

Clear as a Whistle

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The Protected Disclosures (Protection of Whistleblowers) Bill (Bill) seeks to clear up confusion for organisations and disclosers by making whistle-blowing simpler and more accessible than it is under the Protected Disclosures Act 2000 (Act). The Bill has passed its first reading and is now before the select committee.

Protected disclosures – a recap

Under the current Act, employees are protected from liability or disadvantage when they disclose serious wrongdoing even if they are honestly mistaken or if they technically fail to comply with the Act's requirements. However, employees must state they want their disclosure to be protected by the Act to gain this protection. Currently, serious wrongdoing means conduct which:

- poses a serious risk to public health and safety, the environment or the maintenance of law; or
- is an offence.

In the public sector, serious wrongdoing also includes unlawful or corrupt use of funds, discriminatory conduct, and gross mismanagement.

Some private organisations now captured

The Bill proposes changes that will capture previously exempt private organisations that carry out statutory duties or functions, or which use public funds and/or resources. The meaning of "serious wrongdoing" is to be broadened to include:

- all unlawful, corrupt or irregular uses of public funds or public resources, regardless of whether the organisation is public or private; and
- oppressive, improperly discriminatory, gross mismanagement or grossly negligent conduct by those performing statutory functions or duties or exercising statutory powers.

Greater employee protection

If the Bill is passed into legislation, employees will no longer be required to specifically state they are making a 'protected disclosure' or to refer to the Act in order to get the protection of the Act. Employers will need to be aware of when a disclosure is made that would engage the Act.

Employees who disclose will continue to be protected from retaliation and from being treated less favourably for making a disclosure. The Act does not define retaliate. The Bill clarifies and defines retaliate to include:

- dismissing the employee;
- not offering the employee the same opportunities, conditions or terms as other comparable employees;
- any detriment to the employee including to their job satisfaction; and
- retiring the employee (or causing the employee to resign).

Employers taking any retaliatory action against someone making a protected disclosure could face a personal grievance under the Employment Relations Act 2000.

Employees will be able to directly disclose to an external authority

Under the Act, employees are currently required to follow the process established by their own organisation before making a disclosure to an external authority.

The Bill proposes allowing employees to go directly to an external authority, rather than having to exhaust internal procedure. It also provides a reference schedule for employees to understand which external authority is likely to be appropriate, depending on the nature of the disclosure.

If the Bill is passed into legislation, employers who have a current whistleblower policy that does not allow for immediate disclosure to an external authority will need to amend their process to reflect this change.

Clearer Process for employers

The Bill explains what employers (and anyone who receives a protected disclosure) should do. This includes:

- acknowledging you have received the protected disclosure;
- considering the disclosure;
- checking whether the disclosure has also be made elsewhere;
- dealing with the disclosure; and
- informing the discloser of what has been done and why.

When will the changes take effect?

If the Bill is passed into legislation, the changes will take effect from **1 July 2021**. Watch out for our updates as we track this Bill through the select committee stage and as it comes into force.

Further Advice

The employment team at Gallaway Cook Allan is happy to review or develop protected disclosure policies and processes that fit your business and manage your risk. Please feel free to contact Jenna Riddle at jenna.riddle@gallawaycookallan.co.nz or 027 742 1032 or Rebecca Crawford at rebecca.crawford@gallawaycookallan.co.nz or 03 477 7312 to discuss your needs.

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