The lack of a 'good faith' obligation on disclosers. We advise retaining the existing (however clunky) 'not bad faith' requirement to avoid shifting the burden of proof from the organisation to the discloser.
- The implications of lowering the threshold for part of the test from 'reasonable grounds to believe' to 'reasonable grounds to suspect'.

To address these issues in the paper:

Points arising from Ministerial consultation

- We have placed more emphasis on the need to clarify the Act's drafting to make the three-part test for disclosure clearer, i.e.:
 - The discloser must have reasonable grounds to believe (or, as we propose, reasonable grounds to suspect)
 - Serious wrongdoing has occurred or is occurring in their organisation
 - And not be acting in bad faith.
- We have retained the 'suspect' proposal in the paper and provided alternative recommendations for Cabinet in case there is a wish to retain 'believe'. Although not critical, we believe that moving to 'suspect' will improve the system, particularly in disclosures relating to suspected fraud, where the inherent difficulty of gathering supporting evidence means disclosers struggle to meet a 'believe' test.
- In para 47 we have also explained why we do not advise moving from

the negative 'not bad faith' to a positive 'good faith' obligation.

We recommend

- that you release this aide-memoire in full once the attached paper has been considered by Cabinet

Agree/disagree.

Proactive Release

Hon Chris Hipkins

Minister of State Services

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