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A Whistle-Stop Tour of the Updated Protected Disclosures Regime

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It's been almost a year since the Protected Disclosures (Protection of Whistleblowers) Act 2022 (the Act) came into force on 1 July 2022. If you haven't done so already, now is a good time to consider whether your policies and procedures are up to date.

The Act effectively updates the previous Protected Disclosures Act 2000 to provide people who speak up about serious wrongdoing with greater protection. It also puts in place clearer procedures for dealing with disclosures.

Protected Disclosures – A Recap

A whistleblower includes a current or former employee, homeworker, secondee, contractor, volunteer, or board member, who makes a "protected disclosure" under the Act. To receive protection, a whistleblower must:

- reasonably believe that there has been a serious wrongdoing by their organisation;
- make their disclosure in good faith;
- make the disclosure to their organisation or an "appropriate authority"; and
- ensure they abide by the Act.

The Act defines "serious wrongdoing" as any conduct by a public or private organisation which:

- is an offence;
- poses a serious risk to public health; public safety; the health or safety of any individual; or the environment;
- poses a serious risk to the maintenance of law;
- is an unlawful, corrupt, or an irregular use of public funds or public resources; or
- in the public sector, is oppressive, unlawfully discriminatory, grossly negligent, or gross mismanagement.

Enhanced Protections for Whistleblowers

The Act introduced a range of new protections for whistleblowers, with the aim of facilitating the disclosure and investigation of serious wrongdoing in New Zealand. These protections include:

- That the person receiving the disclosure must keep the whistleblower's identity confidential (with certain limited exceptions).

- Immunity from Court or disciplinary proceedings for making the disclosure.
- Protection from claims under the Employment Relations Act 2000 and Human Rights Act 1993 for making the disclosure.
- Whistleblowers are no longer required to disclose the wrongdoing to their employer first, before disclosing it to an appropriate authority. An appropriate authority includes the head of any public sector organisation, any officer of Parliament, or the membership body of a particular profession or trade. It doesn't include the media.
- People who come forward and disclose information in support of a whistleblower will now also have protection where they disclose in good faith and comply with the Act.
- Organisations cannot contract out of the Act or have internal procedures that are inconsistent with it.

Did They Blow It?

While the Act is a positive development in terms of clarifying the law around whistleblowing in New Zealand, there are some points to be aware of.

First, "serious wrongdoing" has been expanded to now include conduct by any organisation (including private sector organisations) that is:

1. Misuse of public funds.
2. Actions by a person performing (or purporting to perform) a function or duty or exercising (or purporting to exercise) a power on behalf of a public sector organisation or the Government that is oppressive, unlawfully discriminatory or grossly negligent or gross mismanagement.

Whether conduct constitutes "misuse" of public funds, or is oppressive, unlawfully discriminatory, grossly negligent, or gross mismanagement will ultimately be a question for the person or entity receiving the disclosure to consider. The key point though, is that a whistleblower only has to "reasonably believe" serious wrongdoing has occurred to be protected under the Act.

Extending the definition of serious wrongdoing to include "serious risks to an individual's health or safety" means the protected disclosures regime could potentially be used to disclose issues that are better addressed through employment law processes, such as allegations of bullying or harassment for example. The requirement to keep a discloser's identity confidential sits uncomfortably with the natural justice principle that a person accused of misconduct is entitled to know the identity of their accuser. This could pose challenges for a receiver tasked with responding to an allegation of bullying or harassment made under the protected disclosures process. In practice we think a prudent approach when faced with this kind of situation will be to explain to a discloser the limitations that maintaining their anonymity will place on an employer's ability to investigate their concerns.

Finally, although the Act provides some helpful guidance around what a receiver should do, a receiver does not have to do anything when they a receive a disclosure. The Ombudsman can in some circumstances refer the disclosure to a Minister or investigate where an organisation has not acted as it should under the Act or has not addressed the alleged serious wrongdoing. But a person has no right under the Act to take legal action because of a receiver's failure to act in accordance with the Act's recommendations.

In practice if a receiver does not respond to a disclosure, they run the risk the discloser will disclose further if they do not feel their concerns have been appropriately addressed. Many readers will no doubt be able to think of examples of organisations suffering damaging media coverage as a result of disgruntled employees "blowing the whistle." Therefore, in many, if not most, cases following the guidance set out in the Act will be the right approach.

Further Advice

If you haven't done so already, we recommend reviewing your whistleblowing policies and procedures to ensure they are updated to reflect the legislative requirements.

For assistance with reviewing your whistle blower policies, or if you'd like further advice on your obligations or rights under the Act, please contact our employment law team.

Our thanks to Kari Schmidt and Gerrad Brimble for preparing this article.