



AIDE-MEMOIRE

[IN CONFIDENCE]

Protected Disclosures (Protection of Whistleblowers) Bill – for Ministerial Consultation

Date: 20 May 2020

Minister: Hon Chris Hipkins, Minister of State Services

Report No: SSC 2020/0077

Protected Disclosures (Protection of Whistleblowers) Bill – for Ministerial Consultation

Purpose	This paper provides you with an updated package for the Protected Disclosures (Protection of Whistleblowers) Bill, following departmental and non-departmental consultation, to support you in your consultation with Ministerial colleagues
Date of meeting	16 June 2020
Consultation	<p>As noted in our previous briefing to you (refers to SSC2020/0026), we have consulted with departments and the following non-departmental stakeholders on the LEG paper and draft Bill:</p> <ul style="list-style-type: none"> • Chief Ombudsman • Human Rights Commission • Privacy Commissioner • Inspector-General of Intelligence and Security (IGIS) • Parliamentary Commissioner for the Environment • Office of the Auditor- General. <p>Agencies were supportive with questions on technical aspects of the Bill. We received extensive feedback from the Chief Ombudsman, and comments from other agencies particularly the Human Rights Commission, IGIS, and departments including the Department of Prime Minister and Cabinet, Ministry of Foreign Affairs and Trade (MFAT), and the Department of Conservation. Where possible we have amended the Bill in response to feedback or referred policy issues to tranche two.</p> <p>We have inserted comments from the Chief Ombudsman and Privacy Commissioner in the LEG paper.</p> <p>We have consulted those agencies listed in draft Schedule 2 on their inclusion in that Schedule.</p> <p>We had a positive meeting with the Public Service Association (PSA) on 12 March in which we briefed them on the contents of the Bill.</p>
Changes and additional decisions resulted from consultation	As well as the decisions you made in relation to our briefing dated 20 February 2020 (SSC2020/0026) we have made the following amendments in response to consultation and Parliamentary Counsel peer review:

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- More clearly outlining receivers' obligations within 20 working days while recognising that organisations may need more time for investigations (clauses 12 and 15)
- Explicitly providing that these procedural provisions are guidance and do not create a legally enforceable right (new clause 12(3)). This approach is similar to section 11(2) of the Privacy Act which provides that the privacy principles are not enforceable
- Removing the Parliamentary Commissioner for the Environment (PCE) from Schedule 2 at their request. As an Officer of Parliament, PCE continues to be an appropriate authority. Removing PCE from Schedule 2 should mean that disclosers approach other organisations first on matters relating to the environment.

The Chief Ombudsman and Privacy Commissioner were both keen to include comments in the LEG paper and these have been incorporated at paragraphs 17-19.

The Privacy Commissioner is positive about the amendments in the Bill, but considers these changes should be supported by a clear complaints mechanism. We have already deferred consideration of further complaints and redress mechanisms to tranche two, alongside the question of a 'one stop shop'. We also consider that there are adequate processes in the Bill to address breaches of confidentiality.

Changes proposed in consultation that will not be made in tranche 1

The Chief Ombudsman's comments relate to his keenness to progress tranche two and particularly to his desire to work with SSC on the 'one stop shop' concept. With regard to the Privacy Commissioner's point, the Chief Ombudsman notes that he already has the power to investigate privacy breaches in this context and that he will work with the Privacy Commissioner on a protocol for how privacy breaches will be addressed.

We had worked through options to provide for IGIS investigating protected disclosures involving security and intelligence information held by public sector organisations, other than an intelligence and security agency (for example, by MFAT or Customs). This has proved to be a complex matter which we are deferring to tranche two.

We also received a query regarding how Ministers would be expected to deal with any disclosures escalated to them under clause 13, including whether the Bill should explicitly include a power for Ministers to transfer a disclosure. We propose to consider this question further as part of updating guidance on the Act and/or in tranche 2, to avoid the risk of extending or limiting Ministers' existing powers, for example powers to commission inquiries under the State Sector Act 1988.

Next steps	25 May – 5 June	Ministerial consultation and finalisation of Bill
	8 – 10 June	Any final updating to Bill and LEG paper before lodging
	11 June	Lodge for LEG
	16 June	Bill considered by LEG
	22 June	Cabinet approval sought for introduction

Author	Lisita Aloua, Assistant Analyst, System Improvement
Manager	Mereama Chase, Manager, System Improvement