



Te Ture Whakahaumarū i te Whākinga 2022

Protected Disclosures (Protection of Whistleblowers) Act 2022

GUIDANCE

This guidance provides an overview of the Protected Disclosures (Protection of Whistleblowers) Act 2022, and details what public and private sector organisations must know before the Act comes into effect on 1 July 2022.

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Mō te Ture | About the Act

The Protected Disclosures (Protection of Whistleblowers) Act 2022 replaces the Protected Disclosures Act 2000. It continues the 2000 Act's purpose – to facilitate the disclosure and investigation of serious wrongdoing in the workplace (also known as whistleblowing), and to provide protection for employees and other workers who report concerns. However the 2022 Act makes changes to address issues and improvements that have been identified.

The new Act comes into force from 1 July 2022.

The 2022 Act:

- extends the definition of 'serious wrongdoing' to cover private sector use of public funds and authority, and behaviour that is a serious risk to the health and safety of any individual
- enables people to report serious wrongdoing directly to an appropriate authority at any time, while clarifying the ability of the appropriate authority to decline or refer the disclosure
- strengthens protections for disclosers by specifying what a receiver of a disclosure should do
- clarifies the potential forms of adverse conduct disclosers may face
- clarifies internal procedures for public sector organisations, and requires them to state how they will provide support to disclosers

He aha te whākinga e whakahaumarutia ana?

What is a protected disclosure?

A disclosure of information is protected 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 about that in accordance with the Act, and
- does not disclose it in bad faith.

Section 9 of the Act

He aha te takahanga nui?

What is serious wrongdoing?

Serious wrongdoing has a particular meaning under the Act. It does not apply to all possible wrongdoing that a person might see and think about reporting.

Serious wrongdoing includes an act, omission or course of conduct that is:

Type of serious wrongdoing	Does it apply to the public sector?	Does it apply to the private sector?
An offence	Yes	Yes
A serious risk to public health, or public safety, or the health or safety of any individual, or to the environment	Yes	Yes
A serious risk to the maintenance of the law including the prevention, investigation and detection of offences or the right to a fair trial	Yes	Yes
An unlawful, corrupt or irregular use of public funds or public resources	Yes	Yes, but does not include the use of private sector funds or resources
Oppressive, unlawfully discriminatory, or grossly negligent or that is gross mismanagement by a public sector employee or a person performing a function or duty or exercising a power on behalf of a public sector organisation or the Government	Yes	Yes, but does not include the use of private sector powers

Section 10 of the Act

Ehara te aha i te takahanga nui? Me pēhea tā te tangata pūrongo i ngā mea ehara i te takahanga nui?

What is not serious wrongdoing? How does a person report things that do not qualify as serious wrongdoing?

Things like dissatisfaction with the leadership of an organisation, or more minor misconduct matters, may not amount to serious wrongdoing and therefore may not be covered by the Act. And the Act does not cover employment issues that are more properly covered by the Employment Relations Act 2000.

If a person is unsure about whether the information they want to disclose relates to serious wrongdoing, they can contact the Ombudsman for advice. Potential disclosers can also look at their organisation's policies about handling other staff complaints.

Mō ngā kaiwhāki | About disclosers

Ko wai tētahi kaiwhāki?

Who is a discloser?

A discloser, in relation to an organisation, means an individual who is (or was formerly):

- an employee
- a homeworker within the meaning given in section 5 of the Employment Relations Act 2000
- a secondee to the organisation
- engaged or contracted under a contract for services to do work for the organisation
- 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)
- a member of the Armed Forces (in relation to the New Zealand Defence Force)
- a volunteer working for the organisation without reward or expectation of reward for that work.

Section 8 of the Act

Ka pūrongo te kaiwhāki i te takahanga nui ki a wai?

Who does a discloser report serious wrongdoing to?

A discloser may make a protected disclosure to their organisation or to an appropriate authority.

A disclosure made to the discloser's organisation should be in accordance with any internal procedures, or to the head or deputy head of the organisation.

A discloser may make a disclosure to an appropriate authority at any time. An appropriate authority is a trusted external party who can be approached if a discloser is not confident about making the disclosure within their own organisation. An appropriate authority includes:

- the head of any public sector organisation
- any officer of Parliament (an Ombudsman, the Controller and Auditor-General or the Parliamentary Commissioner for the Environment)
- (as examples), the persons or bodies listed in Schedule 2 of the Act
- the membership body of a particular profession, trade, or calling with the power to discipline its members.

An appropriate authority does not include a Minister or Member of Parliament.

A discloser may also make the disclosure to another person, as long as they do so on a confidential basis and for the purposes of seeking advice about how to make a protected disclosure in accordance with the Act.

Disclosures to the media are not protected under the Act (journalists' protection of their sources is covered by other legislation).

Sections 11 and 25 of the Act

He ture rānei mō te whāki i ngā pārongo mō ngā hononga ki tāwāhi, mō ngā take tōrangpū, mō ngā take whakahaumaru rānei ki te manatū e tika ana?

Are there rules for disclosing international relations and intelligence and security information to an appropriate authority?

The Ombudsman is the only appropriate authority who can receive a protected disclosure that includes international relations information (defined in section 4 of the Act).

The Inspector-General of Intelligence and Security is the only appropriate authority who can receive a protected disclosure that includes intelligence and security information (defined in section 4 of the Act).

There are further provisions in the Act about disclosing these types of information.

Sections 25, 27 and 28 of the Act (with references also in sections 14, 16, 17, 30, 32 and 33).

Āhea whakahaumarutia ai te tangata e pūrongo ana i te takahanga nui?

When is the person reporting serious wrongdoing protected?

A discloser is entitled to protection for a disclosure made in accordance with an organisation's internal procedures, to the head or deputy head of the organisation, or to an appropriate authority. A discloser is entitled to protection even if:

- they are mistaken and there is no serious wrongdoing, or
- they do not refer to the name of the Act when making the disclosure, or
- they technically fail to comply with some of the Act's requirements (as long as they have substantially complied with the Act), or
- they also make the disclosure to another person (as long as they do so on a confidential basis, to seek advice about whether or how to make a protected disclosure).

Another discloser who discloses further information in support of a disclosure is also entitled to protection if they do not disclose in bad faith and they disclose to their organisation or to an appropriate authority in accordance with the Act.

The Act cannot be contracted out of so its rights and protections apply even if the discloser has agreed, for example, in an employment agreement, confidential settlement or non-disclosure agreement that the information cannot be disclosed.

A disclosure is not protected if:

- the discloser knows the allegations are false
- the discloser acts in bad faith
- the information being disclosed is protected by legal professional privilege.

Sections 9, 11, 12, 24 and 39 of the Act

He aha te āhua o te whakahaumarū i te tangata e pūrongo ana i te takahanga nui?

What protections are there for the person reporting serious wrongdoing?

The protections a discloser is entitled to are: confidentiality, not retaliated against or treated less favourably, and immunity from civil, criminal and disciplinary proceedings.

Confidentiality

Receivers of a protected disclosure must use their best endeavours to keep confidential information that might identify the discloser.

The exceptions are if the discloser consents to the release of the identifying information, or if there are reasonable grounds to believe that the release of the identifying information is essential:

- for the effective investigation of the disclosure; or
- to prevent a serious risk to public health, public safety, the health and safety of any individual, or the environment; or
- to comply with the principles of natural justice, or
- to an investigation by a law enforcement or regulatory agency for the purposes of law enforcement.

The Act provides that disclosers must be consulted in these cases (if practicable in respect of serious risk to public health, public safety, the health and safety of any individual, or the environment; or to an investigation by a law enforcement or regulatory agency for the purposes of law enforcement).

The Ombudsman can provide advice to disclosers considering making an anonymous disclosure.

The release of information that might identify a discloser in breach of these provisions means a complaint may be made under the Privacy Act 2020 for interference with privacy. And as a result, the Privacy Commissioner may undertake an investigation.

A receiver must refuse a request for information if that information might identify the discloser of a protected disclosure – under the [Official Information Act 1982](#), or the [Local Government Official Information and Meetings Act 1987](#).

Obligations not to retaliate or treat less favourably

An employer must not retaliate or threaten to retaliate against an employee because the employee intends to make or has made a protected disclosure. If this occurs the employee has a personal grievance under the Employment Relations Act 2000. Retaliate means to dismiss the employee, treat the employee less favourably than other similar employees, or subject them to any detriment or disadvantage.

A discloser, or someone who supports the discloser, who is treated less favourably than others in the same or similar circumstances may be able access the anti-victimisation protections in the Human Rights Act 1993. This applies to all types of discloser, including persons not covered by the Employment Relations Act.

Immunity from civil, criminal and disciplinary proceedings

Neither a discloser who makes a protected disclosure, nor a receiver who refers the disclosure, under the Act is liable to any civil, criminal or disciplinary proceeding because of making or referring the disclosure. This applies even if there is a prohibition or restriction on disclosing the information such as in any contract, agreement, procedure or practice (except where the information is covered by legal professional privilege).

These protections only apply to making the disclosure. Action can still be taken against a discloser if they were involved in the wrongdoing.

Sections 17-24 of the Act

Mō ngā kaiwhiwhi i ngā whākinga e whakahaumarutia ana | About receivers of protected disclosures

A receiver of a protected disclosure can be

the organisation concerned, or

an appropriate authority.

Ka aha te kaiwhiwhi i tētahi whākinga e whakahaumarutia ana?

What does the receiver of a protected disclosure do?

Within 20 working days of receiving a protected disclosure, the receiver should:

- acknowledge to the discloser the receipt of the disclosure
- consider the disclosure and whether it warrants investigation
- check with the discloser whether the disclosure has been made elsewhere (and any outcome)
- deal with the matter by doing one or more of the following:
 - » investigating the disclosure
 - » addressing any serious wrongdoing by acting or recommending action
 - » referring the disclosure (see below)
 - » deciding that no action is required, and
- inform the discloser (with reasons) about what the receiver has done or is doing to deal with the matter.

However, when it is impracticable to complete these actions within 20 working days, the receiver should undertake the first three steps and inform the discloser how long the receiver expects to take to deal with the matter. The receiver should then keep the discloser updated about progress.

Section 13 of the Act

Ka pēhea mēnā te kaiwhiwhi ka whakatau me waiho te take?

What if the receiver decides no action is required?

A receiver must inform the discloser, with reasons, if the receiver decides no action is required on the disclosure. Reasons may include that the requirements of the Act in relation to disclosers and disclosures are not met, that the length of time since the alleged wrongdoing makes an investigation impractical or undesirable, or that the matter is better addressed by other means.

Section 15 of the Act

Ka pēhea mēnā ka tuku atu te kaiwhiwhi i te whākinga?

What if the receiver refers the disclosure?

The receiver that is the organisation concerned may refer the disclosure to an appropriate authority. The receiver that is an appropriate authority may refer the disclosure to the organisation concerned or another appropriate authority. Before referring a protected disclosure, the receiver must consult the discloser and the intended recipient of the referral.

Section 16 of the Act

He aha ngā mea ka taea e te kaiwhāki mēnā ki ōna whakaaro kāore i te tirohia te whākinga?

What can a discloser do if they believe their disclosure is not being addressed?

A discloser could believe on reasonable grounds that the receiver of a protected disclosure has not acted as it should, or has not dealt with the matter, to address the serious wrongdoing. In this case the discloser may make the disclosure to:

- an appropriate authority, including an Ombudsman (which the discloser can do at any time)
- a Minister
- the Speaker (if the disclosure relates to serious wrongdoing in or by the office of an officer of Parliament, the office of the Clerk of the House of Representatives, or the Parliamentary Service).

Special rules apply to escalating disclosures that involve international relations information or intelligence and security information, to ensure the security of that information.

Sections 11 and 14 of the Act

Ngā tukanga mā ngā whakahaere | Procedures for organisations

He aha ngā tukanga me whai e ngā whakahaere katoa o te rāngai tūmatanui mō ngā whākinga e whakahaumarutia ana?

What procedures must all public sector organisations have for protected disclosures?

Every public sector organisation must have appropriate internal procedures, which must:

- comply with the principles of natural justice
- set out a process for what the organisation will do as the receiver of a protected disclosure
- identify who in the organisation a protected disclosure of serious wrongdoing in or by that organisation may be made to
- include reference to the requirement to not retaliate, or threaten to retaliate, against the discloser or treat them less favourably than others
- describe the circumstances when it might be referred on
- describe how the organisation will provide practical assistance and advice to disclosers
- describe how the organisation will meet the duty of confidentiality.

The organisation must publish widely (and republish at regular intervals) information about the existence of the internal procedures, and adequate information on how to use the procedures.

All public sector organisations were required by the Protected Disclosures Act 2000 to have internal procedures. The 2022 Act includes additional requirements such as enhanced procedures for the organisation as a receiver of a protected disclosure, referencing for disclosers the protections available under the Act and how the organisation will provide practical assistance to disclosers.

As a result all public sector organisations will need to review and update their procedures for the implementation of the new Act.

Section 29 of the Act

Me aha ngā whakahaere o te rāngai tūmataiti mō ngā whākinga e whakahaumarutia ana?

What must private sector organisations do in relation to protected disclosures?

Items a to c of the definition of serious wrongdoing (see below) apply equally to the public sector and the private sector. Items d and e can apply to the private sector in certain situations.

Serious wrongdoing includes an act, omission or course of conduct that is:

- a. An offence*
- b. A serious risk to public health, or public safety, or the health or safety of any individual, or to the environment*
- c. A serious risk to the maintenance of the law including the prevention, investigation and detection of offences or the right to a fair trial*
- d. An unlawful, corrupt or irregular use of public funds or public resources*
- e. Oppressive, unlawfully discriminatory, or grossly negligent or that is gross mismanagement by a public sector employee or a person performing a function or duty or exercising a power on behalf of a public sector organisation or the Government.*

Private sector organisations must follow the provisions of the Act including those as a receiver of a protected disclosure. However private sector organisations are not required by the Act to establish internal procedures for protected disclosures.

Some private sector organisations may be appropriate authorities. For example an appropriate authority as defined in the Act includes the membership body of a particular profession, trade, or calling with the power to discipline its members. As an appropriate authority such a body should handle a protected disclosure in accordance with the requirements in the Act.

Te wāhi ki Te Kaitiaki Manga Tangata | The role of the Ombudsman

The Ombudsman may provide information and guidance on the Act (as well as being an appropriate authority). For example, the Ombudsman can provide information and guidance to disclosers who approach it about how to make a disclosure and the protections under the Act. The Ombudsman may escalate to a Minister a protected disclosure made to it or to another appropriate authority. The Ombudsman may investigate a disclosure if the disclosure relates to serious wrongdoing by a public sector organisation.

The Ombudsman may request from an organisation information about whether the organisation has established internal procedures, request a copy of those procedures and information about how the procedures operate (with only public sector organisations required to comply). The Ombudsman may review and guide an investigation of a protected disclosure being conducted by a public sector organisation. The Ombudsman may receive reports on certain investigations of protected disclosures and may report at a summary level in its annual report on protected disclosures.

Sections 30-37 of the Act