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WHISTLEBLOWING LEGISLATION IN NEW ZEALAND

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WHISTLEBLOWING LEGISLATION IN NEW ZEALAND

On 1 January 2001, the *Protected Disclosures Act 2000*(1) came into force in New Zealand. The Act seeks to promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an "organisation." It also seeks to protect from liability or unfavourable treatment employees who, in accordance with the Act, make disclosures of information about serious wrongdoing in or by the organizations that employ them.(2)

An "organisation" has been broadly defined for purposes of the Act to mean "a body of persons, whether corporate or unincorporate, and whether in the public-sector or in the private-sector, and includes a body of persons comprising 1 employer and 1 or more employees."(3) Although the Act contains no definition of a private-sector organization, it defines a public-sector organization as encompassing a wide range of organizations including government departments and public authorities, bodies and organizations. The definition also includes the Office of the Clerk of the House of Representatives, the Parliamentary Service, and an intelligence and security agency.(4)

"Serious wrongdoing" is defined for purposes of the Act to include:

- unlawful, corrupt or irregular use of public funds or resources;
- an act, omission or course of conduct that constitutes a serious risk to public health, public safety, the environment, or the maintenance of law (including the prevention, investigation, and detection of offences and the right to a fair trial);
- an act, omission or course of conduct that constitutes an offence; or

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(1) The Act may be viewed at: http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/007.html.

(2) Statutes of New Zealand, *Protected Disclosures Act 2000*, section 5.

(3) *Ibid.*, section 3.

(4) *Ibid.*

- an act, omission, or course of conduct by a public official that is "oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement;"

regardless of whether the wrongdoing occurred before or after the coming into force of the Act.(5) The above definition covers a wide range of situations, examples of which include the misuse of money paid to a contractor by a government agency, unsafe disposal or storage of toxic chemicals, and concealing information about criminal offending.

Under the Act, an "employee" of either a public- or private-sector organization may disclose information in the manner provided for by the Act if:

- the information is about serious wrongdoing in or by that organization;
- the employee believes on reasonable grounds that the information is true or likely to be true;
- the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
- the employee wishes for the disclosure to be protected.(6)

A disclosure made in accordance with the above is a "protected disclosure" for purposes of the Act.(7)

A wide range of persons, in relation to an organization, are considered to be "employees" for purposes of the Act, including:

- former employees;
- homeworkers;
- persons seconded to the organization;
- individuals engaged or contracted under a contract for services to do work for the organization (i.e., independent contractors);
- persons "concerned in the management of the organization"; and
- in relation to the New Zealand Defence Force, a member of the Armed Forces.(8)

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(5) *Ibid.*

(6) *Ibid.*, section 6(1).

(7) *Ibid.*, section 6(2).

(8) *Ibid.*, section 3.

The Act requires all public-sector organizations to have appropriate internal procedures for receiving and dealing with information about serious wrongdoing in or by the organization.(9) The Act sets out specific guidelines for these internal procedures. In particular, organizations must:

- comply with principles of natural justice;
- identify the persons in the organization to whom a disclosure may be made; and
- include reference to the effects of sections 8 to 10 of the Act (which generally set out a series of steps to be taken if the employee is unable to obtain a satisfactory response from the person to whom the wrongdoing was reported).(10)

Apart from the above requirements, there is no prescribed format for the internal procedures of public-sector organizations. Information about internal procedures and adequate information on how to use the procedures must be published widely in public-sector organizations and must be republished at regular intervals.(11)

Unlike the situation for public-sector organizations, the Act does not expressly require private-sector organizations to have internal procedures for receiving and dealing with information from employees about serious wrongdoing in or by those organizations. Nevertheless, the establishment of such a procedure by a private-sector organization to ensure that a disclosure is dealt with effectively would presumably reduce the likelihood of an employee making a disclosure outside the organization because his or her concerns have not been adequately addressed internally.

Under the Act, an employee must generally disclose information in the manner provided for by internal procedures established by and published in the organization, or the relevant part of the organization, for receiving and dealing with information about serious wrongdoing.(12) However, a disclosure of information may be made to the head or deputy head of the organization if:

- the organization has no internal procedures established and published for receiving and dealing with information about serious wrongdoing; or

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(9) *Ibid.*, section 11(1).

(10) *Ibid.*, section 11(2).

(11) *Ibid.*, section 11(3).

(12) *Ibid.*, section 7(1).

- the employee making the disclosure believes on reasonable grounds that the person to whom the serious wrongdoing should be reported in accordance with internal procedures is or may be involved in the wrongdoing or, by reason of any relationship or association with a person who is or may be involved in the wrongdoing, is not a person to whom it is appropriate to make the disclosure.(13)

An employee in either a public- or private-sector organization may make an external disclosure of serious wrongdoing to an "appropriate authority" if the employee believes on reasonable grounds that:

- the head of the organization is or may be involved in the alleged wrongdoing;
- immediate reference to an appropriate authority is justified by reason of the urgency of the matter to which the disclosure relates, or some other exceptional circumstances; or
- no action has been taken or recommended on the matter to which the disclosure relates within 20 working days of an internal disclosure.(14)

For purposes of the Act, an "appropriate authority" is defined as follows:

> "appropriate authority", without limiting the meaning of that term, –
>
> (a) includes –
> (i) the Commissioner of Police:
> (ii) the Controller and Auditor-General:
> (iii) the Director of the Serious Fraud Office:
> (iv) the Inspector-General of Intelligence and Security:
> (v) an Ombudsman:
> (vi) the Parliamentary Commissioner for the Environment:
> (vii) the Police Complaints Authority:
> (viii) the Solicitor-General:
> (ix) the State Services Commissioner:
> (x) the Health and Disability Commissioner: and
>
> (b) includes the head of every public sector organisation, whether or not mentioned in paragraph (a); and

(13) *Ibid.*, section 8(1).

(14) *Ibid.*, section 9(1).

(c) includes a private sector body which comprises members of a particular profession or calling and which has the power to discipline its members; but

(d) does not include –
(i) a Minister of the Crown; or
(ii) a Member of Parliament.(15)

The Act does not state what action an appropriate authority should take upon receiving a protected disclosure. However, the Act does provide that where an appropriate authority to whom a protected disclosure was made considers, after consultation with another appropriate authority, that the information disclosed can be more suitably investigated by another appropriate authority, it may refer the matter to the other appropriate authority.(16) In such a case, the appropriate authority to whom the information was referred must promptly notify the person by whom the disclosure was made that the information disclosed has been so referred.(17) The protected disclosure of information continues to be protected.(18) The legislation does not prevent a protected disclosure of information from being transferred from one appropriate authority to another on more than one occasion.(19)

As a last resort, an employee may make a disclosure to a Minister of the Crown or an Ombudsman(20) if the employee making the disclosure:

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(15) *Ibid.*, section 3.

(16) *Ibid.*, section 16(1).

(17) *Ibid.*, section 16(2).

(18) *Ibid.*, section 16(3).

(19) *Ibid.*, section 16(4).

(20) For purposes of the *Protected Disclosures Act 2000*, an "Ombudsman" means an Ombudsman holding office under the *Ombudsmen Act 1975* and includes for the purposes of the Act (with the exception of section 13 concerning special rules on procedures of certain organizations relating to international relations and intelligence and security):

a) any person holding office under an Ombudsman to whom the powers of an Ombudsman have been delegated under section 28 of the *Ombudsmen Act 1975*, and

b) any person whom an Ombudsman has appointed to perform an Ombudsman's functions under the *Protected Disclosures Act 2000*. (section 3)

There are two Ombudsmen appointed under the *Ombudsmen Act 1975* by the New Zealand Parliament. Their primary purpose is to inquire into complaints raised against New Zealand central, regional and local government organizations or agencies. They are independent review authorities and are accountable to Parliament, not the Government of the day.

- has already made substantially the same disclosure internally or to an appropriate authority;
- believes on reasonable grounds that the person or appropriate authority to whom the disclosure was made has decided not to investigate the matter; or has decided to investigate the matter but has not made progress with the investigation within a reasonable time; or has investigated the matter but no action has been taken or recommended; and
- continues to believe on reasonable grounds that the information disclosed is true or likely to be true.(21)

However, there is a further limitation in that the disclosure can only be made to an Ombudsman if it is in respect of a public-sector organization and it has not already been made to an Ombudsman as an appropriate authority.(22) Although the Act makes no specific mention about what action an appropriate authority can or should take, the Act states that Ombudsmen have the same powers in relation to investigating a disclosure of information as they have in relation to a complaint under the *Ombudsmen Act 1975* but they are not bound to investigate the disclosure of information.(23)

The Ombudsmen also have the role of providing guidance to employees (including private-sector employees) about making a protected disclosure. According to the Act, where an employee notifies the Office of the Ombudsmen that he or she has disclosed, or is considering the disclosure of information under the Act, an Ombudsman must provide information and guidance to the employee on the following matters:

- the kinds of disclosures that are protected under the Act;
- the manner in which, and the persons to whom, information may be disclosed under the Act;
- the broad role of each of the various "appropriate authorities" under the Act;
- the protections and remedies available under the Act and the *Human Rights Act 1993* if disclosure leads to victimization; and
- the right of an appropriate authority to refer the disclosed information to another appropriate authority under the Act.(24)

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(21) Statutes of New Zealand, *Protected Disclosures Act 2000*, section 10(1).

(22) *Ibid.*, section 10(2).

(23) *Ibid.*, section 23(2).

(24) *Ibid.*, section 15.

Apart from the general requirements set out in the Act concerning the receiving and dealing with disclosures by employees of information concerning serious wrongdoing in or by the organizations that employ them, the Act sets out special rules for disclosure that apply to intelligence and security agencies and certain other organizations relating to international relations and intelligence and security.

According to the Act, the internal procedures of an intelligence and security agency must:

- provide that the persons to whom a disclosure may be made must hold the appropriate security clearance and be authorized to have access to the information;
- state that the only appropriate authority to whom information may be disclosed is the Inspector-General of Intelligence and Security;
- invite any employee who has disclosed, or who is considering the disclosure of, information under the Act to seek information and guidance from the Inspector-General of Intelligence and Security and not from an Ombudsman; and
- state that no disclosure may be made to an Ombudsman or to a Minister of the Crown other than the Minister responsible for the relevant intelligence and security agency or the Prime Minister.(25)

Insofar as they relate to the disclosure of information concerning the international relations of the Government of New Zealand or intelligence and security matters, the internal procedures of the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence and the New Zealand Defence Force must:

- provide that the persons to whom a disclosure must be made must be persons holding an appropriate security clearance and be authorized to have access to the information;
- state that the only appropriate authority to whom information may be disclosed is an Ombudsman;
- invite any employee who has disclosed, or who is considering the disclosure of, information under the Act to seek information and guidance from an Ombudsman; and

(25) *Ibid.*, section 12.

- state that no disclosure may be made to a Minister of the Crown other than:
  1. the Prime Minister or the Minister responsible for foreign affairs and trade in the case of information relating to the international relations of the government of New Zealand; or
  2. the Prime Minister or the Minister responsible for an intelligence and security agency in the case of information relating to intelligence and security matters.(26)

Neither the Inspector-General of Intelligence and Security nor an Ombudsman may disclose information relating to intelligence and security and international relations received in the above context except in accordance with provisions of the *Inspector-General of Intelligence and Security Act 1996* or the *Ombudsmen Act 1975*, as the case may be.(27)

The Act provides protection for employees who make a protected disclosure about serious wrongdoing in or by the organizations that employ them. If the employee suffers retaliatory action from his or her employer as a result of making a protected disclosure, the employee may bring a personal grievance under the *Employment Contracts Act 1991*.(28) The employee is also protected under the *Human Rights Act 1993* from being treated unfavourably because of disclosure.(29)

No employee who makes a protected disclosure of information or who refers a protected disclosure to an appropriate authority for investigation is liable to any civil, criminal or disciplinary proceeding by reason of having made or referred that disclosure.(30) According to the Act, this immunity from civil and criminal proceedings applies "despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath or practice."(31) In other words, the immunity applies notwithstanding any confidentiality requirements earlier agreed to or imposed by law.

The protections conferred by the *Protected Disclosures Act 2000* and by section 66 of the *Human Rights Act 1993* (concerning victimization) do not apply where the

(26) *Ibid.*, section 13.

(27) *Ibid.*, section 14.

(28) *Ibid.*, section 17.

(29) *Ibid.*, section 25.

(30) *Ibid.*, section 18(1).

(31) *Ibid.*, section 18(2).

person making the disclosure makes an allegation knowing it to be false or otherwise acts in bad faith.(32)

The Act does not limit other protections, privileges, immunities or defences, relating to the disclosure of information.(33)

Under the Act, the identity of the employee who made a protected disclosure must usually be protected by anyone to whom the disclosure is made or referred. The only exceptions are if:

- the employee consents in writing to the disclosure of that information; or
- the person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of the identifying information is essential to the effective investigation of the allegations, to prevent serious risk to public health, public safety or the environment, or having regard to the principles of natural justice.(34)

Finally, the Act requires that, no earlier than two years after the commencement of the Act (the Act came into force on 1 January 2001), the Minister of State Services must cause a report to be prepared on the operation of the Act since its coming into force and whether any amendments to the Act are necessary or desirable, including an amendment to require further periodic reports to the House of Representatives on the operation of the Act.(35) The Minister of State Services must ensure that the Chief Ombudsman is consulted on the matters to be considered in the report.(36) As well, the Minister of State Services must, not later than three years after the coming into force of the Act, present a copy of the report to the House of Representatives.(37)

(32) *Ibid.*, section 20.

(33) *Ibid.*, section 21.

(34) *Ibid.*, section 19.

(35) *Ibid.*, section 24(1).

(36) *Ibid.*, section 24(2).

(37) *Ibid.*, section 24(3).