

New Public Service Act and Workforce Assurance Model Standards

The new Public Service Act 2020 (Act) came into force on the 6th of February 2021 and replaces the previous State Services Act 1988.

Under section 19 of the Act the Public Service Commissioner (**Commissioner**) can issue guidance on integrity and conduct within the public service workforce. In August 2020, the Commissioner released "the Workforce Assurance Model Standards" (**Standards**). The Standards outline the Commissioner's expectations of public service organisations and Crown entities when recruiting (including that previous serious misconduct is disclosed to other State services employers) investigating and entering into settlement agreements. The Commissioner says that the Standards help ensure the suitability of public service employees and so that the public service workforce continues to meet high standards for integrity and honesty.

Disclosing serious misconduct

Under the Standards, all prospective employees should be asked to authorise the disclosure of whether they have been subject to a serious misconduct investigation (either concluded and upheld or ongoing) from all previous State services employers for the last three years. If the person's application proceeds, a request should be made to the former employer for additional detail relating to the serious misconduct investigation (subject to the employee's further consent). Evidence of the consent to the disclosure will have to be shown to the former employer. The Standards emphasise that just because a person does not consent to the disclosure, it does not mean they should not be employed. The organisation can ask why consent was refused and take those reasons into account when deciding whether to progress the application. The Standards also say that disclosure of serious

misconduct does not necessarily mean the person cannot be employed.

The Standards are clear that consent from the employee must be obtained before the information can be disclosed, which would appear to alleviate any significant privacy concerns that may be held by the organisation disclosing the information. The Standards do not specify precisely what "further details" the former employer should be providing about the serious misconduct. Employers will be on safer ground providing minimal details and should agree with the former employee on exactly what information is going to be provided, if the employee consents to the disclosure. Organisations will also need to ensure that the privacy of other people who have been involved in the investigation is protected.

Investigations

The Standards recommend that all investigations into serious misconduct should be concluded even when the person has ceased to work for the organisation. This applies except in exceptional circumstances where specialist advice is obtained and subject to obtaining the approval of the organisation's Chief Executive.

This expectation is relatively onerous for employers, especially as investigations are often expensive and time consuming. It will also be difficult for an employer to make any findings if the employee accused of the serious misconduct has resigned and refuses to participate any further in the investigation.

Settlement agreements

The Standards state that settlement agreements should not be used to shortcut an investigation into wrongdoing. The practical reality is settlement agreements are often entered into with employees not as "shortcut" but as a legitimate tool to minimise the stress and cost involved with an investigation on both

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sides. The Standards do acknowledge that settlement agreements can assist to minimise potentially drawn-out processes where the parties have not been able to resolve a dispute or problem or where trust and confidence has irretrievably broken down.

Under the Standards employers are expected to include confidentiality provisions in settlement agreements only where they are genuinely necessary and in the interests of both parties and where they are included, should be written so as not to prevent an agency from responding openly to a reference from a future employer.

Confidentiality clauses are a very common, and important feature of settlement agreements. They can protect both parties' reputations and for employers, ensure that any financial aspects of the settlement will not be disclosed to other employees and thereby remove the concern that other employees will expect similar "pay-outs". Many employees agree to an exit so as to protect their future employment prospects. It is difficult to imagine a situation where either party would agree to settlement in the absence of a confidentiality clause. In our view, confidentiality provisions will therefore largely be both genuinely necessary and in the interests of both parties.

Want to know more?

If you have any questions about the Standards, please contact our specialist [Employment](#) Team.