

New law ramps up protections for whistleblowers, 23 June 2022

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The Protected Disclosures (Protection of Whistleblowers) Act 2022 (the Act) was recently passed into law and comes into effect on 1 July 2022. It updates the original Protected Disclosures Act 2000 (PDA).

New Zealand was one of the first countries in the world to introduce legislation that protects people who report concerns of serious wrongdoing in their workplace.

However, in the 20 years after the initial PDA, it became clear that the law wasn't working as well as it should for either employees or organisations and the procedure around protection of whistleblowers needed to be updated.

Currently, under the PDA, employees are protected from liability or disadvantage when they disclose serious wrongdoing even if they are honestly mistaken. However, employees must state they want their disclosure to be protected by the PDA to gain this protection. Further, when an employee wants to report serious wrongdoing, they are required in most circumstances to start with their workplace's internal policy and processes for managing and reporting serious wrongdoing.

The new Act gives greater protection to a whistleblower and streamlines the disclosure process. The overall purpose is to promote the public interest by assisting the disclosure and timely investigation of serious wrongdoing, in or by an organisation, and by protecting the people who disclose that wrongdoing. Logically, it is important for people to feel they can raise these serious issues in confidence and that they won't be punished for bringing them to light.

Features of the Act

The new Act defines what is meant by a protected disclosure and clarifies the definition of serious wrongdoing.

It enables people to report serious wrongdoing directly to an appropriate authority at any time, strengthens protections for disclosers, and explains what employers, and anyone who receives a protected disclosure, should do.

It clarifies the internal procedure requirements for public sector organisations, requiring them to state in their published internal procedures the support for disclosers. It also sets out the potential forms of adverse conduct disclosers may face.

Here are some of the key descriptions:

Meaning of protected disclosure?

A disclosure of information is a "protected disclosure" if the discloser believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the discloser's organisation and discloses information and does not disclose it in bad faith.

Who is a Discloser?

Includes an individual who is (or was formerly) an employee or contractor, a secondee to the organisation, volunteer or who was concerned in the management of the organisation (including, for example, a person who is or was a member of the board or governing body of the organisation)

What is a serious wrongdoing?

As set out in the Act, it includes any act, omission, or course of conduct in (or by) any organisation that is one or more of the following:

- An offence
- Serious risk to public health; or public safety; or the health or safety of any individual; or the environment
- Serious risk to the maintenance of law, including the prevention, investigation, and detection of offences; or the right to a fair trial
- An unlawful, a corrupt, or an irregular use of public funds or public resources
- Oppressive, unlawfully discriminatory, or grossly negligent behaviour or gross mismanagement done by an employee (if employed by a public sector organisation) or if done by a person performing a function on behalf of the public sector or the Government.

Key changes

- The coverage of serious wrongdoing is extended to include:
 - All unlawful, corrupt, or irregular uses of public funds or public resources, regardless of whether the organisation itself is public or private; and
 - oppressive, improperly discriminatory conduct, gross mismanagement, or grossly negligent conduct by those performing statutory functions or duties or exercising statutory powers.

This change captures some private organisations which were previously exempt.

- The definition now expressly includes behaviour that is a serious risk to the health and safety of any individual.

There is some debate over whether this wider definition covers bullying and sexual harassment in the workplace. These issues are usually dealt with through a complaint and then a subsequent employer investigation, often as part of a personal grievance process. Whether an individual chooses to use the whistleblower process will be interesting as this process is distinct from a personal grievance process.

- A central change is that following serious wrongdoing, people can report directly to an external authority at any time allowing employees to go directly to an external authority, rather than having to exhaust internal procedures. The Act provides a useful reference schedule for potential whistleblowers to understand which external authority is likely to be the most appropriate, depending on the nature of the disclosure.

The Ombudsman is an example of an authority which is referred to in the schedule for public sector matters as it handles complaints against government agencies. The Chief Ombudsman, Peter Boshier says the passing of new whistleblower legislation will help reinforce New Zealand's international reputation as a free and transparent society. "Insiders are usually the first to know about serious wrongdoing in the workplace. Every worker in New Zealand needs to know if they make a disclosure, it will be taken seriously, and action will be taken."

Mr Boshier says his advisory role will be expanded to provide independent information and guidance to anyone. This includes both past and present employees, and organisations (both public sector and others).

- The Act strengthens protection for disclosers by giving clear guidance what those receiving disclosures should do. Receivers should acknowledge receipt, check, and deal with the matter within 20 working days (unless this is impracticable), during which the receiver should at least tell a discloser what they have done and how they will deal with the matter. If a receiver decides that no action is required in respect of a disclosure, they should inform the discloser and provide reasons for their decision.
- There is clarification on the internal procedure requirements for public sector organisations including requiring them to state in their published internal procedures how support for disclosers, in the form of practical assistance and advice, will be provided. They must publicise these procedures widely.
- A new clause has been added to make it clear that another discloser, who discloses information in support of, or relating to, a protected disclosure is also entitled to protection under the Act.
- The Act says that every receiver must use their best endeavours to keep confidential any information that might identify the discloser unless they consent, or it is essential to release this information. Information may be released if essential to investigate the disclosure effectively or to comply with the principles of natural justice among other reasons. Any such release of information which would identify the discloser (if not consented to or essential) would be a breach of the Privacy Act 2020 and the discloser can bring a complaint.
- Retaliation for making a protected disclosure is prohibited. There is a specific list of what it means to retaliate including, dismissing the employee, or refusing to offer them the same employment terms or conditions of work. Retaliation also means subjecting the discloser to a disadvantage which would affect their job performance or job satisfaction.

Key Takeaways for Employers

Employers should make sure they are familiar with the new rules around the protection of whistleblowers before the Act comes into force on 1 July.

Your business may wish to develop an internal policy on how to manage and support protected disclosures, including the form of practical assistance and advice which will be provided. If your business already has a Protected Disclosure Policy, then it may need updating to reflect the change to allow for immediate disclosure to an external authority and the new additions to the definition of serious wrongdoing.

Any policy should define the key terms as to what constitutes serious wrongdoing and the rules around when a person can make a protected disclosure.

In addition, it is worth noting that the Employment Relations Act will be amended from 1 July to specifically provide for the ability to raise a personal grievance if an employer has retaliated, or threatened to retaliate, against the employee, because the employee intends to make or has made a protected disclosure. The burden of proof is on the employer to prove, on the balance of probabilities, that the disclosure was not a substantial reason for the employer's actions or omissions.

From here, keep an eye out for more updates and helpful summaries from the Public Service Commission as the Act comes in force.