

Making a protected disclosure – “blowing the whistle”

If you’re concerned about serious wrongdoing in or by your organisation, the Ombudsman is able to provide information and guidance.

The [Protected Disclosures Act](#) (or PDA) came into force in 2001. It’s about disclosure in the public interest of serious wrongdoing – sometimes called “whistle-blowing” – and identifies procedures to be followed in making disclosures, and the protections available to those who make disclosures.

This document provides information and guidance on making a protected disclosure.

Contents

The purpose of the PDA.....	2
What is serious wrongdoing?.....	2
When is a disclosure (not) protected?.....	2
Making a protected disclosure.....	3
What protections are available?	5
Appropriate authorities.....	7
Referral of protected disclosures between appropriate authorities.....	13
What can the Ombudsman do?	13
Contact details	15

The purpose of the PDA

The purpose of the PDA is to promote the public interest by:

- facilitating the disclosure and investigation of serious wrongdoing in or by an organisation; and
- protecting employees who make disclosures of information about serious wrongdoing in or by an organisation in accordance with the Act.¹

The PDA applies to employees of both public and private sector organisations.

What is serious wrongdoing?

Serious wrongdoing includes:

- unlawful, corrupt or irregular use of funds or resources of a public sector agency;
- conduct that poses a serious risk to public health, safety or the environment;
- conduct that poses a serious risk to the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial;
- an offence;
- conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.²

When is a disclosure (not) protected?

To make a protected disclosure, you must be an “employee” of the organisation you’re making the disclosure about.

You’re an “employee” of an organisation if:

- you receive wages or salary from the organisation;
- you’re a former employee of the organisation;
- you’re a homemaker (within the meaning of section 5 of the [Employment Relations Act 2000](#));
- you’re seconded to the organisation;

¹ See section 5 PDA.

² See the definition of “serious wrongdoing” in section 3 PDA.

- you're an individual contracted to do work for the organisation;
- you're concerned in the management of the organisation;
- the organisation is the New Zealand Defence Force, and you're a member of the Armed Forces; or
- you work for the organisation as a volunteer.³

Your disclosure **will be protected** if:

- the information is about serious wrongdoing in or by your organisation; and
- you believe on reasonable grounds that the information is true or likely to be true; and
- you want the serious wrongdoing to be investigated.⁴

Your disclosure **won't be protected** if:

- you know the allegations are false, or you act in bad faith;⁵ or
- the information you're disclosing is protected by legal professional privilege.⁶

Making a protected disclosure

Internal procedures

The first thing to do is find out whether your organisation has internal procedures for making protected disclosures.

Public sector organisations are required to establish internal procedures for receiving and dealing with information about serious wrongdoing.⁷

If your organisation has internal procedures, you're generally required to make your disclosure in accordance with those procedures (read on to learn about the exceptions to this rule).⁸

³ See the definition of "employee" in section 3 PDA.

⁴ See section 6 PDA.

⁵ See section 20 PDA.

⁶ See section 22 PDA. There are two types of legal professional privilege – solicitor-client privilege and litigation privilege. Solicitor-client privilege applies to communications between a solicitor (acting in that capacity) and client for the purposes of seeking or giving legal advice or assistance, irrespective of legal proceedings. Litigation privilege applies to communications with third parties where that communication has, as its dominant purpose, the object of enabling a legal adviser to advise a client on the conduct of litigation (whether current or anticipated).

⁷ See section 11 PDA.

⁸ See section 7 PDA.

Disclosure to the head of your organisation

You can make your disclosure to the head of your organisation if:

- your organisation doesn't have any internal procedures for receiving and dealing with information about serious wrongdoing; or
- you believe on reasonable grounds that the person you're required to report the wrongdoing to in accordance with the internal procedures is or may be involved in the wrongdoing; or
- you believe on reasonable grounds that it's not appropriate to report the wrongdoing to that person because of their relationship or association with the alleged wrongdoer.⁹

Disclosure to an appropriate authority

You can make your disclosure to an [appropriate authority](#) if you believe on reasonable grounds:

- that the head of your organisation is or may be involved in the serious wrongdoing; or
- it is justified because of the urgency of the matter to which the disclosure relates, or some other exceptional circumstances; or
- you've already made the disclosure to your organisation, but there's been no action or recommended action within 20 working days.¹⁰

Disclosure to a Minister or Ombudsman

You can make your disclosure to a Minister or Ombudsman if:

- you've already made substantially the same disclosure in accordance with your organisation's internal procedures, or to the head of your organisation, or to an appropriate authority; and
- you believe on reasonable grounds that the person or authority to whom you made your disclosure:
 - has decided not to investigate the matter; or
 - has decided to investigate but has not made progress with the investigation within a reasonable period of time; or

⁹ See section 8 PDA.

¹⁰ See section 9 PDA.

- has investigated but not taken or recommended any action.¹¹

Note that although a disclosure can be made to the Ombudsman in respect of a private sector organisation, the Ombudsman's options for dealing with that disclosure are restricted to referring it to the appropriate authority or Minister. The Ombudsman cannot investigate the conduct of a private sector organisation.

Special rules for international relations and intelligence and security organisations

Some disclosures are intended to be made only to certain specified appropriate authorities. Disclosures relating to an intelligence and security agency should only go to the [Inspector-General of Intelligence and Security](#).¹² Those arising within the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence, or the New Zealand Defence Force, where they relate to the international relations of the Government, or to intelligence and security matters, should only be made to the Ombudsman.¹³

What protections are available?

The key protections available under the PDA are:

- the ability to take personal grievance proceedings against retaliatory action by your employer;
- immunity from civil and criminal proceedings;
- confidentiality; and
- application of the anti-victimisation provisions of the [Human Rights Act 1993](#).

¹¹ See section 10 PDA.

¹² See section 12 PDA.

¹³ See section 13 PDA.

Personal grievance

If you're an "employee" within the meaning of the [Employment Relations Act](#), and you believe you've suffered retaliatory action by your employer as a result of making a protected disclosure, you may have a personal grievance because of a claim that:

- you've been unjustifiably dismissed; or
- your employment or conditions of employment have been affected to your disadvantage by some unjustifiable action by your employer.¹⁴

Immunity from civil and criminal proceedings

If you make a protected disclosure, you're not liable to any civil, criminal or disciplinary proceedings for having done so. This applies notwithstanding any prohibition or restriction on the disclosure of information (though not where the information being disclosed is protected by legal professional privilege).¹⁵

Confidentiality

The people to whom you've made or referred your protected disclosure must use their best endeavours not to disclose information that would identify you, unless one of the exceptions in the Act applies.

The exceptions are if you consent to the disclosure, or if disclosure is essential:

- to the effective investigation of the allegations;
- to prevent serious risk to public health or safety, or the environment;
- to comply with the principles of natural justice.¹⁶

The Ombudsman can provide information and guidance to organisations and employees about the circumstances in which anonymous disclosures can be made under the PDA.

¹⁴ See section 17 PDA and section 103(1)(a) and (b) of the Employment Relations Act.

¹⁵ See sections 18 and 22 PDA.

¹⁶ See section 19(1) PDA.

Human Rights Act (HRA)

The anti-victimisation provisions of the HRA also provide protection to employees making protected disclosures.

Section 66(1)(a) of the HRA states:

- (1) *It shall be unlawful for any person to treat or to threaten to treat any other person less favourably than he or she would treat other persons in the same or substantially similar circumstances—*
- (a) *on the ground that that person, or any relative or associate of that person,—*
- (i) *intends to make use of his or her rights under this Act or to make a disclosure under the Protected Disclosures Act 2000; or*
 - (ii) *has made use of his or her rights, or promoted the rights of some other person, under this Act, or has made a disclosure, or has encouraged disclosure by some other person, under the Protected Disclosures Act 2000; or*
 - (iii) *has given information or evidence in relation to any complaint, investigation, or proceeding under this Act or arising out of a disclosure under the Protected Disclosures Act 2000; or*
 - (iv) *has declined to do an act that would contravene this Act; or*
 - (v) *has otherwise done anything under or by reference to this Act.*

This protection (like the others under the PDA) will not apply if you've made a false allegation or otherwise acted in bad faith.

The rights under the HRA may include the right to damages and other forms of compensation. To avoid time limits under the HRA, proceedings may have to be commenced promptly. It may be necessary to make a choice between proceedings under the Employment Relations Act or the HRA; both remedies may not always be available.

Appropriate authorities

Disclosures may be made to an appropriate authority [in certain circumstances](#). You'll find information about these authorities and their particular areas of responsibility below. It's sensible to approach the authority whose responsibilities relate most closely to the subject matter of your concern. Disclosures can be [referred](#) between appropriate authorities in certain circumstances. If you're not sure which authority to approach, you can ask the Ombudsman for information and guidance.

The Ombudsman is also an appropriate authority. Read on to learn more about [what the Ombudsman can do](#) under the PDA.

Commissioner of Police

The role of the New Zealand Police is to serve the community by reducing the incidence and effects of crime, detecting and apprehending offenders, maintaining law and order and enhancing public safety.

The Police General Instructions make special provision for whistleblowers from within the Police ranks.

Contact details:

Office of the Commissioner
PO Box 3017
Wellington
Phone: +64 (04) 474 9499
Fax: +64 (04) 498 7400
Web: www.police.govt.nz

Controller and Auditor-General

The role of the Controller and Auditor-General is to assist Parliament to strengthen the effectiveness, efficiency and accountability of public sector organisations, including local government organisations.

The Controller and Auditor-General is independent of the Government, and has the power to make inquiries and report to Parliament.

Contact details:

Office of the Controller and Auditor-General
PO Box 3928
Wellington 6140
Phone: +64 (04) 917 1500
Fax: +64 (04) 917 1549
Email: enquiry@oag.govt.nz
Web: www.oag.govt.nz

Director of the Serious Fraud Office (SFO)

The SFO is responsible for complex or serious fraud investigations and prosecutions. This doesn't include more common dishonesty offences, which are a Police matter.

The Director of the SFO is required to act independently in all matters relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case.¹⁷

Information provided to the SFO is assessed objectively against set criteria to determine whether that information justifies the launch of a new investigation. These criteria include:

- the financial value of the alleged fraud (typically in excess of \$2,000,000);
- the number of victims impacted by the alleged fraud;
- the factual, legal and financial complexity of the alleged fraud;
- the likelihood of a custodial sentence if the alleged fraud led to convictions;
- the preventative impact of a successful prosecution on the wider fraud landscape in New Zealand.

Contact details:

Director of the Serious Fraud Office
PO Box 7124
Auckland 1141
Phone: +64 (9) 303 0121
Fax: +64 (09) 303 0142
Email: complaints@sfo.govt.nz
Web: www.sfo.govt.nz

Inspector-General of Intelligence and Security

The Inspector-General is an independent office established under the [Inspector-General of Intelligence and Security Act 1996](#).

The role of the Inspector-General is to assist the Minister responsible for the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) in the oversight and review of those intelligence agencies. This includes inquiring into:

- matters relating to compliance by an intelligence agency with the law of New Zealand; and
- complaints by any New Zealand person or employee or former employee of an intelligence agency that they have been adversely affected by the acts or omissions of that agency.¹⁸

¹⁷ See section 30 of the [Serious Fraud Office Act 1990](#).

¹⁸ See section 11 of the Inspector-General of Intelligence and Security Act.

Contact details:

PO Box 5609
Wellington 6145
Phone: +64 (04) 473 8672
Fax: +64 (04) 473 8534
Email: irene.white@justice.govt.nz

Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment has wide-ranging powers to investigate environmental concerns.

The Commissioner's functions include:

- reviewing the system of agencies and processes set up by the Government to manage the country's resources, and reporting to the House of Representatives;
- investigating the effectiveness of environmental planning and management by public authorities, and advising them on remedial action;
- investigating any matter where the environment may be or has been adversely affected, advising on preventative measures or remedial action, and reporting to the House;
- reporting, on a request from the House or any select committee, on any petition, Bill, or any other matter which may have a significant effect on the environment;
- inquiring, on the direction of the House, into any matter that has had or may have a substantial and damaging effect on the environment;
- undertaking and encouraging the collection and dissemination of information about the environment; and
- encouraging preventive measures and remedial actions to protect the environment.

Contact details:

Parliamentary Commissioner for the Environment
PO Box 10-241
Wellington 6143
New Zealand
Phone: +64 (04) 471 1669
Fax: +64 (04) 495 8350
Email: pce@pce.parliament.nz
Web: www.pce.parliament.nz

Independent Police Conduct Authority (IPCA)

The IPCA's role is to consider complaints of misconduct or neglect of duty by any member of the Police, or concerning any practice, policy or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity.

The IPCA is not authorised to investigate any matter relating to the terms and conditions of service of any person as a member of the Police.

Contact details:

Independent Police Conduct Authority
PO Box 5025
Wellington 6145
Phone: +64 (04) 499 2050
Fax: +64 (04) 499 2053
Email: enquiries@ipca.govt.nz
Web: www.ipca.govt.nz

Solicitor-General

The Solicitor-General is the Chief Executive of the Crown Law Office.

The Crown Law Office provides legal advice and representation services to the government in matters affecting the executive government, particularly in the areas of criminal, public and administrative law. The services provided include matters covering judicial review of government actions, constitutional questions including Treaty of Waitangi issues, the enforcement of criminal law, and protection of the revenue. The Office administers the prosecution process in the criminal justice system, in particular, trials on indictment before juries.

Independently the Solicitor-General can exercise a number of public interest functions which may arise out of the common law or be conferred by statute. The role of "appropriate authority" falls into this category.

The Crown Law Office is not, however, an investigatory body. In practice, while the Solicitor-General may be well placed to co-ordinate a response, most protected disclosures will be referred to another more appropriate agency.

Contact details:

Solicitor-General
Crown Law Office
PO Box 2858
Wellington 6140
Phone: +64 (04) 472 1719
Fax: +64 (04) 473 3482
Web: www.crownlaw.govt.nz

State Services Commissioner

The State Services Commissioner provides leadership through a range of activities including statutory functions and powers under the [State Sector Act 1988](#). These functions include appointing and developing public service chief executives, and advising the government on the performance of public service departments and agencies. The Commissioner sets the minimum standards of integrity and conduct for the state services which are promulgated in a code of conduct for state servants.

Under the State Sector Act, chief executives of public service departments are responsible to their Minister for carrying out the functions and duties of their department, and for the general conduct of their department. In matters relating to decisions on individual employees, the chief executive of a department is not responsible to the Minister but must act independently. However, while the Commissioner usually cannot intervene in matters on individual employees, the chief executive is accountable to the Commissioner for their performance as a chief executive. Further, in matters relating to integrity and conduct, the Commissioner has the power to carry out investigations into breaches of the code of conduct.

Contact details:

State Services Commissioner
PO Box 329
Wellington 6140
Phone: +64 (04) 495 6600
Fax: +64 (04) 495 6686
Email: commission@ssc.govt.nz
Web: www.ssc.govt.nz

Health and Disability Commissioner

The role of the Health and Disability Commissioner is to investigate complaints about persons or bodies that provide health care or disability services. The Commissioner can make public statements and publish reports on any matter affecting the rights of health and disability consumers and can bring matters that impact on the public interest, particularly public safety, to the attention of any appropriate persons.

Contact details:

Health and Disability Commissioner
PO Box 11934
Wellington 6142
Phone: 0800 112 233
Email: hdc@hdc.org.nz
Web: www.hdc.org.nz

Other appropriate authorities

In addition to the authorities listed above, every head of a public sector organisation is an appropriate authority. Some of them have statutory powers of investigation.

Private sector bodies having disciplinary powers over members of a profession or calling are also appropriate authorities.

Referral of protected disclosures between appropriate authorities

A protected disclosure may be referred from one appropriate authority to another if the receiving authority considers that the disclosure can be “*more suitably and conveniently investigated*” by the other authority. Where this happens the authority that receives the referral must promptly notify the whistle-blower. Referral in this way does not affect the protections available under the legislation.

What can the Ombudsman do?

The Ombudsman’s role is to provide information and guidance to employees who want to make protected disclosures. As an “appropriate authority” the Ombudsman can also receive protected disclosures in certain circumstances.

Information and guidance

The Ombudsman can provide information and guidance to an employee on any matter relating to the PDA.

If an employee notifies the Ombudsman that he is she has made or is considering making a protected disclosure, the Ombudsman must provide information and guidance on the following matters:

- the kinds of disclosures that are protected under the PDA;
- the manner in which, and the persons to whom, information can be disclosed under the PDA;
- the role of each [appropriate authority](#);
- the [protections and remedies](#) available under PDA and the HRA;
- how information disclosed to one appropriate authority may be referred to another appropriate authority.

Receiving protected disclosures

The Ombudsman is an “appropriate authority” to whom protected disclosures can be made in certain circumstances.

You can make a protected disclosure to the Ombudsman if you believe on reasonable grounds:

- that the head of your organisation is or may be involved in the serious wrongdoing; or
- it is justified because the urgency of the matter to which the disclosure relates, or some other exceptional circumstances; or
- you’ve made the disclosure in accordance with your organisation’s internal procedures, but there’s been no action or recommended action within 20 working days.¹⁹

You can also make a protected disclosure to the Ombudsman if you’ve already made it in accordance with your organisation’s internal procedures, or to the head of your organisation, or to another appropriate authority, but you believe on reasonable grounds that the person or authority to whom it was made:

- has decided not to investigate the matter; or
- has decided to investigate but has not made progress with the investigation within a reasonable period of time; or
- has investigated but not taken or recommended any action.²⁰

The Ombudsman can’t receive disclosures about serious wrongdoing in or by intelligence and security agencies. Such disclosures can only be made to the [Inspector-General of Intelligence and Security](#).

What will the Ombudsman do with a protected disclosure?

When the Ombudsman receives a disclosure he or she will consider whether the various tests in the legislation are made out.

For instance:

- Does the person making the disclosure qualify as an “[employee](#)”?
- Does the disclosure relate to “[serious wrongdoing](#)” in or by an organisation?
- Has the disclosure been made in accordance with the [procedures](#) set out in the Act?

¹⁹ See section 9 PDA.

²⁰ See section 10 PDA.

If a disclosure does not meet the various tests, the Ombudsman will provide advice and guidance to the person.

Sometimes a disclosure that doesn't meet the threshold for "serious wrongdoing" might still be a matter the Ombudsman can inquire into under the [Ombudsmen Act 1975](#), and consideration will be given to this as well.

If a disclosure does meet the various tests, the Ombudsman will consider what the best course of action is to address the matter.

This could include referring the protected disclosure to another appropriate authority or Minister. This may be because the disclosure can be more suitably and conveniently investigated by another appropriate authority and / or because the Ombudsman doesn't have the power to inquire into the matter him or herself.

The Ombudsman can investigate a protected disclosure where that is warranted. However, the Ombudsman can only investigate serious wrongdoing in or by **public sector organisations**.

The Ombudsman's wide powers of investigation under the [Ombudsmen Act](#) apply to the investigation of a protected disclosure. However, a protected disclosure is not a complaint under the Ombudsmen Act. While an Ombudsman is authorised to investigate a disclosure in respect of a public sector organisation, whether it will be investigated is at the Ombudsman's discretion. Section 15E(2) of the PDA provides:

- (2) *The Ombudsmen have the same powers in relation to investigating a disclosure of information made under this Act as Ombudsmen have in relation to a complaint under the Ombudsmen Act 1975, but are not bound to investigate the disclosure of information.)*

Contact details

You can ask us for information and guidance, or contact us for the purpose of making a protected disclosure, in writing or orally. Your enquiries will be treated in confidence, and dealt with by our specialist staff.

Our contact details are as follows:

The Ombudsman
PO Box 10152
Wellington 6143
Phone: 0800 802 602
Fax: +64 (04) 471 2254
Email: info@ombudsman.parliament.nz
Web: www.ombudsman.parliament.nz